STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Bamberg County
James R. Barber, III, Circuit Court Judge
Op. No. 2016-UP-023

Frankie Lee Bryant, III,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2016-000876

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

The Court of Appeals correctly found probative evidence did not support a finding that counsel was ineffective for failing to object to the jury instructions on self-defense because they were not erroneous.

STATEMENT OF THE CASE

Petitioner Bryant was convicted at trial of voluntary manslaughter for the stabbing death of his cousin, Willie Wright. Bryant was sentenced by the Honorable Doyet A. Early, III, to twenty-five years imprisonment. Bryant was represented at trial by Kent Kirkland, Esquire. Bryant appealed and the conviction and sentence was affirmed in an unpublished opinion (2008-UP-574).

Bryant filed an application for post-conviction relief (PCR). An evidentiary hearing was held before the Honorable James R. Barber, III, on July 12, 2011. Judge Barber granted relief by order dated December 12, 2011. The matter was transferred from this Court to the Court of Appeals. The Court of Appeals granted the State's petition for writ of certiorari on October 8, 2014. Following briefing and oral argument, the Court of Appeals reversed the grant of relief. Bryant v. State, 2016-UP-023 (S.C. Ct. App. filed January 20, 2016). Bryant petitioned for rehearing, which was denied. Bryant petitioned this Court for a writ of certiorari and the State filed its return. This Court granted the petition on March 7, 2017. Bryant filed his Brief of Appellant on March 31, 2017. The State's brief follows.

STATEMENT OF FACTS

Respondent Frankie Lee Bryant stabbed his cousin, Willie Wright, in the chest, groin, and upper thigh. Wright died as a result of cardiogenic shock and brain injury caused by lack of blood flow. App. pp. 110-114.

Sheila Oliver testified as the first witness at trial. Wright was driving Sheila Oliver around small towns and countryside, and they eventually picked up Bryant. While driving around, Bryant and Wright would get out of the truck and "tussle," then get back in the truck and continue riding around as if nothing was wrong. The record is clear they were horsing around: Oliver testified after their tussle, they were "[k]ind of happy. They wasn't upset or anything. Nobody was upset." They were drinking and searching for drugs. Along the way they picked up another man later identified at trial as Anthony Gordon. While riding around, Wright drove, Oliver sat in the middle, and Bryant on the passenger side. App. pp. 55-57 (direct quote, tr. p. 56, lines 17-20).

Oliver testified they arrived at a trailer and Oliver went to ask the occupants if she could use their bathroom. On her way, she saw a knife in Bryant's hand. She told a man and woman in the house about the knife. Oliver testified that at the time Bryant held a knife, they had not started fighting or tussling yet, but that "Willie was coming around to his side to punch him again or whatever, like they was doing." Wright did not have a weapon. App. pp. 57-58 (direct quote, App. p. 58, lines 14-17).

When Oliver came out of the trailer, Wright was on the ground. With help, she moved Wright into the truck. They tried to stop the bleeding and took him to the hospital. App. pp. 59-60.

Antoinette Jenkins was at the trailer, which was Nate Johnson's trailer. She saw Bryant pull out a knife and start stabbing Wright. Tr. pp. 72-73. She testified, "And when he was stabbing him,

he pushed him inside the seat part, like where the seat is at in the truck and just kept on stabbing him." Tr. p. 73, lines 16-18. Bryant backed up when he finished stabbing and exclaimed: "I told you." Bryant just stood there while Jenkins helped put Wright in the truck to take to the hospital. Wright did not have a weapon. Jenkins testified Wright did not have a chance to defend himself. App. pp. 73-74.

Anthony Gordon was the other man riding around with Bryant, Wright, and Oliver. They were looking for drugs. They stopped at Nate's trailer and Gordon knocked on the trailer door looking for Nate. He testified he saw Bryant and Wright "bull jiving," at least he thought so. His back was turned when he heard a scream. He turned around to see Wright falling in the truck and Bryant holding a knife. Bryant told Gordon that he did not want to go to the hospital because he had too many warrants. App. pp. 89-93. Gordon admitted he did not know who brought the knife to the fight. App. p. 98.

Bryant did not stay around the crime scene or go to the hospital. He left. Officer Thompson was dispatched to try and find him. He saw Bryant by the Easy Shop 18 by trash containers. Bryant made his getaway. App. pp. 78-82. Bryant's fingerprints were on the passenger side and driver side of the vehicle. Blood collected in the threshold of the driver door. App. pp. 105-107.

Bryant testified in his defense. Bryant claimed he did not smoke crack cocaine that day but was tipsy. Bryant claimed that Wright approached him and demanded his money. Wright then started to choke Bryant, and pulled out a knife. Bryant claimed that while Wright was still choking Bryant, Bryant took the knife and stabbed Wright. Bryant claimed that Wright stabbed him; however, the medical records introduced at trial did not bear this claim out. App. pp. 129-131, p. 136, p. 140; pp. 160-161.

ARGUMENT

The Court of Appeals correctly found probative evidence did not support a finding that counsel was ineffective for failing to object to the jury instructions on self-defense because they were not erroneous.

Counsel testified he should have objected to the self-defense charge given concerning the degree of force allowed. Counsel testified he provided his own version of instructions on this matter which the trial court did not charge to the jury. The PCR court found counsel ineffective for failing to object to the instruction; however, the PCR court's order fails to explain why the charge given was erroneous. Case law indicates that the instructions are not erroneous. Further, despite counsel's hindsight assessment of his performance, probative evidence fails to indicate that his performance was deficient or that Bryant was prejudiced by the supposed error.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Trial counsel's willingness to engage in hindsight at the PCR hearing does not amount to evidence of ineffectiveness. See Wright v. Hopper, 169 F.3d 695, 707 (11th Circuit 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a

strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding "counsel's current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial"). Trial counsel using PCR for an exercise in hindsight, second-chance advocacy on behalf of his former client was not evidence of deficient performance.

At trial, the trial court gave the following instruction with regards to self-defense:

> **A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm.** Therefore, in self-defense, the defendant has the right to use the force needed to avoid death or serious bodily harm.
>
> **The force used in self-defense does not have to be limited to the degree or amount of force used by the victim.** The defendant has the right to use so much force as appeared to be necessary for complete self-protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.
>
> If the defendant is justified in defending himself, then the defendant is also justified in continuing to defend until it is apparent that the danger of death or serious bodily injury has completely ended.
>
> And finally, in self-defense, the degree of resistance ought to be in proportion to the nature of the injury offered; that is, that it should be sufficient to ward off such injury and do no more.
>
> In other words, the moment a man disarms or puts himself out of power of the aggressor to do him further injury, then he should cease from further violence. But if he does commit any further outrage, then he becomes the aggressor.

App. p. 195, line 11 - p. 196 (emphasis added). The last paragraph closely tracks the language of Golden v. State, 1 S.C. 292 (1870). Golden remains good law and its principle has been reaffirmed several times.

"Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Indeed, the purpose of the instructions is to enlighten the jury and to aid it in arriving at a correct verdict. Id.

Jury instructions should be considered as a whole, and if as a whole the instructions are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991).

In the instant case, the instructions to the jury were a correct statement of law. In State v. Wood, 1 S.C.L. 351 (1794), the court held receiving the first blow from an assailant provides justification from the defendant to act in self-defense: "But there must be however, in all cases, some proportion between the battery given, and the first assault." Wood further noted the following:

> [T]he degree of resistance ought to be in proportion to the nature of the injury offered; that it be sufficient to ward off such injury, and no more. For the moment a man disarms or puts it out of the power of the aggressor from doing further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor.

Id. (cited in August 23, 1996 letter opinion to Captain Keel 1996 WL 549578 (S.C.A.G.)).

In State v. Quin, 5 S.C.L. 515 (S.C. Const. App. 1815), the court held: "Proof that the prosecutor was the aggressor would not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defense."

In State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918), this Court held: "The defendant, if without fault, had the right to use such **necessary** force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to the degree or quantity of attacking opposing force." Id., 111 S.C. at 112, 96 S.E. at 544 (emphasis added).

Bryant cites the following portion of Campbell:

> A person assaulted, being without fault and bringing on the difficulty, has the right to use such force as is necessary for this complete self-protection . . . The defendant, if without fault, has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.

Campbell, 96 S.E. at 544 (1918). However, the trial court instructed similar language when the trial court instructed the jury:

> The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self-protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.

App. p. 197, lines 17-23. The trial court also clearly instructed the jury that: "A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm." App. p. 197, lines 11-13.

Subsequent to Campbell, the South Carolina Supreme Court cited Wood with approval, with additional favorable citation to Golden, in State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925)

overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Jones noted the following:

> Once conceded that the defendant in repelling the attack of his assailant, has used more force than was reasonably necessary, his plea of self-defense, which up to the moment of his repelling attack was perfect, immediately falls to the ground, and he is held in law as the aggressor from the beginning of his attack; the degree of his responsibility must be determined therefore by the character of his attack, the nature of the weapon used, and the extent of the injury inflicted, just as if there had been no previous attack upon him.

Jones, 130 S.E. at 750.

Campbell was subsequently cited with approval in Douglass v. State, 332 S.C. 67, 504 S.E.2d 307 (1998). In that case, Douglass requested a charge tracking the language of Campbell, but instead the trial court instructed the jury as follows:

> [If] the defendant was justified in using force and firing the first shot, he is justified in continuing to shoot **until it appears that any danger to his life and body has ceased**.
>
> The law in this state is that the defendant does not have to wait until the deceased gets the drop on him or the deceased beings to shoot him. He has the right to act upon the law of self-preservation and prevent this.

Douglass, 332 S.C. at 72-73, 504 S.E.2d at 309-310. This Court found that the trial court's instruction complied with the dictates of Campbell. Id., 332 S.C. at 73, 504 S.E.2d at 310.

Bryant stretches matters to assert the applicability of State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). That case was a directed verdict case where in the light most favorable to the prosecution, the defendant shot in quick succession four times and the decedent fell only after the last shot was fired. Therefore, this Court sensibly rejected the argument that there was evidence the defendant used excessive force. Id. at 661, 244 S.E.2d at 507. Nonetheless, Hendrix reaffirmed the

principle that "one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled." Id. Accordingly, Hendrix reaffirms the principle of law in Wood and Golden.

Further support for Golden's continuing viability came at the threshold of this century. This Court, addressing the force allowed to resist an illegal arrest, quoted a post-Campbell case as follows:

> It not infrequently has been reasoned that an unlawful attempt to restrain a person's liberty is such an aggression as to furnish a complete excuse for slaying the aggressor. The contention, however, has met with little or no favor in the eyes of the courts. On the contrary, it is generally held that the slayer is not excused unless he can show that the homicidal act was done in his necessary defense. While there can be no doubt of the right of the citizen to resist an attempt illegally to restrain his freedom, yet his resistance must not be in enormous disproportion to the injury threatened.

State v. McGowan, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (quoting State v. Francis, 152 S.C. 17, 34-39, 149 S.E. 348, 355-56 (1929)). As these cases show, necessity, reasonableness, and proportionality all remain essential to justifying a homicide allegedly committed in self-defense.

The instructions in this case are consistent with Wood, Quin, Golden, and Jones, and further, are not inconsistent with Campbell or Douglass. All these cases find that a defendant has the right to use as much force as necessary to protect himself from bodily harm until the danger has ceased. The instruction in the instant case made clear the defendant has the right to use as much force needed to avoid death or serious bodily harm, that an exact calculation of the force needed is not required, that the defendant is justified in defending himself until the danger has ended, but that the resistance must be proportional and end when the aggressor disarms or puts himself out of power. This is not an

erroneous charge in light of the cases discussed above. Therefore, counsel was not ineffective for failing to object to a charge that was not erroneous.

Of course, counsel's performance is not required to be perfect, just reasonable. For one thing, trial counsel is not required to be clairvoyant and anticipate changes in the law not in existence at the time of trial. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial") *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Accordingly, when Bryant asks this Court to expressly overrule the holdings of Wood and Golden for the benefit of bench and bar, Bryant is making the tacit admission that counsel's performance did not actually fall below professional norms, because no existing precedent overrules these cases and puts counsel on notice that he needed to make an objection.

To the extent the instruction might be considered erroneous, Bryant was not prejudiced by the instruction to warrant reversible error. In the instant case, only two witnesses claimed to see the stabbing, Bryant and Antoinette Jenkins. Bryant claimed that Wright bore the knife and that Wright stabbed him and was choking him. The instructions would not be misleading as clearly, if the jury believed this version of events, they would have found him not guilty based on the instruction given, as under this version of events, the degree of resistance would clearly be in proportion to the nature of the injury offered, as instructed. Under Jenkins' version of events, Wright was helpless and she did not provide testimony that suggested Bryant needed to defend himself. Therefore, the instruction was not prejudicial to Bryant.

The findings of the PCR court will not be upheld if not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 386 S.E.2d

624 (1989). Further, a reviewing court may reverse the PCR court's decision if it is controlled by an error of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). In the instant case, the PCR court's findings were not supported by probative evidence because the instruction was a correct statement of law and was not prejudicial to constitute reversible error. The Court of Appeals correctly reversed the PCR court.

CONCLUSION

For the above stated reasons, this Court should affirm the Court of Appeals' opinion and affirm Bryant's conviction and sentence.

Respectfully submitted,

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FRANKIE L. BRYANT, III,

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Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Brief of Respondent on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 1st day of May, 2017.

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