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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable Edward W. Miller, PCR Judge

Appellate Case No. 2017-002116

MICHAEL ROGERS..Petitioner,

v.

STATE OF SOUTH CAROLINA. ....Respondent.

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statements of Issues of Certiorari

I. Did the PCR Court err in denying Petitioner relief where trial counsel failed to admit a 911 tape which contained evidence of Petitioner's efforts to save the decedent's life and tended to prove that the stabbing was an accident which would have further supported an involuntary manslaughter jury charge?

II. Did the PCR court err in denying Petitioner relief where trial counsel failed to argue the trial court and preserve for appellate review whether Petitioner was entitled to the lesser-included jury charge of involuntary manslaughter where evidence in the record indicated a struggle over a weapon and where this Court found that counsel failed to preserve the issue of habitation, and where trial counsel failed to request jury charges for involuntary manslaughter and habitation?

Respondent's Counterstatements of Issues of Certiorari

I. Did the post-conviction relief court properly determine that Petitioner failed to establish that counsel was ineffective when he strategically chose not to offer a 911 audio recording into evidence?

II. Did the post-conviction relief court properly determine Petitioner failed to establish that counsel was ineffective when he did not request a jury charge on involuntary manslaughter or defense of habitation?

STATEMENT OF THE CASE

Michael Rogers (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its March 2011 term, the Spartanburg County Grand Jury indicted Petitioner for Murder (2011-GS-42-1933). Petitioner was represented by Clay T. Allen, Esquire (hereafter "Counsel"). Assistant Solicitor Danny N. Fulmer, Jr., Esquire, from the Seventh Circuit Solicitor's Office, represented the State.

A pre-trial hearing on the motion was convened before the Honorable J. Derham Cole, circuit court judge, on September 2, 2011, during which testimony was presented on the issue of Petitioner's motion to dismiss the murder charge on the ground he was immune from prosecution. Specifically, Petitioner alleged he was immune from prosecution because he was allegedly attacked in his house by the victim, he did not have a duty to retreat, and Petitioner reasonably believed his conduct was reasonable and necessary to prevent death, great bodily harm, or the commission of a violent crime. The motion was denied by written order because he failed to establish by the preponderance of the evidence that he was acting lawfully in committing an unlawful assault and battery on the victim, that he was the victim of an unprovoked attack in his home by someone who was not an invited guest, or that he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another or the prevent the commission of a violent crime.

The matter proceeded to trial on October 4-6, 2011, before Judge Cole and a jury. On October 6, 2011, the jury found Petitioner guilty of voluntary manslaughter. Judge Cole sentenced Petitioner to twenty-one years' imprisonment.

Petitioner timely filed a notice of appeal.[1] Carlyle R. Cromer, Esquire, and Robert M. Dudek, Esquire, represented Petitioner on appeal. The issue raised on appeal was:

> Whether the court erred in denying appellant's Motion to Dismiss pursuant to S.C. Code 16-11-450 where the evidence showed appellant had repeatedly demanded that the decedent attacked appellant with a knife which ultimately resulted in a struggle over the knife and injuries to appellant and a fatal wound to the decedent.

The South Carolina Court of Appeals affirmed Petitioner's conviction. *State v. Rogers*, Op. No. 2014-UP-332 (S.C. Ct. App. filed Sep. 17, 2014). Specifically, the Court found the defense of habitation argument was not preserved for appeal and that Petitioner failed to carry his burden of proof in establishing by the preponderance of the evidence that he was permitted to use deadly force.

Petitioner's petition for rehearing was denied by the Court of Appeals on October 23, 2014. On December 4, 2014, Petitioner filed a petition for writ of certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated January 23, 2015. The remittitur was returned on January 29, 2015.

Petitioner timely filed a PCR application on September 16, 2015, alleging:

1. Ineffective assistance of Trial Counsel, in that:
    a. Counsel failed to respond, object and appeal to trial judge's pretrial decision on the matter of immunity from prosecution under S.C. Code § 16-11-450, which was denied.
    b. Counsel failed to properly preserve the issue of immunity from prosecution from appellate review.
    c. Counsel failed to object and adequately challenge statement made by State's witness Jackie Lance.
    d. Counsel failed to request instruction on lesser included offense of involuntary

[1] Petitioner's counsel deliberately omitted Petitioner's records from his direct appeal (appellate case no. 2011-201326), which were attached to the return and before the PCR court, from the appendix, in violation of Rule 243, SCACR. Respondent contacted Petitioner's Counsel about this concern on August 19, 2020, but Petitioner's Counsel refused to submit a supplemental documents containing the documents. As a result, Respondent requests the Court take judicial notice of these records.

manslaughter where evidence of a struggle between Petitioner and victim over the weapon.

e. Counsel failed to request accident charge along with the manslaughter charge.
f. Counsel failed to request habitation defense.
g. Counsel failed to ask for additional instruction of withdrawal, after provocation of conflict, as reviving right of self-defense.
h. Counsel failed to produce evidence of 911 call which was in favor of Petitioner.
i. Counsel failed to bring up defense of habitation, protection of person or property during pretrial or trial.
j. Counsel failed to conduct legal research to familiarize himself with case law similar to and of the exact nature of the Petitioner's crime.

2. Ineffective assistance of appellate counsel:
   a. Counsel failed to argue issue of immunity properly consistent with trial under protection of persons and property act resulting in Petitioner being denied issue on direct appeal infringed on Petitioner's due process.
   b. Counsel failed to object to Attorney General's direct appeal and writ of certiorari because of error.
   c. Counsel was failed to bring up failure of Trial Counsel to request involuntary manslaughter jury instruction.

Respondent made its Return on July 1, 2016. The evidentiary hearing occurred on February 1, 2017, before the Honorable Edward W. Miller. Susannah Ross, Esquire was the Petitioner's attorney. Caitlin B. Hastings, Esquire of the South Carolina Attorney General's Office represented Respondent. At the evidentiary hearing, Applicant moved forward on the following allegations:

1. Counsel was ineffective for failing to immediately appeal the denial of Applicant's motion to dismiss the case at the stand your ground hearing.
2. Counsel was ineffective for failing to object to the solicitor's question eliciting Applicant's answer that he did not try and eject the victim from his home.
3. Counsel was ineffective for failing to introduce the 911 tape into evidence.
4. Counsel was ineffective for failing to request a jury instruction for defense of habitation, accident, withdrawal, and involuntary manslaughter.
5. Counsel was ineffective for failing to conduct a proper investigation.

The Court issued an Order of Dismissal, denying Petitioner's PCR Application and remanding him to the custody of South Carolina Department of Corrections, filed on April 6, 2017. The request for relief was denied for the following reasons:

1. Counsel was not ineffective for failing to immediately appeal the denial of the motion to

dismiss because Counsel credibly testified that he thought the issue was preserved for appeal because he reincorporated the arguments made at the preliminary hearing in both of his motions for directed verdict and that he believed the issue was addressed by the South Carolina Court of Appeals.

2. Counsel was not ineffective for failing to object because, other than that one statement, Counsel believed the record clearly indicated that Petitioner asked the victim to leave the home.
3. Counsel was not ineffective for failing to introduce the 9-1-1 tape because he did not think the tape was helpful, Counsel's decision to leave out the tape was reasonable, and Petitioner failed to demonstrate any prejudice.
4. Counsel was not ineffective for failing to request jury instructions of defense of habitation, accident, withdrawal, and involuntary manslaughter because:
    a. Counsel credibly testified that he thought involuntary manslaughter was inapplicable to the case and, thus, Counsel did not think the judge would charge the jury on involuntary manslaughter.
    b. Counsel credibly testified he thought defense of habitation was inapplicable because Petitioner acted in defense of himself, not his home.
    c. Counsel did not request an accident or withdrawal instruction because he did not feel they applied to Petitioner's case.
5. Counsel was not ineffective for failure to investigate because Counsel reviewed all evidence in the case, discussed all possible defenses with Petitioner, pursued any leads provided, pursued a theory of self-defense, and reviewed the State's evidence with Petitioner prior to trial, and Petitioner has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate.

On April 2, 2017, Petitioner filed a Motion to Alter or Amend the Judgment, which was denied on October 6, 2017. Petitioner appeals from the denial of relief based upon the allegations that Counsel was ineffective for failure to offer the 911 audio recording into evidence and because Counsel was ineffective for failing to request a jury charge on involuntary manslaughter or on defense of habitation.

STATEMENT OF FACTS

Tonya Lowery was romantically involved with Petitioner and close friends with the victim. (App. 6-10, 19 34). Lowery testified that the victim had been drinking with Petitioner since the previous day and the victim spent that night at Petitioner's home. (App. 19-20, 34-35). The victim's mother testified that she tried to locate the victim and his truck the night before the incident, but Lowery and Petitioner refused to provide the location so that she could pick up the victim and his truck. (App. 101-02).

On November 12, 2010, Petitioner, the victim, and Jackie Lance were drinking at Petitioner's home when Lowery arrived. (App. 8-9, 34-35). Shortly after Lowery arrived, the victim approached her from behind, and put his arms below her chest in front of Petitioner. (App. 11, 35-36). Lowery asked him to remove his hands and Petitioner said "get your hands off my woman" and then pushed the victim, causing him to fall into Petitioner's stereo system. (App. 11, 35-36). According to Lance, the victim's head bounced off the stereo. (App. 73, 84). Lance testified that the victim was "too messed up" to defend himself and described Petitioner as being in a rage. (App. 72-74, 92). Petitioner then got on top of the victim and began punching him in the face. Lowery asked Petitioner to stop and he did. (App. 10-11, 21, 36-37, 54). Petitioner testified at trial that he "got the best of" the victim in the first altercation because he was "just a better fighter." (App. 63).

Thereafter, the victim then kicked Petitioner between the legs and they began fighting again. (App. 11-12, 37-38, 46, 74). Lance testified that Petitioner jumped on the victim again and was "steady beating" the victim and calling the victim names. (App. 74). Lance testified that the victim was staggering, not "swinging" or attempting to defend himself because he was too intoxicated and was also on nerve medication. (App. 75). Lowery and Lance separated Petitioner

and the victim, and Lowery walked Petitioner to the bathroom to remove blood from his lip and for him to cool down. (App. 12, 22-23, 38-39). Lowery also testified that she did not see any cuts on Petitioner when she took him to the bathroom after the second fight and that Petitioner did not complain of cuts. (App. 22-23).

Lance then left for the store in the victim's truck. (App. 12-13, 23, 75-76). Lance testified that Petitioner became upset when the victim gave her the keys and that Petitioner told the victim he could not leave the house because he was too drunk to drive. (App. 77). Lowery and Petitioner exited the bathroom, returned to the kitchen, and Petitioner asked the victim to leave the home, but the victim refused. (App. 13, 25-26, 38-39). Lowery informed Petitioner that the victim could not leave because Lance had his truck, but Petitioner stated he still wanted him to leave. (App. 13, 39, 41).

Petitioner testified that he did not know how the knife was introduced into the fight, but stated he noticed it in the victim's hand and they fought over it. (App. 42). Petitioner also stated that his left forearm was cut and that he suffered other injuries including bruises and cuts on his knuckles and a broken tooth. (App. 42-44). Petitioner testified that the knife in question belonged to him and he thought it was in his pocket. (App. 45). Petitioner denied that the victim put his hand in Petitioner's pocket to retrieve the knife and stated that he thought he personally put it on the table to open mail. (App. 49-50). Lance was seated at the kitchen table and testified she did not see a knife. (App. 70, 91). Petitioner stated that the next thing he knew, there was blood and the victim was wounded. (App. 42). Petitioner admitted that the victim had wounds and assumed it was the result of the altercation and fight with the knife. (App. 48). He testified that the only time he had the knife in his hand was when he could overpower the victim and take the knife. (App. 48-49). He stated he did not intentionally stab the victim. (App. 47). Lance testified that

she believed the Petitioner used the knife to kill the victim in cold blood and that Lowery was an accessory, but was not present at this time. (App. 95-96).

Meanwhile, Lowery left the home through the back door, circled the home, and returned through the front door. (App. 13-15, 18, 26-27). When she re-entered, she found the victim on the floor in a pool of blood with Petitioner standing over him. (App. 13-15, 27-29). Petitioner directed Lowery to dial 911 and advised her that he "accidentally stabbed" the victim. (App. 13-15, 27-29). Lowery stated she did not see a knife. (App. 29). After Lowery dialed 911, the victim stood up and walked over towards the bar, but fell to the floor. (App. 15). Lowery observed stab wombs on the victim and a lot of blood. (App. 15-16). Petitioner placed a towel over the victim's wounds and attempted to resuscitate the victim. (App. 16-17).

Officer Nix was asked to search for a second knife, but only found knives stored in a kitchen drawer without the appearance of blood or recent washing. (App. 98-100). He also recalled seeing mail on the kitchen table. (App. 98-100).

Officer Gary testified that Petitioner gave verbal statements with three different versions of events. In the first statement, Petitioner said he saw the victim put his arms around Lowery and Petitioner did not like it, so he pushed the victim down, got on top of the victim, and "got the best of him." (App. 109-10). Petitioner then realized he had a cut on his arm and he had no choice but to pull the knife out of his pocket and stab the victim. (App. 109-10). Petitioner said he then asked Lowery to call 911. (App. 109-10). When questioned about going into the bathroom, Petitioner said he went into the bathroom after the first fight to clean up, the victim hit him in his face as Petitioner returned to the kitchen, Petitioner then saw that he was cut, and pulled out the knife and stabbed the victim. (App. 110-11). When asked how he was cut, Petitioner admitted he never saw the victim with a knife or anything that could have cut him.

(App. 111). Petitioner then said that he pulled the knife out of his pocket while in the bathroom, concealed the blade in his hand, and confronted the victim with it, ultimately stabbing him. (App. 110-11). When asked why, if Petitioner was afraid of the victim, he left the bathroom, knife in hand, instead of staying in the bathroom and calling for help, Petitioner was unresponsive. (App. 112).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State,* 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to introduce a favorable 911 call at trial and for failing to move for jury instructions concerning involuntary manslaughter and habitation. However, the PCR court properly rejected these arguments, finding that Counsel acted reasonable and Petitioner was not prejudiced when Counsel did not enter a 911 call into evidence that had damming evidence on it and when he did not pursue habitation defense and involuntary manslaughter jury instructions after concluding they were not relevant to Petitioner's case. These findings are not controlled by an error of law and are supported by probative evidence in the record.

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant

has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “‘only in the rarest case’” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that

course should be followed. *Id.* at 696-97.

I. **The post-conviction relief court properly determined Petitioner failed to establish that counsel was ineffective when he strategically chose not to offer a 911 audio recording into evidence.**

Counsel was not ineffective when he chose not to offer a 911 audio recording into evidence at trial.[2] "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). This is gauged under an objective standard of reasonableness. *Id.* Further, "where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011).

Respondent has reviewed the call, asserts it was not favorable to Respondent, and Counsel's decision not to introduce the 911 call was strategic. Though the call showed Petitioner's concern and panic over the victim's life, it was otherwise damming for Petitioner. Specifically, the recording primarily featured Lowery, who made it seem like Petitioner stabbed the victim out of anger when the victim made a pass at Lowery. In fact, in the recording, Lowery twice states that Petitioner was enraged at the victim, started fighting and attacking him for touching Lowery. (Call 1:00, 3:30). She also states he stabbed the victim and blood was everywhere. (Call 1:00, 3:30). Counsel was concerned these statements would highlight that the victim was killed because Petitioner was enraged and began fighting the victim, not because he asked the victim to leave but the victim refused. (App. 566).

Additionally, on the call, the dispatcher continued to ask several times where the knife

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[2] This 911 call was introduced as an exhibit at the PCR hearing and has been transported to this Court for further review.

was and no one entered the house until Lowery stated she could not see the knife anywhere and Petitioner no longer had it in hand. (Call 3:13, 5:07, 6:51) Counsel was concerned about how, because Petitioner was armed, the ambulance was on scene but refusing to enter the house until officers entered and secured the house, further emphasizing that Petitioner was armed and potentially dangerous. (App. 566-67). Thus, Counsel decided not to introduce the 911 call as a part of a strategic decision and, thus, was not deficient.

Regarding prejudice, Respondent contends that, based upon its review of the call, the call featured little substantive information at all, and what substantive information existed on the call came in through testimony at trial. The call essentially consisted of Lowery, extremely panicked, stating Petitioner got angry at the victim for making a pass at her and started fighting the victim, Petitioner stabbed the victim, and blood was all over the room. (Call 0:00-3:30). Additionally, throughout the call, Petitioner was heard yelling at the victim to wake up. (Call 4:58-7:45).

This was information brought in at trial as testimony. At trial, Petitioner stated he asked Tonya to call 911, that he was caught yelling in the background while Tonya was on the call, and that he was not running from the scene and tried to save the victim's life. (App. 65, 416). Further, it was undisputed at trial that Petitioner started fighting with the victim once the victim made a pass at Lowery and that Petitioner ultimately stabbed the victim. (App. 11, 13-16, 27-29, 35-36, 47-49). Thus, the useful information on the audio recording likely would have just repeated the testimony contents while giving further credibility to the State's theory that Petitioner stabbed the victim because he was angry at him and started fighting with him out of anger, not out of defense of himself or his home. Beyond the contents of the call itself, the call was very emotionally charged and did clearly portray Petitioner as someone who got angry and violent which, if anything, probably would have injured Petitioner's case more. Consequently,

because the helpful information from the 911 recording would have been cumulative, Petitioner was not prejudiced by any alleged inaction by Counsel on this ground.

II. The post-conviction relief court properly determined Petitioner failed to establish that counsel was ineffective when he did not request a jury charge on involuntary manslaughter or defense of habitation.

Counsel was not ineffective for failing to request an involuntary manslaughter or habitation defense jury instruction. Concerning deficiency, Counsel must articulate a valid reason for employing a certain strategy, which is measured under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1992). Counsel is not ineffective for failing to request a lesser included offense jury instruction when there is no evidence that the defendant committed the lesser, as opposed to the greater offense. *Bozeman v. State*, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992).

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

1. Counsel was not ineffective when he did not request an involuntary manslaughter jury instruction.

Counsel was not ineffective when he did not request an involuntary manslaughter jury instruction. Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either an unlawful activity not naturally tending to cause death or great bodily harm or a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). “To warrant a jury charge on involuntary

manslaughter under either definition, there must be some evidence that the killing was unintentional." *Sullivan v. State*, 407 S.C. 241, 244-45, 754 S.E.2d 885, 887 (Ct. App. 2014). *See Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (stating "involuntary manslaughter is at its core an unintentional killing"); *State v. Gibson*, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) (stating "the essence of involuntary manslaughter is the involuntary nature of the killing"). A defendant's stated intention behind his action that caused a casualty is not singularly dispositive of whether a defendant is entitled to an involuntary manslaughter instruction. *State v. Sams*, 410 S.C. 303, 310-11, 764 S.E.2d 511, 515 (2014).

Actions allegedly taken in self-defense, or otherwise pursuant to a fight underway, including stabbing or shooting and killing the victim, do not constitute involuntary manslaughter if the fighting or violent action itself was intentional. *See e.g. State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996) (finding that an applicant's firing of a gun in self-defense does not support a charge of involuntary manslaughter); *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994) (finding that the defendant acted intentionally in wielding a knife and stabbing the victim did not properly constitute involuntary manslaughter); *State v. Morris*, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991) (finding involuntary manslaughter was not an appropriate charge when the defendant intentionally fired a gun in self-defense).

Further, even if the killing itself was unintentional, if the actions leading to the death were unlawful and of a quality to naturally cause death, an involuntary manslaughter instruction is improper. *See State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (finding that even though the defendant did not intentionally fire the gun, an involuntary manslaughter instruction would have been improper because he unlawfully pointed the gun at the victim and waived it in the air); *Douglas v. State*, 332 S.C. 67, 74-75, 504 S.E.2d 307, 310-11 (1998)

(involuntary manslaughter instruction was improper when defendant admitted he intentionally fired the gun in self-defense); *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976) (finding no error in failure to issue an involuntary manslaughter instruction when the defendant intended to fire the gun over the victim's head).

Here, Counsel was not ineffective for failing to request a jury instruction for involuntary manslaughter, because the evidence presented at trial demonstrated a lack of accident. Petitioner intentionally started fighting with the victim because he became angry with the victim over how he grabbed Lowery. (App. 224, 369-70). Lance testified that Petitioner jumped on the victim and was "steady beating" the victim and calling the victim names. (App. 74). At one point, Petitioner got on top of the victim and began punching him in the face. (App. 10-11, 21, 36-37, 54). Petitioner stated that, the second time, he went after the victim, got him to the ground, and hit the victim many times. (App. 372-73). Petitioner testified at trial that he "got the best of" the victim in the first altercation because he was "just a better fighter." (App. 63). Because Petitioner initiated the fight, hit the victim many times, and called the victim names because he was enraged that the victim for touching Lowery, it remains clear that the fight itself was not on accident and Petitioner did not start the fight for lawful reasons.

Regarding the stabbing specifically, the medical evidence indicates that the stabs, because of how deep they were, were likely not committed on accident. Even it was not Petitioner's aim to stab and kill the victim, however, Petitioner intended to fight with the victim, to hurt him, and to grab the knife from the victim while they were fighting. (App. 224-31) Additionally, the knife wound the victim ultimately died from was very long and deep; thus, the medical examiner determined there were several an incised stabs, as opposed to a cut or slice, and concluded that once the knife went in, Petitioner either pushed it in further, or the victim fell

against it. (App. 322-23). There were two additional stabs on the victim's back. (App. 449). Thus, Petitioner's argument that the stabbing happened purely on accident is likely without merit. Because it was not on accident and was committed pursuant to an unlawful activity naturally to cause death or great bodily injury, Petitioner was not entitled to an involuntary manslaughter jury instruction. Counsel, seemingly aware of this, acted reasonably in refusing to request a jury instruction that did not fit the crime charged and, thus, was not deficient on this ground.

Because involuntary manslaughter would not be a jury instruction properly considered in this case, the jury's finding based upon instructions given was not in violation of the Constitution. Thus, Petitioner was not prejudiced by Counsel's alleged failure to request an involuntary manslaughter jury instruction.

2. Counsel was not ineffective when he did not request a defense of habitation jury instruction.

Counsel was not ineffective for failing to request a habitation defense jury instruction. "[T]he defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." *State v. Rye*, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." *Id.* For the victim to properly be considered a trespasser, the victim must either "attempt [] to force himself into another's dwelling" or "be a guest in another's dwelling and 'refuse to leave when the owner makes that demand.'" *State v. Bryant*, 391 S.C. 225, 233, 705 S.E.2d 465, 470 (Ct. App. 2010) (quoting *State v. Bradley*, 126 S.C. 528, 533, 120 S.E.2d 240, 242 (1923)). "When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as

may be reasonably necessary to accomplish the expulsion. *Id.* at 234, 705 S.E.2d at 470. One is entitled to a charge of defense of habitation when he is defending himself from an imminent attack on his own premises, so long has his subjective belief of imminent danger is reasonable. *State v. Lee*, 293 S.C. 536, 537, 362 S.E.2d 24, 25-26 (1987). One element necessary to this defense is that "the defendant be without fault in bringing about the difficulty." *State v. Moultrie*, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979).

Deadly force is generally only reasonable when the perpetrator is threatened with imminent danger of losing his life or serious bodily harm. *See State v. Bryant*, 391 S.C. at 234-35, 705 S.E.2d at 470-71 (defense of habitation instructions were warranted when defendant, who was confined to a wheelchair, argued with and was assaulted by the deceased, defendant entered his hotel room, attempted to prevent deceased from entering, deceased forcefully entered, advanced towards the defendant, and threatened to kill him); *State v. Sullivan*, 345 S.C. 169, 547 S.E.2d 183 (2001) (finding that a defense of habitation instruction was proper when the defendant committed deadly force after being threatened by the victim in his home, the defendant was not responsible for victim's aggression, the defendant retreated, and both individuals struggled over a handgun immediately before the shooting); *State v. Starnes*, 213 S.C. 304, 49 S.E.2d 209 (1948) (when an intruder refuses to leave a dwelling at the request of the owner, the owner can use necessary force to eject him, including deadly force if his life or safety or the life and safety of another member of the dwelling is jeopardized).

Counsel was not deficient for failing to argue for a habitation defense instruction because Petitioner was at fault in bringing about the accident. Petitioner initiated the fight after the victim put his arm around her and right before he pushed the victim, Petitioner said "get your hands off my woman." (App. 11, 35-36). Petitioner's inherently violent action was the catalyst that started

the fight. (App. 370). Petitioner testified at trial that he “got the best of” the victim in the first altercation because he was “just a better fighter.” (App. 63). Petitioner pinned the victim to the ground and punched him in the face many times. (App. 10-11, 21, 36-37, 54, 372-73). The evidence reflects that Petitioner physically attacked the greatly intoxicated victim in a rage over Petitioner’s girlfriend and stereo and any action taken by the victim was an attempt at defending himself against Petitioner’s unlawful physical attacks. Thus, because Petitioner initiated the fight and hit the victim many times thereafter, and ultimately stabbing the victim several times, Petitioner was at fault in causing the incident.

Additionally, a habitation defense jury instruction was improper because the victim was an invited guest in Petitioner’s home and had not unlawfully or forcibly enter Petitioner’s home. Additionally, Petitioner never testified he stabbed the victim to defend himself against intrusion, to force the victim from the home, or because the victim posed a danger. In fact, according to Lance, Petitioner had told the victim that day that he could not leave the house because he was too intoxicated. (App. 77). Petitioner testified at trial he would have succeeded in kicking him out of the home if he wanted to, but that was not why he began fighting victim. (App. 417). Petitioner also testified that the victim probably still be alive if that was the objective. (App. 417). Any demand for the victim to leave the premises occurred while engaged in an unlawful attack upon the victim out of anger because the victim put his arms around Petitioner’s girlfriend; not because Petitioner reasonably feared for his safety or was attempting to eject the victim from the premises. Thus, his actions were not committed in defense of his home and, consequently, a habitation defense instruction would have been improper.

Further, a habitation defense instruction would have been improper because deadly force was unreasonable. At trial, Petitioner never stated he felt he was in imminent danger of dying or

great bodily injury. Additionally, according to Lance, the victim was “too messed up” to defend himself and described Petitioner as being in a rage. (App. 72). She described Petitioner as violent and stated that the victim did not fight back. (App. 72-74, 92). Lance also testified that the victim was staggering, was not “swinging” and or attempting to defend himself because he was too intoxicated and was on nerve medication. (App. 75).

Though Petitioner stated he wanted to retrieve the knife from the victim, he did not state he was afraid it would be used to severely hurt him. However, Petitioner’s narrative as given to the Officer Gary contradicts this. Officer Gary testified that Petitioner told him that immediately after the accident occurred, Petitioner stated he emerged from the bathroom with the knife, concealed in hand, and stabbed the victim out of fear. (App. 110-11). Officer Gary also testified that Petitioner admitted he never saw the victim with a knife or anything that could have cut him. (App. 111). Further, when Officer Gary asked why, if Petitioner was afraid of the victim, he left the bathroom knife in hand instead of staying in the bathroom and calling for help, Petitioner was unresponsive. (App. 112). Thus, the record reflects that the victim probably did not have the knife in his hand, but even if he did, the threat of having the knife being used against Petitioner subsided when Petitioner gained control over the knife. Additionally, given the highly intoxicated state of the victim, it is also unlikely that deadly force was reasonable under the circumstances.

For the reasons outlined above, a habitation defense jury instruction would have been improper. Much like with the potential involuntary manslaughter jury instruction, Counsel, aware of that a habitation defense jury instruction was improper in this case, acted reasonably in refusing to request a jury instruction that did not fit the crime charged and, thus, did not act deficiently. Because involuntary manslaughter would not be a jury instruction properly

considered in this case, the jury's finding based upon instructions given did not lead the jury to reaching a finding in violation of the Constitution. Thus, Petitioner suffered no prejudice by Counsel's alleged failure to request an involuntary manslaughter jury instruction.

CONCLUSION

For the reasons stated above, this court should affirm the PCR Court's findings that Petitioner had effective assistance of counsel.

Respectfully submitted,

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Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
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ATTORNEYS FOR RESPONDENT

September 9, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Sep 09 2020
SC Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY

The Honorable J. Derham Cole, Trial Judge
The Honorable Edward W. Miller, PCR Judge
Appellate Case No. 2017-002116

MICHAEL ANTHONY ROGERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Respondent has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 9th Day of August, 2020.

s/ Chelsey F. Marto

Chelsey F. Marto
Assistant Attorney General
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From:	Chelsey Marto
To:	Gilliam, Taylor; "Allgire, Mary"
Cc:	Seventhcircuitpcr
Subject:	Rogers, Michael - Brief of Respondent (2017-002116)
Date:	Wednesday, September 9, 2020 4:28:00 PM
Attachments:	ROGERS Michael - BOR, CL, COS (02374889xD2C78).PDF

Good afternoon,

Attached please find the Brief of respondent in Michael Roger's PCR appeals case (2017-002116), to be filed with the court of appeals momentarily.

Best,
Chelsey Marto

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Sep 09 2020
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

August 9, 2020

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
Sep 09 2020
SC Court of Appeals

Re: Michael Rogers v. State of South Carolina
Appellate Case No. 2017-002116
Lower Court Case No. 2015-CP-42-3862

Dear Ms. Kitchings:

Attached is a copy of the original **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
SC Bar #104191

CFM/ec

cc: Taylor Gilliam, Esquire
Victim Advocacy Division (without enclosure)