ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD ALLEN WOODBURY,

APPELLANT

APPELLATE CASE NO. 2014-000390

FINAL BRIEF OF APPELLANT

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1.

Did the court err by instructing the jury on mutual combat when there was no evidence of a mutual intent and willingness to fight including no evidence that Appellant and the decedent knew the other was armed or of any pre-existing ill will or dispute between Appellant and the decedent, and where there is a strong likelihood that this erroneous charge prejudiced Appellant by acting as a limitation on his ability to claim self-defense?

2.

Did the court err by refusing to instruct the jury on the lesser included offense of involuntary manslaughter where the evidence in the light most favorable to Appellant established that Appellant fatally stabbed the decedent while he was lawfully acting in self-defense but acted recklessly when he was "swinging wildly" and struck the decedent?

STATEMENT OF THE CASE

A Marion County Grand Jury indicted Appellant at the February 2013 term of General Sessions for murder and attempted murder. R. 542 – R. 543. His case was called to trial on February 18, 2014 before the Honorable D. Craig Brown, and a jury. R. 1. Solicitor Edgar L. Clements, III represented the state, and Ralph J. Wilson represented Appellant. R. 1.

On February 21, 2014, the jury acquitted Petitioner of murder, attempted murder, and assault and battery of a high and aggravated nature (ABHAN),[1] but found him guilty of the lesser included offense of voluntary manslaughter. R. 529, l. 12 – 530, l. 5. Judge Brown sentenced Appellant to thirty years imprisonment. R. 539, ll. 18-21.

This appeal follows.

[1] ABHAN was charged as a lesser included offense of attempted murder. See R. 507, ll. 20-25.

STATEMENT OF FACTS

After dark on the night of September 29, 2012, Charles Wilson was at his home on South Withlacoochee Avenue in Marion County with the decedent, Ian Gause, Ian's brother Rishawn Gause, the Gause brothers' cousin, Ronnie Boatwright, and Tywana Grisham. The men were outside underneath the carport drinking and downloading music on a laptop computer. R. 182, ll. 14-25; R. 209, ll. 8-12; R. 262, l. 24-18; R. 285, ll. 14-25. There was a table and chairs underneath the carport on the end closest to the backyard where the men were located and a van parked on the other side. R. 263, l. 21 – 264, l. 3.

At some point during the night, Appellant arrived at the residence in his black Jeep Cherokee with Ky Graham and Lamont Davis. Graham got out of the car first and greeted the men under the carport.[2] R. 183, ll. 2-25. Shortly thereafter, Appellant also got out of the car and approached the men. Appellant shook hands with Wilson, Rishawn, and Boatwright, but did not acknowledge Ian, the decedent. R. 184, ll. 6-11. Wilson testified that he had no idea why Appellant did not greet Ian. R. 184, ll. 12-14.

According to Wilson, angered that he was ignored, Ian said to Appellant, "you don't see me, or something like that." R. 184, ll. 15-17. Rather than argue with Ian, Appellant walked away "back towards the Jeep," that was parked in the driveway directly behind the van. R. 184, l. 18 – 185, l. 8. Ian followed Appellant and the two met by the side of Appellant's Jeep. R. 185, ll. 9-23. Then there was "a lot of trash talking." R. 185, l. 24 – 186, l. 5.

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[2] There were allegations at trial that Ky Graham went to the home to purchase marijuana. While Graham initially denied buying any drugs that night, he later admitted that he "bought one." R. 328, ll. 17-22.

Wilson testified that he got in between Appellant and Ian and told Appellant "to go ahead and leave," but the two were "still back and forth talking trash to each other." R. 186, l. 9 – 187, l. 3. Ian tried "to actually break passed" Wilson, but Wilson stuck his hands out to block Ian from reaching Appellant. At this stage, the verbal argument "was real heated," but Wilson had no "idea what it was about." R. 187, ll. 5-17. Wilson then "kind of turn[ed] around" and "almost start[ed] to wrestle [Ian]." R. 187 , ll. 18-21. "That's when [Wilson] noticed [Ian] had a gun." R. 187, l. 23. "He had it by his side." R. 187, l. 25.

When Wilson noticed that Ian had a gun he moved out of the way because he did not want to get shot. After he backed away, Wilson heard a single gunshot. He did not know who fired the shot, but later heard it was Rishawn. He assumed Rishawn fired into the air. R. 188, l. 11 – 189, l. 18.

After the gunshot, "[e]verybody like froze." R. 189, ll. 19-25. According to Wilson, Appellant, who was still standing by his car, started "talking some more junk." The men continued "talking trash." R. 190, ll. 1-15. Somehow, Ian and Appellant ended up in the road. They were "face to face talking to each other," but they did not "start fighting" and neither threw any punches. R. 190, l. 25 – 191, l. 6. Then all of a sudden Appellant and Ian took off running. R. 191, ll. 13-19. They ran back towards the house and ended up under the carport. R. 191, l. 23 – 192, l. 6.

Wilson could not see what happened under the carport because it was dark and the van was blocking his view. He "heard like chairs and stuff moving around" and "tussling." R. 192, ll. 4-23. "After that, after the tussling and stuff was over somebody shot [ran] through the backyard, and that's when I see Ian coming back from underneath the car shed." Ian told his brother, Rishawn, that he needed to go to the hospital and "he said something

about, I should have shot him, or something like that." R. 192, l. 25 – 193, l. 22. Rishawn also said he "got cut" and the Gause brothers left to go to the hospital. R. 194, ll. 1-9.

According to Wilson, Appellant eventually returned from the backyard and said "he left something." He claimed Appellant picked up one half of "a bamboo stick thing" that turned out to be a knife.[3] R. 194, l. 10 – 195, l. 13. This was the first time Wilson had seen Appellant with a weapon. He never saw Appellant with a weapon in the driveway or in the road before the men ran under the carport. R. 211, ll. 19 – 212, l. 8. After retrieving the knife, Appellant left with Ky Graham. R. 195, ll. 14-20.

Rishawn Gause, Ian's brother who was noticeably biased in favor of his brother, testified that he was at Wilson's house that evening with Ian and Boatwright. He claimed that when Appellant walked up to the carport, he shook hands with every one, except he "purposely . . . did not shake my brother['s] hand, Ian." Ian "had a smirk" and said, "[O]h, so you can't shake my hand?" R. 359, l. 9 – 360, l. 17. Appellant said something in return and then walked away back towards his car. He and Graham both got into the car. R. 360, ll. 17-25. Rishawn claimed Appellant pulled out of the driveway and left, but returned about three minutes later. R. 360, l. 25 – 361, l. 7.

According to Rishawn, when Appellant returned, he got out of the car and "was messing with his pants so Ian said, oh, oh, you went and got something. He said, you went and got something." Rishawn claimed that he and Ian were still under the carport and that

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[3] When law enforcement searched Appellant's Jeep several hours after the altercation pursuant to a search warrant, they found a "Ninja sword" or knife used in marital arts. See R. 314, ll. 18-25; see also R. 317, l. 6. It was "a long cylinder that when you actually pull it apart two blades are housed inside." R. 155, ll. 21-23. When the blades are "removed from each other" they become "two separate weapons." R. 156, ll. 2-10.

Ian never went up to the Jeep. R. 363, ll. 7-23. Rishawn then walked to his own car that was parked in the yard and got his gun from the trunk because he saw Appellant "fidgeting with something." R. 364, ll. 4-6. He "was watching the whole situation" and eventually shot once into the air because they [Ian and Appellant] were "kind of about to get into it." R. 364, ll. 7-10.

Rishawn claimed that after he fired once into the air, he put his gun back into the trunk. R. 366, ll. 9-15. He also claimed he did not see Ian with a gun that night and that he knows Ian was not fighting with a gun in his hand. R. 367, ll. 6-15. Eventually, Ian and Appellant got into a "brawl" under the carport. Rishawn testified that he got in the middle of the altercation and Appellant was **"[s]winging wild."** R. 367, ll. 17-24 (emphasis added). Ian eventually said he had been stabbed and that he needed to go to the hospital. After Ian said he had been stabbed, Appellant ran into the backyard. R. 369, ll. 5-25.

At the hospital, Rishawn spoke with three different law enforcement officers. He gave a different story to each of the officers. For example, he told one officer that he was in the house when the altercation took place and that he did not know who stabbed his brother. He told a different officer the altercation happened on Huggins Street, not South Withlacoochee Avenue, and that they had not been at anyone's house. Rishawn admitted on cross-examination that he was a liar and "whatever I told when I was at the hospital was, it was garbage." R. 377, l. 22 – 383, l. 11.

Ronnie Boatwright, who was also noticeably biased in favor of his cousins, testified that when Appellant arrived at the residence that night he walked to the carport and "spoke

to everybody."[4] See R. 280, l. 11-25. Appellant and Ian then "got into it" and were "running their mouths." R. 266, l. 15 – 267, l. 4; R. 288, ll. 18-25. Boatwright claimed Appellant walked backed to his Jeep and then returned to the carport where he and Ian started "fussing again." He claimed the next thing he knew, Appellant "was holding like something on his side" and Ian repeatedly said, "[Y]ou got something, you got something." Rishawn then went to his car, got a pistol, and shot into the air. R. 267, l. 6 – 268, l. 6. After the gunshot, everyone "calmed down" for a couple of minutes. R. 268, ll. 7-17.

Boatwright explained, "So after that I don't know what happened then. Just everybody end up in the road after that. Next thing I know people just took off running, took off running, ran in the car porch." R. 296, ll. 3-6. He later clarified that the only people who ran under the carport were Appellant, Ian, and his brother, Rishawn. R. 269, ll. 8-9. Boatwright continued, "Probably like about five minutes [later] Ian came back out [from under the carport] and he said, man, I got stabbed, he stabbed me. Rishawn [also] came [out from under the carport], he said, he stabbed me too." Ian and Rishawn then left for the hospital. R. 269, ll. 10-16.

According to Boatwright, after about ten or twenty minutes, Appellant "came back looking for his knife. He found his knife and he went on." R. 269, ll. 17-24. He claimed Appellant had one half of the weapon in his hand and picked up the other half from the ground near the carport. R. 270, li. 2-15.

Boatwright also explained that when the men were drinking and downloading music, the light under the carport was on. However, once Appellant, Ian, and Rishawn ran under

[4] Boatwright was impeached with his prior convictions for safecracking, giving false information to law enforcement, breaking and entering into an automobile, and possession of a controlled substance. R. 278, ll. 10-21.

the carport during the altercation, "somebody cut the light off." He said he thought Tywana Grisham turned the light off when Appellant, Ian, and Rishawn were running because Grisham, who was standing under the carport at the time, "probably got scared and ran in the house and cut the light off trying to keep the heat down." R. 271, ll. 5-25. Because it was so dark and the van was blocking his view, Boatwright could not see what happened under the carport. He explained, "I ain't even see the stabbing." All he knew was that "they were fighting" and "it was kind of chaos." R. 272, ll. 1-15. Lastly, Boatwright claimed that the only person he saw with a firearm that night was Rishawn. He claimed he did not see Ian with a gun. R. 276, ll. 6-25; R. 296, ll. 9-24.

Ky Graham testified that he went to Charles Wilson's house on the night of September 29, 2012 with Appellant and Lamont Davis. Appellant was driving his black Jeep Cherokee. R. 306, l. 8 – 307, l. 15. When they got to Wilson's house, they parked in the driveway directly behind the van that was underneath the carport. R. 308, ll. 1-17. Graham got out of the car first, walked over to the carport, and "spoke to everybody." R. 310, l. 4. Appellant also "got out [of the car] after a while" and greeted the men. R. 309, l. 22 – 311, l. 4. According to Graham, Appellant and Ian then "had a little words" and it was "a little heated." R. 311, ll. 5-22. Ian "took offense" when Appellant did not greet him. R. 330, ll. 10-21. Graham said he was not aware of "any trouble" between Ian and Appellant in the past and had no idea why they exchanged words that night. R. 311, ll. 10-14. Appellant eventually walked away and went back to his Jeep. Graham followed and both men got back into the car. R. 312, ll. 3-9

Graham testified that when they were in the car, Appellant retrieved his knife and "Ian was saying a little something." R. 312, l. 24 – 313, l. 24. Appellant got out of the car

with the ninja sword concealed in his pocket and he and Ian "were having a few words" by the side of the car. R. 315, ll. 7-12; R. 333, ll. 8-23. Wilson got in between the two men and was holding Ian back. R. 315, ll. 13-22. According to Graham, Appellant then pulled out his "sword," but did not pull the two ends apart. The weapon remained closed. Graham claimed that after Appellant pulled out his closed sword, Ian pulled out his gun and had it down by his side. R. 317, ll. 6-21. Rishawn then shot once into the air to try "to break everything up." R. 317, l. 22 – 442, l. 13.

Graham then explained, "Ian had Richard [Appellant] go down the street, you know, pointing the gun at him." Ian and Rishawn both had their guns out and all three men, Appellant, Ian, and Rishawn, ran towards the carport. R. 319, l. 18 – 320, l. 1. When they got to the carport, the light went out, but he "didn't see nobody turn the light out." R. 321, ll. 7-12. Graham could not see what happened under the carport because it was dark and the van was blocking his view, but he could hear "fighting and stuff." He said he did not try to break up the altercation because "they [Ian and Rishawn] had guns on them." R. 321, ll. 17-21. "[A]fter a while," Graham thought he heard Ian say something to Rishawn and then the two left. R. 322, ll. 1-19. According to Graham, Appellant then came out from around the back of the house. He "had one of his knives" and the other one "was on the ground in front of the car porch." R. 322, l. 20 – 323, l. 9. After retrieving his knife, Graham and Appellant left.

Nicholas Batalis, the forensic pathologist who conducted the autopsy, testified that Ian died from "a stab wound to the upper left side of the chest centered right on the left nipple." The wound was about five and a half inches deep and went through the muscle in the chest and "the sack that wraps around the heart, and then struck "one of the big blood

vessels that drains blood back to the body." Put more simply, Ian bled to death. R. 230, ll. 2-18. He also had a wound to the upper right chest that was about half an inch deep, a minor cut on his right wrist, and a scrape on his left thumb. R. 229, l. 11 – 230, l. 1; R. 231, l. 20 – 232, l. 4.

During Appellant's case in chief, his nephew, Robert Woodbury, testified that he collects samurai swords, medieval swords, and ninja swords and that he originally owned the "ninja sword" that Appellant used during the altercation. R. 417, ll. 5-22. About two years ago, Robert gave the sword to Appellant who "was gonna use it as decoration." R. 418, l. 22 – 564, l. 6.

Rosa Carmichael, who also testified during Appellant's case in chief, explained that Wilson's house on South Withlacoochee Avenue is directly behind her house on Dunlop Street. R. 420, ll. 22-25. On the night of September 29, 2012, she was at home when she heard "someone behind my house . . . getting beat up and there were gun shots." She heard four gunshots and called 9-1-1. R. 421, ll. 1-17. The only thing she saw were "shadows when they were coming back up towards the carport, okay, because all of a sudden the light went out. As soon as the argument really got started it went dark." R. 421, l. 20 – 422, l. 1. She explained further, "And I could see some shadows but . . . the closer they got back toward the house the less I could see. And I heard somebody say, well man, what you doing, I don't have a knife. Then so I heard him getting all beat up and I heard somebody say, well how you like that now, how you like that now, then I heard something go pow, pow, pow. So I just put the window down and called 9-1-1." R. 422, ll. 3-10. Despite giving the 9-1-1 dispatcher her name and address, she was never contacted by law enforcement. R. 422, l. 20 – 423, l. 2.

Jury Question

While the jury was deliberating, it sent out a note asking, "What happens if we can't agree on a verdict?" Judge Brown responded, without objection, by writing on the note, "Please continue to deliberate" and sending the note back to the jury. R. 526, ll. 16-22. The court never issued an Allen charge.[5] After several hours of deliberating, the jury acquitted Appellant of murder, attempted murder, and ABHAN, but found him guilty of voluntary manslaughter. R. 529, l. 12 – 530, l. 5.

[5] Allen v. United States, 164 U.S. 492 (1986)

ARGUMENT

1.

The court erred by instructing the jury on mutual combat when there was no evidence of a mutual intent and willingness to fight including no evidence that Appellant and the decedent knew the other was armed or of any pre-existing ill will or dispute between Appellant and the decedent, and where there is a strong likelihood that this erroneous charge prejudiced Appellant by acting as a limitation on his ability to claim self-defense.

Relevant Facts

During the discussion on jury instructions, the state requested the court charge the jury on mutual combat. Defense counsel objected to the charge arguing that mutual combat did not apply to the facts of this case. R. 429, l. 12 – 430, l. 23. The court ultimately charged the jury as follows:

> Now the following elements are required to establish self-defense. 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 purposes 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 serious bodily injury. However, if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault on bringing on the difficulty. Now for mutual combat there must be mutual intent and willingness to fight. This intent may be shown by the acts and conduct on the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with deadly weapon, with a deadly weapon.**

R. 508, l. 25 – 509, l. 22 (emphasis added).

Discussion

The trial court erred by instructing the jury on mutual combat because there was no evidence of a mutual intent and willingness to fight or of any pre-existing ill will or dispute between Appellant and Ian before that evening. There was also no evidence that each knew the other was armed. Appellant was prejudiced because this unwarranted instruction acted as a limitation on his ability to claim self-defense and transferred the state's burden to disprove self-defense onto Appellant, forcing him to prove he acted in self-defense.

"In general, the trial judge is required to charge only the current and correct law of South Carolina and the law to be charged to the jury is determined by the evidence at trial." State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) (internal citations omitted). "To warrant reversal, a trial judge's charge must be both erroneous and prejudicial." Id. (citing Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct.App. 1990)).

"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." State v. 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.'" Taylor, 356 S.C. at 231-232, 589 S.E.2d at 3 (quoting Graham, 260 S.C. at 450, 196 S.E.2d at 495). "The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." Id. at 232, 589 S.E.2d at 4 (citing State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977)).

In Taylor, our Supreme Court adopted three additional requirements for mutual combat recognized by other states. The first is "that the fight [must] arise out of a pre-existing dispute." Id. at 233, 589 S.E.2d at 4. The second is that **"an 'antecedent agreement to fight' must exist** for the court to charge mutual combat." Id. at 233, 589 S.E.2d at 4 (citing Eckhardt v. People, 126 Colo. 18, 247 P.2d 673 (1952), People v. Cuevas, 740 P.2d 25 (Colo.App. 1987), Lujan v. State, 430 S.E.2d 513, 514 (Tex.Crim.App. 1968), and Carson v. State, 89 Tex.Crim. 342, 320 S.W. 997 (1921)) (emphasis added). And lastly, "mutual combat does not arise from 'a mere fist fight or scuffle,' rather it "arises only when the parties are armed with deadly weapons." Id. at 233, 589 S.E.2d at 4 (citing Flowers v. State, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978) and Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969)).

"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." [6] Taylor, 356 S.C. at 234,

[6] State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where the defendant returned to the injured party's property at least twice with a gun despite prior verbal warnings not to return and threatening gunshots);

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). Lastly, to "charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." Id. at 233, 589 S.E.2d at 4 (quoting Flowers, 247 S.E.2d at 218) (internal quotation marks omitted).

In Taylor, our Supreme Court found there was insufficient evidence of a mutual intent and 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. The 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. The 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 *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).

Under these recognized principles, the facts elicited at Appellant's trial did not support the giving of a mutual combat instruction. Like Taylor, the evidence of the events leading up to and during the fight between Appellant and Ian "is sketchy at best." See

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State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) (finding the mutual combat charge was proper where the defendant and the decedent had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934) (finding the mutual combat charge was proper based on testimony that the defendant and the deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other).

Taylor, 356 S.C. at 234, 589 S.E.2d at 5. Moreover, many of the state's witnesses were noticeably biased in favor of the decedent. There was no evidence that there was any pre-existing ill will or dispute between Appellant and Ian. While the state may argue that because Appellant did not greet Ian when he first approached the men under the carport that there was animosity between the two, there is no evidence to support this contention. Wilson and Graham both testified that they were not aware of any reason why Appellant would not have greeted Ian or of any animosity between the two in the past. R. 184, ll. 6-14; R. 311, ll. 2-14. Additionally, Rishawn testified that he thought "they were cool," but that night "evidently they weren't." R. 363, ll. 4-6. However, he never suggested there was any pre-existing ill will between the two.

Moreover, there is no evidence that Appellant went to Wilson's house that night seeking an armed encounter with Ian. Rather, the evidence suggested Appellant drove Ky Graham to the home so that Graham could purchase marijuana from Wilson. See R. 328, ll. 17-22. There was absolutely no evidence that Appellant even knew Ian was at Wilson's house before he greeted the men under the carport. Additionally, there was no evidence that Ian and Appellant had an "antecedent agreement to fight" and certainly "evidence of [an] agreement to fight" was not "plain." See Taylor, 356 S.C. at 233-234, 589 S.E.2d at 4.

Furthermore, while there was arguably some evidence that both Ian and Appellant were armed with deadly weapons, there was **no evidence that both knew that other was armed.** See Id. at 234, 589 S.E.2d at 5. Rishawn, the only person who somewhat saw the altercation between Ian and Appellant, testified that he never saw Appellant with a weapon, rather he simply saw Appellant "fidgeting with something in his pants." R. 373, ll. 18-25. He also testified, even more significantly, that Ian "didn't know he [Appellant] had it [the

knife]" because it was dark and no one would have fought Appellant if they "would have seen two long blades" in his hand. R. 370, 11. 21-22; R. 373, l. 21 – 374, l. 5. According to Rishawn, Ian simply thought the men were fist fighting.[7] See Taylor, at 233, 589 S.E.2d at 4. Furthermore, if the men were both armed, they certainly were not armed equally since Appellant allegedly had two long blades and Ian allegedly had a pistol. See Id. 356 S.C. at 234, 589 S.E.2d at 5. It is hard to imagine one would enter into an agreement to fight on such unequal terms.

Under these circumstances, there was clearly insufficient evidence of a mutual intent and willingness to fight to submit the issue of mutual combat to the jury and the court erred by doing so over defense counsel's objection. See R. 430, ll. 18-20.

The charge on mutual combat, given without any facts in the record tending to establish the requisites for application of that doctrine, was also highly prejudicial to Appellant because it acted as a limitation on his ability to claim self-defense. Id. 356 S.C. at 234-235, 589 S.E.2d at 4-5. 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 Id. 356 S.C. at 232, 589 S.E.2d at 3. Furthermore, this unwarranted charge prejudiced Appellant by transferring the state's burden to disprove self-defense onto Appellant, forcing him to prove self-defense. Id. at 5, 589 S.E.2d at 235; see State v. Burkhart, 350 S.C. 252m 565 S.E.2d 298 (2002); see also State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2000); see also State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

[7] There is also a strong argument that if Ian was armed with a pistol and knew Appellant was armed with two long knives, he would have shot Appellant in self-defense.

Because the mutual combat instruction was unwarranted and prejudiced Appellant who argued self-defense at trial, this Court should reverse his conviction and sentence and remand for a new trial.

Therefore, either Ian was not armed himself or he did not know Appellant was armed with the knives.

2.

The court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter where the evidence in the light most favorable to Appellant established that Appellant fatally stabbed the decedent while he was lawfully acting in self-defense but acted recklessly when he was "swinging wildly" and struck the decedent.

Relevant Facts

During the discussion on jury instructions, defense counsel requested the court charge the jury on the lesser included offense of involuntary manslaughter. He explained that Rishawn Gause testified Appellant was "swinging wildly" during the altercation and that this would be "reckless conduct on the part of the defendant which caused the death of the [decedent]." R. 427, l. 18 – 428, l. 10. The solicitor argued that the facts did not warrant an involuntary manslaughter charge because Rishawn "just thought it [the swinging] was wild because . . . the punching was actually stabbing." R. 428, ll. 12-21.

Judge Brown stated that he fully considered Rishawn Gause's testimony that Appellant "was stabbing, so to speak, kind of wildly," but concluded that an involuntary manslaughter instruction was not "appropriate to charge in this case." R. 440, ll. 1-6. Citing to this Court's opinion in State v. Scott, 408 S.C. 21, 757 S.E.2d 533 (Ct. App. 2014)[8], the court explained that "self-defense and involuntary [manslaughter] essentially [cannot] be charged together. It was either self-defense or it was negligent type conduct that . . . would warrant [an] involuntary [manslaughter instruction]; it's not both." R.

[8] Judge Pieper dissented in Scott finding the evidence warranted an involuntary manslaughter charge. 408 S.C. at 27, 757 S.E.2d at 536. Our Supreme Court granted Scott's Petition for Writ of Certiorari to the Court of Appeals by order dated September 11, 2014.

440, l. 12 – 441, l. 1. Therefore, the court found an involuntary manslaughter instruction in this case would be improper and refused to charge it to the jury. R. 441, ll. 3-5.

Discussion

The court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter because the evidence in the light most favorable to Appellant established that Appellant fatally stabbed Ian while he was lawfully acting in self-defense but acted recklessly when he was "swinging wildly" and struck Ian with the knife.

"In determining whether the evidence requires a charge on a lesser-included offense, the . . . Court must view the facts in the light most favorable to the defendant." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). A requested charge "is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995), and State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)). A "trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) and State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)).

"Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." Id. at 309,

764 S.E.2d at 514 (citing Tucker, 324 S.C. 155, 478 S.E.2d 260 and S.C. Code Ann. § 16-3-60 (2003)).

A "self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges." Sams, 410 S.C. at 314, 764 S.E.2d at 516 (citing State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008)) (internal quotation marks omitted).

In State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468-469, our Supreme Court found Light was entitled to a jury instruction on both self-defense and involuntary manslaughter where the evidence showed Light took a loaded gun from the decedent who was threatening him with it and that he recklessly handled the gun because it fired almost immediately after he took possession of it. Therefore, the Supreme Court found Light was lawfully armed in self-defense but acted recklessly by the way he handled the firearm. Id.

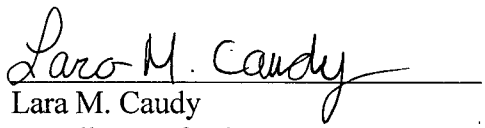
Additionally, in State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999), our Supreme Court found Burriss was entitled to an involuntary manslaughter charge when he was lawfully acting in self-defense, but recklessly handled a loaded firearm. Burriss, who was attacked by two men and pushed to the ground, drew a gun from his pocket and fired twice into the ground, causing both men to back away. As Burriss was attempting to get off the ground, one of the men advanced towards Burriss, who was separated from his gun. Burriss grabbed the gun and it accidentally fired, killing the victim. Id. at 263, 513 S.E.2d at 108. Therefore, Burriss was entitled to a charge on involuntary manslaughter because there was evidence he handled the loaded gun in a negligent manner.

In this case, there was evidence Appellant was lawfully armed in self-defense when he struck Ian with the knife, but that he was acting in a reckless manner because he was "swinging wildly." The evidence in the light most favorable to Appellant established that Ian and Rishawn chased Appellant under the carport and that the men were "tussling." See R. 192, l. 4 – 193, l. 1. There was some evidence that either Ian or Rishawn or both were armed with a handgun. While no one knows what happened under the carport, Rishawn testified that Appellant was "swinging wild" in the dark and somehow struck the decedent with a knife. See R. 367, ll. 17-24. This is evidence that Appellant drew the knife or knives in self-defense, but that he was acting in a reckless manner when he handled the knife. Based on this evidence, the trial court erred by refusing to charge the jury on the lesser included offense of involuntary manslaughter.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 20, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD ALLEN WOODBURY,

APPELLANT

APPELLATE CASE NO. 2014-000390

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of July, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .