

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

BARRY ALLEN EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001863

BRIEF OF PETITIONER

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ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel told the jury during opening statements that he would prove Petitioner "acted in self-defense on that day" and when he argued to the jury during closing arguments that "we proved it" since his statements shifted the burden of proof from the state to Petitioner and since no valid trial strategy would shift the burden of proof in this manner?

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction on mutual combat since there was no evidence of a mutual willingness to fight on equal terms and since there is a strong likelihood that this erroneous charge improperly affected the jury's deliberations and confused the self-defense issue?

STATEMENT OF THE CASE

An Anderson County Grand Jury indicted Petitioner at the November 13, 2007 term of General Sessions for assault with intent to kill (AWIK) and possession of a weapon during the commission of a violent crime, and at the July 22, 2008 term for assault and battery with intent to kill (ABIK). App. 393-394; App. 408-411. His case was called to trial on October 6, 2008 before the Honorable J.C. Nicholson, Jr., and a jury. Assistant Solicitors Scott McElhannon and Catherine Huey represented the state, and Fletcher N. Smith represented Petitioner. App. 1.

On October 8, 2008, the jury found Petitioner guilty of ABIK and the weapons charge, but acquitted him of AWIK. App. 263, ll. 8-24. He was sentenced by Judge Nicholson to twenty years imprisonment suspended upon the service of fourteen years imprisonment and five years probation for ABIK and five years concurrent for the weapons offense. App. 274, l. 5 – 275, l. 7.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. Filed April 11, 2011).

On September 5, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 279-283. The state filed a return to this application dated January 25, 2013. App. 284-288. Petitioner filed an amended application for post-conviction relief on February 25, 2013 raising the issues argued in this brief. App. 289-291. The matter proceeded to an evidentiary hearing on May 8, 2013 before the Honorable R. Lawton McIntosh. App. 292. Assistant Attorney General J. Walt Whitmire represented the state, and William N. Epps, III represented Petitioner. App. 292. By order dated July 23, 2013, Judge McIntosh denied Petitioner relief. App. 393-407.

On April 28, 2014, Petitioner filed a petition for writ of certiorari. The state filed a return on October 22, 2014. By order dated December 10, 2014, this Court granted the petition by a vote of all five justices. This brief follows.

STATEMENT OF THE FACTS

Janice Lavoie, who lived directly across the street from Petitioner and his ex-wife, Linda Evans,¹ testified that on September 14, 2007 around five o'clock in the evening she was watching television when in her "peripheral vision" she saw Petitioner "running down the street . . . in a crouched position." She explained that as she was "kneeling on the couch looking out the window" she saw Petitioner approach Billy Craft who was getting into a car. She claimed Petitioner "[w]ent right over to Billy [Craft]" and "[s]tarted cutting him." According to Mrs. Lavoie, Craft "didn't even seem to be able to defend himself" and Petitioner "kept cutting." App. 55, l. 11 – 58, l. 3. She testified that Craft did not have a weapon and she did not see Craft pull a knife out of his pocket. App. 61, l. 16 – 62, l. 3. Furthermore, Mrs. Lavoie did not hear any words exchanged between Petitioner and Craft at the time the altercation began. She admitted that Craft could have told Petitioner, "I'm going to fuck you up." App. 66, l. 17 – 67, l. 1.

According to Mrs. Lavoie, sometime during the altercation, a young woman, who was in the backseat of the car Craft was getting into at the time the confrontation began, got out of the car and ran into the Lavoie residence. Mrs. Lavoie's husband, Kevin Lavoie, then left the house armed with a machete. Mrs. Lavoie claimed her husband went outside with a machete "to protect all of us." App. 58, ll. 8-11. She specifically denied that her husband tried to attack Petitioner and testified that Mr. Lavoie "just stood [in the yard] with [the machete]." App. 65, ll. 10-15. She claimed at some point Petitioner came up to her husband in the yard and said, "You are next, M-F." App. 66, ll. 1-4.

¹ Linda Evans is Petitioner's ex-wife. At some point while she was separated from Petitioner, but still married to him, she married the complainant, Billy Craft. However, Craft did not know Linda was still married to Petitioner when Craft married her. At the time of the incident, Petitioner and Linda were divorced, but had an on-again, off-again relationship. See App. 130, ll. 8-14; see also App. 112, ll. 6-11; see also App. 194, ll. 5-11.

Mrs. Lavoie also explained that at some point during the altercation, Linda Evans hit Petitioner with a car and pinned him up against the house. App. 67, ll. 6-11. Mark Durham, Petitioner's son-in-law, also came outside with a gun. App. 66, ll. 5-6

Kevin Lavoie testified that around five o'clock on September 14, 2007, he was watching television with his wife when his wife said, "What's [Ppetitioner] running down the road for?" As a result, he looked out the window and saw Petitioner in "an Indian position like he was stalking somebody." Mr. Lavoie claimed Petitioner ran up to the window of the car and attacked Billy Craft. He said, "I thought [Ppetitioner] was punching her [sic] at first until I seen the sun reflect and showed the straight razor." App. 70, l. 22 – 71, l. 23. Mr. Lavoie claimed Craft "put up his hand to defend himself then he fell to the ground, you know, like in a fetal position, and he just didn't move, didn't try to fight back or anything." App. 72, ll. 17-21. He claimed that he never saw Craft with a weapon. He also said that he did not hear Craft yell anything at Petitioner. App. 73, ll. 18-23.

Mr. Lavoie explained that the only other people around were Linda Evans, Mark Durham, who was Petitioner's son-in-law, and a young woman with a baby. He said the young woman ran into his house with her baby and he grabbed his machete and went outside "just in case [Ppetitioner] had come forward or was chasing anybody else." App. 71, l. 24 – 72, l. 13. He claimed that while he was outside in his yard Petitioner came towards him and said, "You're next." Mr. Lavoie said that he raised the machete to protect himself and Petitioner "walked down the side of the road to my next door neighbor on my left side and he grabbed a pipe. I believe it was about five or six feet long, and started chasing me with that. And he threw it at me, and I just went into the house." App. 74, ll. 1-12. According to Mr. Lavoie, the pipe hit the siding on his house. App. 74, ll. 17-22.

Additionally, Mr. Lavoie testified that Petitioner's ex-wife, Linda Evans, got into her car and drove - - tried to pin [Petitioner] against her own house" during the altercation. App. 71, ll. 22-25.

Mark Durham, who is married to Petitioner's daughter, was the next to testify. App. 88, l. 22 – 89, l. 4. He explained that around five o'clock on September 14, 2007, he was at Linda Evans' residence and was about to go to dinner with Linda, Billy Craft, and Nickie Scarborough, who had a baby with her. According to Durham, Linda and Nickie had already gotten into the car and Craft was walking towards the front passenger door. Durham, however, was the last person out of the house and had not reached the driveway yet. Durham testified that as he was walking down the front steps he noticed Petitioner coming out of the next door neighbor's house. App. 89, l. 5 – 90, l. 23. He explained, "[Petitioner] proceeded to come out to the road and he was just kind of walking at a trot, and Billy [Craft] was over at the passenger door." Durham said that when Petitioner reached Craft "[o]ne of them said something. Both of them started hollering then they started fighting. I didn't actually see the fight on the other side of the car happen." App. 91, ll. 8-22.

However, Durham was then impeached with the written statement he gave law enforcement the day of the incident where he said that Petitioner approached Craft, pulled a knife, and then began hitting Craft with his closed fist and slicing him with the knife. App. 91, ll. 23-25; App. 94, l. 16 – 95, l. 14. After being impeached, Durham testified that he did not see Craft with a knife or any other weapon that day. The only person he saw with a knife was Petitioner. App. 103, ll. 8-13.

However, on cross-examination, Durham explained that part of his written statement was incorrect and that he did not remember saying the part "about [Petitioner] pulling the knife beforehand." Durham did not know who pulled the knife out first, and that it is possible Petitioner

took the knife from Craft. He also explained that Craft was known to carry both a knife and a gun. App. 104, l. 18 – 105, l. 5.

Billy Craft testified that around five o'clock on September 14, 2007 he was at Linda Evans' house. App. 112, ll. 12-18. Craft explained that he, Linda, Durham, and a young woman from down the street were about to go to dinner together. App. 113, l. 9 – 114, l. 8. According to Craft, Durham, Linda, and the young woman were already in the car when he "looked to his left and saw three men coming down the road, and I noticed one right off the bat. It was Barry Evans. And he said, Hey Billy. I said, Hey, Barry." Craft claimed Petitioner then ran towards him and said, "I'm going to kill you." Craft said when he looked up Petitioner "had a straight razor" and began cutting him. He testified that he "couldn't do nothing" and he was "trying to block it" but Petitioner was "cutting his hands all to pieces." App. 114, l. 9 – 115, l. 9. He claimed he got cut a "bunch" of times. App. 115, ll. 17-19.

Craft told the jury that **he was not armed** that day and did nothing to provoke Petitioner. App. 116, ll. 2-6. He also testified, "**If I of knowed Barry [Petitioner] was going to do anything of that nature**, you know, I couldn't run from him because I'd of fell over, you know. But I would have tried to pick a rock up to throw at him, or something, but **I didn't have the slightest idea.**" App. 121, ll. 11-19 (emphasis added).

John Johnson, who testified during Petitioner's case in chief, explained that he lived right next door to Petitioner and Linda Evans. He said that Petitioner had been staying with him for about five to six months before the incident, but that Petitioner would travel back and forth from his residence to Linda's residence. App. 174, l. 13 – 175, l. 17. Johnson was present when the altercation took place on September 14, 2007. He explained that around five o'clock that evening, Petitioner and Tony Martin left Johnson's residence to walk to Martin's house. Johnson testified

that the only way to walk to Martin's house was to pass by Linda's residence. As Martin and Petitioner were walking by Linda's house, Petitioner and Craft began "cussing at each other." According to Johnson, Craft started the incident because Craft is "the one that came out of the yard" and said "he was going to get him [Petitioner]." Johnson explained, "Barry Evans just turned around and asked him what was he going to get him for, and then that's when they locked up to each other. That was all I could tell right there because they was between two vehicles." App. 176, l. 23 – 179, l. 7. He was ultimately able to see Petitioner and Craft fighting. App. 181, ll. 13-14.

According to Johnson, Craft is the one who had the weapon because he knew Petitioner did not have a weapon. He said he knew Petitioner did not have a weapon because "he was at my house that day and I made sure he did not have none." App. 179, ll. 8-16. Johnson also saw Craft with the knife and is certain that it came out of Craft's pocket. App. 188, ll. 3-8.

Petitioner, who took the stand in his own defense, testified that on September 14, 2007, he was at John Johnson's house with Tony Martin. At some point, Martin and Petitioner left Johnson's house to walk to Martin's residence, which was right down the street. Petitioner had no intention of fighting Craft that day and "**never even knew Billy Craft was there.**" He explained that as they passed by Linda's house, Craft "spoke up" and said, "What the hell you doing around here?" Craft then "started toward" Petitioner and "pulled a knife" on him. The two struggled until "some way [Petitioner] got the knife and . . . that's when the knife cut his [Craft's] hand." Petitioner explained that as he was trying to get away, Linda hit him with a car and Craft "was stomping me while I was on the car. Then when I got out from under the car I just started cutting. And I hate that he got cut like that but I was just trying to get free so I could flee." Petitioner was eventually able to get away. He turned himself in the next day. App. 194, l. 16 – 196, l. 24 (emphasis added).

Petitioner testified that Craft was known to carry a knife and was known as “bas ass Billy.” Petitioner also explained that he knew Craft had “cut Ralph Woods up real bad.” App. 197, ll. 19-22. Petitioner cut Craft that day not because he was angry, but because he was scared. He said, “I was cutting at him to try to get away” and that he was in fear of his life. App. 201, ll. 8-19.

During closing arguments, trial counsel told the jury that Petitioner “was defending himself against this man, Billy Craft.” He argued that Craft had a knife, Petitioner and Craft “struggled” over the knife, and Petitioner ultimately took the knife from Craft. He said, “[Petitioner] had a right to defend himself. If someone draws a weapon on you or if someone goes in their pocket and you think they’ve got a gun in their pocket or if they come after you with a knife you have a right to defend yourself to the fullest extent of the law. Barry Evans had a right to defend himself on September the 14th, 2007, otherwise there wouldn’t be any dispute here and the Judge would not have to charge self defense.” App. 218, l. 10 – 219, l. 3.

The solicitor argued during his closing argument, “[Petitioner] ran out of that house crouched down, as you heard the Lavoies say, in an Indian couch [sic] or like he was running down the road to hide. He was trying to be deceptive so that no one would see him until it was too late, and he succeeded. He came all the way up to the car where Billy Craft was getting into the car already and struck him in the back of the head to knock him to the ground and then began cutting on him, just slashing him.” App. 227, ll. 1-8. The solicitor also argued, “Billy Craft never had a knife in this incident. He never had a knife in his hand.” App. 228, ll. 17-18.

In regards to the AWIK charge, the solicitor argued, “[Petitioner] came after Kevin Lavoie into their yard with the knife. Kevin Lavoie did have a machete and Barry Evans picked up this fence post and threw it, and you heard the clank [on the 911 tape]. You could hear it hit the side of

the house. Kevin Lavoie was in fear of his life because he saw what Barry Evans had just done to Billy Craft. That's assault with intent to kill." App. 231, ll. 9-17.

Near the end of the solicitor's argument he stated, "This is not a case of self-defense, **it's not a case of mutual combat**. This is a case of an attack on an innocent person . . ." App. 232, ll. 18-20 (emphasis added).

ARGUMENT

1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel told the jury during opening statements that he would prove Petitioner "acted in self-defense on that day" and when he argued to the jury during closing arguments that "we proved it" since his statements shifted the burden of proof from the state to Petitioner and since no valid trial strategy would shift the burden of proof in this manner.

Relevant Facts

During opening statements, trial counsel told the jury, "[W]e're going to prove to you in this case, members of the jury, that these are false charges that have been brought against Mr. Barry Evans. *We're going to prove to you in this case that he acted in self-defense* on that day." App. 50, ll. 3-6 (emphasis added). Trial counsel also told the jury, "We are going to prove to you, members of the jury, he is not guilty of assault and battery with intent to kill." App. 51, ll. 11-12.

Later during opening statements, the solicitor objected when trial counsel told the jury that the complainant, Billy Craft, was a "cocaine user" and sold drugs. The trial court responded in front of the jury, "Mr. Smith, don't make arguments. *Tell them what you are going to prove.* Stay away from arguing your case, please, sir." Trial counsel then immediately told the jury, "*We're going to prove to you that he's not guilty.*" App. 52, l. 19 – 53, l. 12 (emphasis added).

Additionally, during closing arguments, trial counsel told the jury, "[A]t the beginning of this trial *I told you what we were going to prove and I think we proved it.*" App. 215, ll. 16-17 (emphasis added). He further argued, "We didn't hide behind the standard of reasonable doubt. We didn't hide behind the standard of presumption of innocence." App. 216, ll. 9-10.

PCR Hearing

Petitioner testified at the PCR hearing that trial counsel told the jury, “he would prove self-defense” and that Petitioner was not guilty of ABIK. Petitioner said he a “problem” with trial counsel’s statements because “that put the burden on me instead of the State.” He explained, “I’ve always assumed it was the State’s burden to prove your guilt. You’re innocent until proven guilty.” Petitioner said he thought trial counsel’s burden shifting statements affected the outcome of his trial and put in the minds of the jurors that he had to prove a defense to the charges. App. 303, l. 15 – 304, l. 20.

Trial counsel, Fletcher Smith, testified that Petitioner’s defense at trial was self-defense. App. 334, ll. 22-24. He explained self-defense “was what our defense was going to be because the whole point was, that was why [Petitioner] was taking the knife away from the guy. When you look at [Petitioner’s] testimony, this is basically what he said. He took the knife from the guy and he was defending himself from the knife attack on his own property, so yes, that’s self-defense.” App. 335, l. 23 – 336, l. 4. Trial counsel admitted that he told the jury during opening statements, “We are going to prove to you in this case that he acted in self-defense on that day.” App. 335, ll. 11-19; App. 336, ll. 20-23.

Trial counsel testified that he knows the burden is on the state to disprove self-defense beyond a reasonable doubt and that self-defense is no longer an affirmative defense that has to be proved by a preponderance of the evidence by the defendant. App. 336, l. 20 – 337, l. 6. However, he explained, “I win more cases by *taking the burden of proof and proving it* and the kick to it is, I went to the University of Virginia seminar talking about Judge Histerm who was a federal prosecutor and a United States District Court Judge. In criminal cases that the defendant relies on in opening statements on the presumption of innocence and things of that nature, the defendants

usually lose. The judge is going to direct anything the lawyer does subsequently in his jury charge, so anything that I may say in opening statement, the judge is going to correct it two times. Whatever he says in an opening statement is not fact. It's an opening statement. These are opening statements. And number two, when we get down to the conclusion of the trial, I can actually say to the jury, 'We proved to you that Mr. Evans was not the aggressor in this, that so-and-so was' and things of that nature and then I've made a bond with the jury at that point and then at that point when the judge actually charges the jury he knocks out all the arguments that were made by counsel and tells the jury that they can only believe what comes from the witness stand. And it worked with machete guy [the AWIK charge]. It just didn't work with the other one." App. 337, l. 8 – 338, l. 6 (emphasis added).

Trial counsel specifically stated that his trial strategy was to take the burden of proof. App. 338, ll. 7-10. Trial counsel acknowledged that his statements to the jury may have shifted the burden from the state to Petitioner. App. 338, l. 23 – 339, l. 1. But he said, "the burden doesn't hurt me." App. 339, l. 9. He later stated, "I don't think it shifts the burden, because the judge tells the jury throughout the course of the trial that it's a burden of the State to prove the guilt of the defendant beyond a reasonable doubt." App. 339, ll. 3-6.

Trial counsel also claimed that his strategy of taking the burden of proof was successful because the jury found Petitioner not guilty of assault with intent to kill in regards to the allegation that Petitioner assaulted Kevin Lavoie. However, he later conceded that he does not know whether his strategy of taking the burden was actually successful on that charge and that it's possible the jury simply found the state did not prove that charge beyond a reasonable doubt. App. 343, ll. 15-24.

At the close of the testimony, Petitioner's PCR counsel argued that trial counsel was ineffective for "coming out of the gate and telling the jury that, 'We're going to prove to you self-

defense. We're going to prove that Mr. Evans is not guilty.'" PCR counsel further argued that this was "not good trial strategy." App. 370, l. 13 – 371, l. 11.

Order of Dismissal

The PCR court found that trial counsel's statements to the jury that he was going to prove self-defense "did not operate to shift the burden of proof to the defense." The court noted trial counsel testified that he learned this technique at a University of Virginia seminar and "employed it as part of his trial strategy in this case." The court also noted that "the trial judge properly charged the jury that the burden was on the State to prove [Petitioner's] guilt and disprove [Petitioner's] defense of self-defense." Therefore, the PCR court held Petitioner "failed to meet his burden of proving either that trial counsel's representation was deficient in his case or that he was prejudiced as a result." App. 397-398.

Discussion

Trial counsel was ineffective when he told the jury during his opening statement that "[w]e're going to prove to you in this case that [Petitioner] acted in self defense on that day" and when he argued during his closing argument that "we proved it" as this shifted the burden of proof from the state to disprove self-defense to Petitioner in violation of State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2000), and State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). See App. 50, ll. 306; see also App. 215, ll. 16-17.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“At one time, self-defense was an affirmative defense in this State, and a defendant bore the burden of establishing it by a preponderance or greater weight of the evidence.” Wiggins, 330 S.C. at 544, 500 S.E.2d at 492 (citing State v. McDowell, 272 S.C. 203, 249 S.E.2d 916 (1978)). “However, current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt.” Id. at 544, 500 S.E.2d at 492 (citing State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989)). Furthermore, this Court “has taken pains to make sure the burden to disprove self-defense remains on the State.” State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) (citing Addison, 343 S.C. 290, 540 S.E.2d 449 and Wiggins, 330 S.C. 538, 500 S.E.2d 489).

Despite trial counsel’s testimony that he learned this technique at a University of Virginia seminar, it was not a valid trial strategy. No strategy that shifts the burden of proof from the state to disprove self-defense to a defendant to prove self-defense can be seen as valid or effective. At no point during his opening statement or his closing argument did trial counsel tell the jury that he did not actually have the burden of proof. Trial counsel’s statements likely confused the jury and affected the outcome of Petitioner’s trial.

Furthermore, unlike trial counsel's testimony at the PCR hearing that the trial judge's instruction to the jury cured any error in his statements, this was not the case. The trial court's instruction to the jury addressing the burden of proof in regards to self-defense was one sentence: "The State has the burden of disproving self defense by proof of a reasonable doubt." See App. 246, ll. 9-11. First, it must be noted that this instruction was both unclear and confusing because the court omitted the word "beyond." The court should have stated, "The state has the burden of disproving self-defense by proof *beyond* a reasonable doubt." Not only was this instruction unclear and confusing, it was also insufficient to cure trial counsel's error in telling the jury that Petitioner would prove he acted in self-defense and arguing at the end of trial that Petitioner "proved it." See App. 50, ll. 306; see also App. 215, ll. 16-17. Therefore, Petitioner was prejudiced by trial counsel's erroneous statements to the jury.

The PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction on mutual combat since there was no evidence of a mutual willingness to fight on equal terms and since there is a strong likelihood that this erroneous charge improperly affected the jury's deliberations and confused the self-defense issue.

Relevant Facts

At Petitioner's trial in 2008, the trial court intermixed self-defense and mutual combat in its jury instruction as follows:

The defendant has raised the defense of self-defense. Self-defense is a complete defense, and if it is established you must find the defendant not guilty. The State has the burden of disproving self-defense by proof of a reasonable doubt [sic].

If you have a reasonable doubt that the defendant is guilty after considering all the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt as to the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the defendant guilty.

There are four elements required by law to establish what is referred to as self defense in this case. First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self defense.

If the defendant voluntarily participated in mutual combat for the purpose other than protection *the killing* of the victim would not be self-defense. This is true even if during the combat the defendant feared death or seriously bodily harm. However, if before *the killing* is committed the defendant withdraws and tried in good faith to avoid further contact and

either by word or act makes that act known to the victim he would be without fault in bringing on the difficulty.

For mutual combat there must be a mutual intent and willingness to fight. This intent must be shown by the acts and circumstances and conduct of the parties surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.

A defendant must show that she believe she was in imminent danger, not that he was actually in such danger because he had a right to act on appearance and under the circumstances as they appeared to her - - to him, he believed he was in such danger.

A person may act on appearances and if the appearances are such that a person of ordinary courage, firmness, and prudence would have been justified in coming to the conclusion that the necessity did then and there exist to strike to save himself from serious bodily harm or death that would be sufficient, although it turned out afterward that there was no actual present danger, and that the necessity to strike did not exist.

Third, if this defense is based upon the defendant's belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow or save himself from serious bodily harm or losing his own life.

Four, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did in this particular instance. However, if the defendant was on his own premise he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

App. 246, l. 7 – 248, l. 19.

Trial counsel made no objection to the charge on mutual combat. App. 253, l. 23 – 254, l.

19.

PCR Hearing

Petitioner alleged at the PCR hearing that trial counsel was ineffective for failing to object to the jury instruction on mutual combat pursuant to Taylor, 356 S.C. 227, 589 S.E.2d 1. Petitioner testified that trial counsel never discussed with him mutual combat and that he had never even heard of mutual combat before trial. App. 301, ll. 18-20. He explained that the trial court instructed the jury on self-defense and that in the middle of the court's explanation of the first element of self-defense, that one must be without fault on bringing on the difficulty, the judge charged mutual combat. Petitioner acknowledged that mutual combat is a mutual willingness to fight and negates the defense of self-defense. App. 318, l. 14 – 319, l. 14. Petitioner thought trial counsel's failure to object to this instruction was ineffective assistance of counsel and affected the outcome of his trial. App. 319, l. 15 – 320, l. 6.

Trial counsel maintained that he thought there was evidence of mutual combat. He testified, "These people had a history of violence towards each other and it centered around Mr. Evans [Petitioner] right here. Mr. Evans doesn't like the other guy and his wife and the other guy didn't like Mr. Evans . . . **there was a fight between these two individuals. Mr. Evans says the guy was trying to cut Mr. Evans and the guy says Mr. Evans cut him and so, to me, that was mutual combat.**" App. 353, ll. 9-19 (emphasis added).

Trial counsel acknowledged that he raised the issue of mutual combat when he asked John Johnson at trial whether "there was mutual combat between the two of them [Petitioner and Craft]?" App. 352, ll. 9-17. He understood that mutual combat negates self-defense, but he still raised mutual combat despite arguing to the jury that he would prove and did prove self-defense. App. 352, l. 18 – 353, l. 7.

Trial counsel testified that he did not request the jury instruction on mutual combat. App. 362, ll. 13-18. He later testified that he does not “believe” he requested a mutual combat charge. Unfortunately, the discussion on jury instructions is not on the record because it occurred during an off the record bench conference. Regardless, trial counsel admitted that he never objected to the mutual combat charge. App. 364, l. 15 – 365, l. 8.

Order of Dismissal

The PCR court found trial counsel was not ineffective for failing to object to the mutual combat charge under Taylor, 356 S.C. 227, 589 S.E.2d 1. The court stated, “These charges [self-defense and mutual combat] were not mutually exclusive because there were two different victims in this case – Kevin Lavoie (the AWIK victim) and Billy Craft (the ABIK victim). As such, self-defense could apply to one charge and mutual combat could apply to the other.” The court held “the totality of these charges were correct and proper and trial counsel did not err in not objecting to their [sic] being charged to the jury.” App. 404.

Discussion

Trial counsel was ineffective for failing to object to the jury instruction on mutual combat because there was no evidence of a mutual agreement to meet and fight on equal terms. Petitioner was prejudiced by trial counsel’s failure to object to the charge because, as this Court noted in Taylor, “to charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense.” 356 S.C. at 233, 589 S.E.2d at 4 (quoting Flowers v. State, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978)). Therefore, because trial counsel did not object to the trial court erroneously charging the jury on mutual combat, the jury was unable to fully consider Petitioner’s defense of self-defense. Additionally, charging mutual combat entwined within the self-defense charge, led the self-defense charge itself to be confusing to the jury. See State v. Peterson, 287 S.C.

244, 248, 335 S.E.2d 800, 802 (1985) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)) (finding “Merely superimposing correct instructions over erroneous one serves only to foster prejudice and confusion.”).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686; also Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

“The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be a ‘mutual intent and willingness to fight’ to constitute mutual combat.” Taylor, 356 S.C. at 231, 589 S.E.2d at 3 (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)); see Nauful v. Milligan, 258 S.C. 139, 147, 187 S.E.2d 511, 515 (1972). “Mutual intent is ‘manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.’” Id. at 231-232, 589 S.E.2d at 3 (quoting Graham, 260 S.C. at 450, 196 S.E.2d at 495).

“Whether or not mutual combat exists is significant because ‘the plea of self-defense is not available to one who kills another in mutual combat.’” Id. at 232, 589 S.E.2d at 3 (quoting Graham, 260 S.C. at 450, 196 S.E.2d at 495); see State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919). “In order to claim self-defense, the defendant ‘must be without fault in bringing on the difficulty.’” Taylor, 356 S.C. at 232, 589 S.E.2d at 3 (quoting State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). “Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the ‘no fault’ element of self-defense cannot be established.” Id. “As such, it is only logical that **the evidence of agreement to fight be plain**, like the evidence of mutual combat present in the *Porter*, *Graham*, and *Mathis* cases.”² Taylor, 356 S.C. at 234, 589 S.E.2d at 4 (emphasis added). Additionally, these South Carolina cases “emphasize that *each party knew* the other was armed.” Id. at 234, 589 S.E.2d at 5 (emphasis in original).

In Taylor, this Court found there was insufficient evidence of a mutual willingness to fight to submit the issue of mutual combat to the jury where there was no evidence the decedent was willing to engage in an armed encounter with Taylor or that the decedent even knew Taylor was armed with a knife. This Court further found the mutual combat charge was prejudicial as well as erroneous because Taylor had admitted to killing the decedent and relied entirely on self-defense at trial. Id. at 234-235, 589 S.E.2d at 5. This Court stated, “[The self-defense] charge was negated by the court’s unwarranted charge on mutual combat. We find that the court’s mutual combat charge acted as limitation on [Taylor’s] ability to claim self-defense, and prejudiced him by transferring the

² State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

State's burden to disprove self-defense onto [Taylor], forcing him to disprove self-defense . . .” *Id.* at 235, 589 S.E.2d at 5 (emphasis in original).

As this case law demonstrates, the law of mutual combat is inapplicable absent evidence of a mutual agreement to meet and fight on equal terms. Under these recognized principles, the facts elicited in Petitioner’s trial could not support the giving of a mutual combat instruction and, therefore, trial counsel was ineffective by failing to object to the charge.

First, the state’s evidence established that this was a random occurrence and that either Petitioner or Craft approached the other out of nowhere and began attacking the other with a knife. There was absolutely no evidence of a mutual intent and willingness to fight. Craft himself testified that he “**didn’t have the slightest idea**” Petitioner “was going to do anything of that nature.” App. 121, ll. 11-19 (emphasis added). The evidence presented by the defense also established that this was a random incident. Petitioner and Johnson both testified that Petitioner was walking down the street to Martin’s house when the altercation suddenly occurred. There was no evidence presented by Petitioner that the men agreed to meet and settle their differences. Petitioner even testified, “I never even knew Billy Craft was there [at Linda’s house]. I never even was concerned with over there, you know. I was over at John’s house. **I didn’t even know Billy Craft was over there.**” App. 195, ll. 9-10 (emphasis added). Therefore, there was no evidence of a mutual agreement to fight as required for a mutual combat charge. See Taylor, 356 S.C. at 234, 589 S.E.2d at 4.

Additionally, all of the state’s witnesses, except Durham, claimed that **only Petitioner was armed with a knife**. Durham originally testified, and stated in his written statement, that Petitioner had the knife and that he did not see Craft with a knife that day, but then later conceded on cross-examination that he did not know who had the knife first and that it was possible Craft had the knife first and Petitioner took the knife from Craft. Either way, according to Durham’s testimony, **only**

one man was armed with a weapon. Furthermore, Petitioner testified that **Craft was the only one armed with the knife** and that the two struggled over Craft's knife. Johnson also testified that it was Craft who was armed with a knife and that he knew Petitioner did not have a weapon. Therefore, according to all the testimony, the men were not on equal terms as required for a mutual combat charge since only one of the men was armed with a knife. See Taylor, 356 S.C. at 234, 589 S.E.2d at 4 (mutual combat "requires mutual agreement to fight **on equal terms** for purposes other than protection.") (emphasis added).

Therefore, under both the state's theory of the case and the defense's theory of the case, one man initiated the fight and the other simply defended himself from the attack. During closing arguments, the solicitor stated, "This is not a case of self-defense, **it's not a case of mutual combat**. This is a case of an attack on an innocent person . . ." App. 232, ll. 18-20 (emphasis added). Furthermore, trial counsel told the jury during closing arguments that Petitioner "was defending himself against this man, Billy Craft." App. 218, l. 10 – 219, l. 3.

Moreover, there was absolutely no evidence of mutual combat between Petitioner and Kevin Lavoie. Mrs. Lavoie testified that Mr. Lavoie "just stood [in the yard] with [the machete]" and specifically denied that her husband tried to attack Petitioner. App. 65, ll. 10-15. All she claimed was that at some point Petitioner came up to her husband in the yard and said, "You are next, M-F." See App. 66, ll. 1-4. Additionally, Mr. Lavoie claimed that while he was outside in his yard Petitioner came towards him and said, "You're next." Mr. Lavoie testified that he raised the machete to protect himself and Petitioner grabbed a six foot long pipe and threw it at him. App. 74, ll. 1-12. This is not evidence of mutual combat.

Accordingly, there was insufficient evidence of a mutual willingness to fight on equal terms to submit the issue of mutual combat to the jury and trial counsel was ineffective for failing to object to this improper charge.

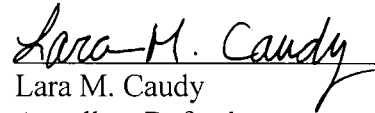
The charge on mutual combat, given without any facts in the record tending to establish the requisites for application of that doctrine, was prejudicial to Petitioner, as it undermined and confused the self-defense issue. Taylor, 356 S.C. at 234-235, 589 S.E.2d at 4-5. First, it should be noted that the mutual combat charge given to the jury **twice** referenced a “killing.” See App. 247, ll. 1-9. **No one was killed in this case.** This error alone was confusing to the jury. Additionally, there is a strong likelihood that this erroneous charge improperly affected the jury’s deliberations and confused the self-defense issue since mutual combat negates the first element of self-defense that one must be without fault in bringing on the difficulty. See Taylor, 356 S.C. at 232, 589 S.E.2d at 3.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court, vacate his convictions and sentence, and remand for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER.

This 9th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

BARRY ALLEN EVANS,

PETITIONER,

V.

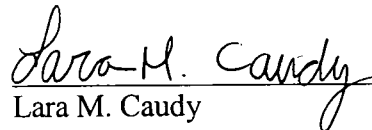
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001863

CERTIFICATE OF SERVICE

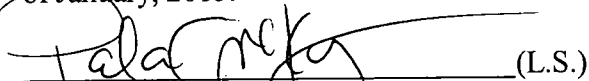
I certify that a true copy of the brief of petitioner, in this case has been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of January, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of January, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.