STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH BOWERS

APPELLANT

APPELLATE CASE NO. 2014-002176

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by instructing the jury on "mutual combat" where the instruction was inapplicable to the facts of this case since there was no evidence of a tacit agreement or otherwise to engage in "mutual combat"?

2.

Whether the court erred by instructing the jury on voluntary manslaughter where there was no evidence the decedent did anything to appellant that would constitute a "sufficient legal provocation" to put appellant in a "heat of passion"?

STATEMENT OF THE CASE

Appellant was indicted for two counts of murder, two counts of attempted murder, and possession of a firearm during the commission of a violent crime. R. 358 – 370. His case came on for trial on September 29, 2014, before the Honorable R. Markley Dennis, Jr., and a jury. R. 1. The state dismissed one count of murder during the trial, and the other count went to the jury after the judge stated directing a verdict in this case would constitute him weighing the evidence.

On October 1, 2014, the jury found appellant guilty of voluntary manslaughter on the other count of murder. The jury found appellant guilty of assault and battery of a high and aggravated nature (ABHAN), on one count of attempted murder, and not guilty on the other count of attempted murder. The jury also found appellant guilty of possession of a firearm during the commission of a violent crime. R. 352, l. 2 – 353, l. 3.

Judge Dennis sentenced appellant to fifteen years imprisonment for voluntary manslaughter, fifteen years imprisonment for ABHAN, and five years imprisonment for possession of a weapon during the violent crime. All sentences were concurrent. R. 356, ll. 2 – 13.

This appeal follows.

ARGUMENT

1.

Whether the court erred by instructing the jury on "mutual combat" since the instruction was inapplicable to the facts of this case since there was no evidence of a tacit agreement to engage in "mutual combat"?

Introduction

The evidence in this case showed that appellant went to the club with a couple of people he knew. There was not any evidence before the jury that he went to the club with the intention of engaging in "mutual combat." An altercation occurred between two other men that did not involve appellant, and armed individuals outside the club began shooting when one decedent fired a flare gun. The trial judge **correctly did not instruct the jury on accomplice liability –** the hand of one is the hand of all." R. 312, l. 16 – 340, l. 2. Appellant objected to instructing the jury on "mutual combat," and voluntary manslaughter. The judge instructed the jury on both over appellant's objection. There was no evidence of a tacit agreement or otherwise to engage in mutual combat in this case. The "mutual combat" instruction was extraordinarily prejudicial because it negated the jury's ability to find appellant not guilty by reason of self-defense in what certainly appeared to be a self-defense case *if* appellant fired a gun during the chaos that ensued after the flare gun was fired.

Relevant Facts

Stanley Humphries was that state's first non-law enforcement witness at trial. Stanley went by the nickname "Hump." R. 74, ll. 10-20.

Stanley remembered that on June 21, 2012, he was with Dante Bailey. Dante went by the nickname "Cole." That night he went with Dante Bailey and "Janey" to the Sand Dollar, and they played pool there until the Sand Dollar closed. Appellant Joey Bowers was not with them. The men then went by Dante's house to get a pack of cigarettes. "Some other people got in the van with us, and we went to the Midnight Soul Patrol [club], I believe is the name of it." Joey Bowers was one of the men who got in the green minivan with them. Appellant's nickname was "Opie." Stanley did not even know where the Midnight Soul Patrol bar was so he had to get directions. R. 75, l. 13 – 77, l. 3. Stanley was driving green minivan at the time. R. 74, l. 15 – 75, l. 14.

Stanley had known Dante since he was about fourteen or fifteen years old, and he was thirty-seven at the time of the trial. The following occurred on direct examination of Stanley.

> Q. Tell us what happened when you got to the [Soul Patrol] club.
>
> A. We went inside. Some people got some drinks. I got a bottle of water. *Asked where the pool table was*, they said it was off in the side room. Stood around and talked for a little while, walked outside, and this whole incident started. *We never even got to shoot pool that night.*
>
> *Q. All right. And is that why you went there?*
>
> *A. Yes, ma'am.*
>
> Q. And when you say this whole incident started, tell us exactly what started.
>
> A. We were outside smoking, and this guy Krum, they call him Krum, came over there and started *some trouble with Dante. And somebody said, Come on, let's go. And as we went to leave the gunshots rang out.*
>
> Q. Do you actually get in your van?
>
> A. Yes, ma'am.

> Q. All right. Did Dante get in the van?
>
> A. No, ma'am. He was backing us out. There was cars parked real close to us. There was a telephone pole beside us, and he was actually directing us out. He was standing at the back passenger side of the van.
>
> Q. **Did Opie get in the van?**
>
> **A. Yes, ma'am.**
>
> **Q. Did he get out of the -- did he stay in the van?**
>
> **A. We all got out of the van once we realize that Cole [Dante] had been shot.**
>
> Q. All right. What did you see after Cole had been shot?
>
> A. I actually went over there to him and pulled his shirt up, and he had a bullet hole on his right side.
>
> Q. Did you see anyone tending to him?
>
> A. No, ma'am. He was -- he was -- he was already dead.

R. 77, l. 4 – 78, l. 11. (emphasis added).

On direct-examination Stanley initially said that he thought appellant Joey Bowers left with them but now maintained that he was wrong. However, he acknowledged on cross-examination that appellant Bowers was actually the person who "called out and said, C'mon, let's go." R. 78, l. 14 – 80, l. 24.

Stanley said he did not have a gun that night, Dante Bailey did not have a gun that night, and to the best of his knowledge appellant Joey Bowers did not have a gun that night. Stanley confirmed that they were attempting to leave in the van, and that someone shot and killed Dante. Stanley did not know where the shots came from and Dante dropped to the ground dead. Stanley obviously feared for his life at the time. Stanley also acknowledged that appellant, who was near

him, was also under fire. They both wanted to get away to save their lives. R. 80. l. 25 – 82, l. 15.

There was evidence that appellant Joseph Bowers, "Opie," and Stanley Humphries, "Hump," were the only two white young men at the club that night. Joe Pope remembered seeing appellant, Stanley, "Mike G., and "Corleon" when he arrived at the club but he admitted "It happened so fast." R. 83, l. 4 – 84, l. 23.

Pope admitted that Lucas Morgan was the only person he saw with a gun at the club that night, and Lucas Morgan was the only person he saw shooting his gun. Pope acknowledged that Irvin Smalls got into an argument with Lucas Morgan and that Lucas Morgan crouched down by a propane tank and began firing his weapon. R. 93, l. 11 – 94, l. 11. (Lucas Morgan was acquitted in a separate trial held about two weeks before appellant's trial. This Court can also take judicial notice of the fact that the South Carolina Incarcerated Inmate Locater website does not show Lucas Morgan is incarcerated). R. 4, l. 19 – 5, l. 24. The following occurred during the cross-examination of Pope:

> Q. Isn't it true, Mr. Pope, that you never saw Joseph Bowers with a gun, right?
>
> A. No, ma'am.
>
> Q. Okay. And you never saw Joseph Bowers in an argument with anybody that night, right?
>
> A. I don't -- I don't think I know to about.
>
> Q. Okay. Well, that's helpful. Thank you. And isn't it true, Mr. Pope, that you called 911?
>
> A. Yes, ma'am.
>
> Q. *And you told 911, Hey, look, Lucas Morgan's out here shooting this place up, right?*

> *A. Yes, ma'am.*
>
> Q. Okay. And you told them, Richard Green's been hit, right?
>
> A. Yes, ma'am.
>
> Q. Okay. *And you said, Michael Morgan's* [the decedent] *been hit, too?*
>
> *A. Yes, ma'am.*
>
> *Q. Right. And did you see Michael get shot?*
>
> *A. No, ma'am.*
>
> Q. Did not. And you didn't see Robert Goodwine get shot, correct?
>
> A. No, ma'am.
>
> Q. Do you know when Michael Morgan got shot? Was it while Lucas was firing? Do you have any idea?
>
> A. Well, when them guys came running through the parking lot, Mikey was standing over Richard with a flare gun, holding it like this, and he didn't see them guys coming.
>
> Q. *Right. Michael had a flare gun, right?*
>
> *A. Yes, ma'am.*
>
> *Q. You saw that flare gun in his hand?*
>
> *A. Yes.*

R. 94, l. 15 – 95, l. 23. (emphasis added).

Pope said all of the four or five men he remembered running across the parking lot shooting toward Michael were black men -- meaning appellant was not one of those men. R. 96, ll. 1-17.

Robert Goodwine was one of the men shot at the club that night, and the subject of one of the "attempted murder" indictments. Goodwine testified he was shot by Lucas Morgan. He remembered Morgan "shot at me from the front, but he hit me form the back." Goodwine testified he was running at the time because Morgan was shooting at him. R. 100, l. 25 – 101, l. 19.

Goodwine confirmed the only two people he saw shooting that night were Lucas Morgan and Dante Bailey, "Cole." As seen, Dante Bailey was shot and killed that evening.

Goodwine remembered he got in the van with "Hump," and "Hump," who was Stanley Humphries, took him to the hospital. Goodwine said he had seen appellant earlier that evening at the club but he did not remember appellant being with them when he was driven to the hospital. R. 101, l. 22 – 102, l. 23.

On cross-examination, Goodwine confirmed that he was around Dante Bailey and Joey Chaplin while at the club. R. 103, l. 14 – 104, l. 8. Goodwine confirmed that Chaplin was black.

Richard Green was the victim of the other attempted murder charge. It was apparent he was in a wheelchair at the time of trial. R. 104, l. 14 – 105, l. 23.

Green confirmed he was at the Midnight Soul Patrol club on the evening of June 21, 2012. He remembered "hanging out" for a while at the club before he went to the owner's house nearby. "That's when I heard the first gunshot, so I moved. I walked off a little bit, and that's when I felt I got shot, with a second one." R. 106, ll. 1-5. Green did not know who shot him. Green was paralyzed as a result of the shot. R. 106, ll. 9-10.

Alvin Wilson was also at the club that night. He estimated there were about seventy-five people at the club – it was a busy night. Wilson did not know appellant, but he confirmed he only saw two white people at the club. R. 109, l. 10 – 111, l. 16.

Wilson was in the DJ booth in the club, and he played music. Wilson said he "shut the music down" because "an altercation was going on, like I said, I said, the party is over." R. 112, ll. 8-25.

Wilson did not see anyone shooting but he saw his cousins, Michael Morgan and Richard Green, "laying on the ground outside." R. 113, ll. 5-25. Lucas Morgan was also related to Wilson. R. 114, l. 24 – 115, l. 1. Wilson, nonetheless, admitted that he saw Lucas Morgan with a gun that evening. R. 120, ll. 13-15.

Magnum Smalls was a regular at the Midnight Soul Patrol club. On the night of the shooting he remembered shaking hands with Dante Bailey. Smalls remembered about fifteen minutes later that Dante Bailey and a man named Arthur were "having words." R. 121, l. 6 – 122, l. 25. Another man, "D Grant," got in-between the two men, and "was pretty much walking away from everybody else, like diffusing the problem . . .after that guns [were] flashed . . . like I said, they walked away pretty much from like everybody else, and they were talking – D Grant was talking to both of them. And then the flare gun went off, **after the flare gun went off, all chaos broke loose. Everybody pretty much started shooting.**" Smalls confirmed that decedent Michael Morgan was unfortunately the person who fired the flare gun. R. 123, l. 1 – 124, l. 22. (emphasis added).

Smalls said when the shooting ended he saw Dante Bailey, Michael Morgan, and Richard Green on the ground. As seen, Dante Bailey and Michael Morgan were killed, and Richard Green was badly wounded. R. 126, ll. 2-8.

Smalls saw appellant Joey Bowers standing near his friend Dante, and he maintained appellant picked up Dante's semi-automatic handgun while they were attempting to get Dante inside of the vehicle. R. 126, l. 10 – 127, l. 16. Smalls then gave contradictory statements

saying he saw appellant earlier with a gun, but he admitted at a prior deposition that he said he never saw appellant shoot a gun that evening. R. 127, l. 12 – 131, l. 7.

On cross-examination, defense counsel pointed out the different statements given by Smalls. Smalls admitted he did not see appellant with a gun that night, and that he only saw appellant pick up Dante's gun when they were helping him into the vehicle after Donte had been shot. Smalls repeated he did **not** see appellant shoot the gun however. R. 132, l. 14 – 134, l. 1. The following occurred on cross-examination of Smalls:

> Q. But you've also -- but, you know, *you actually saw the first shot go off, and that was Mikey Morgan, right?*
>
> *A. Right.*
>
> *Q. Okay. And that was him firing his flare gun?*
>
> *A. Yes.*
>
> Q. So, that's one shot right there?
>
> A. Right.
>
> Q. And then you saw Lewis Melvin Johnson, Dolla, shooting out the side door of the club, right?
>
> A. Yes.
>
> Q. Okay. So that's two. And they're not firing at the same time, right?
>
> A. Right.
>
> Q. Okay. **So, it's the flare gun, and then Dolla, and then Lucas firing, correct?**
>
> **A. Correct.**
>
> Q. Okay. And then I think also you would say that you saw *Arthur Chaplin firing his gun across the parking lot, right?*
>
> *A. Correct.*

Q. Okay. **Would it also be fair to say that you saw Joseph Bowers trying to assist Cole while Cole was on the ground and had been shot?**

A. Yes.

Q. Now, you, I guess, would also agree with me that you saw people with guns that night, at that Midnight Soul Patrol?

A. (Nods in the affirmative.)

Q. *And the people that you saw were Arthur Chaplin?*

A. Yes.

Q. Also known as Krum?

A. Correct.

Q. Okay. Dante Bailey?

A. Yes.

Q. Also known as Cole?

A. Yes.

Q. And these are the two gentlemen that you say were in a little verbal altercation over something?

A. Yes.

Q. How about, didn't you see Derrick Grant with a gun that night?

A. Yes, I did.

Q. And is that the man you say kind of separated those two?

A. Yes.

Q. And you saw Terry Thornton with a gun that night, T Dog?

A. Yes.

Q. And, of course, you -- we established that you saw Lucas Morgan with a gun?

A. Correct.

Q. And you saw Mikey with a gun?

A. Correct.

Q. And you saw Dolla, Lucas Melvin Johnson, with a gun?

A. Correct.

Q. And you also saw Stanley Humphries, the other white fellow, with a gun, didn't you?

A. Yes.

R. 133, l. 7 – 135, l. 15. (emphasis added).

Investigator Jeremiah Fraser testified that he talked to Michael Morgan, who "was in obvious pain," after being shot, and Lucas Morgan. Fraser said he took appellant into custody the same day. R. 185, l. 1 – 188, l. 18.

Investigator Fraser testified appellant told him he was pulling Dante Bailey, "Cole," back into the van, that Cole "wouldn't listen to him," "Cole stepped out from behind the van and he was shot. That was pretty much the extent of it." R. 190, l. 13 – 191, l. 11.

On cross-examination, Investigator Fraser admitted that he told appellant five times "look, Joe, just tell me you picked up the gun. If you picked up the gun, you did it in self-defense." Fraser acknowledged that appellant told him he did not have a gun, and that he did not shoot anyone. R. 197, l. 21 - 198, l. 10.

The state also introduced a phone call made by appellant from the jail in which he said "I ain't killed the boy. I only shot the boy." When moving for a directed verdict, defense counsel said this statement was in "essence a denial of killing anyone, and at best an admission that, to

his own internal belief, that he may have shot someone." R. 203, l. 24 – 206, l. 6. R. 271, l. 9 – 273, l. 5. The judge said the jail call still raised a jury question, and that he could not end the trial by directing a verdict given that jail call. R. 273, l. 6 – 275, l. 20; 277, ll. 1-10.

Charge conference

The judge told defense counsel that he, in addition to charging self-defense, had been reading about the legal concept of "mutual combat". R. 277, l. 23 – 280, l. 4. The judge observed that he was concerned because he had read one case where Judge John Hayes had been reversed "for submitting" a mutual combat instruction. That case was State v. Taylor, 356 S.C. 227, 589 S.E. 2d 1 (2003), discussed infra. R. 279, l. 25 – 280, l. 4.

At the charge conference defense counsel objected to the judge instructing the jury on "mutual combat." R. 291, l. 3 – 292, l. 15. In addition to objecting to the "mutual combat" instruction defense counsel also told the judge that she objected to him charging voluntary manslaughter over her objection. R. 291, l. 3 – 293, l. 16.

Following the charge conference, the solicitor told the judge that the state was dismissing the murder indictment against appellant involving Dante Bailey, who went with appellant to the club that night, and who there was evidence appellant was trying to keep out of dangers way at the time Dante was shot and killed. R. 293, l. 21 – 294, l. 23.

Instructions on the Law

The judge, over objection, charged the jury on the lesser-included offense of voluntary manslaughter. R. 325, l. 18 – 327, l. 19. As to "mutual combat" the judge charged the jury:

> Now, I want to discuss with you a part of the theory that you'll have to consider, and it's known as mutual combat. And this law provides that *if a Defendant voluntarily participated in mutual combat for the purpose other than protection, the killing of a 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 in bringing on the difficulty.
>
> For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the combat.
>
> In addition, it must be shown by that -- be shown that both parties were armed with a deadly weapon.

R. 329, l. 15 – 330, l. 8. (emphasis added).

The judge also charged the jury on self-defense. R. 330, l. 9 – 333, l. 9. The judge reminded the jury as to self-defense that if the jury found "mutual combat," he told the jurors "*Then self-defense goes out the window, so to speak. Not available.*" R. 336, ll. 13-23. (emphasis added).

Discussion

In State v. Taylor, 356 S.C. 227, 589 S.E. 2d 1 (2003), the case discussed between the judge and the attorneys regarding" mutual combat" during appellant's trial, our Supreme Court reversed this Court's holding that the judge not err in charging "mutual combat"[1]. In Taylor the Supreme Court noted that the concept of mutual combat had existed in this state since at least 1843, but had fallen out of common use in recent years.

The Supreme Court wrote that the case law established that there must be a mutual intent and willingness to fight to constitute "mutual combat". State v. Graham, 260 S.C. 249, 250, 196

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[1] Defense counsel objected, during an on-the-record charge conference, to the judge instructing the jury on "mutual combat," and also objected to his refusal to charge voluntary manslaughter. Once her objections and position were placed on the record as to the jury instructions with the judge at the charge conference, she was not obligated to continue to object. State v. Johnson, 333 S.C. 62, 65, n. 1, 508 S.E.2d 29, 31, n. 1.

S.E.2d 495, 496 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances **attending and leading up to the combat.**" Id. (emphasis added).

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. (citing 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." 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 unless the defendant can show he withdrew from the intent to engage in mutual combat.

A jury can still find a defendant guilty of voluntary manslaughter and not murder if it finds he was involved in mutual combat. "Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter." State v. Andrews, 73 S.C. 257, 53 S.E.2d 423 (1906). Our Supreme Court in State v. Taylor, 356 S.C. 227, 232-33, 589 S.E. 2d 1, 4 (2003),

> 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. State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased *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 mutual combat charge proper based on testimony that appellant and 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).

Although South Carolina has not explicitly required that the fight arise out of a pre-existing dispute, other states have made this prerequisite to mutual combat explicit. Texas and Colorado adhere to the rule that an "antecedent agreement to fight" must exist for the court to charge mutual combat. 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.W.2d 513, 514 (Tex.Crim.App.1968); Carson v. State, 89 Tex.Crim. 342, 230 S.W. 997 (1921).

Georgia has limited the application of mutual combat in another way by holding that mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist fight or scuffle." Flowers v. State, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978); Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969). In both Flowers and Grant, the defendant admitted to killing the decedent, but claimed self-defense. In both cases, the disputes that ended in death began as fist fights, and so the court found the mutual combat charge erroneous. Significantly, the court found that commingling charges on mutual combat and justification **was "ipso facto harmful" because "it placed upon the defendant a heavier burden than required" for self-defense**. Grant, 170 S.E.2d at 56. The court in Flowers explained, "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." 247 S.E.2d at 218.

We believe the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas are warranted. These limitations are consistent with the South Carolina cases in which the mutual combat charges given were deemed to be proper: Porter; Graham, and Mathis. As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. 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. In holding that mutual combat was properly charged in Graham, this Court reasoned as follows:

> *[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing,* and required that the issue be submitted to the jury for determination.
> 260 S.C. at 452, 196 S.E.2d at 496.

(emphasis added).

This was not a mutual combat case. At the outset, there was certainly evidence appellant was not even armed when he went to the club. There was evidence the men only went to the club to play pool. An argument ensued between two men who apparently "flashed "their guns at one another, a "flare" was fired from a gun and "chaos ensued." If appellant even fired a gun it was apparently Donte's gun after Dante was shot and killed after appellant urged him not to get out of the minivan. There was also evidence appellant was the man who urged leaving immediately when it appeared there may be trouble.

As this Court also will recall, appellant met Stanley Humphries, "Hump," over at his house and rode with the others to the club. There was evidence they had never been to the club before that date.

This was not a case where two people or more, held a grudge against each other, they were spoiling for an armed fight, and there was an understanding or a tacit agreement that there would be a fight with deadly weapons. This was not a case where their differences would be settled with a duel, or a shootout at the O.K. Corral with Wyatt Earp, Doc Holliday, Virgil Earp and Morgan Earp on one side and Bill Claiborne, Ike and Billy Clanton and Tom and Frank

McLaury on the other side.[2] There also was not the Sharks and the Jets from West Side Story agreeing to a "fair fight," at a specific location, which turned into a deadly rumble.

Respectfully, to charge "mutual combat" in this case was for "mutual combat" to lose its meaning within our case law. Finally, the record in this case shows that the police investigator repeatedly urged that all appellant had to do was admit that he pick up Dante's weapon, and shot it back at the shooters, and he was not guilty by reason of self-defense. The trial judge correctly struggled with charging "mutual combat." The solicitor was nonetheless successful in urging the judge to charge "mutual combat" over appellant's objection.

Because an erroneous finding of mutual combat disqualified appellant from being found not guilty by the jury by the reason of self-defense, it was an extraordinarily prejudicial and misleading jury instruction. "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) *citing* State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). Appellant should be granted a new trial.

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[2] The lawmen were eventually exonerated by a local justice of the peace after a 30-day preliminary hearing and then by a local grand jury. https://en.wikipedia.org/wiki/Gunfight_at_the_O.K._Corral (last visited October 31, 2016).

2.

The judge erred by instructing the jury on voluntary manslaughter over appellant's objection. There was no evidence justifying that verdict option. There was no evidence the decedent, Michael Morgan, did anything that would constitute a sufficient legal provocation for appellant to shoot him in a "heat of passion." This also was not a trial involving accomplice liability – "the hand of one is the hand of all."

The state's case was that appellant's acquaintance, Dante, was shot and killed next to the green minivan in the parking lot of the Midnight Soul Patrol. Appellant was right next to Dante. The state contended that appellant then grabbed Dante's gun, returned fire, killing the decedent, and wounding two other men.[3] This record is the void of any evidence that the decedent did something to appellant that would constitute a "sufficient legal provocation" under our case law.

Specifically, in State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000), the defendant contended that he was entitled to a voluntary manslaughter instruction because there was evidence of a domestic dispute between the defendant and his girlfriend at the time of the shooting. The defendant further contended that because the girlfriend's mother threw a cigarette case at him during the argument -- and immediately before the shooting -- that this constituted the "sufficient legal provocation" necessary for voluntary manslaughter.

The Supreme Court noted that the "provocation necessary to support a voluntary manslaughter charge must come *from some act of or* related **to the victim** in order to constitute sufficient legal provocation." *citing* State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). **Provocation of the deceased** must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment,

[3] It still remains difficult to understand why the state also tried appellant for murdering Dante before the solicitor dismissed that indictment towards the close of the trial.

or terror, rendering the mind incapable of cool reflection." State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000).

Our Supreme Court noted, inter alia, "This overt act [was] made by a *third party, not the deceased*, and South Carolina **has not recognized** sufficient legal provocation from *a third party that can be transferred to the victim.*" State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000). (emphasis added).

Thus, since there was no evidence of a sufficient legal provocation caused by the decedent against appellant in this case the judge erred by instructing the jury on voluntary manslaughter over appellant's objection. Under the facts of this case, and South Carolina law, appellant had the right to a verdict of guilty of murder or not guilty because the State had failed to disprove self-defense beyond a reasonable doubt. See, State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998); State v. Addison, 343 S.C.290, 294, 540 S.E.2d 449, 451 (2000).

Since there was no evidence tending to reduce the crime from murder to voluntary manslaughter in this case, the judge erred by instructing voluntary manslaughter over appellant's objection. The shooting in this case was murder or it was in self-defense.

There was no evidence of actions by the decedent against appellant which would have constituted a "sufficient legal provocation" necessary to reduce the shooting from being murder to voluntary manslaughter, and the same is true of the element of "heat of passion" since the record is also the void of any evidence of actions by the decedent which would have caused appellant to go into the highest degree of "exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." State v. Franklin, 310 S.C.122, 125, 425 S.E.2d 458 (Ct. of Appeals 1993).[4] Appellant should be granted a new trial.

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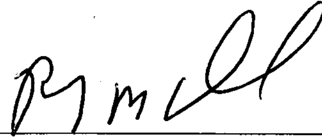
4 Overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

CONCLUSION

By reason of the foregoing arguments, appellants convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

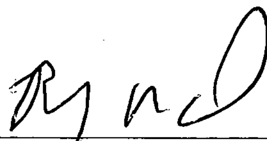
ATTORNEY FOR APPELLANT

This 5th day of May, 2017.

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."

May 5, 2017



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