

IN THE SUPREME COURT OF FLORIDA

BENJAMIN SMILEY, JR.
Appellant,

v.

CASE NO. SC18-385
L.Ct. 532015CF004903A000XX

STATE OF FLORIDA
Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT, POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This appeal follows the denial of the Appellant's, Willie Bush, Jr., motion for postconviction relief following an evidentiary hearing in the trial court. The one volume appellate record will be referenced by "R" followed by the page number. The Appellant, Willie Bush, Jr., will be referred to as Mr. Bush. The prosecuting authority, the State of Florida, will be referred to as the "State".

STATEMENT OF THE CASE AND FACTS

On November 18, 2010, the State Attorney, in and for the Ninth Judicial Circuit, Orange County, Florida, filed an Information charging the Appellant, Willie Bush, Jr., with one count of second degree murder, a life felony, contrary to §782.04(2), 775.087(1), and 775.087(2).[R17] Mr. Bush was charged with shooting Frederick Quarterman on October 8, 2010.[R17]

Mr. Bush was found guilty as charged after a jury trial.[R19] The trial court sentenced Mr. Bush to 30 years prison with a 25 year minimum/mandatory.[R19-29] Mr. Bush's direct appeal was affirmed. *See, Bush v. State*, 146 So.3d 1198 (Fla. 5th DCA 2014). The mandate issued on September 2, 2014.

On April 5, 2016, Mr. Bush filed a *pro se* Motion for Postconviction Relief.[R30-80] Mr. Bush sought to stay the

collateral proceedings and for leave to amend the postconviction motion.[R81-83]

The Amended Motion for Postconviction Relief was filed on August 26, 2016.[R84-102] The motion raised the following claims for relief:

Claim 1: Trial counsel was ineffective in failing to move to strike testimony, object to testimony, seek a curative instruction, and/or move for mistrial during the trial testimony of Angelina Quarterman's and Fred Quarterman, Jr.'s trial testimony[R87-88]. Mr. Bush alleged it was improper for Angelina Quarterman to testify about the potential danger to others caused by the gunshots fired by Mr. Bush. He further alleged it was improper for both Angelina Quarterman and Fred Quarterman, Jr., to give their opinion of whether or not Mr. Bush acted in self-defense and to disparage his claim of self-defense.[R87-88] Mr. Bush argued the testimony was inadmissible under §90.403 of the evidence code, was speculative, and improper lay witness testimony; thus trial counsel was ineffective for failing to object and take action to remediate the prejudice.[R88-89]

Claim II: Trial counsel was ineffective for failing to present evidence and testimony of Frederick Quarterman's violent or aggressive character. Mr. Bush alleged trial counsel failed to investigate Mr. Quarterman's reputation for violence, his

expertise in kick boxing, and the presence of two tear drop tattoos on his face after he told trial counsel this information.[R90] Mr. Bush would have testified he believed the two tear drop tattoos signified that Mr. Quarterman had killed two people.[R90] Mr. Bush would also have testified he knew Mr. Quarterman became violent and aggressive when he drank and he believed Mr. Quarterman was intoxicated at the time of the altercation.[R91-93]

Claim III: In the original *pro se* motion, Mr. Bush had sought DNA testing. The amended motion acknowledged DNA testing should be raised under Fla. R. Crim. P. 3.853 instead of Rule 3.850 and Mr. Bush would pursue DNA testing as necessary under the appropriate rule.[R93]

Claim IV: Trial counsel was ineffective by failing to object to the prosecutor's improper closing argument which characterized Mr. Bush's testimony as accusing six State witnesses of lying.[R93]

The trial court issued an *Order Directing State To File Response* on May 3, 2017.[R98] After two extensions of time, the State filed a response on November 20, 2017.[R105-127] The State sought summary denial of Claim I as defensive strategy.[R117-121] The State argued Claim II should be denied because the sustained objection to the tear drop tattoos should have been raised on direct appeal, but conceded an evidentiary

hearing was necessary.[R121-125] The State agreed Claim III would be properly raised under a different procedural rule.[R125] The State responded to Claim IV that the comments at issue by the prosecutor were not improper and were invited by trial counsel.[R125-26]

The trial court granted an evidentiary hearing on Claims I, II and IV.[R128-131] The hearing was conducted on June 28, 2018.[R249-] The testimony at the hearing is summarized as follows:

The trial court took judicial notice of the trial transcripts in the case.[R251]

Christina Shephard testified she is an attorney currently in private practice in the area of civil general liability defense, a position she has held for two years.[R253] Her prior employment was as an assistant public defender in the Ninth Judicial Circuit for just shy of ten years.[R253] Ms. Shephard worked her way up to being the "A" attorney handling "punishable by life felonies" as the division lead.[R254] She is currently board certified in criminal trial practice, but was not certified at the time she represented Mr. Bush.[R255] Mr. Bush's case was the first murder case she tried.[R254-55] She had tried over twenty cases before this trial.[R285]

Another lawyer initially handled Mr. Bush's case.[R256] Ms. Shephard eventually took Mr. Bush's case over from Steve Graves;

she was the third attorney on the case.[R256] Ms. Shephard was on the case for about a year before it went to trial.[R256] Ms. Shephard conducted only one discovery deposition, the others were done by other attorneys.[R257] Ms. Shephard reviewed the discovery in this case.[R262] Ms. Shephard served as lead counsel on the case and was assisted at trial by a second lawyer, Christopher Donaudy.[R257]

This case involved two opposing families and was very contentious.[R285] The mood in the courtroom was tense.[R266] Witnesses were "somewhat" difficult to control.[R286]

Ms. Shephard handled the cross-examination of witnesses Angelina Quarterman and Frederick Quarterman during the trial.[R258] She conducted the direct examination of Mr. Bush.[R258] She did the closing argument.[R258]

Prior to this hearing Ms. Shephard reviewed the Amended Motion for Postconviction Relief and the trial file.[R259]

Ms. Shephard testified the defense at trial was justifiable use of deadly force.[R260] The victim was armed with a gun and intoxicated when he started a fight with Mr. Bush inside Mr. Bush's house.[R288] The fight between Mr. Bush and the victim spilled into the garage, where the victim was still armed and Mr. Bush was not.[R289] Mr. Bush was able to disarm the victim in the garage.[R289;293-94]

Ms. Shephard acknowledged it could be important to know the relative physical capabilities of the victim compared to the defendant in a self-defense case and such information was relevant.[R261] Ms. Shephard agreed in this case the physical capabilities of the victim, Mr. Quarterman, were relevant.[R261] Ms. Shephard first claimed she had no information about Mr. Quarterman's kickboxing abilities.[R261] Ms. Shephard was asked to review page 23 of Angelina Quarterman's taped statement from discovery in this case.[R261-62] Ms. Quarterman's statement was read into the record:

"My brother know how to fight, man. He would have— would have been beating his lights out if he just wanted to beat him. My brother—

Q: but just because—

A: [Angelina Quarterman]: To kickboxing, everything.

Ms. Shephard conceded she would have reviewed the taped statement and had the information about kickboxing.[R2633] She also reviewed the discovery deposition, but did not take the deposition and did not know why more questions were not asked of Ms. Quarterman about kickboxing during her deposition.[R263] Ms. Shephard "must have" just missed the references to kickboxing when she reviewed discovery.[R264]

Ms. Shephard admitted she would not want the testimony from Angelina Quarterman about how Mr. Bush could have shot kids outside, his own kids, or his nieces or nephews to have been

admitted into evidence.[R275] Even though these statements were made during cross-examination, Ms. Shephard agreed she could have objected and moved to strike.[R276] She did not object because "There was no reason to give anything that Angelina Quarterman said at this trial any credit or credibility." [R276] She also didn't want to call attention to a passing comment.[R276;286] Ms. Shephard admitted the comments were objectionable on the basis the comments were non-responsive and potentially inflammatory and relevance.[R277] Ms. Shephard admitted she could have sought assistance from the judge and asked the judge to instruct the witness about improper testimony but did not do so.[R279]

Ms. Shephard did not object to Angelina Quarterman's statement that someone had to be coming at you for it to be self-defense.[R281] Ms. Shephard testified it would be hard to say whether this testimony was good or bad, harmful or not in this case given the demeanor of Angelina Quarterman.[R281] Ms. Shephard admitted you do not want a witness offering their opinion this was not self-defense.[R282]

Ms. Shephard testified she did not understand Angelina Quarterman's testimony on redirect about bullying, but agreed she would not want testimony in front of a jury in a self-defense trial that Mr. Bush knew this was not a bullying situation.[R282] She didn't object because she thought the

facts spoke for themselves, that this was bullying.[R282] Ms. Shephard admitted this testimony was not proper.[R283]

Ms. Shephard acknowledged she would not want testimony from another witness, such as that given by Frederick Quarterman, Jr., about what Mr. Bush's state of mind was and that it seemed Mr. Bush came from the house intending to kill the victim.[R284] She did not object because it was a passing comment and didn't accurately reflect the facts of the case.[R284]

Ms. Shephard acknowledged she knew the victim had two tear drop tattoos.[R264] From her experience, a person would have these two tattoos on their face if they committed a murder or attempted murder.[R264] The tattoos would convey to other people the person has killed or tried to kill two others.[R264-65] Ms. Shephard agreed in a self-defense case the victim's prior violent behavior would be something you would want the jury to be aware of.[R264]

Ms. Shephard agreed the intoxication of the victim would be important.[R265] Ms. Shephard had information the victim was intoxicated from a toxicology report and two witnesses at the scene.[R265]

Ms. Shephard did not recall Mr. Bush's trial testimony and could not remember asking him what he knew about Mr. Quarterman's violent reputation, and his kickboxing expertise.[R266] She talked with Mr. Bush prior to trial about

the history between Mr. Quarterman and Mr. Bush.[R267] She did not ask Mr. Bush what he knew about Mr. Quarterman's kickboxing expertise.[R267] Mr. Bush did not bring it up to her.[R267] Ms. Shephard had reviewed her notes, but did not see anything there about kickboxing.[R267] While she does not write down everything, she does write down the important things a client tells her, such as kickboxing.[R267,289]

Ms. Shephard could not remember asking Mr. Bush about the tear drop tattoos and what those may have meant to him.[R268] She did not remember talking to Mr. Bush about Mr. Quarterman being intoxicated or if he knew the type of person Mr. Quarterman became when he was intoxicated.[R268]

Ms. Shephard acknowledged she was present in the courtroom during the prosecutor's closing argument.[R268] She did not object to the prosecutor's argument about Mr. Bush claiming multiple witnesses were lying.[R269] She did not object because she did not interpret the prosecutor's statements to mean "that he had to be telling the truth." [R269] After reviewing the transcript Ms. Shephard acknowledged the prosecutor had said Mr. Bush claimed to be the only one telling the truth and everyone else was lying.[R271] Ms. Shephard did not object at the time because she thought the prosecutor was properly commenting on the testimony.[R271] Ms. Shephard did not believe she had a good

faith basis to object.[R292] She repeated this claim as to the other improper comments.[R271-73]

Ms. Shephard outlined her belief about what an attorney should do if objectionable argument is made.[R272-74] She stated she would not ask for a mistrial without talking to her client, although she would have the final say on whether to ask for a mistrial.[R274]

Mr. Willie Bush, Jr., testified he was 32 years old at the time of trial and had worked in landscaping.[R300] He had six felony convictions, five of which were prior to the trial.[R300]

Mr. Bush testified he had known the victim, Mr. Quarterman, for twenty years.[R301] Mr. Quarterman was older than him, but he knew him from the neighborhood.[R301] Mr. Bush also knew members of Mr. Quarterman's family.[R301]

Mr. Bush knew Mr. Quarterman had two teardrop tattoos by his right eye.[R301] He believed the tattoos meant that "somewhere along the line you killed somebody." [R302] Mr. Bush knew Mr. Quarterman had been violent in his past and knew what the tattoo's stood for, so he believed Mr. Quarterman was a violent person.[R303] Mr. Bush did not know who Mr. Quarterman had killed and he didn't know if the tattoo's had just been put there for decoration.[R306]

Mr. Bush also knew Mr. Quarterman knew how to fight and was trained in martial arts and kickboxing.[R303] Mr. Bush knew Mr. Quarterman participated in marital arts tournaments.[R303]

Mr. Bush knew Mr. Quarterman got "real aggressive" when he was intoxicated and was intoxicated that day.[R303]

Mr. Bush was thinking of all these things when he responded to Mr. Quarterman that day.[R303]

Mr. Bush testified he told his attorneys about his knowledge of Mr. Quarterman's ability to fight, including kickboxing. [R304] Mr. Bush also told the police about Mr. Quarterman's fighting skills.[R307] He told his attorneys how Mr. Quarterman behaved when he was intoxicated.[R305] He told his attorneys about the tear drop tattoos and what those tattoos meant to him.[R305]

The trial court entered a written *Order Denying Motion for Postconviction Relief* on August 15, 2018.[R134-140] The trial court found on Claim I Mr. Bush had not established deficient performance or prejudice based on trial counsel's testimony she either did not find the testimony objectionable or did not object for strategic reasons.[R136] The trial court denied Claim II finding Mr. Bush did not establish deficient performance or prejudice.[R138] The trial court found trial counsel's testimony that Mr. Bush failed to tell her about the victim's kickboxing skills to be more credible.[R138] As to the

teardrop tattoos, the trial court relied on the State's sustained objection to deny relief.[R138] Claim III was deemed withdrawn.[R139] The trial court denied Claim IV, finding Mr. Bush did not establish deficient performance or prejudice.[R139] The trial court relied on trial counsel's testimony she did not find the prosecutor's comments in closing to be particularly objectionable.[R139]

SUMMARY OF THE ARGUMENT

The trial court's determination on each of the three claims of ineffective assistance of counsel that deficient performance was not established is error. The trial court's finding that in each instance trial counsel exercised sound tactical or strategic reasons for her failures to object or to investigate and present evidence is not supported by competent, substantial evidence. The trial court's determination that Mr. Bush was not prejudiced is also erroneous. The errors by trial counsel were particularly egregious when given the theory of defense was self-defense. The admission of improper testimony by State witnesses that Mr. Bush was not acting in self-defense, that he could have harmed many people, that he intended to kill the victim coupled with the prosecutor's improper burden-shifting rebuttal closing argument created significant prejudice. Trial counsel's failure to investigate and introduce evidence which supported self-defense, including the fighting abilities of the

victim, the presence of two tear-drop tattoos on the victim's face, and Mr. Bush's belief as to the capabilities of the victim and his reputation for aggressive and violent behavior prejudiced the defense as it deprived the jury of significant evidence supporting self-defense.

ARGUMENT

ISSUE I

THE TRIAL COURT'S DENIAL OF THE AMENDED MOTION FOR POSTCONVICTION RELIEF WAS ERROR.

This appeal addresses claims of ineffective assistance of counsel. Ineffective assistance of counsel claims are reviewed in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984) [hereafter, *Strickland*]. Establishing ineffective assistance requires proof of two prongs: counsel's performance was deficient and the deficient performance prejudiced the defendant.

Deficient performance is performance which falls below the standard guaranteed by the Sixth Amendment to the United States Constitution and is established when counsel's actions or inactions are shown to be outside the broad range of reasonably professional norms. Deference is given to counsel's performance. *Walker v. State*, 88 So.3d 128, 132 (Fla. 2012) [quoting, *Strickland* 466 U.S. at 689].

Prejudice is established where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010). A defendant does not need to show he would have been acquitted in order to establish prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ["The essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."]

On appeal the court employs a mixed standard of review, deferring to the factual findings of the trial court that are supported by competent, substantial evidence and reviewing the legal conclusions *de novo*. *Bradley v. State*, 33 So.3d at 672. The cumulative effect of the errors must be considered. Mr. Bush submits the trial court's findings on each prong of *Strickland* as to each claims was error.

Claim I: Trial counsel was ineffective in failing to move to strike testimony, object to testimony, seek a curative instruction, or move for mistrial when evidence was improperly admitted where the probative value of the testimony was far outweighed by the prejudicial impact or where the evidence was purely speculative.

In his first claim Mr. Bush argued trial counsel was ineffective when she failed to take any corrective action during the testimony of Angelina Quarterman when Ms. Quarterman testified Mr. Bush endangered children and others when he shot Mr. Quarterman.[R89; Trial Record, Vol.III,T343] Mr. Bush argued trial counsel should have been objected to this testimony as improper because the probative value was outweighed by the prejudicial impact under §90.403, it was purely speculative, and was improper lay witness opinion testimony.[R88-89] The State, in their written response, did not challenge Mr. Bush's assertion these comments were inappropriate- they were referred to as "objectionable embellishments".[R119] The State's position was that trial counsel's objection would have drawn attention to the comments.[R119]

At the evidentiary hearing trial counsel first seemed to excuse her failure to object because the witness was difficult.[R275] She admitted she did not want, as evidence in this case, a witness saying that her client could have shot anybody out there or shot children.[R275] Trial counsel stated "Of course, they [the statements] were objectionable." [R276] Trial counsel admitted she could have objected and moved to strike this testimony.[R276] She did not object because she thought an objection would "give anything that Angelina Quarterman said at his trial any credit or credibility." [R276]

She did not want to call attention to a passing comment.[R276] When asked why she could not have approached the bench to object, trial counsel then changed her answer to "I didn't even know if the jury heard it, so it was a passing comment." [R278] Trial counsel admitted she could have brought the issue to the attention of the judge without saying "I object" and even gotten the judge to instruct the witness to be responsive to questions.[R280]

Mr. Bush argued trial counsel was ineffective for failing to object or take corrective action when Angelina Quarterman testified that Mr. Bush could not have been acting in self-defense because there had to have been someone coming at him.[R87; Trial Record Vol.III,T348] Mr. Bush challenged trial counsel's failure to object to Ms. Quarterman's testimony that Mr. Bush could not have felt bullied by Mr. Quarterman.[R88; Trial Record Vol. III,T351] Mr. Bush correctly argued this testimony was improper because Ms. Quarterman was precluded from expressing her opinion on the guilt or innocence of Mr. Bush and because a witness may not testify whether a defendant acted in self-defense, relying on *Henry v. State*, 700 So.2d 797, 798 (Fla. 4th DCA 1997) and *Mills v. State*, 367 So.2d 1068, 1069 (Fla. 2d DCA 1979).

Trial counsel stated she believed this testimony was unresponsive to her question.[R281] She admitted she would not

have wanted any witness in this case to opine this was not self-defense.[R282] As to Angelina Quarterman's statements about bullying, trial counsel stated " I don't even know what that statement means"[R282], but admitted she would not want a witness to testify that Mr. Quarterman had not bullied Mr. Bush.[R282] Trial counsel then said she didn't object because "The facts spoke for themselves and it was bullying." [R282-283]

Mr. Bush argued trial counsel was ineffective in failing to object to Fred Quarterman's testimony that he believed Mr. Bush "*just shot him as if he knew he was going to kill him as soon as he came out that house; you know?*." [R88; Trial Record Vol. III, T371] Mr. Bush correctly argued this testimony was improper because it was pure speculation, improper lay witness opinion testimony, improper testimony as to Mr. Bush's state of mind, and inadmissible under §90.403. [R89] The State argued in the written response these comments should be excused because the witness had experienced a traumatic event [R120] and objecting could have alienated the jury. [R121]

In her testimony trial counsel admitted she viewed Fred Quarterman's testimony as an opinion about her client's state of mind. [R284] She did not object because the identified comment was "A passing comment, and it didn't reflect the facts of the case." [R284]

Trial counsel's failure to object in each of these instances was deficient performance. Her testimony does not provide the necessary competent, substantial evidence required to support the trial court's finding to the contrary. Trial counsel offered no reasonable basis for her failure to object. In each instance she admitted the identified testimony was prejudicial, unwanted in the trial, and worthy of objection. The flimsy rationale for the lack of objection was essentially the testimony was a "passing comment" that she was not certain the jury heard and she did not want to dignify the testimony with objections. This is not a reasonable tactical strategy. Defense counsel's job is to subject the States' case to an adversarial testing. This is accomplished through proper objection to testimony that is inadmissible and harmful to the defense theory of the case. Trial counsel admitted she could have curtailed Angelina and Fred Quarterman's testimony in a manner which would not have drawn undue attention, but did not offer a reasonable explanation for her failure to do so. Trial counsel's statement that a decision is strategic or tactical does not provide immunity from a finding of deficient performance. In making a strategic decision the decision must be made after the consideration and rejection of alternative courses and the strategic decision at issue was reasonable under the circumstances. *Orme v. State*, 896 So.2d 725, 735 (Fla.

2005); *Rose v. State*, 675 So.2d 567 (Fla. 1996). There is no support in this record for a finding that it was reasonable for trial counsel to permit testimony from two witnesses that they did not believe Mr. Bush acted in self-defense, to permit testimony that Mr. Bush could not have felt bullied by the victim, or that Mr. Bush's actions endangered many others, including children- testimony trial counsel admitted she would not have wanted in the case or was harmful to the defense. Mr. Bush has established deficient performance under the first *Strickland* prong.

The trial court further erred in finding Mr. Bush was not prejudiced by the admission of this testimony, especially when the cumulative effect is considered. The testimony of Angelina and Fred Quarterman was not inconsequential in this case. Their testimony struck at the heart of the Mr. Bush's claim of self-defense. Both were improperly permitted to offer their opinions on Mr. Bush's state of mind at the time of the attack by the victim. This testimony cannot be characterized as merely "passing comments". Both Angelina and Fred Quarterman testified they knew Mr. Bush and the victim was their father. It is entirely probable the jury gave great weight to their opinions as not only eyewitnesses, but as persons who knew both Mr. Bush and the victim. Under the facts of this case, where the only

issue was self-defense, prejudice under *Strickland* has been established.

Claim II: Trial counsel was ineffective in failing to investigate and present evidence and testimony of Frederick Quarterman's violent or aggressive character

In this claim Mr. Bush argued trial counsel was ineffective because she failed to investigate the victim's expertise as a kickboxer and martial arts fighter, his intoxication, and aggressive behavior when intoxicated. Counsel also failed to present evidence or testimony that Mr. Quarterman had two tear drop tattoos on his face. Tattoos that Mr. Bush was aware of and understood to represent a killing or attempted killing.

The trial court found trial counsel's performance was not deficient because the decision to forgo this testimony was a strategic determination. This finding is not supported by competent, substantial evidence and should not govern the analysis of the first prong of *Strickland*.

Trial counsel's statement that a decision is strategic or tactical does not provide immunity from a finding of deficient performance. A strategic decision the decision must be made after the consideration and rejection of alternative courses and the strategic decision at issue must be reasonable under the circumstances. *Orme v. State*, 896 So.2d 725, 735 (Fla. 2005); *Rose v. State*, 675 So.2d 567 (Fla. 1996). Counsel has a duty to make a reasonable investigation or to make a reasonable decision

that makes a particular investigation in a case unnecessary. *Simmons v. State*, 105 So.3d 475, 503 (Fla. 2012)[quoting, *Hurst v. State*, 18 So.3d 975,1008 (Fla. 2009)] In this case trial counsel did not conduct the necessary investigation in order to rule out the omitted evidence and her decision to forgo the presentation of evidence which supported the defense theory of self-defense was not reasonable.

Trial counsel admitted in a self-defense case it would be important to know the relative physical capabilities of the victim compared to the defendant.[R260] She admitted Mr. Quarterman's physical abilities were relevant to the defense.[R261]

Trial counsel initially claimed in her testimony she did not present evidence of Mr. Quarterman's fighting acumen because she was unaware of any such skill and was not told by Mr. Bush that Mr. Quarterman was a skilled martial arts and kickboxing fighter. Trial counsel was then confronted with the fact that in police reports provided to counsel in discovery Angelina Quarterman made statements about Mr. Quarterman's kickboxing skills. Trial counsel was then forced to admit the information was available to her in discovery, but she "must have missed it." [R264] Mr. Bush testified he told trial counsel about the victim's skills, which she denied occurred. The trial court found trial counsel to be more credible on this point.

Trial counsel was also aware, prior to trial, of the tear drop tattoos on Mr. Quarterman's face from autopsy photographs. Trial counsel testified she knew that those types of tattoos were commonly used to convey the wearer had committed a murder or attempted murder for each tear drop.[R264-65] Trial counsel also had to acknowledge she attempted to ask questions of the medical examiner about the presence of the tattoos on cross-examination, but the prosecutor's objection was sustained. Trial counsel admitted she failed to introduce the pictures during her case in chief or to question Mr. Bush about his knowledge of the tattoos and their meaning to him.

Trial counsel also failed to question Mr. Bush about Mr. Quarterman's level of intoxication at the time of the fights and failed to ask Mr. Bush if he was aware of the victim's increased aggression and willingness to fight when he was intoxicated.

The trial court's determination that counsel was not ineffective when she decided to not investigate or question the witnesses about Mr. Quarterman's marital arts and kickboxing skills, to not admit the ME photographs of the victim's tattoos during the defense case, to question Mr. Bush about the victim's tattoos or aggressive behavior while intoxicated is not supported by competent, substantial evidence. Trial counsel admitted each of these lines of omitted questioning were relevant to a self-defense case. Trial counsel had tried one

route to introduce testimony about the tattoos at trial, but then failed to follow through on the proper means of admitting the photographs. Trial counsel's failure to admit multiple types of evidence that bore directly on the defense theory of the case- self-defense, cannot be deemed a reasonable strategic choice. There was no evidence that trial counsel decided not to admit this evidence after considering alternative courses. Defense counsel did not know how to get in the evidence of the tattoos and failed to conduct an adequate investigation into the victim's character and reputation for violence.

Evidence of the character of a victim is admissible under §90.404(1)(b) when the victim's violent conduct or aggressive character forms the basis for a defendant's claim of self-defense. The evidence is admissible to prove the defendant was reasonably apprehensive of the victim and the defensive measures taken by the defendant were reasonable. See, *Antoine v. State*, 138 So.3d 1064, 1075-76 (Fla. 4th DCA 2014); *Smith v. State*, 573 So.2d 306, 318 (Fla. 1990). Character and reputation for violence evidence is relevant to prove the reasonableness of a defendant's belief as to imminent danger from the deceased and relevant to who was the first aggressor. See, *Dupree v. State*, 615 So.2d 713, 720-21 (Fla. 1st DCA 1993); *Styles v. State*, 217 So.3d 1042, 1044 (Fla. 4th DCA 2017).

Trial counsel failed to present clearly admissible evidence that established Mr. Bush's claims of self-defense. The evidence of Mr. Quarterman's violent reputation and character supported Mr. Bush's belief he was in imminent danger from Mr. Quarterman not only inside his home, but outside as well. The evidence of Mr. Quarterman's fighting skills was not disputed, even by his own family- as Angelina Quarterman's statement in police reports contained in discovery that was "missed" by trial counsel demonstrates. There is simply no sound or reasonable strategy to have omitted this evidence from trial. Trial counsel should have known how to admit the evidence of the tear drop tattoos in her own case, but failed to do so. Trial counsel should have known to present evidence of the victim's violent and aggressive character, as known by Mr. Bush, to the jury in a self-defense case. Case law supporting the admission of this evidence, as well as commentary from Erhardt, pre-existed this trial. Counsel's claim of a strategic basis for failing to do so is not reasonable, but instead a desperate attempt at saving face.

The trial court's determination Mr. Bush was not prejudiced by trial counsel's failures to admit evidence of the victim's reputation for violence and aggressive nature, especially when intoxicated, was equally erroneous. It is prejudicial error when evidence of the victim's violent nature is improperly

excluded from trial. See, *Mohler v. State*, 165 So.3d 773, 775 (Fla. 2d DCA 2015); *Brown v. State*, 227 So.3d 185 (Fla. 2d DCA 2017). Clearly, had trial counsel asked these questions of Mr. Bush and admitted the evidence of the tear drop tattoos during her case the evidence would have been relevant and admissible. If the trial court had precluded the admission of evidence of the tattoos or precluded Mr. Bush from answering questions about Mr. Quarterman's tattoos, intoxication, aggressiveness, and fighting skills, this would have been reversible error on direct appeal. See, *Brown*, *Id.*, at 187-88; *Smith v. State*, 661 So.2d 358, 361 (Fla. 1st DCA 1995).

Mr. Bush testified at trial Mr. Quarterman was the initial aggressor, that he was originally armed with a gun, that Mr. Quarterman repeatedly threatened and physically attacked him, that Mr. Bush was able to disarm the victim outside in the garage, and that while he was still attempting to evade Mr. Quarterman, he tripped and fell, shooting Mr. Quarterman in self-defense. The State argued the fact that Mr. Bush disarmed Mr. Quarterman defeated the claim of self-defense because now Mr. Bush and not Mr. Quarterman had the gun. Evidence which established Mr. Quarterman was highly intoxicated and was trained in martial arts and kickboxing was highly relevant evidence as to why Mr. Bush would still fear Mr. Quarterman even though Mr. Quarterman no longer had the gun. Evidence which

established that Mr. Quarterman was an expert in martial arts and kickboxing and that he was particularly aggressive when intoxicated corroborated Mr. Bush's belief that Mr. Quarterman was still an imminent threat to his safety. Evidence of Mr. Quarterman's violent character, proven by the existence of two tattoos on his face commonly believed to represent prior murders committed by Mr. Quarterman corroborated Mr. Bush's testimony that he acted in self-defense, particularly the reasonableness of his fear of Mr. Quarterman.

The jury in this case was deprived of relevant evidence critical to the determination of the sole issue at trial—whether Mr. Bush acted in self-defense. Mr. Bush does not need to show he would have been acquitted in order to establish prejudice sufficient to warrant relief. What is required is a reasonable probability which undermines confidence in the outcome of the proceedings, belief the verdict rendered was suspect. Mr. Bush has met that burden. Trial counsel's failure to present evidence through the admission of the tear drop tattoos, the violent character of the victim, and Mr. Bush's knowledge of the reputation of Mr. Quarterman for violence coupled with his skills as a fighter undermine confidence on the jury's verdict and the rejection of his self-defense claim. Reversal on this claim is required.

Claim IV: Trial counsel was ineffective by failing to object to improper comments made by the prosecutor during closing argument.

Mr. Bush challenged trial counsel's failure to object to this portion of the prosecutor's closing argument:

"So Willie Bush's testimony is that she's [Ms. Taylor] lying, Angelina is lying, Davina is lying, Kelsie is lying, Fred is lying, Jermassioun is lying. They are all lying. And he's the only one telling the truth."
[R93; Trial Record Vol. VI, T753]

The State argued in the written response the comments were not improper because they were made during rebuttal closing.[R125] Trial counsel testified she did not object because she did not interpret that statement to mean that all those people had to be lying if Mr. Bush was telling the truth.[R269] Trial counsel then admitted that the prosecutor was making the argument that for Mr. Bush to be telling the truth all the other witnesses had to be lying.[R271] Trial counsel then changed her answer and said the reason she did not object was because she believed this was a fair comment on the witness's testimony.[R271] Trial counsel said she was confused by the question of what her understanding was about whether this was proper or improper argument.[R271]

Trial counsel's answers do not constitute a tactical or strategic basis for not objecting. Trial counsel did not object because she did not know it was impermissible for the prosecutor to argue in this case that, in order for Mr. Bush's testimony to

be credible or for the defense to succeed, all the State witnesses must be lying. Trial counsel did not know what the law prohibits.

A prosecutor may not make arguments that in order for the defense to succeed, the jury must conclude all the State witnesses are lying or liars. See *Mullings v. State*, 137 So.3d 558 (Fla. 4th DCA 2014); *Mitchell v. State*, 118 So.3d 295 (Fla. 3d DCA 2013). These types of arguments are "clearly impermissible." *Bass v. State*, 547 So.2d 680, 682 (Fla. 1st DCA 1989). Thus, the trial court's determination that trial counsel's made a strategic decision not to object is not based on competent, substantial evidence. Trial counsel did not object because she did not know the law. She did not offer a strategic or tactical reason for her failure to object. Her performance was deficient.

The trial court's finding there was no prejudice is also incorrect. The statements by the prosecutor in this case are improper because they shift the burden of proof and suggest the State is relieved of its burden of proving every element beyond a reasonable doubt. *Gore v. State*, 719 So.2d 1197, 1200 (Fla. 1998; *Mullings v. State*, 137 So.3d at 561. Such arguments are particularly harmful when the jury is urged to decide the case based on witness credibility as opposed to the actual issue in the case which was Mr. Bush's state of mind. The improper

shifting of the burden of proof to witness credibility, specifically that of Angelina and Fred Quarterman was particularly harmful in this case because the testimony of these witnesses that they did not believe Mr. Bush was acting in self-defense as argued in Claim I.

The State's argument that these remarks are not improper or prejudicial because they were made during the rebuttal closing is without merit. The same arguments that were made here were found to be reversible error when done in rebuttal closing argument in *Mullings. Id.*, at 560. Had trial counsel appropriately objected, the objection should have been sustained and if the trial court had overruled the objection, reversible error would have occurred. *See, Mitchell v. State*, 118 so.3d at 298.

Mr. Bush has met his burden under *Strickland*. Trial counsel's failure to recognize the improper burden-shifting argument, then properly object and seek curative action resulted in prejudice in this case sufficient to undermine confidence in the jury verdict. Relief on this ground should have been granted.

CONCLUSION

Based on the forgoing arguments, citations of law, and other authorities, Mr. Bush respectfully requests the denial of

relief by the trial court be reversed and the case remanded for further proceedings. Mr. Bush has met his burden under both prongs of *Strickland* on each of the three claims of ineffective assistance of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the forgoing Initial Brief has been served by email to the Office of the Attorney General, Rebecca Walls, at CrimappDAB@myfloridalegal.com and a copy has been served by U.S. mail to Mr. Willie Bush, Jr., DC#568048, Madison Correctional Institution, 382 Southwest MCI Way, Madison, FL 32340-4430 this 1st day of January 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210.

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