IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

KEVIN LAMONT MCCULLOUGH,

Appellant,

v.

Case No. 5D20-2650
LT Case No. 2017-CF-53264-A

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 1, 2021

3.850 Appeal from the Circuit Court
for Brevard County,
Kelly J. McKibben, Judge.

Eric H. Barker, of NeJame Law P.A., Orlando, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and L. Charlene Matthews, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Kevin Lamont McCullough appeals the postconviction court's order denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. This case involves a fight that led to McCullough shooting

Larry Nelson twice. McCullough contended he shot in self-defense, but the jury did not agree and found him guilty of aggravated battery with great bodily harm. McCullough alleged his trial counsel was ineffective by consenting to the forcible felony self-defense instruction when it did not apply to his case. The postconviction court concluded that McCullough's trial counsel was not ineffective when he consented to a jury instruction that legally negated McCullough's only theory of the case. We disagree and reverse for a new trial.

This case involves a December 2017 argument between McCullough, his sister Bequita McCullough ("Bequita"), and her fiancé, Nelson. The encounter ended with McCullough shooting Nelson twice. There were no other witnesses to the altercation and no recordings memorializing it. Nelson and Bequita testified for the State at trial, and the State also played a custodial interview of McCullough taken the day of the shooting. McCullough testified in his own defense.

The initial events leading to the shooting are mostly undisputed. McCullough and Bequita had a disagreement relating to their deceased mother's house. McCullough had lived there for several years leading up to their mother's death, and thereafter, Bequita and Nelson kicked out McCullough and moved in. On the day of the shooting, McCullough drove

over to the house—according to him—to wish Bequita a belated happy birthday. He spoke to Nelson, who told him Bequita was not there. McCullough and Nelson, who never had any disagreements or disputes before the shooting, spoke calmly for a few minutes before Bequita returned.

Bequita and McCullough spoke, then argued. McCullough left to get some paperwork regarding the house, and when he returned, he and Bequita argued some more. Bequita and Nelson said this argument occurred in the garage without Nelson present; McCullough said it happened "outside" with Nelson present. Bequita then struck McCullough. From this point forward, the jury heard two distinct accounts of what happened next.

The first account came from Nelson—who had multiple felony and dishonesty convictions—and Bequita. Together their testimony suggested that McCullough began calling Bequita profane names and slamming his hands on Nelson's car. Nelson then left the house and joined Bequita and McCullough in the garage. After Bequita pushed McCullough, Nelson put himself between the siblings and began backing McCullough out of the garage. At that time, McCullough said he wanted to fight Nelson, then sucker punched him. Nelson grabbed McCullough's wrists and took him to the ground. Nelson, who was 6'8" and weighed 281 pounds, ended up on top of McCullough, who was 5'7" and weighed 150 pounds. Nelson asked

McCullough if he let him up, whether McCullough would "let it go." McCullough said he would, Nelson pulled him to his feet, and they shook hands. McCullough then walked back towards his car, which was parked in the driveway, took a gun out of his pocket, and cocked it. Bequita told Nelson to run and grabbed McCullough's gun. McCullough shot Nelson in the foot while Nelson was running away. Specifically, Nelson testified that the bullet bounced on the ground and into his heel, traveling up his foot and coming to rest by his little toe. Nelson fell to the ground, unable to support his weight. He attempted to stand but fell again. McCullough then stood over Nelson and shot him in the side. He kept repeating, "I ought to kill you." Bequita did not see the second shot.

McCullough provided the second account, which was presented to the jury via a custodial interview following his arrest for shooting Nelson and his trial testimony. His testimony differed slightly from his interview, but in both cases, he claimed Nelson attacked him first, and that he shot twice to protect himself. McCullough said that Bequita began slapping, hitting him, and calling him names. Nelson eventually restrained her. McCullough walked halfway to his car before walking back towards Bequita and yelling at her. Nelson then punched him in the face. They fell to the ground, where Nelson

started choking him. McCullough, who had no felony history and a concealed-carry permit, escaped Nelson's chokehold and stood up.

In his custodial interview, McCullough said he drew his gun and shot Nelson twice on the ground to prevent him from getting up. At trial, McCullough testified that Nelson stood up and "proceeded toward" him. When he saw the gun, Nelson said he had been shot before and took another step forward. McCullough then shot towards Nelson's feet. McCullough agreed with Nelson and Bequita that the first shot ricocheted off the ground before entering Nelson's foot. McCullough testified at trial that after Nelson started "proceeding [towards] me again," he shot Nelson in the side.

McCullough remained at the scene, and he cooperated fully with law enforcement. In addition to giving a post-*Miranda* interview, McCullough provided DNA samples and authorized law enforcement to search his car without a warrant. When confronted with Nelson and Bequita's account of the incident, he suggested law enforcement speak to neighbors with cameras that would have recorded the incident. These cameras, however, were either pointed in the wrong direction or inoperable. McCullough had noticeable physical injuries from the altercation with Nelson, including cuts on his right eye and right cheek, bruising on his right eye and left cheek, and a cut on his left elbow.

At the trial, trial counsel consented to the issuance of the forcible felony self-defense instruction, and this constitutes McCullough's only asserted claim for postconviction relief. This instruction arises from section 776.041, Florida Statutes (2017), and it precludes an assertion of self-defense when a defendant "is attempting to commit, committing, or escaping after the commission of a forcible felony." Fla. Std. Instr. (Crim.) 3.6(f). But the Florida Supreme Court has held that trial courts should only give the instruction when the State charges an independent forcible felony *other* than the one a defendant claims to have committed in self-defense. *See Martinez v. State*, 981 So. 2d 449, 454 (Fla. 2008).

The *Martinez* Court's discussion pertaining to the effect of issuing the forcible felony instruction when a defendant is not charged with an independent forcible felony is relevant to McCullough's postconviction claim. Including the forcible felony instruction under those circumstances, the *Martinez* Court explained, results in an instruction precluding a finding of self-defense and amounts to a directed verdict on the affirmative defense of self-defense. *Id.* at 453. In other words, even if a jury believed a defendant's self-defense claim, the forcible felony instruction would prevent the jury from finding the defendant acted in self-defense. *Id.*

To prevail on his ineffective assistance of counsel claim, McCullough "must establish deficient performance and prejudice." *See Gore v. State*, 846 So. 2d 461, 467 (Fla. 2003). Under the first prong, he "must show that . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the second prong, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id*. This standard does not require McCullough to show that trial counsel's "deficient conduct more likely than not altered the outcome in the case." *Id*. at 693. Rather, trial counsel's errors must be "so serious as to deprive [McCullough] of a fair trial, a trial whose result is reliable." *Id*. at 687; *see Sloss v. State*, 45 So. 3d 66, 68–69 (Fla. 5th DCA 2010); *Stoute v. State*, 987 So. 2d 748, 749–50 (Fla. 4th DCA 2008).

Based on a review of our voluminous record, we find that trial counsel was deficient in this case for consenting to a jury instruction that legally negated his client's sole defense. *See Martinez*, 981 So. 2d at 453 (determining that "even if the jury believed the version of events related by Martinez (i.e., he was not the provoker, and [the victim] attacked him first),

the forcible-felony instruction precluded the jury from finding that he acted in self-defense").

We further conclude that trial counsel's consent to the issuance of the forcible felony self-defense instruction caused McCullough prejudice. *See Sloss*, 45 So. 3d at 68–69 (holding that counsel's failure to object to inclusion of forcible felony jury instruction prejudiced defendant). Self-defense was McCullough's only trial strategy, and the parties' differing accounts of the incident were both plausible. In addition, and contrary to the State's characterization of it, the limited forensic evidence supported both McCullough's and the State's theories. For example, two photographs demonstrate a bullet entry wound on the bottom of Nelson's heel. But the jury heard no expert testimony on the bullet's trajectory, and all parties to the incident agreed the bullet entered Nelson's heel after ricocheting off the driveway.

Overall, based on the record evidence, it is reasonably probable a jury could have concluded McCullough acted in self-defense. But according to *Martinez*, the jury would have been precluded from acquitting McCullough on this basis. Under the circumstances of this case, we believe that had the jury not been given the improper forcible felony self-defense instruction, there is a reasonable probability the outcome of the proceeding would have

been different. *See Strickland*, 466 U.S. at 684; *Sloss*, 45 So. 3d at 69. Accordingly, we reverse for a new trial.

REVERSED and REMANDED.

EDWARDS, SASSO and TRAVER, JJ., concur.