STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Trial Judge
The Honorable Larry B. Hyman, Post-Conviction Relief Judge

Appellate Case No. 2019-000533

LARRY T. CHESTNUT, Petitioner,

v.

THE STATE, Respondent

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the PCR judge properly deny relief for the allegation that trial counsel was ineffective for failing to object to the trial judge's instruction on mutual combat when counsel articulated a valid, strategic reason for not objecting and when Petitioner was not prejudiced by the mutual combat instruction because the jury ultimately returned a verdict of voluntary manslaughter and where Petitioner' self-defense claim was fatally defeated by the facts in the record irrespective of whether the trial judge charged mutual combat?

STATEMENT OF THE CASE

In July 2006, the Horry County Grand Jury indicted Petitioner for one count of murder. (App. 1030-031). On August 13-17, 2021, a jury trial was held in the Horry County Court of General Sessions with the Honorable Steven H. John presiding. Petitioner was represented by Ralph Wilson, Sr., Esq. The State was represented by Assistant Solicitor Nancy Livesay of the Fifteenth Circuit Solicitor's Office. At the conclusion of trial, Petitioner was convicted of voluntary manslaughter. The trial judge sentenced Petitioner to a twenty years' imprisonment.

Petitioner filed a timely notice of appeal. While pending in the Court of Appeals, Petitioner's case was certified for review by the South Carolina Supreme Court pursuant to Rule 204(b) SCACR. The Supreme Court affirmed Petitioner's convictions in a memorandum opinion dated January 14, 2015 State v. Chestnut, Op. No. 2015-MO-002 (S.C. Sup. Ct. filed January 14, 2015). The remittitur was issued on January 30, 2015.

On January 29, 2016, Petitioner filed an application for post-conviction relief. Petitioner alleged twelve grounds for relief. Of relevance to this appeal, Petitioner claimed trial counsel was ineffective for "Counsel's failure to object to a mutual combat charge being included in the Jury instructions. There was no evidence to support a mutual combat charge. Mutual combat effectively ruins a self-defense claim." (App. 1038). The State submitted a return on February 16, 2017 and an evidentiary hearing into the matter was convened on May 21, 2018 before the Honorable Larry B. Hyman. Petitioner was represented by Stephen Geoly, Esq. and the State was represented by Johnny James of the South Carolina Attorney General's Office. Judge Hyman dismissed Petitioner's application in a written order on July 17, 2018. Petitioner filed a motion to alter or amend pursuant to Rule 59(e) SCRCP on August 10, 2018. Petitioner's motion was denied by written order on February 25, 2019. Petitioner filed a notice of appeal on April 1, 2019

and a petition for writ of certiorari with the South Carolina Supreme Court on July 10, 2019. The Supreme Court transferred Petitioner's case to this Court on November 27, 2019. This Court granted certiorari on September 22, 2021.

STATEMENT OF FACTS

A number of people gathered on May 21, 2006, at the apartment home of Petitioner and his girlfriend, Christie Hucks, for Petitioner's birthday party. (App. 301-03). When the birthday party was over, Petitioner, his brother Kendrick (Mo) Chestnut, and the teenage victim, Joey Hucks, all went out around 10 p.m. to celebrate further at a club. (App. 452-53). After Petitioner and Victim left the apartment, Christie, who was eight months pregnant, looked through some of the birthday cards brought to Petitioner at the party. (App. 388, lines 14-16; App. 454-55). Christie opened one and, after reading it, concluded Petitioner was cheating on her; she was distraught. (Appx. 454-55, 567-72).

Christie called her younger sister, Cynthia (Cindy) Evans, in the late night, early morning hours, and Cindy came back to the house a few minutes later alongside her boyfriend Richard (Moke) Day to talk things over. (App. 304-05, 386-88). Shortly after Cindy and Richard arrived, Petitioner, Kendrick, and Joey returned to the home. (App. 307-08, 388-90). Petitioner met with Christie in the kitchen for a private conversation which soon became heated, and Petitioner stormed back into the living room. (App. 309-10, 389-90).

The argument between Petitioner and Christie became physical and Petitioner began to choke her. (App. 310-11, 390-94). Cindy, Richard, and Joey immediately moved to intervene and de-escalate, but instead the confrontation worsened. (App. 311-12, 391-94). Petitioner punched Cindy repeatedly and also struck Joey, who fell against the steps. (App. 312-13, 394-95, 466-67).

Petitioner and Cindy fought in the kitchen. Cindy threw a shoe at Petitioner as he charged her. Petitioner bit Cindy's leg while she yanked his dreadlocks and beat him over the head with a vase. (App. 396-99). Richard pushed his way around Kendrick, where he found

Petitioner biting Cindy. (App. 314). Richard forced Petitioner against the counter and the fighting briefly stopped. Richard disengaged to follow and check on Cindy after she fled out of the front door. (App. 314-15).

Victim attempted to defend his sisters with a small pocket knife. (App. 468-69, 578-83). Petitioner swung at Victim, who managed to cut Petitioner as he fell and hit the floor. (App. 469-71, 519-20). In the middle of the conflict, Christie left the room to take two children who had been sleeping on the couches in the living room upstairs and out of harm's way. (App. 470-71). Petitioner returned to the kitchen and opened a drawer next to the stove. (App. 413). While Christie was upstairs, Petitioner, Kendrick, and Victim were apparently alone in the kitchen.

Christie returned from securing the children and saw Petitioner, Kendrick, and Victim in the kitchen. Victim's hands were on the dishwasher and he had blood on his face. Kendrick stood by the refrigerator, unarmed and uninjured. Petitioner stood in a corner near the stove, armed with kitchen shears. (App. 471-75). Christie retrieved Victim and he silently followed her outside as his face continued to bleed, though she did not realize the scope of his injuries at the time. (App. 474-76).

As Christie and Victim exited the apartment, Kendrick caught up with them and punched Victim in the head. (App. 476-77). Victim did not get up again. (App. 480). Christie fell with him, and recalled white shoes kicking Victim, but she could not recall whether Petitioner or Kendrick was kicking Victim. (App. 477). When Richard turned towards Victim, he saw both Petitioner and Kendrick kicking Victim and Petitioner stabbing Victim. (App. 318-20). Richard attempted to stop the assault, but Kendrick threatened to kill him and motioned as though to draw a gun from his pocket. (App. 318-20). Christie, unharmed, told Cindy to get help, and

began yelling the names of neighbors seeking help, but nobody answered. (App. 477-78, 487, 514). Christie stayed with Joey while Richard and Cindy attempted to get help. (App. 551).

Because she lost her cell phone during the fight, Cindy and Richard knocked on neighboring apartment doors to get help. Eventually, Cindy and Richard waived down a car passing by along the highway, who called 911. (App 276-81, 315, 402-03). Cindy returned to a blood-drenched Victim lying on the ground, and cradled his head as he gurgled blood. (App 403, 479-80). Petitioner and Kendrick fled and first responders arrived very shortly thereafter. (App. 403-04, 490).

Victim was cut or stabbed ten times in the face, chest, arm, hands, thigh, and back, and died at the hospital. (App. 544, 765-70). Dr. Cnythia Schandl, who conducted the autopsy, concluded that "wound number five," a stab wound to the left chest which plunged four inches through the pericardial sack and into the heart, caused Victim's death. (App. 772-73). Dr. Schandl could not clearly conclude whether the stab wounds were caused by the scissors or the knife provided alongside Victim's body. (App. 776-77).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

The PCR judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the "mutual combat" language used by the trial judge within his self-defense instruction because trial counsel articulated a valid, strategic reason why he did not object, and because Petitioner was not prejudiced by the mutual combat charge when the jury ultimately returned a verdict of voluntary manslaughter and because Petitioner's self-defense claim was fatally defeated by the facts in the record irrespective of whether the trial judge charged mutual combat.

Petitioner argues the post-conviction relief court erred by finding trial counsel was not deficient in failing to object to the trial judge charging the jury on the law of mutual combat within the trial judge's self-defense charge. In support of his argument, Petitioner cites to our Supreme Court's opinion in State v. Taylor[1] to assert that trial counsel was deficient in his representation of Petitioner by failing to object to the mutual combat language within the trial judge's self-defense instruction, because it defeated Petitioner's self-defense claim. Petitioner's argument misunderstands the holding of Taylor, ignores the plain language of the trial judge's instruction, ignores the testimony of trial counsel at the PCR hearing, and disregards the factual obstacles Petitioner's self-defense claim faced at trial as well as the jury's ultimate verdict. Contrary to Petitioner's argument, the PCR court did not err in denying relief to Petitioner for three reasons: (1) trial counsel articulated a valid, strategic reason why he did not object to the trial judge's instruction, (2) Petitioner was not prejudiced by the mutual combat instruction because the jury ultimately returned a verdict of voluntary manslaughter, and (3) Petitioner was not prejudiced by the instruction because his self-defense claim would have failed regardless of whether the trial judge charge mutual combat. The holding of the PCR court should be affirmed.

[1] State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003)

Trial Counsel's Failure to Object to Mutual Combat was Strategic

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different." Gilchrist v. State, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002). "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Id.

Counsel is not required to object at every opportunity if Counsel has a reasonable explanation for not doing so. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010); See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

"To constitute mutual combat there must exist a mutual intent and willingness to fight." State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). "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.'" State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) (quoting Graham

356 S.C. at 450, 196 S.E.2d at 495). "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." Taylor 356 S.C. at 232, 589 S.E.2d at 3. "We do not suggest mutual combat and self-defense are mutually exclusive; rather in Taylor, there was no evidence that the victim was willing to engage in mutual combat with Taylor." State v. Jackson, 384 S.C. 29, n. 5, 681 S.E.2d n. 5 (Ct. App. 2009).

Here the trial judge gave the following hybrid instruction to the jury on both self-defense and mutual combat:

> The following elements are required to establish self-defense. One, without fault. The defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.
>
> Mutual combat. If the defendant voluntarily participated in mutual combat for the purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, *if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.*
>
> For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

(App. 998, lines 4-24)(emphasis added). Petitioner argues trial counsel was ineffective for failing to object to the aforementioned instruction. However, trial counsel articulated a valid, strategic reason that he did not object to the mutual combat language in the trial judge's instruction. According to trial counsel, self-defense and mutual combat can coexist and the language in the mutual combat charge was actually beneficial to his client considering the facts of this case. Trial counsel explained his reasoning as follows:

> Now, let me explain self-defense. With self-defense, the way it would work is, is if that if—how the two and coexist. (sic) If in the situation Mr. Chestnut abandons his mutual combat, let's say that he decides he doesn't want to fight Joey anymore and he walks away from the fight. And then Joey comes and follows him in the kitchen and then he arms himself with the scissors in order to protect himself, now you've got self-defense. Totally and separate away from the first issue of whether or not it was mutual combat because – and because he left the fight, he goes into a separate room to get away from the fight and while he's in that separate room, he is followed by Mr. Chestnut – by Mr. Hucks who then – who is still armed with a knife, supposedly, and he then picks up the shears and defends himself against Mr. Hucks. So, in that case, yes.

(App. 41, lines 8-22). Trial counsel further clarified his thoughts in the following exchange with the PCR judge:

> The Court: Your position, Mr. Wilson, is that you may withdraw from mutual combat?
>
> Mr. Wilson: Yes, sir.
>
> The Court: And the fact that there may've been mutual combat, if there's an affirmative withdrawal, then self-defense may kick in.
>
> Mr. Wilson: Yes, sir. That's exactly what I'm saying.

(App. 42, lines 8-14). Trial counsel further explained the facts of this case made this strategy necessary because Petitioner was not without fault in bringing on the difficulty because the fight began when Petitioner was choking Victim's pregnant sister. (App. 43). Accordingly, counsel was forced to show that Petitioner regained his ability to claim self-defense after he withdrew from the initial conflict with Victim. Therefore, trial counsel reasonably concluded the mutual combat language regarding withdrawing from the conflict helped him make a compelling argument to the jury. Trial counsel then proceeded to argue in closing that Petitioner attempted to withdraw from combat with Victim but was kept from doing so by Victim. Thus, trial counsel's refusal to object to the mutual combat charge was part of a well devised strategy to give Petitioner the strongest self-defense argument possible in light of the unfavorable facts in the

record. Because trial counsel's refusal to object was part of his overall trial strategy, the PCR court did not err in determining trial counsel was not deficient in his representation of Petitioner.

Petitioner Did Not Suffer Prejudice from Mutual Combat Instruction

Even if trial counsel were deficient in his representation of Petitioner for failing to object to the mutual combat instruction, Petitioner did not suffer any prejudice from the instruction in light of the verdict returned by the jury and the factual difficulties Petitioner faced in proving self-defense.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (Ct. App. 2007). "A finding that a defendant was engaged in mutual combat does not preclude the jury from convicted the defendant of manslaughter as opposed to murder." Taylor 356 S.C. at 232, 589 S.E.2d at 3. "Where two person 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 premedication or malice, it would be manslaughter." State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906).

Here, the jury acquitted Petitioner of murder but found him guilty of voluntary manslaughter. (App. 1019). The jury's verdict indicates the mutual combat charge had no effect on their ultimate conclusion. For the jury to return a verdict of guilty for voluntary manslaughter they had to find Petitioner acted in a sudden heat of passion upon sufficient legal provocation. On the other hand, for the jury to find Petitioner was engaged in mutual combat they would have to find a mutual intent and willingness to fight existed between Petitioner and Victim. A mutual intent and willingness to fight would be equivalent to a finding that Petitioner acted with malice aforethought. Similarly, a mutual intent and willingness to fight is incompatible with a person

acting in the sudden heat of passion. Clearly, the jury did not think Petitioner acted with malice aforethought, because they acquitted him of murder. Instead, the jury concluded Petitioner acted in the sudden heat of passion when they convicted him of voluntary manslaughter. Therefore, the jury could not have concluded Petitioner and Victim had the mutual intent to fight each other. In light of the jury's verdict, the PCR judge correctly concluded that Petitioner did not suffer any prejudice from the mutual combat instruction.

Even if this Court disregards the jury's verdict, the facts in the record plainly demonstrated that Petitioner's self-defense claim was dubious at best. As trial counsel articulated at the PCR hearing and multiple witnesses testified at trial, Petitioner brought on the difficulty by choking his pregnant girlfriend. (App. 43, 310-11, 390-94). Even if the jury accepted Petitioner's claim that he disengaged from the conflict with Victim and his sister, Petitioner plainly reinitiated the conflict later when he began to kick and stab Victim after Victim retreated outside. (App. 318-20). Trial counsel provided the best self-defense claim he could in light of the facts and circumstances, but the facts presented at trial doomed Petitioner's self-defense claim regardless of whether the trial judge instructed the jury on mutual combat. Therefore, the PCR judge correctly found Petitioner was not prejudiced by trial counsel's refusal to object to the mutual combat charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BY: Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 2, 2022