STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

XZARIERA OKEVIS GRAY,

APPELLANT

APPELLATE CASE NO. 2019-001109

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Is Appellant entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act based on the evidence presented and where the trial judge placed an improper burden of Appellant and refused to resolve conflicts in the evidence presented?

II Did the trial judge err in admitting a video of the alleged shooting where the state failed to provide sufficient evidence to authenticate the video and due to the low quality of the contents of the video its probative value was substantially outweighed by the danger of confusing and misleading the jury?

III Did the trial judge err in failing to grant a hearing on Appellant's motion for a new trial where the jury deliberated for over ten consecutive hours during which they received only one meal and subsequently discovered evidence showed that at least one member of the jury believed not only that a verdict must be rendered, but that a verdict had to be rendered that day?

STATEMENT OF THE CASE

On May 4, 2018, a Greenwood County grand jury indicted Appellant for murder (2018-GS-24-829) and possession of a weapon during the commission of a violent crime (2018-GS-24-830). R. 540 – R. 541; R. 543 – R. 542.

Prior to trial, Appellant filed a motion to dismiss pursuant to the Protection for Persons and Property Act. R. 530. The state, represented by Joshua Thomas and Carson Penney, called the case to trial before the Honorable Frank R. Addy and a jury on May 6-9, 2019. R. 1. Jana Nelson and Shane Goranson represented Appellant. R. 1. After the jury was selected, the judge presided over a hearing on Appellant's motion to dismiss. R. 4, ll. 18-21. After hearing the evidence, the judge denied Appellant's request. R. 77, l. 23 – R. 80, l. 8.

The jury found Appellant guilty as charged. R. 515, l. 19 – R. 516, l. 2. Due to the late hour, Judge Addy deferred sentencing until May 14, 2019. R. 517, l. 7-11; R. 518, ll. 1 – R. 610, l. 5. On that date, Judge Addy sentenced Appellant to thirty years imprisonment for murder and five years imprisonment for the weapon. R. 524, ll. 14-25; R. 542; R. 545. He ordered the sentences be served consecutively. R. 524, ll. 14-25; R. 542; R. 545.

On May 23, 2019, Appellant filed a motion for new trial. R. 534. In the motion, Appellant requested a new trial based upon the jury deliberating for over ten hours during which they received only one meal and the judge's failure to clarify that the jury need not reach a verdict, and more importantly, that the jury need not reach a verdict that night. R. 534. Appellant requested a hearing on the motion and individual voir dire of the jurors on the matter. R. 534. On June 21, 2019, Judge Addy issued an order denying the motion and refusing to hold a hearing on the motion for a new trial. R. 538.

On July 2, 2019, Appellant served his notice of appeal.

ARGUMENT

I. Appellant is entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act based on the evidence presented and where the trial judge placed an improper burden of Appellant and refused to resolve conflicts in the evidence presented.

Standard of review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "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." State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Relevant facts

In August 2017, Appellant and the brother of Demetrious "Meatball" Fuller got into an altercation. R. 16, ll. 10-13. The brother was armed and chased Appellant around a car. R. 16, ll. 10-16; R. 21, ll. 21-25. After the chasing ended, Meatball arrived with a gun. R. 16, ll. 17-19; R. 22, ll. 1-3. Although Meatball refused to put his gun down, he did not harm Appellant that day. R. 16, ll. 17-22. After these two confrontations, Appellant heard from others in the neighborhood that Meatball was armed and threatening to kill him. R. 16, l. 23 – R. 17, l. 3; R. 22, ll. 13-16.

On Friday, August 25, 2017, Appellant was visiting with his friend, Ricky Grant, in Grant's home on Gray Street. R. 6, l. 3 – R. 7, l. 8; R. 58, ll. 5-7. Around midnight, Appellant and Grant decided to go to a neighborhood nightclub. R. 7, ll. 9-13; R. 57, l. 19 – R. 58, l. 4. While Appellant and Grant were pulling out of Grant's driveway, Meatball approached the car

and knocked on the window. R. 7, 19-22. When Meatball learned they were going to a nightclub, he asked to join them. R. 8, ll. 1-6; R. 67, l. 25 – R. 68, l. 1.

Aware of a prior altercation between Appellant and Meatball, Grant asked if Appellant would be agreeable to Meatball riding with them. R. 8, ll. 1-6; R. 9, ll. 7-14. Appellant agreed. R. 8, ll. 5-6. Thereafter, the three rode to the nightclub together. R. 8, ll. 7-8; R. 57, ll. 22-23. When they arrived, only Grant and Meatball entered the nightclub because Appellant was no longer interested. R. 8, ll. 7-12. Appellant stayed in the parking lot where he talked to people he knew. R. 8, ll. 13-16. According to Grant, Meatball placed his gun in some bushes outside the nightclub before entering. R. 59, ll. 11-15; R. 64, ll. 14-20.[1]

Between 3:30 and 4:00 a.m., Grant returned to the car and indicated he was ready to return home. R. 8, ll. 17-23. Appellant got into the car with him. R. 8, ll. 17-23; R. 58, ll. 12-14. Meatball was not with them. R. 9, l. 25 – R. 10, l. 2; R. 58, ll. 15-16; R. 68, ll. 10-12.

Grant and Appellant continued to socialize while at Grant's home. R. 11, ll. 4-10; R. 58, l. 22 – R. 59, l. 1. Suddenly, Meatball appeared in the doorway. R. 10, ll. 10-13; R. 59, ll. 5-7. Meatball was angry with Appellant regarding a physical altercation between Appellant and Meatball's brother that occurred two weeks prior. R. 10, ll. 14-16. As Appellant and Meatball began a heated verbal exchange, Grant told the two men to take their disagreement outside. R. 10, ll. 16-18; R. 13, ll. 1-8; R. 60, l. 6 – R. 61, l. 8. Appellant and Meatball walked outside. R. 10, ll. 18-24; R. 13, ll. 11-12. Appellant re-entered Grant's house, but Meatball followed him and continued to berate him. R. 10, ll. 19-24; R. 13, ll. 19-21. Grant again instructed the two to go outside. R. 10, l. 25; R. 13, ll. 22-23; R. 64, ll. 5-6; R. 69, ll. 10-11.

[1] Ricky Grant did not tell the police that he saw Meatball hid the gun in the bushes at the club. R. 70, l. 17 – R. 71, l. 13.

As Appellant and Meatball walked onto the front porch, Meatball swung his fist at Appellant. R. 11, ll. 4-6; R. 14, ll. 3-6. The two began to tussle. R. 11, ll. 5-6; R. 14, ll. 7-8; R. 26, ll. 21-24. Appellant saw Meatball reach for a gun in his waistband. R. 11, l. 7; R. 14, ll. 12-13; R. 26, ll. 14-17. In fear, Appellant grabbed for the gun. R. 11, l. 8; R. 14, ll. 15-16; R. 27, ll. 1-5. The two then struggled over the gun. R. 11, l. 9. Appellant gained control of the gun, and as he stumbled back from Meatball, the gun fired. R. 11, ll. 10-12; R. 14, l. 17; R. 18, ll. 3-11; R. 27, ll. 11-13. When Appellant was stumbling backward, the two men were about twenty feet apart. R. 28, ll. 4-10. However, Meatball was charging him at the time he fired the single shot. R. 18, ll. 12-15; R. 19, ll. 8-10; R. 28, ll. 11-14; R. 31, ll. 8-9. After being shot, Meatball ran away. R. 29, ll. 11-12.

Well aware that Meatball's family lived in the area, Appellant, who was in shock, ran to Grant's door, but Grant would not let him in. R. 61, l. 14 – R. 62, l. 3. Appellant then went to the house next door. R. 62, ll. 1-3.

Appellant explained that he feared death during the encounter with Meatball. R. 17, ll. 16-24. He was scared that Meatball would shoot him and fulfill his promise to kill Appellant. R. 17, ll. 20-24. Appellant was "really scared." R. 19, ll. 15-19; R. 28, ll. 16-18.

Jeovani Vacquec lived near Grant. R. 32, ll. 3-6. He had multiple cameras around his house. R. 32, ll. 13-20. All of the cameras feedback to one central monitor. R. 32, ll. 21-23. Vacquec was certain the cameras were working on August 26, 2017, because he checked the cameras every two days. R. 33, ll. 8-15. Vacquec personally installed and maintained the cameras. R. 38, ll. 7-11. He noted the cameras recorded "on the recording machine" and were saved for "probably like two, three months" and then "erase[d] everything." R. 38, ll. 12-25. When the police arrived at his house on August 26, 2017, he watched video footage with the

officer. R. 33, ll. 16-24. The video footage recorded from Vacquec's equipment was admitted into evidence during the hearing over defense counsel's objection. R. 33, l. 25 – R. 37, l. 23; State's Exhibit #2.[2]

Raymond Kennedy claimed he was hanging out Rick's house on the night of August 25, 2017. R. 40, ll. 13-25. He observed Grant, Meatball, and Appellant leave to go to the club. R. 41, ll. 8-14. However, Grant, Appellant, and Appellant's brother returned together; Meatball was not with them. R. 41, ll. 15-22. Later, Meatball arrived. R. 41, l. 23 – R. 42, l. 2. He was angry because he claimed his gun was missing. R. 42, ll. 5-17; R. 59, ll. 8-10. When Meatball repeatedly accused Appellant of having his gun, Appellant denied the false accusations. R. 42, ll. 13-21. Kennedy claimed Meatball left, but returned approximately thirty minutes later and resumed his interrogation of Appellant regarding his missing gun. R. 43, ll. 10-13. Based upon the altercation, Grant told Meatball and Appellant to leave his house. R. 43, ll. 14-16.

According to Kennedy, Appellant stood in the yard while Meatball continued his barrage of accusations. R. 43, ll. 14-17. Despite Appellant's continued denials, the two men "got to scuffling and then gunshot went off." R. 43, ll. 17-19. Kennedy admitted the two were "tussling on the steps at first," and then the scuffle started in the yard. R. 43, l. 23 – R. 44, l. 5.

Kennedy did not see who fired the gunshot, but he did hear it. R. 44, ll. 9-10. He observed that after the gunshot, Meatball "got up" and said, "That MF shot me for real." R. 44, ll. 10-12. Meatball then "ran down the street." R. 46, ll. 6-8.

Defense counsel argued Appellant was entitled to immunity because he was in a place where he had a right to be as an invited guest at the home of Ricky Grant. R. 72, l. 25 – R. 73, l. 5. Additionally, Appellant satisfied the requirements of self-defense because he feared losing his

[2] Appellant challenged the admissibility of the video during the pre-trial hearing and the trial. On appeal, Appellant continues to challenge the admissibility of the video. See Issue II, infra.

life at the hands of Meatball, who was armed. R. 73, ll. 6-13. The state conceded that Appellant was in a place where he had a right to be, but argued it was "a jury question as to the elements of self-defense." R. 73, ll. 15-19. Specifically, the state argued:

> There's some testimony from the witnesses that the defendant was armed with a handgun, got in sort of a tussle and he retrieved it, but that the victim came in, had no handgun on him, was asking about the gun and then the victim pulled a gun out after a tussle and shot him. I guess my position is that, in my mind, is a jury question.

R. 73, ll. 20-25.

When ruling on the motion, the judge explained that the question before him was whether Appellant had "demonstrated by the preponderance of the evidence" that he was entitled to immunity. R. 78, ll. 2-4. However, the judge failed to apply this burden of proof when reviewing the evidence. The judge found Appellant and the deceased were "invited guests." Therefore, Appellant had a right to be there as required by the Act. R. 78, ll. 6-7. After noting the witnesses gave "different version[s] of events," the judge explained the descriptions were nuanced. R. 78, ll. 11-14. Thereafter, the judge explained his reasoning for denying the request:

> If it [were] a clear open and shut case where all witnesses testified as to what [Appellant]'s version of the events were, it might be a different matter entirely. The Court might be inclined to grant the defendant's motion.
>
> But based upon the varying evidence and the open question of whether the defendant's entitled to a self-defense instruction, the Court's - - and passing upon the credibility of the witnesses who have testified, the Court finds that the defendant has not met his burden of proving by the preponderance of the evidence that he is entitled to protection under the Act.

R. 78, ll. 15-25.

When defense counsel noted that it was the judge's responsibility to weigh the evidence and resolve conflicts in the testimony in order to make a determination as to immunity, the judge was unrelenting in his view. R. 79, ll. 21. He emphasized that if he "had a hundred percent or

very firm belief in the version of events put forward by [Appellant] and argued by [defense counsel], then perhaps, ... it would be a different outcome, obviously." R. 79, ll. 17-21. He noted that "to the extent that [Appellant]'s testimony would have been corroborated by others who were present at the scene, the court might be more inclined to say that the defense has met the burden of proving it by a preponderance of the evidence." R. 79, l. 22 – R. 80, l. 2. "In light of the conflicting evidence, though, and the open question of whether this is, in fact, a case of self-defense," the judge denied the motion. He thought "such matters [were] best left, in this case, since there is so much conflicting evidence, these matters [were] best left to the finders of fact, namely the trial jury." R. 80, ll. 3-8.

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property 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] that it is 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 its 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).

> 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).

Recently, the Supreme Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. State v. Glenn, Op. No. 27935 (S.C. Sup. Ct. filed December 18, 2019) (Shearouse Adv. Sh. No. 49 at 25) (citing State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" Id. (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 267). During the pretrial hearing, a defendant must set out "a valid case of self-defense," 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." State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Court explained that "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, Op. No. 27935 (S.C. Sup. Ct. filed December 18, 2019) (Shearouse Adv. Sh. No. 49 at 25). "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. Where section

16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." Id. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. "[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." Id. Additionally, "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id.

"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). The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Here, the trial judge first erred in requiring Appellant to satisfy a burden of proof higher than by a preponderance of the evidence. Second, the judge erred in refusing to act as the fact-finder in the case as he refused to resolve disputes in the evidence presented and apply those factual findings to the immunity statute. And, finally, the judge erred in denying immunity to Appellant where he satisfied the elements of self-defense save the duty to retreat and section 16-11-440(C) of the South Carolina Code.

Burden of proof

As previously mentioned, "[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.

"A 'preponderance of the evidence' stated in simple language, is that evidence which convinces as to its truth." Frazier v. Frazier, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955); see also Gorecki v. Gorecki, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010); DuBose v. DuBose, 259 S.C. 418, 424, 192 S.E.2d 329, 331 (1972). In fact, the Children's Code provides that "[p]reponderance of evidence means evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition." S.C. Code Ann. § 63-7-20 (21). Often understanding the burden of proof is explained in comparison to other burdens of proof: "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a *firm belief* as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less that is require for proof beyond a reasonable doubt; it does not mean clear and unequivocal." In re Dickey, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (emphasis added).

Examining jury instructions provides useful guidance in defining the preponderance of the evidence. A suggested jury instruction in civil cases to inform juries regarding how to arrive at a verdict provides that the preponderance of the evidence is the equivalent to the greater weight of evidence. Ralph King Anderson, Jr., Requests to Charge – Civil, General Instructions

– Burden §§1-3. According to the instruction, this means a party must prove the proposition by evidence that is more convincing on that party's side than the other side. Id. Further, the instruction explains:

> What is meant by the greater weight or preponderance of the evidence may be illustrated by an ordinary set of merchant scales used in a place of business. When the case begins, the scales are evenly balanced. When the case ends after all the evidence has been presented and as you deliberate, if those scales remain evenly balanced or if those scales tip ever so slightly in the defendant's favor, then the plaintiff has not met the required burden of proof and your verdict would be for the defendant. If, on the other hand, those scales tip ever so slightly in the plaintiff's favor, then the plaintiff has met the required burden of proof in this matter and your verdict would be for the plaintiff.

Id. Stated somewhat differently, but maintain the same meaning, Judge Anderson also proposed the following jury instruction:

> The scales of justice are in perfect equipoise as the case begins. The preponderance of the evidence moves the scales of justice from the position of perfect equipoise in favor of the party producing the preponderance of the evidence. As you evaluate the evidence and testimony, the scales of justice may tip ever so slightly in the party's favor on that factual issue and, if so, that party has met the burden of the preponderance of evidence on this factual issue. On the other hand, if the scales of justice remain in perfect equipoise on the factual issue, or if the scales tip ever so slightly in the other party's favor, then the party having the burden of proof has failed to meet the required burden.

Id.

The trial judge's ruling showed that he placed a very heavy burden upon Appellant to show his entitlement to immunity rather than the proper burden of by a preponderance of evidence. Admittedly, when ruling on the motion, the judge used the correct language when he stated the question before him was whether Appellant had "demonstrated by the preponderance of the evidence" that he was entitled to immunity. R. 78, ll. 2-4. However, the judge's ruling showed he placed a burden *at least* as high as beyond a reasonable doubt, if not higher, upon Appellant. The judge declared that if "*all* witnesses testified as to what [Appellant]'s version of

the events were," then he "*might* be inclined to grant" the request for immunity. R. 78, ll. 15-25 (emphasis added). Similarly, he noted that "to the extent that [Appellant]'s testimony would have been corroborated by others who were present at the scene, the court might be more inclined to say that the defense has met the burden of proving it by a preponderance of the evidence." R. 79, l. 22 – R. 80, l. 2. Thus, the judge required that all of the witnesses who testified to have corroborated Appellant in order for him to grant immunity. Requiring the testimony of all witnesses to support Appellant's version of events placed the burden of proof on Appellant in excess of by a preponderance. Further, requiring Appellant to present corroborative evidence placed a greater burden of proof on Appellant than permitted under the law.

Finally, and most revealing, the trial judge made clear that only if he "had a *hundred percent* or *very firm* belief in the version of events put forward by [Appellant] and argued by [defense counsel], then perhaps, ... it would be a different outcome, obviously." R. 79, ll. 17-21 (emphasis added). "In light of the conflicting evidence, though, and the open question of whether this is, in fact, a case of self-defense," the judge denied the motion. The judge's ruling made clear that he placed upon Appellant a burden of proof in excess of "by a preponderance of the evidence." This was error.

Act as fact-finder

The Supreme Court made clear, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity." Id. In State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), the South Carolina 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.

Based on the controlling case law requiring judges to decide whether a person is entitled to immunity based upon a preponderance of the evidence standard, judges have a duty to make credibility findings to the extent there was conflicting testimony during the immunity hearing. This is no different than any other setting in which the judge must act as finder of fact and judge of the law, including family court cases and matters in equity. Perhaps the best analogy is a civil bench trial during which the trial judge would be required to find the facts by a preponderance of the evidence, especially when conflicting evidence exists regarding the true facts. See e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting."); Rule 52 (a), SCRCP (explaining that in non-jury actions, "the court shall find the facts specially and state separately its conclusions of law thereon"). Continuing with the analogy to civil cases, the lower court appears to have applied the standard for determining whether a party is entitled to summary judgment – whether any genuine issue of material fact exists. See Rule 56, SCRCP; Baughman

v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). For the circuit court to rule that because testimony was conflicting it created a *jury question* was an abdication of the circuit court's obligation to Appellant, and the law.

The Supreme Court's decision in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) is particularly instructive. The state sought to have Luckabaugh declared a sexually violent predator. Id. at 129, 568 S.E.2d at 341. The circuit court concluded Luckabaugh was not a sexually violent predator. Id. at 131, 568 S.E.2d at 342. After quoting the order, the Supreme Court explained "[t]he order did not find any facts to support its legal conclusion that the state failed to carry its burden of proof." Id. In other settings, the Supreme Court was familiar with reviewing the adequacy of orders, including in family court and administrative law decisions. Id. at 132, 568 S.E.2d at 342. Thus, the Court applied those same principles to the Luckabaugh matter. Id.

The Court explained that while it did not require a lower court to set out findings on all the myriad factual questions arising in a particular case, it did require the lower court to set out findings sufficient to allow a reviewing court "to ensure the law is faithfully executed below." Id. at 133, 568 S.E.2d at 343. Further, the Court explained that the lack of factual findings made the task of the reviewing court "impossible because the reasons underlying the decision [are] left to speculation." Id. (internal quotation omitted). Thereafter, the Court held the Luckabaugh order failed to set forth sufficient findings of fact to support the trial judge's conclusions of law. Id. Additionally, the Court held its "review of the record [could not] save the order from its deficiencies due to the contradictory testimony presented below." Id. The contradictory testimony left the appellate court to speculate if the circuit court reached its conclusion because it believed Luckabaugh's testimony or that of medical experts. Id.

Another helpful analogy is in the realm of post-conviction relief (PCR) actions in which a trial judge must decide whether an applicant has met his burden by a preponderance of the evidence. Rule 71.1(e), SCRCP. By statute, the PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. Perhaps the best and most useful comparison is to draw a parallel between the immunity and other familiar pre-trial determinations by trial judges, such as the admissibility of statements by defendants. Trial judges frequently hear conflicting testimony in pre-trial hearings regarding the circumstances surrounding a defendant's statement to law enforcement. It is incumbent upon the trial judges to decide the facts and determine whether the state proved the admissibility of the statement by a preponderance of the evidence. See e.g., State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988).[3]

It is the duty of the circuit court judge to resolve the conflicting testimony in order to make a pre-trial determination on the request for immunity. After resolving any conflicts in the evidence that may exist, the remaining question for the circuit court judge is whether the defendant has proven entitlement to immunity by a preponderance of the evidence. The mere existence of conflicting evidence does not strip a person of his right to immunity from prosecution.

This point was made clear in the South Carolina Supreme Court's recent 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

[3] Another example of a trial judge acting as a fact finder occurs when the state seeks to admit evidence of prior bad acts. While this determination may not occur during a pre-trial hearing, the judge must first determine the state proved the occurrence of the prior bad act by clear and convincing evidence. See Rule 404(b), SCRE; State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008).

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 Supreme Court affirmed the circuit court's findings. Id. Concerning the key issue in the case, the circuit court made credibility findings, to which the Supreme Court deferred. Id. at 472-473, 819 S.E.2d at 120.

Judge Addy, as the trier of fact at the immunity hearing, had the duty to make credibility findings where he found the evidence was not consistent. For example, he noted that the testimony "differed somewhat in terms of whether the decedent was six feet away, or 20 feet away, or somewhere in between from the defendant when the defendant fired at him." R. 78, ll. 8-10. He further noted that there were "different version[s] of events being offered by various witnesses. All of them [were] nuanced." R. 78, ll. 12-14. Instead of resolving the differences, the judge found that inconsistent testimony made this a jury question. Specifically, he ruled that "based upon the varying evidence and the open question of whether the defendant's entitled to a self-defense instruction," he was denying immunity. 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).

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 SC. 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.

In State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), the South Carolina Supreme Court analyzed Dickey's claim that he was entitled to a directed verdict because the evidence showed he was exercising his right to self-defense as a matter of law. Dickey was a security guard at Cornell Arms apartments. Dickey, 394 S.C. at 495, 716 S.E.2d at 98. Two men were guests of residents of the apartment complex. Id. When the men refused to leave, Dickey, in his role as security guard, intervened. Id. at 495, 716 S.E.2d at 99. Dickey contacted the police, and the men decided to leave. Id. at 496, 716 S.E.2d at 99. When the men walked outside, Dickey walked behind them so that he could tell the police where the men had gone. Id. The men turned toward Dickey, made threats, and advanced toward Dickey. Id. at 496-497, 716 S.E.2d at 99. Dickey pulled his gun, but one of the men continued to advance. Id. at 497, 716 S.E.2d at

100. When the man reached under his shirt, Dickey feared the man had a weapon. Id. In response, Dickey fired his gun, killing one of the men. Id.

Analyzing the first element of self-defense, the Court held Dickey was not at fault in bringing about the harm. Id. at 499, 716 S.E.2d at 101. The Court recognized "a business proprietor's right to eject a trespasser from his premises." Id. The Court explained that "[i]f the proprietor is engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty, and would not be bound to retreat." Id. at 499-500, 716 S.E.2d at 101. The Court concluded that Dickey was exercising his right to eject trespassers in good faith, as the agent of the apartment complex and, as a matter of law, he was not at fault for bringing on the difficulty because he had not brandished his gun, had followed the men outside only to alert the police to their whereabouts, and had not used threatening or words or posture. Id. at 500-501, 716 S.E.2d at 101-102.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, the Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id.

Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

Furthermore, 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.; see also State v. Scott, 424 S.C. 463, 472-473, 819 S.E.2d 116, 120 (2018) (explaining that what the defendant "knew in the heat of the moment" controlled whether the defendant was in actual imminent danger or reasonably believed he was).

Additionally, "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. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

The South Carolina 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 initially 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" where 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. In Jones, 416 S.C. at 288, 786 S.E.2d at, 135, 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 in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in

self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

Appellant was not at fault in bringing on the difficulty. By all accounts, Appellant was a guest in Ricky Grant's home. While socializing with his friend, Meatball arrived acting aggressively toward Appellant. Although Appellant claimed Meatball was threatening him due to an earlier confrontation between Appellant and his brother, another witness alleged Meatball was asking Appellant about the location of his gun. Regardless of the substance of the confrontation, it was undisputed that Meatball was the aggressor as he approached Appellant and argued with him. Further, Appellant testified he was in actual fear of losing his life when he saw Meatball reach for his gun. Even if this Court were to determine that Appellant was not in actual danger, then the evidence supports a finding that Appellant actually believed he was in such danger. This belief was reasonable as it was undisputed by the witnesses that Meatball often carried a gun and no witness claimed to have ever seen Appellant with a gun. Finally, the danger was such that a man of ordinary courage would have fought for control of the gun and fired the fatal shot to protect himself from Meatball who was armed and acting aggressively. Appellant explained he had no way to

retreat because he feared Meatball would harm him or Meatball's family, who lived in the area would harm him. See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (explaining that an individual has no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury). Thus, Appellant was entitled to immunity because he satisfied each element of self-defense.

Protection of Persons and Property Act

Even if this Court were to determine that Appellant is not entitled to immunity under the Act pursuant to his satisfaction of the elements of the self-defense, specifically, the duty to retreat element, Appellant was entitled to immunity under the Act because he satisfied the elements section 16-11-440(C). The trial judge erred in finding otherwise. The trial judge properly found that Appellant was in a place where he had a right to be as he was an invited guest at the home of Ricky Grant. Although Grant had asked that he and Meatball go outside due to the argument, Grant never evicted Appellant or Meatball from his premises. Thus, the trial judge properly concluded Appellant was in a place where he had a right to be as required under the statute.

Next, Appellant was not engaged in unlawful activity. While the witnesses claimed Meatball accused Appellant of stealing his gun, there was no evidence whatsoever to support the allegation. By all accounts, Appellant was simply sitting at the home of his friend Ricky Grant when the confrontation began. Thereafter, he was simply walking into the yard of his friend when Meatball continued his barrage of false accusations and attacked him physically.

Further, Appellant was attacked by Meatball. Appellant testified that Meatball swung at him with his first. Additionally, as discussed supra, Meatball was the aggressor because he approached Appellant repeatedly and engaged him in a verbal altercation which turned physical. Pursuant to the statute, Appellant was under no duty to retreat and could meet Meatball's force with

force, including deadly force, as long as he reasonable believed it was necessary to prevent death or great bodily injury to himself. Appellant testified as to his fear of being killed by Meatball when he saw Meatball's gun. Others testified that Meatball was known to carry a gun. Even the state's theory of the case was that Meatball regularly carried a gun. The evidence presented showed that Appellant's act of shooting Meatball was necessary to prevent Meatball from shooting him. Therefore, Appellant satisfied each of the elements of the immunity statute as well. The trial judge erred in denying immunity to him.

II The trial judge erred in admitting a video of the alleged shooting where the state failed to provide sufficient evidence to authenticate the video and due to the low quality of the contents of the video its probative value was substantially outweighed by the danger of confusing and misleading the jury.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. Id.

Relevant facts

During the hearing regarding immunity, the state sought to admit into evidence a video recording of the alleged encounter. Vacquec lived near Grant and had multiple cameras installed around the exterior of his home. R. 32, ll. 3-20. The cameras "all feed back to one central" monitor. R. 32, ll. 21-23. Vacquec claimed the cameras were working on August 26, 2017, and he was certain of this because he checked them "every two days." R. 32, ll. 8-15. When the police arrived, he allowed the officer to look at the recorded footage. R. 34, ll. 16-20. Despite his conscientious checking of the cameras to ensure they were working, Vacquec never set the date and time on them. R. 36, l. 23 – R. 37, l. 2.

Defense counsel objected to the admission of the video because "the time stamp on the video [did] not match the alleged time of the incident." R. 35, ll. 1-3. As defense counsel explained, there was no way to know if the video showed "the right time or not." R. 35, ll. 3-4. Further, defense counsel argued that Vacquec was not "actually watching this occur on the monitors as it occurred" and he had no way of knowing what time it occurred. R. 37, ll. 10-14.

The judge noted that Vacquec testified he did not set the time when he set up the cameras. R. 37, ll. 15-17. He determined the "question of the time stamp would go to the weight as opposed to the admissibility." R. 37, ll. 17-18. Thus, the judge found Vacquec "authenticated the videos that were taken at his residence." R. 37, ll. 18-20. He allowed the video to admitted for the hearing. R. 37, ll. 21-23.

After the immunity hearing, defense counsel moved in limine to prohibit the introduction of the video from Vacquec's home. R. 81, l. 22 – R. 83, l. 3. As previously discussed, defense counsel noted "the time stamp does not match the actual time of the incident [and] Mr. Vacquec was not any kind of personal witness to what was going on." R. 82, ll. 12-15. Specifically, he was not "sitting at his monitor watching as this occurred" so that he could "correlate it with a gunshot he heard." Due to the low quality of the video, the jury would be invited to speculate as to what occurred. Thus, defense counsel argued the video was inadmissible pursuant to Rule 403, SCRE. R. 82, l. 22 – R. 83, l. 3.

The state conceded that "no one testify as to what happened." R. 83, ll. 5-7. However, the state argued he was proceeding under "sort of the pictorial testimony theory of introducing a piece of evidence like this, a video or photograph." R. 83, ll. 5-9. The state also cited "the silent witness theory" as a means of admitting the video into evidence. R. 83, ll. 10-16. Pursuant to this theory, "if you have a surveillance video or something like that," the evidence is admissible. R. 83, ll. 10-12. The state cited North Carolina, Maryland, Alabama, and Illinois as other jurisdictions that had adopted the silent witness theory. R. 83, ll. 12-13. Those jurisdictions based the theory on Rule 901(b)(4), SCRE, regarding distinctive characteristics of the evidence or Rule 901(b)(9), SCRE, regarding the process or system used to produce the video. R. 83, ll.

14-16. However, the state conceded there was "no real case law in South Carolina" on the subject. R. 83, ll. 13-14.

The state explained, "Basically if you can get somebody - - the operator of the video equipment, the surveillance equipment to testify as to basically how it works, the low threshold foundational requirement, how it works, the process by which it records, the product you get and that the actual exhibit is something that comes from hat product, then you've met the very basic threshold authentication requirement." R. 83, ll. 17-23. The state proffered that Vacquec could "testify that that's a video from his security system, it points out that way." R. 84, ll. 10-12. However, Mr. Vacquec was unaware of what was on the video because he was not watching it. R. 84, ll. 12-13.

Turning to counsel's argument regarding Rule 403, SCRE, the state agreed the quality of the video was low making it difficult to tell what was transpiring. R. 83, ll. 24-25. However, the state argued that "some of the action" was visible. R. 84, ll. 1-2. The quality of the video was a matter of "the credibility of the evidence," not a consideration for its prejudicial impact. R. 84, ll. 3-9.

The judge overruled defense counsel's objection. R. 85, ll. 15-16. The judge opined, "A picture's worth a thousand words, so to speak." R. 85, ll. 16-17. The judge acknowledged that Vacquec was able to testify that the video equipment was his, he installed it, and he ran it. R. 85, ll. 17-19. Regarding the time stamp, the judge found Vacquec "cleared that up in the sense that he didn't mess with the time stamp when he installed the equipment." R. 85, ll. 20-23.

Regarding the objection pursuant to Rule 403, SCRE, the judge found the video depicted "relevant or potentially relevant information in this particular case." R. 86, ll. 10-14.

Vacquec then told the jurors that he had eight cameras around his property. R. 95, ll. 4-8. He checked the cameras "pretty regularly to make sure they were working." R. 95, ll. 23-25; R. 96, ll. 10-11 (stating he checked "it" every week). Vacquec installed the cameras, which linked back to a monitor. R. 96, ll. 1-5. The cameras were constantly recording. R. 96, ll. 12-13. Vacquec explained that after "like two or three months" the recordings "erase" and it will start over. R. 96, ll. 14-16. When Vacquec bought the cameras, he "just hook[ed] it up," without adjusting the date and time. R. 97, ll. 1-5.

When the police arrived, Vacquec did not pay attention to what the officer was looking for. R. 97, ll. 22-25. The officer downloaded the video to a USB drive. R. 98, ll. 6-13. Vacquec identified State's Exhibit #2 as surveillance footage from a camera at his home. R. 98, ll. 14-25.[4] Vacquec admitted he was not present at the scene shown on the footage, and therefore, he had no idea what was going on. R. 100, l. 19 – R. 101, l. 5. Additionally, Vacquec was not watching the monitor at the time of the shooting. R. 101, ll. 13-15.

Recognizing its weak case against Appellant based upon its witnesses, the state relied heavily upon the video in its closing argument. The state claimed the video showed "three people coming off the steps of that house, of them over here, two of them over where, a shot, and then somebody running away." R. 418, ll. 13-16. While that was all the video showed, the solicitor claimed it was "enough." R. 418, ll. 16-18. The state claimed the video showed "a scuffle, 30 to 45 seconds in that front yard." R. 435, ll. 12-16. He told the jurors there was "[a] fight between two people grasping ahold of each other, trying their hardest to get - - to fight for their lives." R. 435, ll. 18-20; R. 436, ll. 5-9. While showing the video, the state pointed to the front yard and where the shell casing was found by police. R. 436, ll. 21-23. The video, while

[4] When the state offered the video into evidence during the trial, defense counsel renewed her objection, which the trial judge overruled. R. 99, ll. 12-15.

"not the best video in the world" was "just clear enough to show you what you need to know." R. 437, ll. 1-2. In the video, the solicitor pointed to "one person here" and "two people walk by here," then he noted "[o]ne person, two people, three people, five to six feet apart, gunshot, [Meatball] falls down." R. 437, ll. 4-9. The solicitor played the video numerous times during his closing argument. R. 436, ll. 16-18; R. 437, l. 3; R. 437, ll. 10-12; R. 438, ll. 17-18.

According to the solicitor, the video discredited Appellant. The video allegedly showed someone standing next to Appellant. R. 439, ll. 10-11. He claimed the video showed Appellant firing the gun, but not "falling backwards," not "running away," and "not locked up with anybody rolling, tussling, pushing, grabbing." R. 439, ll. 15-17. He further claimed the video showed Meatball was "not advancing," "not charging." R. 439, ll. 21-22. The solicitor conceded that Meatball may have been "in a fighting stance" and may have been "getting ready to throw a punch," but he claimed Meatball did not have a gun and was "just standing there." R. 439, ll. 23-24. To counter the defense theory that the state's witnesses were merely parroting a rumor in the community, the solicitor told the jurors that "what's not a rumor is this surveillance video." R. 474, ll. 8-9. He continued, "They say a picture is worth a thousand words. A video's got to be worth something more than that. You're going to get to watch the video, take it back there with you." R. 474, ll. 9-12.

After deliberating for about one hour, the jury requested to see the video again. R. 498, ll. 13-16; R. 500, ll. 22-24; R. 525. The jury immediately requested to see a portion of the video played two more times. R. 502, ll. 3-19. Just over an hour later, the jury requested to see a portion of the video yet again. R. 503, ll. 4-7; R. 526. While watching this portion, the jurors requested the video be played approximately five more times. R. 503, l. 15 – R. 504, l. 7. After deliberating for five hours, the jurors requested to see a portion of the video again. R. 509, ll. 1-

9; R. 528. While watching the video this time, the jurors asked to see the portion two more times and that it be paused at a certain time. R. 512, ll. 2-12. Thereafter, the judge provided the jurors with a laptop for them to use to watch the video at their leisure. R. 512, ll. 8-12. Ten hours after the jury started its deliberations, it returned with its verdicts. R. 514, l. 23 – R. 515, l. 2.

Discussion

Authentication

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. See also State v. Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (stating "[i]t is black letter law that evidence must be authenticated or identified in order to be admissible"). This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. As the state conceded at trial, no witness could say the contents of the video were what the state purported them to be because no witness had personal knowledge of the events.

Another way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve

to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009) (finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

Analyzing whether loan documents were authenticated, this Court held the proponent offered sufficient evidence. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 65, 773 S.E.2d 607, 610-611 (Ct. App. 2015). This Court explained that a witness "testified he agreed to purchase a note from CresCom Bank, he examined the loan documents while negotiating the agreement, and the loan documents offered in evidence were the ones he examined and later received pursuant to this transaction." Id. at 65, 773 S.E.2d at 611. "This testimony authenticated the loan documents because it was sufficient to support a finding that they were the documents [the proponent] claimed them to be." Id. This Court rejected the argument that the witness was not a witness with knowledge under Rule 901(b)(1), SCRE, because he did not know "'when, how, or by whom the documents were prepared, how they came to be in the possession of CresCom Bank, or how they were maintained by that bank.'" Id. According to this Court, "[t]he authentication requirement does not demand this degree of proof." Id.; see also State v. Patterson, 425 S.C. 500, 507-508, 823 S.E.2d 217, 221-222 (Ct. App. 2019) (holding the state authenticated DNA evidence by presenting a witness who "had first-hand knowledge of the procedures that went into collecting, storing, maintaining, and testing the DNA profile," and another witness who "personally reviewed and verified the results of the DNA profile match").

Recently, this Court addressed the authentication of social media messages through circumstantial evidence. State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019). This

Court held the state authenticated Facebook messages despite neither the sender nor the recipient testifying. Id. at 232-233, 830 S.E.2d at 715-716. Rather, a witness testified that a co-defendant, who was not on trial, used the name "Ruby Rina" on Facebook. Id. at 228, 830 S.E.2d at 713. The witness claimed he saw the co-defendant and the defendant "laughing while texting." Id. Later that day, the deceased arrived at the co-defendant's home. Id. Subsequently, the police found the deceased's body. Id. The police learned of the messages from the deceased's father. Id. at 227, 830 S.E.2d at 712. The father claimed he had the deceased's Facebook password and viewed the messages after the deceased went missing. Id. Among the messages was an invitation from Ruby Rina to the deceased on the day of his death for a sexual rendezvous at her home. Id. at 227, 830 S.E.2d at 712-713.

This Court held "the content of the messages was distinctive enough that a reasonable jury could find [co-defendant] wrote them." Id. at 233, 830 S.E.2d at 715. According to this Court,

> Numerous facts link[ed] the Facebook messages to [co-defendant] and, consequently, Green: the use of the screen name 'Ruby Rina,' which [a witness] testified was [co-defendant]'s; reference to 'Julissa' on the messages, which testimony showed was [co-defendant]'s sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; [the deceased]'s reference to Ruby Rina as [co-defendant] ...; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that [deceased] disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered.

Id. at 233, 830 S.E.2d at 715-716. This Court held that "[t]aken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." Id. at 233, 830 S.E.2d at 716.

The state failed to present circumstantial evidence to authenticate the surveillance video.

While the homeowner testified to the location and its general view, he was unable to provide any additional circumstantial evidence to establish the video was from the morning in question or was accurately recorded. The state simply failed to provide the judge with circumstantial evidence sufficient to authenticate the video pursuant to Rule 901(b)(4), SCRE.

Another way to authenticate evidence is through "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Rule 901(b)(9), SCRE. As observed by the state at trial, South Carolina has not addressed how the proponent of video evidence may authenticate the evidence when no witness with personal knowledge can testify that the video contents are what they purport to be.

The South Carolina Supreme Court rejected the state's argument that an officer authenticated GPS records where the officer testified the records were accurate because they were used in court all the time. State v. Brown, 424 S.C. 479, 489, 881 S.E.2d 735, 740 (2018). The Court explained the officer's testimony "shed no light on the accuracy of the GPS records." Id. While no elaborate showing of accuracy of recorded data is required, the proponent of the evidence must make some showing to authenticate the records. Id. at 490, 881 S.E.2d at 741. This may be accomplished by evidence describing the process or system used to produce the result and showing it produces an accurate result. Id. Authenticating evidence pursuant to Rule 901(b)(9), SCRE, requires testimony of someone with general knowledge and experience with the system used, who can explain how the records are generated and can confirm the accuracy of the result. Id. For the GPS system at issue in the case, the Court held that in order to authenticate the records, the proponent must present a witness with experience with the electronic monitoring system used and provide testimony describing the monitoring system, the

process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue. Id. at 492, 881 S.E.2d at 742.

At trial, the state urged the trial judge to adopt the "silent witness" theory of authentication pursuant to Rule 901(b)(9), SCRE. The Indiana Court of Appeals explained that "[i]n order to authenticate videos or photographs using the silent-witness theory, there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result. McFall v. State, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017). "The requirements are 'rather strict.'" Id. "[T]he proponent must show that the photograph or video was not altered in any significant respect, and the date the photograph or video was taken must be established when relevant." Id.

The Florida District Court of Appeal adopted the silent witness theory and created a five-part test for authentication. Wagner v. State, 707 So.2d 827, 831 (Fla. 1st DCA 1998). The Court held photographic evidence may be admitted pursuant to the silent witness theory if a trial judge determined it to be reliable after considering the following five factors: (1) evidence establishing the time and date of the photographic evidence; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the relevant participants depicted in the photographic evidence. Id.

Similarly, the Supreme Court of Alabama instituted a seven-prong test when a litigant invokes the silent witness theory of authentication. Ex Parte Fuller, 620 So.2d 675, 678 (Ala. 1993). The party must (1) show that the device or process or mechanism that produced the item

being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded; (2) show that the operator of the device or process or mechanism was competent; (3) establish the authenticity and correctness of the resulting recording, photograph, videotape, etc.; (4) show that no changes, additions, or deletions were made; (5) show the manner in which the recording, photograph, videotape, etc., was preserved, (6) identify the speakers or persons pictured, and (7) in criminal cases, show that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement. Id.

Appellant urges this Court to adopt one of the tests presented here to clarify for the bench and bar how to authenticate evidence pursuant to Rule 901(b)(9), SCRE. At a minimum, the state failed to present evidence to satisfy the language of the rule because the state presented no witness or other evidence to describe the video recording system or that the system produced an accurate result. The homeowner did not even know the name brand of the video system. He was unable to describe how the system worked in even the most rudimentary of terms. Most importantly, he was unable to say if or how the system produced an accurate result as required by the plain language of Rule 901(b)(9), SCRE. He was simply unable to present the necessary evidence for the state to authenticate the video.

Rule 403

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's

probative value, the danger of unfair prejudice and potential to confuse or mislead the jury posed by the evidence, and the balancing of those two.

"'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence and the propensity of the evidence to confuse or mislead the jury.

"The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice –

prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Very little case law exists in South Carolina regarding the aspects of Rule 403, SCRE, concerning confusing and misleading the jury. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the

marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the video was very low. While it purported to show the actual shooting, which would be highly probative, the quality of the video showed it was of very little probative value. Examining the probative value also explains how the video was misleading and confusing to the jury. The scene was very dark and the camera was too far away to allow the viewer to identify anyone. The scene showed an unknown number of unidentified people moving in unknown directions for unknown reasons. The state interpreted the video for the jury based upon its view of the facts without any actual evidentiary support. This danger of confusing and misleading the jury combined with the danger of unfair prejudice substantially outweighed any probative value of the dark, grainy video.

Admission of the video could hardly be deemed harmless beyond a reasonable doubt in light of the state's heavy reliance upon its interpretation of the video during closing argument and the jury's repeated viewing of the video during its ten-and-one-half hour deliberations. The state had

very little evidence of malice against Appellant. While Appellant admitted to shooting Meatball, the state could present no witness who actually saw the shooting. Therefore, the state relied solely on its interpretation of the video to claim Appellant's version of events was not accurate, and therefore, Appellant acted with malice. The state argued to the jury that the video called into question Appellant's testimony regarding how the shooting occurred. However, the quality of the video was so terrible, it really showed very little. It was only the state's interpretation, presented through its argument, that contradicted Appellant. The video was confusing, misleading, and posed an unreasonably high degree of unfair prejudice to Appellant. When balanced against the low probative value offered, the video should have been excluded.

III The trial judge erred in failing to grant a hearing on Appellant's motion for a new trial where the jury deliberated for over ten consecutive hours during which they received only one meal and subsequently discovered evidence showed that at least one member of the jury believed not only that a verdict must be rendered, but that a verdict had to be rendered that day.

Standard of review

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Harris, 391 S.C. 539, 544-545, 706 S.E.2d 526, 529 (Ct. App. 2011) (quotation omitted). The South Carolina Supreme Court explained that an appellate court must "recognize[] the gatekeeping role of the trial court in making a credibility assessment" "[i]n th[e] post-trial setting." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion." Harris, 391 S.C. at 545, 706 S.E.2d at 529.

Relevant facts

The jury began deliberating at 12:40 p.m. on May 9, 2019. R. 498, l. 13. Prior to sending the jury out to deliberate, the trial judge informed them that lunch had been ordered from Chick-fil-a and would arrive in about one hour. R. 498, ll. 12-18. Over the course of its deliberations, the jurors asked multiple questions, primarily concerned with watching the video. R. 498, l. 19 – R. 512, l. 24; R. 525 – R. 529. At one point, the jury requested a "high school level explanation of the difference between murder and voluntary manslaughter." R. 504, ll. 19-21; R. 527. Close to 6 p.m., the judge noted that there was a "problem" because "some jurors [were] concerned about kids at home." R. 509, ll. 23-24. He indicated he would allow them a phone call to check on them. R. 509, ll. 24-25; R. 511, ll. 10-18.

When it was almost 9 p.m., the jurors requested to use the phone again and a smoke break. R. 513, ll. 7-8; R. 529. Further, the jury indicated they were "pretty deadlocked at 10:2." R. 529; R. 513, ll. 9-10. Judge Addy gave the jurors the option of returning on Monday to resume deliberations. R. 513, l. 24 – R. 514, l. 8. He told them there was "no set limitation on jury deliberations." R. 514, ll. 11-12. He explained that it was entirely within the jury's deliberation "[h]owever long [they] deliberate[d]." R. 514, ll. 12-13. At 10:50 p.m., the jury returned with its verdicts. R. 514, l. 23.

Notably, Judge Addy noted he would "entertain any motions to delay sentencing because quite candidly [his] blood sugar [was] dangerously low." R. 517, ll. 7-9. He remarked that the same may be true of the jurors. R. 517, ll. 9-10. He "want[ed] to be at the top of [his] game" for purposes of sentencing. R. 517, ll. 10-11. He told the lawyers that he "would feel better about [his] faculties if [he] was not as fatigued and tired." R. 518, ll. 1-3. He thought he "would be more attentive to everything" at a later date. R. 518, ll. 3-5.

On May 23, 2019, Appellant filed a motion for new trial. R. 534. In the motion, Appellant noted the jury deliberated for approximately 10.5 hours. R. 534. Further, when the jury sent a note to the judge at 9 p.m., indicating they were "pretty deadlocked at 10-2," the judge inquired whether the jury wanted to resume deliberations or return on Monday in light of the following day, Friday, being a state holiday. R. 534. Two hours later, the jury returned with a verdict, having received no dinner during their deliberations. R. 534. After the trial, Appellant found a social media post by one of the jurors indicating she had been in court for fourteen hours and "just couldn't leave without a verdict." R. 534. This evidenced the pressure placed on the jurors to reach a verdict. R. 534. Appellant requested a hearing on the motion and individual voir dire of the jurors on the matter. R. 534.

On June 21, 2019, Judge Addy issued an order denying the motion and refusing to hold a hearing on the motion for a new trial. R. 538. In the order, the judge noted that the jury did not indicate they were deadlocked; rather, the jurors "were struggling to reach a verdict." R. 538. There was no mention of the note stating the jurors were "pretty deadlocked 10:2."

After nothing that "under Rule 606, the inquiry suggested by [Appellant] would likely be improper in that it would cause the jurors to reveal the subject matter of their deliberations," the judge concluded the social media post by one of the jurors did "not cause the Court sufficient concern to warrant the drastic step of questioning all twelve (12) jurors." R. 538.

Regarding the jurors not eating dinner, the judge noted that a late lunch had already been provided and the jury room "was stocked with crackers, snacks, and drinks." R. 538. In a footnote, the judge stated, "Out of solidarity, I did not eat supper either, nor partake of any snacks." R. 538. The judge neglected to note his own statements following the verdict that his blood sugar was low and he was fatigued such that he wanted to defer sentencing until he could be at the top of his game.

Discussion

Pursuant to Rule 29(b) of the Rules of Criminal Procedure, a motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence. A motion for a new trial based on after-discovered evidence must be granted if the evidence "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)(citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)).

In Spann, 334 S.C. at 619, 513 S.E.2d at 99, the South Carolina Supreme Court held a trial judge erred in failing to grant a new trial based on after-discovered evidence. Spann "was convicted of the 1981 sexual assault, robbery, and murder of Melva Neill, as well as the burglary of her home, and received a death sentence." Id. At his motion for new trial based on after-discovered evidence, Spann claimed he was entitled to a new trial because expert testimony would have shown that the killing was the work of a serial killer in the area, not Spann. Id. at 620, 513 S.E.2d at 99. Although Spann presented other matters during his motion for new trial, which the trial judge concluded were merely impeaching or not credible, the South Carolina Supreme Court granted Spann a new trial based on the expert testimony and did not reach the remaining issues. Id.

The Court explained the context of the crime for which Spann was convicted to place the proposed after-discovered evidence in the correct context. Id. at 620, 513 S.E.2d at 99. These three events "occurred within a twelve mile radius in York County between July and November 1981." Id. First, "[o]n July 18, 1981, the body of Mary Ring was discovered in the bathtub of her home." Id. She was "a heavy-set white woman, fifty-seven years old, who had been beaten about the head, sexually assaulted, and strangled to death. Her nude body was found in her partially filled tub." Id. Second, "two months later, the nude body of eighty-one year old Mevla Neill was found in the bathtub of her home." Id. She "had been beaten around the face and chest, had been brutally sexually assaulted, and strangled, her body then placed in the partially filled tub." Id. She too "was a heavy-set white woman." Id. Finally, "[o]n November 16, 1981, the mostly nude body of Bessie Alexander was found on her dining room floor." Id. Her face and neck were injured, and bruises were on other parts of her body. Id. She had been sexually assaulted and then strangled. Id. Like Ms. Ring and Ms. Neill, Ms. Alexander "was a heavy-set white woman" who lived alone. Id. Unlike Ms. Ring and Ms. Neill, however, Ms. Alexander was not found in her bathtub. Id.

However, her bathtub was "inaccessible from her home's interior," and her body was found "drenched in liquids, including fruit juice." Id.

The police never arrested anyone for the death of Ms. Ring. Id. Spann was arrested for the murder of Ms. Neill, and Johnny Hullett was arrested and convicted for the murder of Ms. Alexander. Id. Importantly, Ms. Alexander was killed "approximately two months after" Spann was arrested for Neill's death. Id. In 1981, the police said publicly there was no connection between the three murders, and the local pathologist "did not recognize any pattern" among the three deaths. Id. at 620-621, 513 S.E.2d at 99-100.

At his hearing on the motion for new trial, Spann presented three expert witnesses who testified the three murders were related. Id. at 621, 513 S.E.2d at 100. One expert "testified all three women were strangled in a unique way." Id. Based on this and other similarities, the expert "opined that one perpetrator was responsible for all three murders." Id. A second expert "testified the three murders were committed by a single individual, a sexual sadistic murderer." Id. This expert "opined based upon his examination of [Spann] that it was 'impossible' that [Spann] had committed these offenses." Id. This expert also "testified that sexual sadistic killers are almost always psychiatrically disturbed white males." Id. Spann was a black man with no history of psychiatric problems; Johnny Hullett was a white man with a long psychiatric history. Id. Finally, a third expert "profiled the killer of these three women as a white male in his mid-20's to mid-30s with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area." Id. Spann simply did "not fit this profile." Id.

The trial court rejected Spann's bid for a new trial, "finding the evidence and science upon which their opinions were based was all in existence at the time of [Spann]'s trial." Id. Thus, the

trial court concluded the evidence "could have been discovered by his attorneys with the exercise of due diligence." Id. The Supreme Court disagreed. Id. The Court explained the attorneys would have needed to recognize the similarities between the three deaths, which were not recognized even by experts in the field at the time of the trial. Id. at 621-622, 513 S.E.2d at 100. The "due diligence standard imposed upon [the] trial attorneys" by the trial judge was too high. Id. at 622, 513 S.E.2d at 100. The Court granted Spann a new trial. Id.

In another capital murder case, the South Carolina Supreme Court affirmed a trial judge's decision to deny a motion for new trial based on after-discovered evidence. State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009). At trial, "[t]he centerpiece of Mercer's guilt phase defense was third-party guilt." Id. at 163, 672 S.E.2d at 563. He pointed the finger at his co-defendant, Marcus Thompson, as the triggerman. Id. "This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman." Id. at 164, 672 S.E.2d at 563. During the trial, Mercer argued the police and the state had a "myopic view to focus on Mercer at the expense of a thorough and proper investigation." Id. at 164, 672 S.E.2d at 563-564.

Shortly after Mercer's trial ended in guilty verdicts and a death sentence, Kevin Fuller contacted the state, claiming Thompson had confessed to shooting the deceased. Id. at 165, 672 S.E.2d at 564. Based on this information, Mercer filed a motion for new trial. Id. at 165-166, 672 S.E.2d at 564. The trial judge denied the motion, finding Fuller was not credible. Id. at 167, 672 S.E.2d at 565. The judge based on his credibility finding on his observations of Fuller's demeanor, the inconsistencies in Fuller's statements, the inconsistencies of Fuller's testimony with "known facts." Id. In the judge's estimation, Fuller's testimony, which was inconsistent with evidence presented at trial, was not the result of a "mistake or failure of recollection," but

was "intentional calculated misrepresentation." Id. In short, the trial judge "believe[d] Fuller fabricated the story" of Thompson's confession. Id.

On appeal, the Supreme Court engaged in "careful scrutiny of the actual statements Fuller attribute[d] to Thompson." Id. at 168, 672 S.E.2d at 566. "Given the inconsistencies with Fuller's story," the Court found "a basis to sustain the trial court's lack of credibility finding." Id. Additionally, a second inmate, whom Fuller claimed would support his testimony, testified at the hearing, but he denied Fuller's account of Thompson's confession. Id. The trial court credited the second inmate's testimony. Id. Finally, the appellate court contrasted "the purported Thompson confession against what [were] fairly solid facts." Id. Of particular interest to the Court was the description of the assailant provided by the only eyewitness to the crime – the deceased's roommate. Id. This description "closely matched the much bigger Mercer and not the slender Thompson." Id.

The Court held the trial judge's decision to deny Mercer's motion for new trial was not an abuse of discretion. Id. at 170, 672 S.E.2d at 567. The Court was careful to note that "a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt." Id. Nevertheless, the Supreme Court affirmed the trial judge's ruling based upon the judge's credibility determination and view of the evidence presented at trial. Id.

The "general rule is that newly discovered evidence which 'merely impeaches or contradicts the testimony of a witness at the trial' affords no sufficient grounds for a new trial." State v. Strickland, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942). However, "there may be exceptional cases warranting a new trial on merely cumulative or impeaching testimony." Id.

When the newly discovered evidence is "so directly applicable to the main point involved that it would be a denial of justice to refuse the motion," the general rule must not apply. Id.

Appellant respectfully requests a hearing on his motion for new trial to permit the questioning of jurors regarding (1) the impact of the length of the deliberations on their ability to deliberate, (2) impact of the lack of nourishment on their ability to deliberate; and (3) what their understanding of whether a verdict had to be rendered was and any impact any misunderstandings may have had on the verdict. The information already known is that the jury deliberated for over ten hours and received only one meal. After receiving the verdict, the judge indicated his blood sugar was low and he was fatigued. He candidly told the parties he would prefer to go forward with sentencing because he was not at the "top of his game" due to his lack of food and his lack of rest. The same was true for the jurors. The true impact of the length of the deliberations coupled with the lack of food and the imprecise instructions regarding rendering a verdict was unknown until Appellant discovered a social media post from a juror showing the juror believed a verdict was necessary and that it was necessary to render a verdict that day. This information was not merely impeaching or cumulative to any other information available at trial, and was not known at the time of trial. Had the true impact of the length of the deliberations without food and the vague instructions been known, there is a reasonable probability that it would have changed the verdict. In light of the prima facie case Appellant respectfully requests a hearing on his motion for new trial.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court grant him immunity from prosecution based upon the Protection of Persons and Property Act. Regarding Issue II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Finally, regarding Issue III, Appellant respectfully requests this Court remand for a hearing on his motion for a new trial based on after-discovered evidence.

s/*Susan B. Hackett*
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Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 30, 2020

s/*Susan B. Hackett*
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