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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARVIX L. WRIGHT,

APPELLANT

APPELLATE CASE NO. 2021-001537

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court judge abuse his discretion by denying Appellant's request for immunity under the Protection of Persons and Property Act where the circuit court judge ruled Appellant's "claim of self-defense present[ed] a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution"?

II. In the alternative, if this Court determines the trial judge ruled on the merits of Appellant's request for immunity such that the ruling may be reviewed by this Court, did the trial judge err by failing to find Appellant was immune from prosecution under the Act where Appellant proved by a preponderance of the evidence that he acted in self-defense?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Appellant for murder and possession of a firearm during the commission of a violent crime. R. *(indictment).[1] On December 6, 2021, Appellant filed a motion to dismiss pursuant to section 16-11-450, a statutory provision contained within the Protection of Persons and Property Act of the South Carolina Code. R. *(Motion). On December 10, 2021, Appellant appeared before the Honorable J. Derham Cole for a hearing on his motion. Hrg. 1. Barry J. Barnette represented the state, and Daniel J. MacDonald, IV, represented Appellant. Hrg. 1. Prior to counsel even making his argument at the conclusion of the presentation of evidence, Judge Cole indicated he would "review everything and issue a decision." Hrg. 84, ll. 18-19. Only after a bench conference did he allow counsel to present argument. Hrg. 84, l. 20 – Hrg. 99, l. 5. Nevertheless, by an order filed December 14, 2021, Judge Cole denied Appellant's request for immunity. R. *(order).

Thus, the state, represented by Barnette, called the case for trial on December13-15, 2021, before Judge Cole. Tr.1. MacDonald and Louei Christopher Nmair represented Appellant. Tr. 1. Ultimately, the jury found Appellant guilty of the lesser-included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Tr. 296, ll. 4-8. Judge Cole sentenced Appellant to thirty years imprisonment for voluntary

[1] Appellant was also indicted for unlawful possession of a firearm after being prohibited to do so by a court order. Tr. 11, ll. 14-16. Initially, Appellant exercised his right to a jury trial on this charge as well, and the case was called along with the murder and weapon charges. Tr. 11, ll. 14-16. However, immediately after jury selection, Appellant indicated his desire to enter a guilty plea to this offense only. Tr. 43, l. 12 - Tr. 47, l. 21. The Honorable Derham Cole accepted Appellant's guilty plea and deferred sentencing until the end of the trial. Tr. 47, ll. 19-20. Further, the state indicated the factual basis of the guilty plea would be developed through the evidence presented during the trial. Tr. 47, l. 23 – Tr. 48, l. 4. Judge Cole sentenced Appellant to three years imprisonment for this offense. Tr. 303, l. 25 – Tr. 304, l. 7. He ordered the sentence to be served consecutively to the sentences of thirty years and five years, which he imposed on the other charges. Tr. 304, ll. 5-7.

manslaughter and five years for the weapon. Tr. 303, ll. 13-24; R. *(sentence sheets). He ordered these sentences to be served concurrently. Tr. 303, ll. 22-24; R. *(sentence sheets).

On December 20, 2021, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

The appellate courts review a claim of immunity under the Act using an abuse of discretion standard of review. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); see also State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Douglas, 411 S.C. at 316, 768 S.E.2d at 237 (internal citation omitted).

ARGUMENT

I. The circuit court judge abused his discretion by denying Appellant's request for immunity under the Protection of Persons and Property Act where the circuit court judge ruled Appellant's "claim of self-defense present[ed] a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution."

Relevant facts

At the conclusion of the hearing on Appellant's request for immunity, defense counsel argued that the evidence demonstrated Appellant acted in self-defense. Hrg. 85, ll. 23-24. Defense counsel argued Appellant was not at fault in bringing on the difficulty because the deceased charged him with a knife. Hrg. 87, ll. 4-13. Acknowledging that the deceased's conduct was in response to Appellant kicking in an air conditioning unit, defense counsel noted the deceased's "violent behavior was an unreasonable reaction to kicking in the AC unit." Hrg. 87, ll. 14-17. Further, the evidence showed Appellant was trying to leave the residence when he was approached by the deceased with a knife. Hrg. 88, ll. 10-18.

According to defense counsel, the physical evidence supported Appellant's testimony. The autopsy report showed the bullet was fired at close proximity and an officer noting stippling around the gunshot wound, which corroborated Appellant's statements. Hrg. 89, l. 24 – Hrg. 90, l. 6. The autopsy report also showed the projectile entered into the front side of the deceased showing that she was facing Appellant, which aligned with Appellant's testimony. Hrg. 90, ll. 6-11. Additionally, the autopsy report showed "the trajectory of the bullet was at an upward angle" supporting Appellant's testimony that the gun fired as he pulled the gun up from his hip. Hrg. 90, l. 23 – Hrg. 91, l. 7. Despite what the circuit court judge would later conclude in his order, defense counsel did *not* argue the circuit court was required to accept Appellant's version of the

underlying facts. See R. *(order). Rather, counsel argued that there had "been no witnesses called today that could provide eyewitness testimony of what happened that would contradict any of [Appellant]'s statements." Hrg. 93, ll. 13-17. In fact, counsel heavily relied upon how the physical evidence corroborated Appellant's testimony of what occurred preceding the shooting to support his argument for immunity.

The prosecutor argued Appellant was engaged in an unlawful activity because "[h]e kept a gun in his house" and he was not legally allowed to possess a weapon.[2] Hrg. 94, ll. 2-5. The prosecutor also argued that Appellant "gave basically three statements" and "[n]one of them [were] consistent." Hrg. 94, ll. 11-13. Additionally, the prosecutor claimed that because Appellant "shoved the air conditioner through there" he was at fault in bringing on the difficulty. Hrg. 95, l. 25 – Hrg. 96, l. 2. The prosecutor characterized this conduct as aggravating the situation and contributing to it. Hrg. 96, ll. 2-7.

According to the prosecutor, the physical evidence did not support Appellant's testimony because there was no blood on the knife that Appellant contended was in the deceased's possession when she lunged at him. Hrg. 95, ll. 4-20. Most disturbingly, the solicitor argued that Appellant "could have easily left from that situation," which was tantamount to arguing that Appellant had a legal obligation to retreat. Hrg. 96, ll. 13-14.

On the first day of trial, the judge filed his written order denying immunity. In the order, after summarizing the evidence presented during the hearing on Appellant's request for immunity, the circuit court judge erroneously asserted that Appellant "argue[d] that his testimony is not undisputed [*sic*] and therefore should be accepted by the Court as the facts relevant to the determination of whether he is entitled to immunity under the Act." R. *(order).

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[2] Defense counsel responded that Appellant was not engaged in an unlawful activity because he armed himself in self-defense. Hrg. 96, l. 20 – Hrg. 97, l. 5.

The circuit court judge cited Black v. Hodge, 306 S.C. 196, 420 S.E.2d 595 (Ct. App. 1991) for the following proposition: "The fact that testimony is not contradicted directly does not render it undisputed." R. *(order). The circuit court judge also quoted Terwilliger v. Marion, 222 S.C. 185, 72 S.E.2d 165 (1952) to explain "[t]here remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation. If there is anything tending to create distrust in his truthfulness, the question must be left to the jury." R. *(order).

Thereafter, the circuit court judge noted he had "the opportunity to hear and observe the defendant as he testified and consider other evidence presented which was observed and collected at the scene." R. *(order). The circuit court judge explained he was "not persuaded by [Appellant]'s version of events as it appear[ed] to be contradicted by the physical evidence observed and collected at the scene." R.*(order). Thus, the circuit court judge concluded that "[i]t appear[ed] that [Appellant]'s 'claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution' as [Appellant] has failed to establish to this Court's satisfaction by a preponderance of the evidence each of the elements of self-defense which by necessity must be shown to exist before [Appellant] would be entitled to immunity pursuant to S.C. Code Section 16-11-440(C)." R. *(order).

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act ("the Act"). S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly found it "proper for law-

abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). Specifically, the Act provides two presumptions for the immunity determination. For purposes of this case, the second presumption is applicable. The Act provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

In State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), the Supreme Court held that because immunity under the Act was a bar to prosecution, it "must be decided prior to trial." The Court also held "that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. In doing so, the Court established that the circuit court must resolve the conflict in the evidence to arrive at findings of fact in order to determine if the defendant proved entitlement to immunity by a preponderance of the evidence. Id. at 410, 709 S.E.2d at 665. To rule that conflicting evidence "created a question for the jury," ignores the standard of proof the circuit court was obligated to apply. When faced with conflicting evidence, the circuit court must make credibility findings, not simply conclude at conflict creates "a jury question," and therefore rule the defendant had not carried his burden of proof.

This point was made clear in the Supreme Court's affirmance of a grant of immunity in State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018). The Court went through each of the elements of self-defense and detailed the circuit court's factual findings as to each element. Id. at 469-470, 819 S.E.2d at 119. Importantly, the Court emphasized "the circuit court made the necessary factual findings to support the existence of self-defense." Id. at 471, 819 S.E.2d at 119. After ensuring the record evidence supported the judge's factual findings, the Court affirmed the circuit court's findings. Id. Concerning the key issue in the case, the circuit court made credibility findings, to which the Court deferred. Id. at 472-473, 819 S.E.2d at 120.

Despite what appeared clear in the law, the Court directly addressed the matter recently in a trilogy of cases. In State v. McCarty, Op. No. 28116 (S.C. Sup. Ct. filed Sept. 21, 2022) (Howard Adv. Sh. No. 34 at 24), the Supreme Court observed that the circuit court issued a

written order in which the court "summarized the evidence presented at the hearing and observed that 'the core facts [were] largely uncontested.'" State v. McCarty, Op. No. 28116 (S.C. Sup. Ct. filed Sept. 21, 2022) (Howard Adv. Sh. No. 34 at 24). Thereafter, the circuit court noted some dispute in the cause and nature of the argument that immediately preceded the shooting. Id. Although the circuit court concluded McCarty failed to meet his burden of showing he had the right to act in defense of another because he did not prove the other person was without fault in bringing on the difficulty, the Supreme Court explained the circuit court erred because the conclusion was based upon the presentation of conflicting evidence, and not the circuit court judge's resolution of the conflict in the evidence. Id. The Court explained the circuit court "never engaged in the weighing of the evidence, and it did not make any specific credibility or factual findings as to any aspect of the testimony." Id. Rather, as previously mentioned, the circuit court erroneously concluded McCarty failed to meet his burden of showing the other person was not at fault in bringing on the difficulty because the evidence in that regard was conflicting. Id.

The Supreme Court held that circuit court judges confronted with the question of immunity must resolve conflicts in the evidence. State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). The Court explained that "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Id. "Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "[A] circuit court, as the designated fact-finder in [immunity hearings], must provide

adequate findings to support its decision so an appellate court can perform its role of reviewing the ruling under an abuse of discretion standard." McCarty, Op. No. 28116 (S.C. Sup. Ct. filed Sept. 21, 2022) (Howard Adv. Sh. No. 34 at 24).

As an initial matter, the circuit court judge's citation to and reliance upon Terwilliger v. Marion, 222 S.C. 185, 72 S.E.2d 165 (1952) is misplaced in the instant case. The circuit court judge misconstrued the meaning of the language it quoted. When considering the issue of whether the trial judge erred by instructing the jury that the uncontradicted testimony of witnesses was not binding on the jury as the jury had the right to determine the truth of the testimony and the weight to be given to the testimony, the Supreme Court stated:

> The fact that evidence is not contradicted by evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result. To justify a Court in instructing a jury that a witness has told the truth, and in directing a verdict based on the truthfulness of his evidence, there must be nothing in the circumstances or surroundings tending to impeach the witness or to throw discredit on his statements. If there is anything tending to create distrust in his truthfulness, the question must be left to the jury.

Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952). The Court also used this reasoning to affirm the trial judge's denial of the motion for judgment notwithstanding the verdict. Id.

The issue before the trial judge in Terwilliger was markedly different than the issue presented in the case sub judice. Here, it was for the circuit court judge *to decide the facts*; whereas in Terwilliger, it was for the trial judge to decide whether the evidence yielded more than one inference of its inference was in doubt. See Wright v. Craft, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. app. 2006). More simply, "[i]n deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." Id. Importantly, and what distinguishes the case at bar from Terwilliger, in which the circuit

court judge misplaced his reasoning, is that "[w]hen considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Id. at 19, 640 S.E.2d at 498.

Here, the circuit court judge abused his discretion by failing to make the findings of fact and conclusions of law necessary to determine whether Appellant proved by a preponderance of the evidence that his conduct satisfied the Act. The circuit court judge summarized Appellant's testimony, but did not indicate what facts the circuit court judge found by a preponderance of the evidence. Instead, the circuit court judge claimed Appellant had argued that because his testimony was undisputed the circuit court was required to accept it. R. *(order). As previously noted, Appellant made no such argument to the circuit court judge. After rejecting the straw man argument that the court had created, the circuit court judge merely concluded that it was "not persuaded by [Appellant]'s version of events" because portions of Appellant's testimony were "contradicted by the physical evidence observed and collected at the scene." R. *(order). After making this conclusion, the circuit court judge revealed why he was denying immunity – "[Appellant]'s claim of self-defense present[ed] a quintessential jury question, which, most assuredly, [was] not a situation warranting immunity from prosecution." R. *(order) (internal quotation marks omitted).

The circuit court judge, as the trier of fact at the immunity hearing, had the duty to make credibility findings where he found the evidence was not consistent. Instead, the judge found that inconsistent evidence made this a "quintessential jury question." His ruling was an abdication of his duty to exercise discretion and make credibility findings. That failure to exercise discretion was in itself an abuse of discretion that constituted reversible error because it was a refusal to exercise discretionary authority. See State v. Hawes, 411 S.C. 188, 191, 767

S.E.2d 707, 708 (2015); Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). In light of this error, Appellant respectfully requests this Court vacate the order and remand for a new order.

II. In the alternative, if this Court determines the trial judge ruled on the merits of Appellant's request for immunity such that the ruling may be reviewed by this Court, the trial judge erred by failing to find Appellant was immune from prosecution under the Act where Appellant proved by a preponderance of the evidence that he acted in self-defense.

In the event this Court determines the trial judge ruled on the merits of the request for immunity, Appellant respectfully requests this Court reverse the trial judge's refusal to grant immunity to Appellant and hold Appellant is entitled to immunity from prosecution.

Relevant facts

In August 2019, Appellant and Quanisha Fernanders, the deceased, were romantically involved and lived in a home together. Hrg. 38, ll. 3-9. On August 3, the deceased woke Appellant shortly before noon. Hrg. 38, ll. 23-22. The deceased returned to the living room while Appellant started playing music. Hrg. 39, ll. 2-14. Appellant then got ready for the day. Hrg. 39, ll. 19-25. When the deceased noticed that Appellant was getting dressed to leave the house, she started arguing with him. Hrg. 40, l. 21 – Hrg. 41, l. 11. Appellant then complained to the deceased that the kitchen was messy because she and her friends had gathered to play cards and drink alcohol the night before, but the crowd had not cleaned up after themselves. Hrg. 41, ll. 14-25.

Appellant cleaned the kitchen, filling a garbage bag in the process. Hrg. 42, ll. 11-14. The deceased opened the door so he could carry the garbage outside. Hrg. 42, ll. 14-19. Appellant told the deceased that if she did not like cleaning up after her company, she could leave the residence. Hrg. 43, ll. 1-5. Angry, the deceased began gathering items from the home and placing them into her room so that Appellant could not benefit from them. Hrg. 43, ll. 6-16. The deceased moved her television from the living room to her bedroom. Hrg. 43, l. 20 – Hrg.

44, l. 9. She even rolled up a rug from the living room and unplugged the microwave in the kitchen. Hrg. 44, ll. 10-16. Appellant went to his game room, trying to ignore the deceased. Hrg. 44, ll. 19-22. Appellant then heard the deceased struggling in the living room. Hrg. 45, ll. 3-8. Curious, Appellant looked into the living room. Hrg. 45, ll. 8-9. He saw the deceased moving a window air conditioning unit from the living room, where it could cool the entire house, to her bedroom - in August. Hrg. 45, ll. 9-23.

Appellant complained to the deceased that he could not believe she would be so childish as to move the air conditioning unit. Hrg. 46, ll. 2-14. Appellant begged her to return the unit to the living room. Hrg. 47, l. 21 – Hrg. 48, l. 14. When the deceased did not move the unit, Appellant pushed the unit through the window from outside. Hrg. 48, ll. 19-24. Appellant re-entered the house and made his way toward his game room. Hrg. 49, ll. 6-11.

The deceased – brandishing a knife – met Appellant in the narrow hallway as he tried to go to his game room. Hrg. 50, ll. 3-14. She was waving the knife around and accusing him of breaking the air conditioning unit. Hrg. 50, l. 15 – Hrg. 51, l. 9. Appellant reached into a linen closet that was nearby and grabbed his gun. Hrg. 51, ll. 12-22.[3] Despite Appellant telling the deceased to back up and end the dispute, the deceased continued her assault. Hrg. 52, ll. 5-21. Appellant accused the deceased of being childish and insisted he was going to "enjoy [him]self with somebody that [was] mature." Hrg. 53, ll. 6-14. Initially, Appellant did not believe the deceased actually would use the knife. Hrg. 63, ll. 2-12.

Incensed, the deceased lunged at him with the knife. Hrg. 53, ll. 14-21. Fearing for his life, Appellant flinched and threw up both of his hands in a defensive posture. Hrg. 54, ll. 1-6.

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[3] Admittedly, Appellant was not allowed to possess a firearm in light of his prior conviction of domestic violence in the third degree. Hrg. 57, l. 5 – Hrg. 58, l. 17; R. *(State's Exhibit #23); R. *(State's Exhibit #24). Appellant purchased the gun for protection. Hrg. 58, ll. 18-19.

As he was moving his hands up, the firearm discharged. Hrg. 54, ll. 4-13.[4] The two were very close at this time; Appellant could feel her breath. Hrg. 54, ll. 14-20. After the gunshot, the deceased dropped to the floor. Hrg. 54, ll. 21-24. Appellant called out to her, but she did not answer. Hrg. 54, l. 23 – Hrg. 55, l. 8. Realizing there was nothing he could do to help the deceased and in shock of what had transpired, Appellant called his mother, the grandmother of his children, his ex-girlfriend, his boss, and a coworker. Hrg. 55, ll. 4-13; Hrg. 67, ll. 20-22; Hrg. 68, ll. 2-16; R. *(State's Exhibit #28). He then called the police. Hrg. 55, ll. 14-15; Hrg. 65, ll. 21-23; State's Exhibit #27. Appellant returned the gun to its place in the closet where he had retrieved it. Hrg. 56, ll. 19-23.

Kegan Kelley, an officer with the City of Spartanburg Police Department responded to the 911 call on August 3, 2019, at 1:31 p.m. Hrg. 8, ll. 6-16; Hrg. 11, ll. 11-15; State's Exhibit #4. He "was flagged down by an older, heavier set black male in a gray shirt." Hrg. 8, ll. 19-20.[5] He saw Appellant was standing at the top of the stairs just outside the entrance to the residence. Hrg. 8, l. 23 – Hrg. 9, l. 2. Appellant escorted the officer into the home and showed him where the deceased was in a bedroom. Hrg. 9, ll. 3-8. The officer saw "a knife on her right side under her leg." Hrg. 9, ll. 9-12. The knife's "handle was downward and the sharp edge of the blade was pointing towards the [deceased]. The handle was almost right behind her hands and almost touching the floor, and the end of the knife was pointing up." Hrg. 15, ll. 13-20. Officer Kelley believed the knife's position was "unusual." Hrg. 15, ll. 21-22. He saw no blood on the knife, but there was "a lot of blood" on the deceased's right side. Hrg. 15, l. 23 – Hrg. 16, l. 2.

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[4] Appellant believed the gun's safety was engaged. Hrg. 64, ll. 21-25.

[5] This older gentleman was Appellant's uncle who arrived while Appellant was waiting for the police. Hrg. 56, ll. 4-6.

Appellant also showed the officer where he had placed the gun after the shooting. Hrg. 10, ll. 21-24. Appellant also told Officer Kelley that he took "full responsibility" for what occurred. Hrg. 14, ll. 8-11. Appellant explained that the shooting was an accident, and he believed the gun's safety was engaged. Hrg. 14, ll. 8-18.

Corroborating Appellant's testimony, the forensic investigator noted there was a rolled-up rug on the sofa. Hrg. 19, ll. 10-15. He also observed that the kitchen and living room were clean. Hrg. 19, ll. 16-18. According to the officer, the linen closet where the knife and gun were found was adjacent to the bedroom where the body was located. Hrg. 22, ll. 1-8. Additionally, the forensic investigator measured the knife that the deceased used when she lunged at Appellant and determined the blade was approximately five inches. Hrg. 23, ll. 3-5. He saw no blood on the knife. Hrg. 25, ll. 12-14. The investigator found an air conditioning unit running, but sitting facedown in the bedroom. Hrg. 23, ll. 16-24. In addition to examining the scene, the investigator examined Appellant. He did not see any blood on Appellant, but he did see a small red droplet on Appellant's shoe. However, presumptive testing for blood on a swab from the shoe was negative. Hrg. 26, l. 13 – Hrg. 27, l. 4. The investigator also saw no injuries on Appellant. Hrg. 28, ll. 2-6.

He briefly examined the deceased and found she had stippling around the gunshot wound just under her left eye. Hrg. 24, ll. 1-8. "Stippling [occurs] when a firearm is in very close proximity." Hrg. 24, ll. 9-11. Based on the stippling observed by the investigator, he estimated the gun was within six inches of the deceased when it fired. Hrg. 24, ll. 12-25. The investigator also saw that there was blood in the area where the first responding officer found the knife. Hrg. 29, ll. 16-22. He also claimed there was blood in her hand. Hrg. 30, ll. 16-20. The investigator

found blood spots in the doorway to the bedroom and "droplets of what appeared to be blood going in a directional pattern. Hrg. 31, ll. 15-18; Hrg. 32, l. 23 – Hrg. 33, l. 1.

As detailed above, the circuit court judge denied Appellant immunity from prosecution, having erroneously concluded Appellant had not proven his entitlement to immunity by a preponderance of the evidence. R. *(order).

Discussion

Appellant incorporates the legal discussion presented in Issue I, supra, as part of the discussion of Issue II. In explaining how to analyze a request for immunity under the Act, the South Carolina Supreme Court held "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Thus, it is necessary to determine whether Appellant established by a preponderance of the evidence that he acted in self-defense.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or

sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. Along these lines, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." Id. (internal quotation omitted). "One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." Id. (citing State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)); see also State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (1978) (explaining that Hendrix's "act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored [Hendrix]'s right of self-defense").

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the

defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507; see also Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998).

Appellant established each of the elements of defense of others by a preponderance of the evidence as required by the Act and case law.

Despite the state's argument that Appellant was at fault in bringing on the difficulty because he agitated the deceased, the evidence showed otherwise. The Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id.

Although Jones Finally left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and Lee grabbing Jones and shaking her immediately prior to the stabbing. Id.

Admittedly, Appellant pushed the air conditioning unit into the house through the window, told the deceased to leave the residence if she did not want to clean up after her friends, and he teased her about him being with other women. However, these acts could not be acts "in violation of the law and reasonably calculated to produce the occasion" of the deceased brandishing a knife and lunging at him with the knife in a narrow hallway. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); see also State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) (explaining that Douglas was not at fault for bringing on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine"). Furthermore, the deceased's conduct was not the proximate cause of the shooting. See State v. Glenn, 429 S.C. 108, 120-121, 838 S.E.2d 491, 497 (2019) (holding that a proximate cause analysis must be applied to the unlawful activity element of subsection (C) of the Act). Appellant had not acted aggressively or engaged with the deceased physically. Instead,

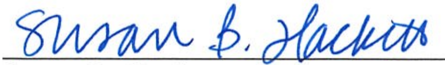
Appellant had asked the deceased to leave his home, cleaned up after her friends, and attempted to leave the home himself.

The state also relied upon the fact that Appellant was prohibited from possessing a firearm at the time of the shooting. However, Appellant's possession of the firearm in violation of the state and federal orders was not the proximate cause of the shooting. See State v. Glenn, 429 S.C. 108, 120-121, 838 S.E.2d 491, 497 (2019) (holding that a proximate cause analysis must be applied to the unlawful activity element of subsection (C) of the Act). Further, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 109 (1999). Here, the evidence showed Appellant armed himself in self-defense as the deceased was attacking him with a knife.

Appellant testified that he was in fear of his life when he shot the deceased. This fear was reasonable because the deceased was brandishing a knife at him, and she ultimately lunged at him in the narrow hallway. Finally, Appellant was not under a duty to retreat as he was in his own home at the time the deceased attacked him. See State v. Gordon, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924) ("One attacked, without fault on his part, on his own premises has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which is ordinarily an essential element of that defense."). Nevertheless, if this Court were to determine that for some reason, Appellant was obligated to retreat under the common law, then he was be relieved of the duty to retreat under the Protection of Persons and Property Act. See State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019) (explaining that "[i]f the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable" as subsection (C) removes the duty to retreat).

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court vacate the circuit court's order and remand for a new order. In the alternative, regarding Issue II, Appellant respectfully requests this Court hold he is entitled to immunity from prosecution.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of October, 2022.