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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM MCKINNEY,

APPELLANT

APPELLATE CASE NO. 2023-001692

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A Greenville county jury indicted appellant William McKinney for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a felon. On January 5, 2023, an immunity hearing was held before the Honorable Alex Kinlaw, Jr. (Jan 5, 2003, Tr. 1). Derek Francis Polsinello represented the State. (Jan 5, 2003, Tr. 1). Ashley Boatwright and William Hellams represented appellant. (Jan 5, 2003, Tr. 1). Judge Kinlaw denied immunity from the bench and on January 9, 2023, issued a written order. R. ___ (Order Denying Immunity).

On October 16, 2023, appellant was tried before Judge Kinlaw. Tr. 1. The jury convicted appellant. Tr. 634-35. Judge Kinlaw sentenced appellant to life imprisonment without the possibility of parole pursuant to South Carolina's recidivist statute. Tr. 638-39. This appeal follows.

STANDARD OF REVIEW

While immunity rulings with disputed facts are reviewed under the abuse of discretion standard, errors of law are reviewed *de novo*. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (providing for abuse of discretion review of immunity decisions); State v. Adams, 409 S.C. 641, 646-47, 763 S.E.2d 341, 344 (2014) (stating first the deferential standard of review in suppression hearings, but noting that questions of law are reviewed *de novo*).

ARGUMENTS

1.

The trial court erred in admitting the videotaped interview of a jailhouse snitch and accepting the State's argument that the Rules of Evidence do not apply to immunity hearings.

Appellant William McKinney acted in self-defense. At McKinney's immunity hearing, the State did not dispute that a security guard at Club Dolce in Greenville County shot first, hitting McKinney in the back with a nonlethal round from a real shotgun as McKinney was walking away from the club's parking lot. Surveillance video captured the shooting. None of the three Club Dolce security guards were authorized by SLED to carry firearms. Two of them fired multiple lethal rounds from their handguns at McKinney.

Despite this undisputed evidence, the State did not take McKinney's immunity hearing seriously. It called no witnesses. At the outset, the solicitor told the court McKinney should not even get an immunity hearing for spurious legal reasons. For example, citing the 2005 case of State v. Gilchrist, 364 S.C. 173, 612 S.E.2d 702, the solicitor argued that our Supreme Court decided as a matter of public policy that no one can get immunity for a shooting at a nightclub. Jan 5, 2023, Tr. 22-23. Gilchrist says no such thing. The Protection of Persons and Property Act did not even go into effect until 2006, a year after Gilchrist was decided. See S.C. Code Ann. § 16-11-410.

But the most egregious argument made by the solicitor—and unfortunately accepted by the trial judge—was that South Carolina's Rules of Evidence do not apply during immunity hearings. Jan 5, 2023, Tr. 77-78. McKinney was the first witness called by the defense at his immunity hearing. During cross-examination of McKinney and with no prelude or even pretense of laying a foundation, the solicitor began playing a video, State's Exhibit Three. Jan 5, 2023,

Tr. 77. The video is of jailhouse snitch Dwight Alonzo Littles talking with the police. State's Ex. 3.

Appellant objected, stating, "There's no witness here to testify as to this conversation. He's just putting in a video." Jan 5, 2023, Tr. 77. The solicitor responded, "It's no different than all the other videos we've played here. Your Honor, South Carolina Rules of Evidence 104, this is a pretrial hearing matter. **The Rules of Evidence don't apply.** Your Honor is certainly allowed to hear witness interviews." Jan 5, 2023, Tr. 77 (emphasis added). The solicitor interrupted defense counsel's response and said, "Even if the witness is not here." Jan 5, 2023, Tr. 77.

Defense counsel replied, incredulous, "But there's no witness here. And he's just putting this person up here." Jan 5, 2023, Tr. 78. Judge Kinlaw accepted the State's argument, stating, "I'm going to allow it. I'm going to allow it. I think Rule 104 permits it." Jan 5, 2023, Tr. 78. The State continued to play the video of Littles' statement to the police. Jan 5, 2023, Tr. 78-80.

While it seems beneath the dignity of this Court, unfortunately an Opinion stating that the Rules of Evidence do apply to immunity hearings appears necessary. The rule cited by the solicitor contains zero support for the notion that the Rules of Evidence disappear during such hearings. Rule 104, titled, "Preliminary Questions," states in its entirety:

> (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

> (c) Hearing of Jury. Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
>
> (d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
>
> (e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 104, SCRE.

Perhaps the solicitor's bold error was based on the last sentence of Rule 104(a) that says a court is not bound by the rules of evidence when hearing preliminary questions about the admissibility of evidence. Rule 104(a), SCRE. This part of the rule prevents time-wasting objections on relevance or otherwise when a party begins laying a foundation. For example, a lawyer seeking to admit a document into evidence might begin by showing the document to a witness and asking, "I'm showing you document X. Have you ever seen this document before?" Rule 104 prevents the opposing side from arguing that no relevance or foundation has been laid for the question. Questioning has to begin somewhere and that is the purpose of this rule, properly placed in the 100s section of the rules. See generally, Preliminary Questions of Admissibility, Generally, 30 S.C. Jur. Evidence § 46. The solicitor may also have confused "preliminary hearing" in Rule 1101(d)(3) with "pretrial hearing." See Rule 1101, SCRE.

Imagine if the solicitor's argument were correct. At an immunity hearing, the defendant could put up any number of witnesses to testify that they heard from John who heard from Jane who heard from Jimmy that the victim was an evil person (Rule 404(a), bad character evidence), shot first at the defendant meaning to kill him (Triple Hearsay), and probably was the real killer

of President John F. Kennedy, Jr. (take your pick). Appellate Counsel does not expect the Attorney General's Office to contest the application of the Rules of Evidence in immunity hearings to this Court.

Defense counsel's objection—that no witness was on the stand who could enter the video or talk about the conversation—implicates many rules that would bar the admission of this video. Admission certainly violates the hearsay rules. Littles' discussion with the police was an out-of-court statement offered for the truth of the matter asserted and the solicitor offered no exception.[1] Rule 801(c), SCRE. Admission of the video also violates the rule requiring authentication because McKinney (the witness on the stand) did not make the video and did not appear in the video. Rule 901, SCRE. Even assuming the solicitor was offering the video to impeach McKinney, none of the prerequisites for admission were satisfied. Rule 613, SCRE. Finally, admission of the video with no witness to cross-examine violated the Confrontation Clause. U.S. Const. amend. VI.

Littles tells the police he is known in the jail for his legal acumen and people will tell him details about their cases. (State's Ex. 3). He then tells the police that McKinney told him he got into an argument with someone at the club, left to get his gun, and came back intending to murder him. (State's Ex. 3). When the solicitor questioned McKinney about Littles, McKinney said Littles got all of his information from reading his discovery. Tr. 78-80.

In Issue Two, appellant will argue the trial judge erred in denying him immunity from prosecution. In the written Order denying immunity, Judge Kinlaw does not mention the Littles

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[1] During the trial, the solicitor made a hearsay objection when defense counsel was cross-examining a police officer. Tr. 206. When defense counsel explained he was not offering the statement for the truth of the matter asserted, both the judge and solicitor still demanded to know what exception he was claiming. Tr. 206-213. The solicitor argued, "So what's the exception? He's failing to cite an exception, and he believes as an exception that this truth—I don't know how he spun it, but it's not the law. It's not in the rules of evidence, Your Honor." Tr. 213.

video by name, but refers to "the State's evidence, theory, and witness statements" to find that appellant returned to Club Dolce with a gun to settle the argument. R. __ (Order Denying Immunity, p. 2). The Littles video was improperly admitted and any findings in the Order based on the video are erroneous and must be stricken from consideration in Issue 2. In the event the Court does not reverse on Issue 2, it appears from the Order entered in the case that the judge credited the Littles video with finding appellant brought on the difficulty by coming to the club this Court should reverse on this issue alone.

2.

It was undisputed (and on video) that appellant was shot first in the back as he was walking away. The trial court erred in denying appellant immunity from prosecution because he was illegally carrying a handgun, lacked a concealed weapons permit, and failed to avoid the difficulty by coming to the nightclub where the security guards shot him.

The urging of spurious legal reasoning by the State extended to the ultimate issue at the hearing: McKinney's entitlement to immunity. The solicitor argued that McKinney was not entitled to immunity because he illegally possessed a firearm. McKinney was shot in the back and shot at with lethal rounds by Club Dolce security guards who also illegally possessed firearms. Despite hearing the correct law from appellant on self-defense and immunity, the trial court uncritically accepted the State's deeply flawed reasoning that is inconsistent with South Carolina law. Appellant is entitled to a finding of immunity by this Court or, at a minimum, a new immunity hearing.

The Video

Club Dolce's surveillance video captured the shooting. (State's Ex. 6).[2] The video of the shooting starts at 4:09:34 AM on July 4, 2020. It does not have sound. It is in color. The resolution, while far from high-definition, is better than many surveillance videos seen at criminal trials.

The view shows a street with cars parked and about a dozen people standing near the club. Cars are leaving. Pausing the video at 4:09:35 shows a small SUV facing the left side of the screen. Near the front of the SUV are two dark-clad men walking toward the crowd. These two men are security guards Carlos Jenkins (left) and Monieque Green (right). McKinney's head and shoulders are visible above where the SUV's windshield ends and the roof begins. He is wearing a sleeveless white t-shirt. (State's Ex. 6).

McKinney fully emerges from behind the SUV at 4:09:39. He is walking away from the crowd towards the parking lot at the upper right corner of the screen. He is wearing shorts and has his hands in his pockets. Jenkins emerges from behind the SUV following McKinney at 4:09:41. Jenkins is holding a shotgun pointed down and to the left. At 4:09:41, security guard Lamar James enters the screen from the left walking in the middle of the street. (State's Ex. 6).

Jenkins and Greene continue to follow McKinney as he walks away and passes a small grey sedan. At 4:09:46, McKinney slightly turns towards Jenkins and Jenkins points with his left arm in the same direction McKinney is already walking. McKinney turns back around and keep walking away with his back to Jenkins. (State's Ex. 6).

At 4:09:49, McKinney's path away from the club leads him to walk in front of a car with its headlights facing the camera. At 4:09:51, McKinney passes the headlights and Jenkins is in

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[2] State's Exhibit Six contains many video files. The relevant file is conveniently named "shooting."

front of the car. Greene is behind Jenkins walking at a slightly sideways angle. At 4:09:52, the flash from the muzzle of Jenkins' shotgun can be seen when Jenkins shoots McKinney in the back. McKinney is continuing to walk away and rounds the corner on the car. At 4:09:55, McKinney is behind the car and Greene runs towards the corner of the club to flank him.

At 4:09:56, a muzzle flashes from McKinney's position behind the car. Jenkins moves behind a small blue sedan facing the right side of the screen and can be seen between its red taillights. At 4:09:58, Greene fires multiple rounds at McKinney from his flanking position. Muzzle flashes can be seen from McKinney's position. At 4:10:01, Greene falls to the ground. At 4:10:03, Jenkins is near the front of the blue car and fires multiple rounds from a pistol at McKinney. McKinney keeps running away. He climbs a fence to get away from the club and disappears at 4:10:15. (State's Ex. 6).

The State's Arguments at the Beginning of the Immunity Hearing

Before McKinney could present any argument or evidence, the solicitor argued no need for an immunity hearing existed. Jan 5, 2023, Tr. 7-8. He told Judge Kinlaw that "there's undisputable facts in this case that the Defense must concede to in the beginning. They have to admit, because, Your Honor, this is a club shooting that occurred on video. So this is—this incident is on video." Jan 5, 2023, Tr. 7-8. The solicitor said that because the shooting was on video, this case was not a question of "what happened." Jan 5, 2023, Tr. 8. The State said appellant was "claiming self-defense. On video you see the Defendant, after he gets shot with a ballistic bullet by a security guard, you see the Defendant take a gun out of his pocket, turn around, and he shoots a security guard three times." Jan 5, 2023, Tr. 9-10.

The solicitor's point was that appellant would have to concede that he had a gun. Jan 5, 2023, Tr. 10. This concession seemed conclusive to the solicitor because McKinney had a prior

felony conviction and was not allowed to possess a firearm. Jan 5, 2023, Tr. 10-11. "There's no need for an exhaustive hearing. He doesn't qualify. The Legislature and case law expressly says that this is for law-abiding citizens. And clearly he's acting unlawfully because he was a convicted violent felon in possession of a weapon arriving to a club." Jan 5, 2023, Tr. 11.

Defense counsel responded by handing up the most relevant case, State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019) and, based on Glenn, arguing that "a person can be acting lawfully even if he is in unlawful possession of the weapon if he was entitled to arm himself at the time of the shooting." Jan 5, 2023, Tr. 12-13. The judge asked for a specific page and the solicitor asked for a headnote. Jan 5, 2023, Tr. 13-14. Defense counsel again responded with the correct case quoted in Glenn, State v. Burriss, 334 S.C. 108, 838 S.E.2d 491 (1999), which the Glenn Court cited for the principle that being in unlawful possession of a firearm does not automatically deprive a citizen of his right to self-defense. Jan 5, 2023, Tr. 14. Defense counsel explained that, under Glenn, the State needed to prove that McKinney's possession of a firearm was the "the proximate cause of the homicide." Jan 5, 2023, Tr. 14-15.

Defense counsel explained how the facts of the case fit into self-defense. Jan 5, 2023, Tr. 15-20. The solicitor responded that defense counsel admitted that McKinney concealed the firearm and because McKinney did not have a concealed weapons permit, that was another reason McKinney should not get an immunity hearing because he was acting unlawfully. Jan 5, 2023, Tr. 21. The solicitor then handed up Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) and argued the Supreme Court decided as a matter of public policy that shootings at dance clubs do not qualify for immunity. Jan 5, 2023, Tr. 21-23. Judge Kinlaw wanted to know if Glenn overruled Gilchrist and later commented that "it was clear as a whistle" that Club Dolce was a nightclub. Jan 5, 2023, Tr. 23-29.

Gilchrist was a PCR case dealing with the ineffective assistance of appellate counsel. Gilchrist at 179-80, 612 S.E.2d at 705-06. Trial counsel requested a jury charge that the defendant did not have a duty to retreat based on a 1922 case dealing with a shooting at an Elk's Club, State v. Marlowe, 120 S.C. 205, 112 S.E.2d 921 (1922). Gilchrist argued appellate counsel was ineffective for not raising the trial judge's failure to give the retreat charge. Id. The Supreme Court held appellate counsel was not ineffective because there was no evidence that Gilchrist was a member of a club that charged $5 for admission. Id. The Court then stated it was overruling Marlowe "elevating a 'club' to the possessory status of a home or place of business. This expansion of the immunity-from-retreat doctrine is not good public policy, especially in the contemporary context of 'private clubs.'" Id. at 180, 612 S.E.2d at 706.

Gilchrist's holding dealt only with the common law Castle Doctrine and not the Protection of Persons and Property Act which was passed a year after Gilchrist was decided. Defense counsel responded to the court's entertainment of the solicitor's Gilchrist argument by continuing to cite cases actually dealing with the modern immunity statute, including State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013); State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019); State v. Scott, 420 S.C. 108, 800 S.E.2d 793 (Ct. App. 2017); State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011); and State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016). Jan 5, 2023, Tr. 29-31. The trial judge relented and said he would "listen to some witnesses." Jan 5, 2023, Tr. 32.

As argued in Issue 1, the point of this explanation of the arguments at the beginning of the hearing is the deeply flawed legal reasoning urged on the trial judge by the solicitor. Had it not been for defense counsel's excellent preparation and knowledge of cases interpreting the immunity statute, McKinney might not have even gotten a hearing. While the trial court

ultimately did not adopt the solicitor's public policy argument based on Gilchrist in its Order denying immunity, the legal reasoning used is not much better. After hearing testimony, watching the video, and hearing further argument, Judge Kinlaw ruled from the bench that McKinney was not entitled to immunity and directed the solicitor to prepare the Order that is the subject of this appeal. Jan 5, 2023, Tr. 179.

The Evidence and Testimony at the Immunity Hearing

The State called no witnesses at the immunity hearing. McKinney was the first witness and testified that he remembered July 4, 2020, because he was attacked by security guards at Club Dolce. Jan 5, 2023, Tr. 34-35. McKinney initially arrived on his motorcycle and sat in the parking lot of the restaurant next door to the club with a friend. Jan 5, 2023, Tr. 35. McKinney left to get his truck because he did not want to drive his motorcycle while he was drinking. Jan 5, 2023, Tr. 77.

McKinney's truck was a "450 dually." Jan 5, 2023, Tr. 36. The club's surveillance video shows McKinney circling the parking lot trying to find a parking place. (State's Ex. 6). His silver-grey Ford truck is larger than a full-size Ford F-150 and has expansive fenders around its rear wheels. (State's Ex. 6). The solicitor cross-examined McKinney with the videos showing his truck circling the parking lot in an attempt to make it seem like McKinney was looking for trouble. Jan 5, 2023, Tr. 46-53. McKinney had already explained on direct-examination that he was looking for a parking spot that was big enough or easy enough to accommodate his oversized truck. Jan 5, 2023, Tr. 36.

McKinney initially tried to park between Club Dolce and the restaurant next door. Jan 5, 2023, Tr. 36. A security guard told him he was blocking traffic and that he could not park in that

spot. Jan 5, 2023, Tr. 36. McKinney pulled off and parked in front of the restaurant. Jan 5, 2023, Tr. 36. He "didn't think it was a big deal." Jan 5, 2023, Tr. 36.

As seen on the video, McKinney socialized with his friends at the back of the club. Jan 5, 2023, Tr. 36. He heard one of his friends say, "'I don't know what's going on, but everybody walk off . . . . don't look back.'" Jan 5, 2023, Tr. 37. McKinney looked over his shoulder and saw "guns pointing at us, coming at us." Jan 5, 2023, Tr. 37. He did not know the men were security guards. Jan 5, 2023, Tr. 37. When defense counsel asked where McKinney was heading, he said, "I was actually trying to get away from the gun." Jan 5, 2023, Tr. 37.

McKinney wanted to leave, but his truck was parked in the same direction from which the armed men were approaching so he made for a parked car in the hope of looking for cover to avoid getting shot. Jan 5, 2023, Tr. 37-38. "And as I was getting up to that car, I'm hit four times in my back." Jan 5, 2023, Tr. 38. He heard and felt the shots fired into his back by Jenkins. Jan 5, 2023, Tr. 38. "I'm feeling my back ripped apart." Jan 5, 2023, Tr. 38. Appellant entered two photographs taken after McKinney's arrest showing the bloody injuries to his back from the nonlethal shotgun rounds Jenkins fired. Jan 5, 2023, Tr. 39-40. (Def. Ex. 1 and 2 from immunity hearing). McKinney ducked behind the car, pulled his gun out of his pocket, and returned fire to make them stop shooting at him. Jan 5, 2023, Tr. 38. When asked what was going through his head, McKinney replied, "That I was being ambushed." Jan 5, 2023, Tr. 38. He knew that three armed men were behind him. Jan 5, 2023, Tr. 65.

McKinney said his gun was still in his pocket while he was walking away from Jenkins. Jan 5, 2023, Tr. 46. He did not have it "out and about," he never pointed it at anyone, and never told anyone he was going to shoot them. Jan 5, 2023, Tr. 46. McKinney denied hearing any

commands from Jenkins while he was trying to leave the club. Jan 5, 2023, Tr. 62. "It was loud music playing. I didn't hear nothing." Jan 5, 2023, Tr. 62.

McKinney had been to the club "[q]uite a lot." Jan 5, 2023, Tr. 54. He did not know it was illegal for him to possess a firearm. Jan 5, 2023, Tr. 58. The solicitor asked McKinney if the incident would have happened if he did not have the gun in his pocket and McKinney replied that it would have "[b]ecause they just shot me for nothing." Jan 5, 2023, Tr. 75. He denied having a beef with anyone and denied bringing a gun because he was looking to settle a score. Jan 5, 2023, Tr. 76-77. The State's lead investigator confirmed that there "have been issues out there" at Club Dolce and that it was very common for the club's patrons to have guns. Jan 5, 2023, Tr. 125-26.

Jewell Simpson testified that he was at the club talking to McKinney when he heard someone say "don't turn around." Jan 5, 2023, Tr. 87. Simpson turned around and saw "the security guards coming with the guns, so I kind of backed up." Jan 5, 2023, Tr. 87. McKinney started walking away. Jan 5, 2023, Tr. 87-88. The music was loud and when he heard the first shot, he ducked behind a car. Jan 5, 2023, Tr. 88.

McKinney had not been arguing or fighting with anyone. Jan 5, 2023, Tr. 88-89. Simpson never saw McKinney's gun. Jan 5, 2023, Tr. 89. He did not see McKinney pull his gun out when the guards followed him as he was trying to leave. Jan 5, 2023, Tr. 89. Simpson did see Jenkins shoot first. Jan 5, 2023, Tr. 91.

Appellant called police officer Isaac McKenzie who responded to the club after the shooting. Jan 5, 2023, Tr. 97. Officer McKenzie said he talked to a man named Jarvis Barksdale at the scene who said the security guard told McKinney to get his hands out of his pocket. Jan 5, 2023, Tr. 97. Barksdale thought the guard fired two beanbag shots at McKinney before

McKinney fired any shots. Jan 5, 2023, Tr. 97. He did not hear the guard ever say "drop the gun" or anything to that extent. Jan 5, 2023, Tr. 98.

Appellant called Officer Shawn Cutting who interviewed the security guards after the shooting. Jan 5, 2023, Tr. 100-01. Defense counsel had Officer Cutting read Jenkins' statement into the record. Jan 5, 2023, Tr. 102-03. Jenkins said that near closing, a young woman told him a man in a silver truck was beefing with someone in the parking lot. Jan 5, 2023, Tr. 102-03. Jenkins went behind McKinney and "asked him to let me see his hands multiple times." Jan 5, 2023, Tr. 102-03. "At that time he removed a black handgun out of his right pocket." Jan 5, 2023, Tr. 102-03. Jenkins then fired two rubber rounds at McKinney and then McKinney returned fire. Jan 5, 2023, Tr. 102-03.

Jenkins said nothing about McKinney being in an altercation at the club earlier that night. Jan 5, 2023, Tr. 103. Jenkins did not say that they approached McKinney because he earlier flashed a gun to Monieque Green. Jan 5, 2023, Tr. 103.

Officer Cutting also interviewed security guard Lamar James. Jan 5, 2023, Tr. 104-05. James' version of events did not match the video. Jan 5, 2023, Tr. 106-07. In James' version he gave the police, a woman told Jenkins that McKinney was feuding with someone in the parking lot and that he was going to shoot somebody. Jan 5, 2023, Tr. 106-07. "Suspect [McKinney] was engaged by Jenkins just before . . . reaching the crowd." Jan 5, 2023, Tr. 106-07. On the video, McKinney is obviously in the crowd before Jenkins approaches him. (State's Ex. 6).

According to James' version, Jenkins told McKinney to take his hands out of his pockets and McKinney pulled out his gun. Jan 5, 2023, Tr. 106-07. Contradicting the video, James said, "[McKinney] pulled into a shooting position in front of him, meaning both hands together." Jan 5, 2023, Tr. 107. After being told several times to drop the gun, McKinney refused and then

Jenkins shot him. Jan 5, 2023, Tr. 107. On the video, James is seen approaching well behind Jenkins and Green and when the shooting happens, he retreats behind a car also fleeing the scene. (State's Ex. 6).

Appellant called Officer Bryan Threlkeld who interviewed Jenkins. Jan 5, 2023, Tr. 112. Jenkins said nothing about any altercations involving McKinney earlier in the evening. Jan 5, 2023, Tr. 112. Jenkins told him about the warning from a girl and that he told McKinney to take his hands out of his pocket. Jan 5, 2023, Tr. 112-13. Contradicting the video, in this version, Jenkins said "after McKinney turned around" he fired the rubber round at McKinney from his shotgun. Jan 5, 2023, Tr. 113.

Appellant called police officer Alvin Tracy King who was the lead investigator for this case. Jan 5, 2023, Tr. 116. The police were not able to interview Green after the shooting because of his injuries. Jan 5, 2023, Tr. 154. When the police interviewed Green two months later, in September 2020, Green claimed that he approached McKinney in his truck and told him to not block the road. Jan 5, 2023, Tr. 117. McKinney supposedly flashed a gun and told Green that Green was not the only person with a gun. Jan 5, 2023, Tr. 117. Green said he called Jenkins on the radio and told him about McKinney flashing the gun. Jan 5, 2023, Tr. 118. Officer King confirmed that when they were interviewed immediately after the shooting, neither Jenkins nor James mentioned anything about McKinney flashing a gun at Green. Jan 5, 2023, Tr. 118-19; 120; 135; 162. The officer agreed that all three of the security guards contradicted each other. Jan 5, 2023, Tr. 139.

Officer King confirmed that Monieque Green was not licensed by SLED to be a security guard. Jan 5, 2023, Tr. 116. Even if security guards are licensed by SLED, they need written approval from SLED to carry rifles or shotguns. Jan 5, 2023, Tr. 160. No written approval for

the shotgun Jenkins carried was provided to Officer King. Jan 5, 2023, Tr. 160. When Officer King was asked if it was illegal for Green to have a firearm if he was not licensed to be a security guard, he replied, "It could be construed as that, yes." Jan 5, 2023, Tr. 116-17. SLED's security guard policies say that guards should call the police before they do anything if they witness or suspect a crime and the Club Dolce guards did not call the police until after the shooting. Jan 5, 2023, Tr. 121. Officer King said what appellant should have done when he was walking away from the club was to stop, listen to the security guards, and then leave. Jan. 5, 2023, Tr. 138. The lead investigator said McKinney's prior record and lack of a concealed weapons permit played a part in his decision to charge McKinney with attempted murder. Jan. 5, 2023, Tr. 146. Appellant rested after Officer King's testimony and the State immediately also rested and told Judge Kinlaw it was not going to call any witnesses. Jan. 5, 2023, Tr. 164.

The Arguments at the End of the Immunity Hearing

Appellant cited Glenn and Burriss again at the beginning of his argument after testimony concluded. Jan. 5, 2023, Tr. 164-65. Defense counsel argued McKinney's status as a felon and lack of a concealed weapons permit did not mean he could not arm himself in self-defense. Jan. 5, 2023, Tr. 164-65. He further argued that the State had to prove that the shooting only happened "simply because William McKinney was at this club" and that McKinney was not there for a drug deal or a robbery. Jan. 5, 2023, Tr. 164-65. McKinney was leaving the club and only returned fire in self-defense. Jan. 5, 2023, Tr. 165-70.

The solicitor began his argument by accusing appellant of wanting "a mini trial" and then argued that whether appellant qualified for self-defense was a jury issue, not one of immunity, because appellant was in illegal possession of a gun. Jan. 5, 2023, Tr. 170-78. McKinney brought on the difficulty by coming back to the club after he initially left on his motorcycle. Jan.

5, 2023, Tr. 170-78. "One, he could have stayed home where he was." Jan. 5, 2023, Tr. 174. He again cited Gilchrist as guiding the court "to the proper ruling in this case." Jan. 5, 2023, Tr. 177-78.

The Trial Court's Ruling and its Written Order

Judge Kinlaw read from the statute and then announced his ruling that appellant had not proven self-defense by a preponderance of the evidence. Jan. 5, 2023, Tr. 178-79. The court made no oral findings about the elements of self-defense and instructed the solicitor to prepare an order. Jan. 5, 2023, Tr. 179.

The written Order signed by the trial judge begins with a "FACTS" section that discusses the State's "theories" and allegations. R. ___ (Order p. 1-3). It lists some facts as undisputed. R. ___ (Order p. 1-3). The Order does not make conclusive factual findings in its recitation of the facts. R. ___ (Order p. 1-3). The beginning of the Order says the court weighed the witnesses' credibility, but never makes any specific credibility as to any witness. The Order makes no finding that McKinney's testimony was not credible.

In its "ANALYSIS" section, the Order quotes the immunity statute and the law of self-defense from Curry. R. ___. It then concludes that appellant "was engaged in an unlawful activity" which barred immunity. R. ___ (Order p. 5). The Order gives two numbered reasons why appellant was engaged in an unlawful activity: (1) McKinney's status as a felon in possession of a firearm, and (2) McKinney's lack of a concealed weapons permit. R. ___ (Order p. 5-6). The Order makes no finding that these unlawful activities were the proximate causes of the altercation. R. ___ (Order p. 5-6).

The Order then addresses appellant's self-defense case and concludes he was at fault in bringing on the difficulty because he left the club and then "chose to get in his truck, and drive

back to the club, with a gun in his possession." R. ___ (Order p. 6-7, emphasis in original). It says "according to State witnesses," even though the State called no witnesses, that the security guards learned appellant came back to the club to "settle some type of score with someone." R. ___ (Order p. 7). The Order says that the same analysis applies to whether appellant had ability to avoid the danger. Finally, without analysis, the Order also conclusory states appellant did not show he reasonably believed deadly force was necessary. R. ___ (Order p. 7).

DISCUSSION

The trial court's Order is riddled with legal errors. These legal errors normally would require a new immunity hearing. See Glenn at 123, 838 S.E.2d at 498-99. In Glenn, the defendant asked the Supreme Court to grant immunity based on the record and the Court declined. Id. The remedy in Glenn was a remand for a new trial. Id. But McKinney's case has something that Glenn did not: a video which shows the defendant being shot first in the back. On the record in this case, McKinney can be granted immunity on appeal. At a minimum, this case must be remanded for a new immunity hearing.

McKinney's Status as a Felon in Possession of a gun or Lack of a Concealed Weapons Permit Does Not Bar Immunity

The trial court's Order omits any discussion of Glenn even though it was the centerpiece of appellant's argument at the hearing. Glenn demonstrates that denying appellant immunity because of his felony status is a fatal legal error. The defendant in Glenn violated a no-trespass list and was carrying an illegal weapon, but the Court still unanimously found the trial judge erred in denying immunity.

Glenn involved a shooting at an apartment complex in Greenville County. Glenn at 113-16, 838 S.E.2d at 493-95. Two female tenants at the apartment complex invited Glenn over to

"chill." Id. Glenn went to the store and while he was gone, Kevin Bruster arrived even though he was on trespass notice at the complex for an incident involving one of the tenant's mother. Id. Bruster slashed Glenn's brother with a razor blade, hit one of the female tenants, and said he would kill the mother. Id.

Bruster ran from the girls' apartment to another apartment and got his nephew to go back with him to get his moped. Id. By this time, Glenn returned from the store. Id. Glenn spoke to police officers who responded to the altercation. Id. He noticed Bruster and his nephew "lurking in the shadows." Id. After finishing with the police, Glenn got his belongings from the apartment and was walking to his car. Id. Bruster and his nephew accosted him, blocked his way, and cursed at him. Id.

Bruster made threats that he was going to "get" Glenn and then punched Glenn in the neck. Id. As he fell back, he saw the nephew pulling something from his waistband and heard a woman yell "gun." Id. Glenn pulled a concealed handgun from his pants and fired, hitting the nephew. Id. The State charged Glenn with attempted murder. Id.

The trial judge denied immunity. Id. He found that Glenn had no right to be at the apartment complex because he was on the no-trespass list. Id. The Supreme Court noted that the trial judge "found Glenn was not involved in any unlawful activity, notwithstanding the fact he was carrying an illegal weapon at the time of the shooting, and that his possession of the weapon was not the proximate cause of the incident." Id. at 115, 838 S.E.2d at 494. The trial judge made no findings of fact with respect to the elements of self-defense. Id.

The Supreme Court quoted section 16-11-450(A) of the immunity act and said, "We have acknowledged that 'another applicable provision of law' includes the common law of self-defense." Id. at 117-18, 838 S.E.2d at 496. Trial courts should first analyze the elements of self-

defense and then, if the defendant has failed to meet the elements of reasonable fear or duty to retreat, determine whether the immunity act relieves the defendant of proving these elements. Id. at 118, 838 S.E.2d at 496.

Dealing with the trial judge's technical ruling on the no-trespass list, the Court said foreclosing immunity based on the location of the incident provoking self-defense was irrational. Id. at 119-20, 838 S.E.2d at 497. The "right to be" analysis must be considered using a proximate cause analysis, otherwise the statute's protections would be "up to happenstance." Id.

Most relevant to this case, the Glenn Court also specifically extended the proximate cause analysis to the "unlawful activity" language in the statute. Id. at 120-21, 838 S.E.2d at 497-98. "In addition, we find a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id. To support this statement, the Court cited State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) and included the following quote from Burris: "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." Id. Another citation notes that the State has the burden of proving the unlawful act is the proximate cause of the incident. Id. citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). A footnote found that the trial judge used the correct proximate cause analysis to find that Glenn's unlawful possession of a weapon was not the proximate cause of the shooting. Id. at n.4.

Even though defense counsel repeatedly argued Glenn at the immunity hearing, the trial judge performed no such analysis. It uncritically accepted the solicitor's wrong argument that just because McKinney was a convicted felon and lacked a concealed weapons permit he could not qualify for immunity. Burris and Glenn make it abundantly clear that this kind of status does

not defeat immunity. The court also failed to feed both sides from the same spoon and neglected the fact that the guards were in illegal possession of firearms.

Had the court applied Glenn and conducted a proximate cause analysis, it could not have found that McKinney was barred from immunity. The video shows McKinney peacefully standing in a group of people. When Jenkins approaches with his shotgun in front of him, McKinney starts to leave. Jenkins follows McKinney and shoots him in the back. McKinney's possession of a weapon is not the proximate cause of this incident. Without any unlawful activity, McKinney was in a place where he had a right to be under section 440(C) and had no duty to retreat—even though he was retreating at the time Jenkins shot him.

The Court's Conclusion on Bringing on the Difficulty is an Error of Law

Judge Kinlaw's Order concludes McKinney was at fault in bringing on the difficulty because he left the club and then returned with a gun. R. ___ (Order p. 6-7). First, this holding makes no sense because nothing is wrong with leaving a place and then returning. McKinney was not at the club unlawfully. Second, no evidence in the record other than the improperly admitted Littles video supports a conclusion that appellant left the club without a gun and returned with a gun. McKinney said he left because he was on his motorcycle and did not want to be driving it if he was drinking. Jan. 5, 2023, Tr. 77.

The following exchange between the solicitor and McKinney illustrates the absurdity of this conclusion in the Order:

> Q. Before you arrived at the club at 4 am it was your testimony that you were with your friend at some house in Greenville County, correct?
>
> A. Yes.
>
> Q. If you stayed there, would this have ever happened?
>
> A. If I stayed there?

Q. If you stayed where you were, at your friend's house, that you can't give us the name or the address, that's where you were, if you stayed there would this shooting have ever happened?

A. Clearly, no.

Q. Okay. Let's forget about that. Even if you went to the club and didn't have the gun in your pocket, would this have happened?

A. Yes, it still would have happened.

Q. Why would it have happened?

A. Because they just shot me for nothing.

Jan. 5, 2023, Tr. 75. The solicitor's reasoning—adopted by the trial court—is that people who leave their houses are at fault if something bad happens. This faulty reasoning is an error of law.

Even if the court's conclusion can be read as McKinney was at fault for having a gun at the club, the same proximate cause analysis required by Glenn is required. The court conducted no such analysis and the same error was again made on this prong of self-defense because of the court's ignoring the self-defense precedent cited by defense counsel. Glenn contains a hypothetical example of a jogger in a park entitled to defend herself from an attack at 8:59, but if the park closed at 9:00, she would lose her right to self-defense. Glenn at 120, 838 S.E.2d at 497.

In State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019), the Court wrote, "But just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." See also State v. Dennis, ___ S.C. ___, ___ S.E.2d ___, Op. No. 6082 (S.C. Ct. App. Aug. 14, 2024) (holding the trial court improperly deferred its duty as fact-finder to the jury). The Court reversed over the State's

contention that evidence existed to support the trial judge's denial of immunity. Cervantes-Pavon at 452, 827 S.E.2d at 569. The Court wrote, "[W]e are unable to discern a legally correct basis on which the court relied." Id. Here, the court's flawed legal reasoning was that had McKinney never went to the club, the shooting would not have happened.

Again, the video shows McKinney was not at fault in bringing on the difficulty. He is standing in a crowd and begins to leave when Jenkins approaches him with a shotgun. Jenkins shoots him in the back. It was undisputed that McKinney only fired after being shot. McKinney satisfied this element of self-defense.

The Trial Court Erred in Saddling McKinney with a Duty to Retreat

Because McKinney was not acting unlawfully, he had no duty to retreat. S.C. Code Ann. § 16-11-440(C). The trial court's Order says "The same analysis" regarding bringing on the difficulty meant that McKinney could have avoided the danger by not coming to the club. The trial court erred by even analyzing this prong of self-defense because section 440(C) eliminated it for McKinney because he was where he had a right to be. The Order's "same analysis" is also wrong because of the reasons this analysis of bringing on the difficulty is wrong.

Furthermore, the court's reasoning is flawed because the video shows McKinney **actually retreating**. He is walking away when he is approached and he is walking away when he is shot. Had Jenkins not shot McKinney, he would have left. Even if McKinney were required to prove this prong, the video and his testimony satisfies it.

Getting Shot in the Back with a Shotgun Creates a Reasonable Belief in the Need to Use Deadly Force

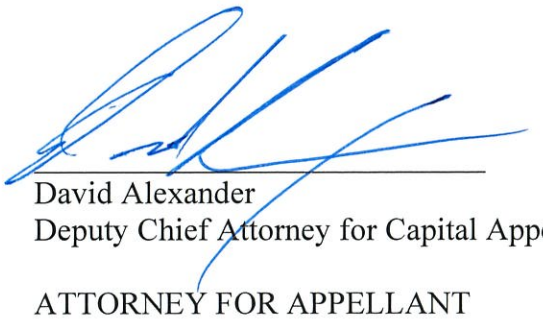
Without any analysis at all, the Order's last paragraph says McKinney failed to prove "he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself

or to prevent the commission of a violent crime. . . ." R. ___ (Order p. 7). This conclusory throwaway line is an error. The court gives no reasons or facts for this conclusion.

Nor could it because of the video showing McKinney being shot in the back. McKinney testified that he felt his back being "ripped apart" and the photographs showed the bloody injuries he suffered from the shotgun round. McKinney's fear of death was reasonable from both a subjective and objective viewpoint.

CONCLUSION

It appears clear from the arguments at the hearing and in the findings in the Order that the trial court denied McKinney immunity because of his prior record and status as felon in possession of a firearm. But even felons are entitled to the right of self-defense. The trial court erred in accepting multiple wrong legal arguments from the solicitor in this case. The video shows McKinney was entitled to immunity. At a minimum, McKinney is entitled to a new immunity hearing. This Court must reverse.



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This 10th day of October, 2024.