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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

APPELLANT,

V.

ANIJAH YARNELL,

RESPONDENT

APPELLATE CASE NO. 2023-000571

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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APPELLANT STATEMENT OF THE ISSUE

1.

Whether Judge Hayes abused his discretion by finding Yarnell was without fault in bringing on the difficulty when Yarnell called Remi over 200 times, made her fearful he would attack her with a weapon, showed up at her friends' private condo and refused to leave after being lawfully ejected multiple times, then left and came back full of anger with no lawful reason to return *and* presented a weapon to the unarmed victim.

2.

Whether Judge Hayes abused his discretion by finding Yarnell was in actual danger of death or great bodily injury when it lacked evidentiary support: Yarnell's window was only cracked 2-3 inches, the door was locked, the victim was squeezed up against another car, and the victim had no weapon, tool, or way by which to enter the vehicle, making it impossible for Yarnell to have been in actual danger of death or serious bodily injury.

3.

Whether Judge Hayes abused his discretion and committed an error of law by applying strict liability to Section A of the PPPA, ruling that because one of Pennington's fingerprints was found on Yarnell's car, Yarnell automatically had the right to shoot to kill because he was entitled to Section A's presumption of reasonable fear (regardless of whether actual entry into the vehicle was possible) when every element of self-defense and the corresponding sections of the PPPA are analyzed as a totality test.

4.

Whether Judge Hayes abused his discretion and made an error of law by finding Section B of the PPPA (revoking any entitlement to Section A's presumption of reasonable fear) did not

apply when Yarnell was engaged in an unlawful activity when he fired, and by finding Yarnell was in a place he had the right to be and his presence was not the proximate cause of the victim's death under Section C.

COUNTER STATEMENT OF THE ISSUES

1.

The trial court did not abuse its discretion by finding respondent was without fault in bringing on the difficulty. Respondent having another disagreement or argument with his girlfriend, who was not the decedent, did not bring on the difficulty. The aggressive threatening decedent reaching into respondent's occupied automobile and punching him brought on the difficulty.

2.

The trial court did not abuse its discretion in finding respondent was in actual danger of great bodily injury or death where the decedent was threatening respondent, where the decedent attacked respondent, threatening him, and punching him through the car window where respondent also had the right to act on appearances.

3.

The trial court did not abuse its discretion in its well-reasoned analysis of S.C. Code § 16-11-440(A)(1) & (2), as to the presumption of fear in the immunity statute by reasoning the evidence showed respondent, at a minimum, had reason to believe the aggressive and cursing decedent was going to harm him where the decedent was threatening respondent and punched him since the decedent was unlawfully and forcibly trying to enter respondent's occupied vehicle at the time the shooting occurred.

4.

The trial court did not abuse its discretion by finding respondent was not engaged in unlawful activity within the meaning of the Protection of Persons and Property Act, and that respondent was also in a place where he had a right to be should he claim that right also under the statute, where respondent was merely on the premises to return his girlfriend's property, and he was not trespassing, neither of which was the proximate cause of the decedent's death regardless.

STATEMENT OF THE CASE

Respondent was indicted at the June 2021 term of the Horry County grand jury for the offenses of murder and possession of a weapon during a violent crime. R. 612 - 615. Respondent and the state filed pre-hearing briefs on the issue of immunity under the Protections of Persons and Property Act. R. 540 - 546.

An immunity hearing was convened on November 14, 2022, before the Honorable Mark Hayes. Morgan Martin and Morgan O'Brian Martin represented respondent. Nancy Livesay and Christopher Helms were the assistant solicitors. R. 1. The immunity hearing concluded on November 16, 2022. R. 1-538

The trial judge issued an order granting the motion for immunity from prosecution pursuant to S.C. Code § 16-11-450, dated April 4, 2023. R. 547 - 561.

Appellant, the local solicitor's office, filed a notice of intent to appeal. The state then filed its brief of appellant.

This brief of respondent follows.

STATEMENT OF THE FACTS

Introduction

During the immunity hearing from November 14-16, 2022, the trial court heard the testimony of fifteen witnesses, and it reviewed a plethora of exhibits, many of which are now before this Court. The trial judge issued a fifteen-page order analyzing the statutes and case law pertaining to the Protection of Persons and Properties Act, the law of self-defense, and applying the applicable law to the facts of this case. Importantly, the judge found respondent to be a credible witness. Order at 11, n. 19; R. 557.

Relevant facts

Melissa Canon was a friend of respondent's girlfriend, Remi Hargrove. R. 39, l. 19 – 40, l. 8. Melissa was in Columbia, South Carolina on the day this incident happened in Myrtle Beach. R. 40, ll. 9-11. Melissa was actually on the telephone with respondent "at the time that this incident occurred." R. 40, ll. 19-24.

Melissa remembered that she was watching a movie with her friend, Michelle Hargrove, when respondent called her from his car. "[A]ll of the sudden I hear a bunch of noise like somebody ran up on the car, and I hear, you know, you want me to cuss . . . I heard: 'get the fuck out of the car, N, I'm going to beat your ass, get out of the car,' and then, within like a couple of seconds I could hear the door like someone was trying to get into the car door, and then Anijah [respondent] said, 'am I supposed to be scared of that?' and I was, like, what is going on . . . and then it was like the phone dropped." R. 40, l. 25 – 41, l. 22. Melissa distinctively remembered a person saying to respondent: "[G]et the fuck out of the car, I am going to fuck you up." R. 42, ll. 3-9.

Melissa testified that the respondent sounded "sincere" on the phone, and she thought that because of the belligerence and anger she heard from the other person or persons, that there was more than one person going after the respondent at the time. R. 43, ll. 1-20. Melissa was "scared" following their telephone conversation. She spoke again with respondent later that night. Respondent told her "a couple of times" that when he was attacked that "[h]e wanted to leave but he couldn't get out of the parking space." R. 44, ll. 4-16.

Melissa said that respondent admitted he shot the decedent, Mike Pennington, but she did not think respondent realized the decedent had died. R. 44, ll. 11-25. Melissa offered that she told respondent if he was telling her the truth, that he needed to go home and turn himself in. R. 45, ll. 1-6. Melissa also related that she heard the man tell respondent several times while she was on the phone with him to "get the fuck out of the car, I am going to fuck you up." R. 45, ll. 1-13.

On cross-examination by the solicitor, Melissa acknowledged that she knew that respondent was upset because he had planned to go out with Remi to dinner that evening, but Remi had planned to go to dinner that night with her family instead. R. 53, ll. 2-8. Melissa was aware respondent was attempting to return Remi's clothes to her that evening, and that he was upset that Remi was not returning his calls. Melissa asked respondent not to throw her "stuff" away because he was upset about the difficulty in getting to talk to Remi. R. 51, l. 8 –53, l. 6.

On redirect examination, Melissa confirmed it was not unusual for respondent and Remi to "bicker" and argue about things. This was definitely not the first time it had happened. Melissa testified that the man telling respondent to get out of his car that he was going to "fuck you up" while she was on the phone with respondent was the aggressor in what was occurring that night. R. 61, ll. 10-23. Melissa said although she thought respondent's car window was

rolled up at the time this occurred that she still able to hear what was going on. She did not know for a fact whether the car window was up or down. R. 61, ll. 4-15.

Derrin Card was visiting from New York on the day of the shooting. He went to dinner with Remi Hargrove and Card's girlfriend, Jennifer. R. 63, l. 16 – 64, l. 14. Card had seen respondent "a couple of times" before that evening, and he had met him. [1] R. 64, ll. 19-24.

As to the fatal altercation itself, Card remembered when respondent returned to the Villas complex parking lot that the decedent approached the respondent's car. Respondent's car window appeared half-way down. The decedent attempted to punch respondent through the window. The decedent pulled on the car door handle to open the door, but he could not open it. R. 70, l. 6 – 72, l. 2. Card did not know whether the decedent's arm was inside of respondent's car when respondent shot him. R. 85, ll. 6-8.

On recross-examination, Card admitted that respondent could not have simply driven away from the decedent's attack that night. Respondent would have had to turn around or back out. Card also admitted he never heard respondent threaten the decedent. However, Card claimed the decedent was not smoking marijuana in the apartment complex parking lot that night, and he did not see the decedent use cocaine that evening either. R. 95, l. 13 – 96, l. 24.

Doctor Robert Bennett, the toxicologist, then testified that the decedent's blood results were positive for a major metabolic product of cocaine, and Xanax. R. 122, l. 18 – 124, l. 15. The lab results indicated recent cocaine consumption by the decedent. Doctor Bennett opined that cocaine use results in increased aggression, especially with cocaine-dependent individuals.

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[1] Defense counsel told the trial judge she considered Card a hostile witness, and the judge asked Card to answer counsel's questions. R. 71, ll. 10-19.

Dr. Bennett testified that individuals who use both cocaine and alcohol showed the highest aggression levels. R. 124, l. 16 – 127, l. 24.

Doctor Bennett further observed that the totality of the drugs present in the decedent's system made it more likely than not that the decedent was exhibiting signs of aggression at the time of the incident. R. 130, ll. 4-14. The decedent's blood-alcohol concentration was .05. R. 137, l. 16 – 138, l. 18. Doctor Bennett stated that this revealed the decedent was impaired. R. 138, ll. 4-8. Further, Doctor Bennett said to a reasonable degree of medical certainty, the decedent [was] displaying some signs of aggression based on the drugs and the number of drugs that [were] in his system at the time. R. 153, l. 21 – 154, l. 20.

Investigator Jonathan Kelly went to respondent's house at around 11 p.m. on the night of the shooting. Kelly identified on State's Exhibit #40, which is before this Court for viewing, that showed what appeared to be a hole in the driver's side window. R. 159, l. 21 – 160, l. 6. Kelly said the damage to the driver's side window appeared to be from the inside of the window outward. The window was down 2.5 to 3 inches from the top of its frame. R. 162, l. 8 – 163, l. 22.

Kimberly Mears was a SLED forensic agent from the print division. Agent Mears testified the fingerprint from the front driver's door of respondent's car matched the decedent's fingerprint. R. 194, l. 18 – 195, l. 10. On cross-examination, Mears said there was obviously no way to tell when the fingerprint was left on respondent's car. R. 198, ll. 3-19.

Jill Domogauer did crime scene investigation in this case. She testified that there was only one entrance and exit out of the condominium complex "[s]o it's the same entrance. You go in there, there is no turn around to come back out. You would have to go down and then come

back out." R. 206, l. 14 – 207, l. 1. She also said that the parking lot was "extremely full" that evening. R. 207, l. 22 – 208, l. 17.

Domogauer identified a case of Michelob Ultra beer which contained eleven cans and one partially opened can which was on ground between "a silver Toyota and a Dodge van." R. 208, l. 25 – 209, l. 8. She also testified on cross-examination that she believed that there was not anything blocking the condominium exit that evening. "There was law enforcement calling for scene security, but other than that, no." R. 249, l. 8 – 250, l. 3.

Courtney Johnson of the Horry County police department testified that cocaine was found in the decedent's pocket. The state argued that the fact that cocaine was in the decedent's possession was irrelevant. The judge overruled that objection. R. 252, l. 14 – 255, l. 2.

Sara Zapata testified that the decedent could not be fully excluded as a DNA contributor to what was found on the gun. R. 260, l. 24 – 262, l. 25. That DNA report, State's Exhibit #27, is before this Court.

The decedent's girlfriend, Emily Cerio, testified that she was with respondent's girlfriend, Remi Hargrove, all day on the date of the incident. According to Cerio, Remi turned her phone off and had no contact with respondent for most of the afternoon. Cerio confirmed that when they returned to the condominium parking lot, Remi was driving since Cerio had been drinking. R. 271, l. 4 – 272, l. 5; R. 278, ll. 10-24.

Cerio testified that they had pulled into the parking lot and had gone inside. When Cerio walked back downstairs, she saw respondent pull into the parking lot. She acknowledged that the decedent had brought a case of beer with him. R. 280, l. 2 – 281, l. 8.

Cerio nonetheless maintained the decedent was not drinking at the time. She did not recall if the decedent was smoking a marijuana blunt in the parking lot. She also did not know if the decedent had cocaine in his possession. R. 281, ll. 9-18.

Cerio remembered the decedent saying to respondent during the altercation: "I'm from Virginia, and if you pull a gun, you better pull the trigger." R. 281, ll. 19-21. Cerio admitted that she saw the decedent swinging at respondent through the window of his car. R. 282, l. 25 – 283, l. 22. She told the decedent to stop. She claimed that respondent started backing out of the parking space, and then stopped. She acknowledged the decedent was trying to open respondent's car door during the incident. R. 284, l. 1 – 285, l. 3. The following occurred with Cerio:

> Q. [B]ut at any rate, there's no question did he reach through the window and hit him?
>
> A. Yeah.
>
> Q. Grabbed him at the door?
>
> A. Yes.
>
> Q. You were telling him to stop, let it go, weren't you?
>
> A. Yes.
>
> Q. Now, let me turn you to page nine. I mean, page 10. The detective asked you about Remi and Anijah arguing that day. Do you see that?
>
> A. Yes.
>
> Q. And your response was: I think it's common, they argue all the time, but I guess he was upset because she wasn't home when he got home from work and then she just turned off her phone and he kept just blowing up her phone. Do you see that?
>
> A. Yes.

R. 285, l. 19 – 286, l. 9.

Cerio claimed that no one touched respondent until he pulled the gun. R. 299, ll. 1-7. On redirect examination, Cerio admitted that the decedent reached into the car and hit respondent at least once. The decedent also tried to get into respondent's car after the gun was pulled. R. 305, l. 12 – 309, l. 24.

Respondent testified during the immunity hearing. The trial judge wrote in his order granting immunity that records indicted respondent was twenty years old. "He was five feet tall, and weighed one-hundred eighty pounds at the time of his arrest." His demeanor while testifying was respectful to both attorneys while being questioned. He was not argumentative or belligerent. He appeared nervous, but also genuine in his attempts to give answers to the questions presented to him. His demeanor remained the same even when pressed by the state. *He was a credible witness.*" Order granting immunity at 11, n. 19. (emphasis added). The judge also noted that "Remi was not called as a witness." Order granting immunity at 11, n. 19. R. 557.

Respondent testified that he was invited to have dinner that evening with Remi, but then plans changed. At around 3:00 or 4:00 p.m. on the day of the incident, Remi told respondent to come over, that she would give him "gas money," and she offered that "I really want to see you and I love you." R. 329, l. 15 – 332, l. 4. Respondent explained that he went to the Crossgate Villas that night to see Remi, talk to her, and to drop off her clothes. R. 329, l. 25 – 332, l. 17.

Respondent made it clear that he always kept a gun in his center console, and that he liked to shoot his gun at a shooting range. The gun was in the center console as usual on the day he was attacked. R. 333, l. 24 – 334, l. 17. Respondent was not anticipating any trouble when he went to the Villas that night. R. 334, ll. 10-12.

Respondent remembered that when he pulled into the parking lot, he asked the decedent if Remi was coming to get her clothing and other items. R. 338, l. 1 –339, l. 17.

Respondent again explained on cross-examination that the decedent had approached his car, and he put his beer down in the parking lot when he approached. "He forcefully tried to enter my vehicle by pulling the door handle. I rolled the window down a little bit, he grabbed the window and I started backing up . . . he started punching me through my vehicle and I grabbed my firearm in my central console . . . when I got my gun out of the central console he said, 'if you pull a gun out you better use it' and he reached in for the gun, and I shot one time in his general direction to get him off of me.'" R. 416, l. 14 – 417, l. 16.

On redirect examination, respondent said all he wanted that night was to give Remi her personal belongings, and go home. Respondent testified that it was his understanding that Remi wanted him to stay there, give her the pictures and other items, and then he could go home. R. 436, l. 1 – 437, l. 3.

Darla Benoit was the homeowners' association property manager for the property where the shooting occurred. Benoit acknowledged that there was a sign hanging that said, "private property, no improper vehicles, trailers and violators will be towed from the area." R. 477, ll. 16-19. There was no sign that said: "No entry." R. 477, l. 20 – 478, l. 1.

There was no gate at the end of the property and no fence around the property. She admitted that FedEx trucks were able to drive onto the property and drop off packages and that the property was accessed for deliveries and other legitimate purposes. There was not a "no trespassing" or "no entry" sign on the property. R. 479, l. 18 – 481, l. 17. Benoit also admitted there was no security guard at the gate and when there was a problem on the property "[w]e tell the owners to call the police if the owners are seeing something." R. 480, l. 22 – 481, l. 12.

Arguments of Counsel

Defense counsel Martin noted that the Protection of Persons and Property Act protected people, such as respondent, who were attacked in an "occupied vehicle." R. 500, ll. 4-17. Counsel noted the standard of proof was by a "preponderance of the evidence." R. 500, ll. 17-25. Counsel also argued that there being conflicting evidence did not mean that the judge could simply send the case to the jury. R. 500, l. 25 – 501, l. 11. Further, the fact that respondent was ultimately found not to be armed was not dispositive. R. 501, ll. 15-22.

Defense counsel cited State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019) and State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) as support for these legal principles. Further, it is also clear respondent had the right to act on appearances even if his ultimate belief was mistaken. Under the law of self-defense "you do not have to wait for your adversary to get the drop on you, that's the caselaw, and thirdly, that threatening words accompanied by aggressive actions are a sufficient basis for one to act in self-defense." R. 501, ll. 15-22.

Counsel also argued respondent was in his own car -- which was a place where he had a right to be -- and while in that occupied car the presumption of reasonable fear of imminent peril applied when respondent was attacked, and the decedent entered or tried to enter his car. R. 502, l. 1 – 503, l. 17. Defense counsel noted that respondent was in his car, he drove into the parking lot, he did not get out of his car, he rolled his window down, and the decedent told him to "get the fuck out of the car, I'm going to fuck you up." R. 503, l. 8 – 504, l. 4.

The decedent was the aggressor, and respondent was not at fault for bringing on the difficulty given the evidence in this case. Further, the decedent was under the influence of alcohol, likely cocaine, marijuana, and Xanax, given the testimony. This was further evidence of respondent's fear that evening, and why he believed he was in imminent peril. There was "no

excuse" for the decedent attacking respondent while respondent was inside of his own car. R. 504, l. 11 – 508, l. 8.

Counsel said it would be absurd to assert that respondent, while in his own car in the parking lot of a condominium building complex, could not defend himself when he was attacked inside his own car. That was not a result the legislature intended. R. 508, l. 3 – 510, l. 23. Counsel said that immunity needed to be granted unless the judge accepted the proposition that by simply driving in his car to the Villas parking lot respondent was at fault for bringing on the difficulty. R. 510, l. 14 – 513, l. 22.

The solicitor argued that the decedent was acting in defense of Remi Hargrove. R. 521, l. 13 – 522, l. 6. The solicitor said that the decedent was invited to go to the condominiums, and she maintained respondent was never invited to the condominiums, and that he was told to leave. R. 522, ll. 6-11. The solicitor asserted that respondent should be considered the aggressor. R. 525, ll. 4-17.

The solicitor admitted the decedent's arm went inside respondent's vehicle but she questioned "when?" R. 525, l. 16 – 526, l. 15. The solicitor contended that respondent was the aggressor, and respondent did not have a right to be on the property that night. R. 530, ll. 9-20.

Defense counsel countered that the evidence showed respondent did not even know the decedent was there that night when he went over. Counsel continued that although the solicitor claimed the decedent was acting in self-defense of Remi Hargrove, Remi was upstairs in her apartment, and she did not need anyone defending her. R. 532, l. 5 – 533, l. 11. Further, the scientific evidence showed that the decedent was only ten to twelve inches from the gun when he was shot. The decedent attacked respondent while respondent was inside his own "occupied vehicle." Respondent had no malice towards the decedent. Respondent's girlfriend Remi had

even offered respondent gas money to come to the condominiums that night, and respondent had a right to defend himself from this unwarranted attack. R. 534, l. 9 – 537, l. 18.

After the arguments by counsel, the judge took the matter under advisement. The judge said he would go through the record thoroughly and issue an order for the appellate courts to review. The judge noted he had gotten reversed before because he did not give a proper and thorough immunity analysis.[2] R. 537, l. 19 – 538, l. 17.

Order Granting Immunity

A written order granting respondent immunity dated April 4, 2023, was issued. R. 547 – 561. In his order granting immunity, the judge wrote "when [respondent] drove his vehicle into the common area of the parking lot to drop off Remi's belongings, he was not trespassing. Remi had consented to [respondent] bringing her belongings to the complex. Even though he did not have a hanging tag, he was not in violation of Maddington Places rules. A vehicle on the property for the purpose of making a delivery of goods does not violate its posted rules. This Court cannot conclude that [respondent] was engaged in an unlawful act at the time of the altercation or attempting to commit an unlawful act. Thus, 16-11-440(B)(1)(Pennington had no right to be in [respondent's] vehicle) and (B)(3)([respondent] was not using his vehicle for an unlawful purpose) do not disqualify [respondent] from immunity. Nevertheless, based on the facts presented to this Court, much like the McCarty case, even if [respondent] were to be considered trespassing when in a common area of the parking lot, his being in his vehicle was not the proximate cause of the attack against him. Order at 6-7. R. 552 – 553.

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[2] While it is generally improper to cite an unpublished opinion, the trial judge was apparently referring to State v. Lunsford, 2021-UP-197 (Filed June 9, 2021), which was likely fresh in the judge's mind at the time of this November 14-16, 2022 immunity hearing, and the issuance of his April 4, 2023 order granting respondent immunity.

The order further noted that respondent came to the condominium to give Remi her clothes and "stuff" back. The decedent put his beer down in the parking lot and screamed "get the fuck out of the car so I can fuck you up." Order at 11. R. 557.

The Court found that respondent was a credible witness, and respondent's testimony was that the decedent was belligerent and aggressive. Cocaine was found in the decedent's possession, and the toxicology report revealed that Xanax and marijuana were in his blood stream. Order at 11. R. 557.

Further, the judge found that the decedent started the altercation in the parking common area of Maddington Place. Order at 12. R. 558. Respondent merely coming to Maddington Place where he was in the common area of the parking lot "to deliver Remi her belongings," this was not an unlawful act. Respondent had been "to the complex before and Remi had provided her consent for [respondent] to be there." "Based on the totality of information presented during the hearing, this Court cannot conclude that [respondent] had a premeditated motive to do serious bodily harm or death to Remi." Order at 13, n. 22. R. 559.

Respondent was not at fault for bringing on the attack and respondent did not provoke the decedent's attack on him while respondent was inside of his own car. Order at 14. R. 560.

The order continued:

> Based on the above, this Court's finding(s) and conclusion(s) are, the [Respondent][3] has met his burden of proof of establishing by a preponderance of the evidence the defense of self-defense. [Respondent] had done nothing to Pennington to provoke Pennington's attack on him while [Respondent] was in his vehicle. [Respondent] was not at fault in bringing on the attack. The facts are such that this Court is convinced that [Respondent] believed he was in imminent danger of losing his life or sustaining serious

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3 The judge in his order referred to Respondent Yarnell as "petitioner" since he was the moving party. For ease of reference, he is referred to herein as "respondent" which is his present legal status on appeal.

bodily injury and that he was actually in such imminent danger during the physical attack on him by Pennington. [Respondent's] fear and belief of imminent danger was real and a reasonable prudent man of ordinary firmness and courage would have come to the same belief. Also, circumstance of the attack placed the [Respondent] in actual imminent danger and these circumstances were such that 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.

Additionally, for purposes of Section 16-11-440(A), the [Respondent] is entitled to be presumed to have a reasonable fear of imminent peril of death or great bodily injury when he used deadly force because the person against whom he used deadly force was in the process of unlawfully and forcefully entering [Respondent's] occupied vehicle and, the person had attempted to remove [Respondent] from his occupied vehicle. The requirements of 16-11-440(A)(1) have been established. Also, [Respondent] has established by a preponderance of evidence that he was aware that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred at the time deadly force was used. Thus, the requirements of 16-11-440(A)(2) have been proven.

Also, this Court finds by a preponderance of the evidence that Section 16-11-440(B)(1) does not disqualify [Respondent] from immunity because Pennington had no right to be in or to lawfully occupy [Respondent's] vehicle. This Court also finds the [Respondent] was not engaging in an unlawful activity nor was he using the occupied vehicle to further an unlawful activity. See, 16-11-440(B)(3).

Therefore, having established his entitlement to immunity by a preponderance of the evidence, this Court finds the [Respondent] is immune from prosecution of the present charges in accordance with S.C. Code Section 16-11-450.

Order at 14-15. R. 560 – 561.

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016), *citing* State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence). 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, 290, 786 S.E.2d 132, 136 (2016) *citing* State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

ARGUMENT

1.

The trial court did not abuse its discretion by finding respondent was without fault in bringing on the difficulty. Respondent having another disagreement or argument with his girlfriend, who was not the decedent, did not bring on the difficulty. The aggressive threatening decedent reaching into respondent's occupied automobile and punching him brought on the difficulty.

Our Supreme Court has held that the defense must show, by preponderance of the evidence, that the defendant has a valid claim of self-defense, and that the circuit court judge must consider all of the elements of self-defense – except the duty to retreat. State v. McCarty, 437 S.C. 355, 368, 878 S.E.2d 902, 910 (2022) *citing* State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Supreme Court noted the elements of self-defense are:

> First, the defendant must be without fault in bringing on the difficulty.
>
> Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.
>
> Third, 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. If the defendant actually was 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.
>
> Fourth, 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 this particular instance. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (quoting State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). We

> reiterated, however, that "[i]t is the fourth element—the duty to retreat—that is excused under the Act and the Castle Doctrine." *Id.*

In its well-reasoned order granting immunity, the judge here correctly found respondent did not bring on the difficulty in this case. He was returning his girlfriend's clothing and "stuff" to her at the Maddington Place. Respondent had planned on having dinner that night with Remi, but her friends being in town changed Remi's plans. While there was evidence respondent was not happy about their dinner plans being changed, respondent, who the judge found "credible" readily admitted that he and Remi had had many disagreements or arguments in the past. This one was nothing unusual in the larger scheme of events.

Respondent simply drove onto the property at Maddington Place to give Remi her property back. He was not doing anything illegal, and he was inside his own vehicle which belonged to him. The decedent had no property or other interest in respondent's vehicle. The decedent started the difficulties by putting his beer down, threatening respondent, and punching respondent while respondent was inside of his own car.

Melissa Canon heard much of what transpired because she was on the telephone with respondent at the time he was attacked. She heard a noise like somebody had run up to respondent's car and that person said: "Get the fuck out of the car, N, I'm going to beat your ass." It sounded like this person was trying to get inside respondent's vehicle. R. 41 - 42. This person, the decedent, was angry, belligerent and aggressive. R. 43 - 44. He said "get the fuck out, I'm going to fuck you up" more than once and simultaneous with the sound of the decedent trying to get inside of respondent's car. R. 45.

The evidence showed the respondent carried his gun inside the center console of his car. Respondent often went to the shooting range with this gun.

The judge correctly reasoned respondent did not bring on the difficulty where the decedent reached into respondent's car and punched him. It appeared the threatening, belligerent, and aggressive decedent was attempting to continue to punch respondent and open his car door. Respondent reasonably was in fear of great bodily harm or death under these circumstances. While the state notes that the decedent was eventually determined to be "unarmed," respondent had the right to act on appearances, even if his belief was ultimately shown to be mistaken. State v. Dickey, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011) *citing* State v. Fuller, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989). The judge did not abuse his discretion by finding respondent did not bring on the difficulty in this case.

2.

The trial court did not abuse its discretion in finding respondent was in actual danger of great bodily injury or death where the decedent was threatening respondent, where the decedent attacked respondent, threatening him and punching him through the car window where respondent also had the right to act on appearances.

The Court correctly found the evidence in this case showed the decedent was threatening respondent, and the decedent punched respondent through the opened or partially opened window on respondent's occupied vehicle. The judge also noted the toxicology evidence that the decedent was found with cocaine in his pocket, and the decedent had cocaine, Xanax, and marijuana in his system. The decedent was also correctly found to be threatening, belligerent and aggressive.

Respondent was in his own "occupied vehicle" at the time. Respondent having another disagreement with his girlfriend, Remi, in no way justified the decedent's actions. The judge properly rejected the solicitor's argument at the conclusion of the immunity hearing that the decedent was somehow defending Remi. As defense counsel correctly noted, Remi was upstairs and not in need of defending by the decedent or anyone else. As seen, the twenty-year-old respondent and Remi apparently argued or had disagreements on many prior occasions in the past as respondent admitted. The decedent was older than respondent, thirty-three years old, and he weighed one-hundred seventy-five pounds. He was punching respondent, and when respondent grabbed his gun from the center console to protect himself, the decedent attempted to grab respondent's gun.

Self-defense under these circumstances was what respondent was left with given the decedent's aggressiveness and his battering of respondent. The judge did not abuse his

discretion by finding respondent reasonably feared great bodily harm, or worst, death. Respondent was alone in his own car, and he was being attacked and punched. When respondent pulled his gun in self-defense, the decedent tried to take the gun. The "preponderance of evidence" established that respondent did not present the gun until after the decedent had approached the vehicle using threatening words such as "get out of the car and I will fuck you up" or "get out of the car so I can fuck you up" were made by the decedent, before or after he reached into the vehicle. After the gun was presented, Pennington stated "if you pull a gun, you better pull the trigger." Order at 8-9. R. 554 – 555.

Respondent was acting in self-defense and he reasonably feared suffering great bodily harm or death. Respondent was entitled to the presumption of fear pursuant to S.C. Code § 16-11-440(A)(1) & (2), as the trial court reasonably found, and the judge did not abuse his discretion in finding respondent also met these elements of self-defense, elements (2) & (3), under these circumstances. Respectfully, this Court's intervention given the judge's thoughtful, well-reasoned order on this issue, and other issues raised by the state is not warranted.

3.

The trial court did not abuse its discretion in its well-reasoned analysis of S.C. Code § 16-11-440(A)(1) & (2), as to the presumption of fear in the immunity statute by reasoning the evidence showed respondent, at a minimum, had reason to believe the aggressive and cursing decedent was going to harm him where the decedent was threatening respondent and punched him since the decedent was unlawfully and forcibly trying to enter respondent's occupied vehicle at the time the shooting occurred.

The state incorrectly argued that the judge applied a "strict liability" standard as to S.C. Code § 16-11-440(A). Brief of Appellant at 22. The state also argues that the judge -- because one of the decedent's fingerprints was found on respondent's car -- "automatically had the right to claim section (A) presumption of fear." Brief of Appellant at 22-25. Respectfully, this is a misreading of the judge's order, and also of the facts of this case. The judge did not abuse his discretion in finding by a preponderance of evidence that respondent was entitled to the presumption of reasonable fear under S.C. Code § 16-11-440(A)(1) & (2).

There was far more evidence than merely the decedent's fingerprint being found on respondent's vehicle to show the decedent was unlawfully and forcefully entering respondent's "occupied vehicle." The decedent was punching respondent through the car window while cursing at him, and threatening him. Respondent was aware that the decedent was engaged in unlawful and forcible entry or unlawful and forcible act of forcefully entering his occupied vehicle, and the decedent had attempted to remove respondent from the vehicle. Order at 14. R. 560. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011); State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Again, there was evidence the decedent was the aggressor, he was threatening respondent, and he was belligerent. A fair reading of this record and the judge's

order, shows the judge did consider the totality of the evidence and he did not apply a "strict liability" standard that because there was evidence that the decedent merely touched respondent's vehicle he must have reached through the window and punched the respondent. Again, the judge found respondent was a credible witness and there was corroborating evidence of his testimony, including the testimony earlier during the immunity hearing of Melissa Canon who was on the phone with respondent at the time he was attacked. Respondent was entitled to the presumption in S.C. Code § 16-11-440(A)(1) & (2). The judge did consider the evidence of the respondent's window being rolled down, and the extent to which it was rolled down, and the decedent being unarmed and him being unable to open respondent's car door despite him trying to open that car door.

The judge was present at the immunity hearing, he observed the fifteen witnesses and viewed the exhibits introduced into evidence. The judge considered all of the evidence and to the extent it was conflicting, made reasonable findings of fact.

Importantly, as seen, the judge found the respondent credible. The state having a one-sided view of how far respondent's window was down, and "the victim's lack of a weapon or tools by which to break the window, or open the car's door, or unlocked door" does not change the fact the judge made considered, well-reasoned findings of fact and conclusions of law as to this matter. The judge did not abuse his discretion.

4.

The trial court did not abuse its discretion by finding respondent was not engaged in unlawful activity within the meaning of the Protection of Persons and Property Act, and that respondent was also in a place where he had a right to be should he claim that right also under the statute, where respondent was merely on the premises to return his girlfriend's property, and he was not trespassing, neither of which was the proximate cause of the decedent's death regardless.

The state argues that respondent was engaged in crime of unlawful use of a telephone by continuing to call Remi when she did not want him to call her, and therefore he should not be allowed protection under the Persons and Property Act. The state also asserts respondent was trespassing because the condominium parking lot was "private property." Brief of Appellant at 26-31.

First, there was evidence Remi talked to respondent when she wanted to talk to him. Further, the judge found respondent credibly testified and respondent admitted that he and Remi often had disagreements or argued in the past, and they got over those disagreements in the past.

The state also argues that respondent was not in a place where he had a right to be because the parking lot was private property and because he refused to leave when asked to do so. Again, the HOA manager admitted the FedEx trucks made deliveries, and other common-sense activities were allowed on the property as long as visiting people did not break the law. If a visitor broke the law, the residents could call the police. Further, the decedent was not in position of authority to act as some kind rogue vigilante police officer by threatening the respondent, and by punching him.

Importantly, also, Remi was not in any danger in this case, as defense counsel noted, she was upstairs in an apartment. The decedent's drug addled threats and his physical attack upon the respondent were simply unwarranted. The decedent was not Remi's protector, and he was not a security guard for the complex. Further, no legitimate security guard would have engaged in such illegal, aggressive and dangerous behavior.

The state further criticizes the judge by claiming that the judge did not consider the fact that this was a private parking lot. Brief of Appellant at 27-31. The state urges that the judge should have found respondent was trespassing.

The state's arguments were considered by the trial judge when he ruled that respondent was not engaged in unlawful activity and that he was not trespassing. A reasonable review of the evidence respectfully reveals that a person such as respondent who merely came onto the condominium property to see his girlfriend or return her property and "stuff" was not banned from coming onto the property. He was not trespassing.

As to the state's contention that respondent should not be entitled to immunity because he was unlawfully using the telephone, the Supreme Court has held if a defendant had the right to arm himself in self-defense, the fact he is collaterally breaking the law in some other respect, does not disqualify him from his right to act in self-defense. See State v . Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (Read together, State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990) and State v. Goodson 312 S.C. 278, 440 S.E.2d 370 (1994) stand for the proposition that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting).

What occurred in this case was truly unfortunate, but the decedent brought on the difficulty by aggressively threatening respondent, and by reaching into his vehicle and punching

him. The judge reasonably found the respondent acted in self-defense under these circumstances, and that he was entitled to the presumption of harm the legislature put in place when it passed S.C. Code § 16-11-440 (A) (1) & (2). See State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018), where the Supreme Court found the judge's findings that Scott was acting in self-defense were not unreasonable or an abuse of discretion. As in State v. Scott and State v. Manning, 418 S.C. 38, 45, 491 S.E.2d 148, 151 (2016), this Court's standard of review respectfully requires that the judge's findings in his case be upheld. The judge's well-reasoned thoughtful analysis and his conclusion that respondent was entitled to immunity under the statute should be affirmed.

CONCLUSION

By reason of the foregoing arguments, the order of the lower court granting respondent immunity should be affirmed.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 10th day of September, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

APPELLANT,

V.

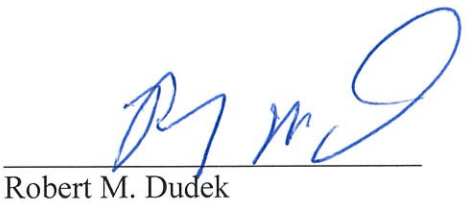
ANIJAH YARNELL,

RESPONDENT

APPELLATE CASE NO. 2023-000571

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Brief of Respondent in the above-referenced case have been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 10th day of September, 2024.



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ATTORNEY FOR RESPONDENT

From: Warren, Kaylynn
To: SC - BROWN MELODY
Cc: Dudek, Robert; Angela Brown
Subject: 2023-000571 The State v. Anijah Yarnell
Date: Tuesday, September 10, 2024 8:28:00 AM
Attachments: 2023-000571 The State v. Anijah Yarnell Final Brief of Respondent.pdf
FBOR Cover Letter.pdf

Good Morning,

Attached for service in the above-referenced case is the Final Brief of Respondent which will be filed today, September 10, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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