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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2023-001692

The State, Respondent,

v.

William McKinney, Appellant.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether Appellant's argument that the trial court erred in admitting the videotaped interview of a jail inmate from Appellant's dorm [Dwight Littles] during which Littles recounted Appellant's alleged statement describing the shooting for which he was on trial, is preserved for appellate review where Appellant made no objection when the State introduced the Littles video into evidence at the immunity hearing? Further, whether the trial court properly allowed use of Appellant's statement to Littles where: (1) the decision to not strictly follow the rules of evidence was within the trial court's broad discretion under the circumstances of an immunity hearing; and (2) the statement was not hearsay because (a) it was not offered to prove the truth of the matter asserted and (b) it constituted a prior inconsistent statement under Rule 801(d)(1), SCRE? Finally, whether any possible error in allowing the State to use the Littles video to cross-examine Appellant was harmless in this case where Appellant suffered no prejudice because the interview could not have reasonably contributed to the trial court's denial of immunity?
2. Whether the trial court properly found Appellant was not entitled to immunity from criminal prosecution under the Protection of Persons and Property Act where *he failed to carry his burden of proving by a preponderance of the evidence that*: (1) he was not at fault in bringing on the difficulty; (2) he had no other means to avoid the danger than to act as he did; (3) his admitted engagement in an unlawful activity was not a proximate cause of the incident; and (4) he reasonably believed repeatedly shooting the victim was necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime?

STATEMENT OF THE CASE

William McKinney (Appellant) was indicted at the July 2020 term of the grand jury for Greenville County for possession of a firearm by person convicted of a violent crime (2020-GS-23-005244A). He was subsequently indicted at the June 2021 term for attempted murder (count 1) and possession of a weapon during the commission of a violent crime (count 2) (2021-GS-23-003551). (Indictments). Appellant was represented by Ashaley Boatwright, Esquire, and Respondent (the State) was represented by Assistant Solicitor Derek Polsinello of the Thirteenth Circuit Solicitor's Office. On January 5, 2023, before the commencement of trial, a hearing on Appellant's motion for immunity under the South Carolina Protection of Persons and Property Act (the Act)¹ was convened at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. (January 5, 2023 Tr.p.1).² At the close of that hearing, after taking testimony, reviewing the evidence submitted, and hearing arguments from both sides, the trial court found Appellant had failed to establish he was entitled to immunity under the Act by a preponderance of the evidence and denied his motion to dismiss the charges. (Tr.p.178, line 3-p.179, line 14).

On October 16-19, 2023, the case proceeded to trial before Judge Kinlaw and a jury. He was represented by Mr. Boatwright and William Robert Hellams, Esquire. After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Appellant guilty beyond a reasonable doubt on all charges. (Trial Tr.p.624-p.627;

¹ (S.C. Code Ann. §§ 16-11-410 to -450) (2020) (the Act).

² For the remainder of this Brief of Respondent, the January 5, 2023, immunity hearing transcript will be referred to as "Tr."

p.634). He was sentenced by Judge Kinlaw to life imprisonment without the possibility of parole for attempted murder; five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime; and five (5) years' concurrent imprisonment for possession of a firearm by a person convicted of a violent crime. (Trial Tr.p.634-p.639; Verdict Forms & Sentencing Sheets). Appellant filed a notice of intent to appeal his conviction and sentence, and a brief in support of his appeal was filed by Deputy Chief Attorney for Capital Appeals David Alexander of the South Carolina Commission on Indigent Defense. This Brief of Respondent follows.

STATEMENT OF FACTS

At approximately 4 a.m. on July 4, 2020, Appellant was outside Club Dolce on White Horse Road in Greenville County, when he pulled a gun from the pocket of his pants and shot club security guard Monique Green (Victim) three times, which resulted in Victim needing emergency surgery. (Tr.p.153, lines 12-21). Immediately after the shooting, Appellant ran from the club, jumped a fence at the edge of the parking lot, got into a blue BMW, and was driven from the scene. He claimed he did not remember what happened to his gun after the shooting, but it was never recovered by the police. (Tr.p.70, line 15-p.75, line 4). Appellant was subsequently charged with possession of a firearm by a person convicted of a violent crime, attempted murder, and possession of a weapon during the commission of a violent crime. He moved for immunity from prosecution under the Act, but at conclusion of a January 5, 2023,

evidentiary hearing, the trial court denied his motion. (Tr.p.178, line 3-p.179, line 14).

Appellant was subsequently taken to trial on October 16, 2023, and was ultimately found guilty of all charges. (Trial Tr.p.634).

Pretrial Immunity Hearing: Preliminary Arguments

On January 5, 2023, prior to Appellant’s case being called for trial, the trial court convened a “stand-your-ground” hearing to address Appellant’s motion for immunity under the Act. (Tr.p.1; p.6). At the outset of the hearing, the solicitor moved for summary judgment and an immediate denial of immunity without the need for the court to take evidence, arguing Appellant should be “absolutely barred” under the “plain meaning” of the Act. He argued that where Appellant was admittedly at a “club” rather than his dwelling, vehicle, or place of business, and was unlawfully in possession of a gun at the time of the shooting, immunity should simply be barred. The State noted the entire legislative intent of the Act was to protect law-abiding citizens—which Appellant was not. (Tr.p.6, line 21-p.11, line 14). Appellant responded by handing up a memorandum in support of his motion for immunity and arguing, primarily in reliance on *State v. Glenn*³ and *State v. Burriss*,⁴ that summary judgment was not appropriate where the court was required to conduct an analysis of the “proximate cause” or “causal connection” to the incident in regard to both the “unlawful activity” and “right to be” elements of Section 16-11-440(C) of the Code. (Tr.p.11, line 15-p.21, line 1). After hearing additional arguments from both sides, the trial court denied the State’s motion for summary judgment and

³ *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019).

⁴ *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999).

asked Appellant to begin presenting witnesses in support of his motion.⁵ (Tr.p.21, line 2-p.33, line 23).

Pretrial Immunity Hearing: Appellant's Testimony

Pursuant to the procedures set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), Appellant presented testimony and other evidence to the trial court in an effort to persuade the judge he should be granted immunity under the Act. First, Appellant took the stand to offer his own version of events in support of immunity. He claimed he shot Victim in response to an unprovoked attack outside of Club Dolce nightclub while talking to friends, when several security guards drew their weapons and shot him as he tried to walk away from them towards his vehicle. Appellant testified he first arrived at Club Dolce on his motorcycle sometime before 4 a.m. but left and later returned in his "450 dually truck" close to 4. He said when he first tried to park, a security guard told him he had to move because he was blocking traffic, so he moved to a different parking spot. Appellant claimed he got out and was standing in the parking lot talking to a group of friends for "maybe not even a minute" when one friend said, though he did not know what was going on, everyone should "walk off" and "don't look back." Appellant said he was scared so he looked over his shoulder as he walked away and "saw

⁵ Notably, Appellant improperly sought to shift the burden of proof at the immunity hearing by incorrectly asserting the State had the burden of proving proximate cause as an element of Section 16-11-440(C) "beyond a reasonable doubt." (Tr.p.27, line 24-p.28, line 25). See *State v. McCarty*, 437 S.C. 355, 373, 878 S.E.2d 902, 912 (2022) (noting the relevant inquiry is not merely whether there is a conflict in the evidence, but, rather, *whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence*) (emphasis added); *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard."); *State v. Dennis*, 444 S.C. 353, 362-63, 907 S.E.2d 142, 147 (Ct. App. 2024) (recognizing circuit courts utilize a pretrial hearing to determine whether a defendant is entitled to immunity under the Act employing a preponderance of the evidence standard).

guns pointing at us, coming at us.” Appellant testified he continued walking away intending to get behind a car when he suddenly got hit four times in the back. He described hearing gunshots and then his “back is being ripped apart.” Appellant testified he then ducked down behind the car, turned around, pulled his gun from his pocket, and started shooting, hoping to get the attackers to stop shooting at him. He said he thought he was being ambushed and was “definitely scared.” Appellant maintained he only shot back in hopes of stopping the attackers from shooting at him. He claimed that no one ever called him by his name or asked him to come to them before they started shooting. He also testified he never had his gun out and about, never pointed it at anybody, and never threatened to shoot anyone before he returned fire in response to the alleged attack. Appellant then authenticated photographs of his injuries and aerial representations of the scene and those photos were marked as Defendant’s Exhibits 1-3 for identification. He next testified as to additional details regarding the incident while portions of the Club Dolce CCTV video from outside Club Dolce was played. (Tr.p.34-p.46; Defendant’s Exhibits 1-3; State’s Exhibit 6). Defendant’s Exhibits 1-3 were later admitted into evidence without objection. (Tr.p.123, lines 2-8).

On cross-examination, the solicitor continued playing portions of the CCTV video while questioning Appellant about the incident. Appellant denied knowing the club was closing when he arrived at 4 a.m. and that security was trying to get people out of the club at that time. He also denied flashing a gun at the security guard who asked him to move his truck. Appellant then admitted he was a convicted violent felon without a valid concealed weapons permit (CWP)

at the time of the incident. He also admitted his gun was in his pocket and acknowledged his hands were in his pockets immediately before the exchange of gunfire. He denied, however, being told multiple times to get his hands out of his pockets—claiming there was loud music playing and he did not hear anything. (Tr.p.46-p.62).

Under further cross-examination, Appellant said he did not know exactly what he had been hit with before he returned fire, but acknowledged no bullet ever entered his flesh and that he did not need emergency surgery after the incident. He acknowledged shooting one of the security guards but did not know his name or how many times he shot him; however, Appellant admitted it was not the security guard he saw holding what he believed was a rifle. Appellant admitted running away after shooting Victim, but claimed it was to avoid getting shot again because people were still shooting at him. He also admitted this was the second time he had been involved in a club shooting. Appellant claimed that despite being convicted of assault and battery with intent to kill in 2006, he did not know that prior conviction prevented him from lawfully owning a gun the night he put it in his pocket and took it to Club Dolce. Returning to the video, Appellant described how he ran from the scene, jumped a fence behind the adjacent Chinese restaurant, and then went to the road seeking help. He said a blue BMW SUV stopped to pick him up and drove him away. Appellant said he did not know the driver, but was friends with the passenger, Kevin Dunham. He claimed he asked the driver to stop the car because he wanted to talk to the police officers who began arriving at the scene, but the driver would not stop. Appellant testified he also wanted medical treatment, yet he continued to run because he

was “delusional.” He claimed he still does not know where the gun is and did not recall if he gave it to the driver, threw it in the woods later, or threw it out the window as they were driving. Appellant admitted that if he had stayed at his friend’s house instead of returning to the club at 4 a.m., the shooting would not have happened; however, he insisted it still would have happened even if he did not illegally have a gun in his pocket. He said he would be surprised to hear the security guards were told he would be returning to the club with a gun in his possession. Appellant denied having a beef with anyone earlier that night, said he had not been in a fight, and said he was not looking to settle a score or seek out any particular individual when he returned to the club with his gun. (Tr.p.62-p.77; State’s Exhibit 6).

**Pretrial Immunity Hearing:
Videotaped Interview of Jail Dorm-mate Dwight Littles**

As cross-examination of Appellant continued, the solicitor began playing a videotape of a law enforcement interview of Dwight Littles, a detainee who had spent time in the jail with Appellant prior to trial. Appellant initially objected to the State’s use of the video, arguing “There’s no witness here to testify as to this conversation. He’s just putting in a video.” (Tr.p.77, lines 13-18). The solicitor responded that it was no different from the previous questioning of Appellant based on other videos that had been played during the hearing. He argued that under Rule 104, SCRE, the rules of evidence do not apply because this was a pretrial hearing. The trial court agreed and allowed the cross-examination to proceed. (Tr.p.77, line 19-p.78, line 4). The State played the video for Appellant and briefly questioned him in regard to how Littles, who was not present, could possibly have known details about the incident unless

Appellant had actually said what Littles claimed Appellant told him. (Tr.p.78, line 5-p.80, line 23). Towards the end of the immunity hearing, after hearing from four additional defense witnesses, the State moved to admit State's Exhibit 3 into evidence. The trial court asked Appellant if there was any objection and Appellant responded: "No, Your Honor." The videotaped interview of Dwight Littles was then admitted into evidence. (Tr.p.151, lines 3-22).

As to the continued cross-examination, Appellant said he recognized the inmate in the orange jump suit as having been in jail with him, but did not know his name. Appellant said the man was not at the club the night of the shooting and the video was then played for Appellant in open court. It consisted of Littles recounting what he claimed was Appellant's statement to him, describing details about the shooting. When the video was done playing, Appellant confirmed Littles was not present at the incident scene. Appellant claimed Littles likely knew the details he knew simply from having seen Appellant's paperwork and not from anything Appellant said to him. Appellant claimed Littles must have read some of the details from the motion Appellant's attorney had prepared, and then must have tried to piece the rest together. He insisted you could tell Littles was lying. (Tr.p.76, line 5-p.80, line 23). At the end of his cross-examination, Appellant watched a videotape of his in-car interview with police during which he asked if they had caught the shooter yet. He claimed he was "out of it" and was not trying to throw law enforcement off the trail. (Tr.p.80, line 24-p.82, line 9; State's Exhibit 4).

On redirect examination, Appellant referred to the videotaped interview with Littles as "the jail house snitch video." He noted how the video evidence from the scene refuted one of

Littles' primary claims—that Appellant said he shot first—which proved Littles lied. He noted it was common for a jail house snitch to try to come forward with evidence in an effort to get a better deal and testified Littles was clearly “not accurate in what he was saying.” (Tr.p.83, line 18-p.84, line 17).

Pretrial Immunity Hearing: Additional Testimony

After completing his own testimony, Appellant called his friend, Jewell Simpson to the stand. Simpson testified he was present in court while all the videos were played, and that he was at Club Dolce the night of the incident. He said he was in the small group of friends talking to Appellant in the parking lot on that night when he heard someone say: “don't turn around.” Simpson said he did turn around and saw “the security guards coming with the guns,” so he backed up. He testified Appellant started walking away and then the security guards shot at Appellant. Simpson testified the security guards said something to Appellant, like “hey,” but he does not know exactly what they said because everyone was talking. He claimed they never said Appellant's name—only that they were yelling something at him. Simpson testified Appellant was not arguing with anyone or trying to fight anybody that night. He said he never saw Appellant with a gun in his hand or anywhere on him, and he did not see Appellant pull his gun out before the security guards shot him. (Tr.p.86-p.89). On cross-examination, Simpson admitted that despite claiming he saw the security guard shoot first, he never approached law enforcement to tell them he was there and what he saw. He also admitted having prior

convictions for giving false information to police and carrying an unlawful weapon, and acknowledged doing federal prison time for conspiracy. (Tr.p.90-p.95).

Next, Appellant called Deputy Isaac McKenzie of the Greenville County Sheriff's Office (GCSO), to the stand. McKenzie testified he was involved in the investigation after the shooting and that he interviewed Javaris Barksdale, one of the Club Dolce security guards who was at the scene. He said Barksdale told him Victim and a second security guard who was carrying a bean-bag shotgun approached Appellant and gave loud verbal commands for him to get his hands out of his pocket and to quit reaching in his pocket, at which point the security officer fired two shots from the shotgun before Appellant discharged his firearm. McKenzie testified he did not remember Barksdale saying he heard the guards tell Appellant to "put down the firearm," or "drop the gun," or use Appellant's name when ordering him to get his hands out of his pocket. (Tr.p.96-p.98).

Appellant then called GCSO Detective Shawn Cutting to the stand. Cutting was also involved in the investigation of the incident. He interviewed and took a written statement from Carlos Jenkins, the security guard with the bean-bag shotgun who fired at Appellant. Cutting read Jenkins' statement into the record, verbatim. In that statement, Jenkins said that close to closing time, a young lady told him to keep an eye on a guy in a silver pickup truck who was beefing with someone in the parking lot. Jenkins said he and "Green" [Victim] then approached Appellant and asked him multiple times to let them see his hands. At that point, Appellant removed a black handgun from his right pocket, which prompted Jenkins to fire two bean bag

rounds at Appellant, followed by Appellant shooting at him and Victim. Cutting testified Jenkins did not say he and Victim approached Appellant because he had previously flashed a gun at Victim, rather, it was because the female patron warned them Appellant was beefing with somebody. (Tr.p.101-p.104).

Cutting testified he also interviewed Lamar James shortly after talking to Jenkins, but only had notes from that interview rather than a written statement. He said James told him the security guards initially approached Appellant because a female told Jenkins: “watch out for this guy,” that “this guy was feuding with another guy that was at the club,” and to “watch him because he was going to shoot somebody.” James said Jenkins told Appellant to take his hands out of his pockets, at which point Appellant pulled a black semi-automatic pistol from his pocket and got into a “shooting position.” James said Appellant was told several times to drop the gun and when he refused, Jenkins fired his shotgun. (Tr.p.104-p.107).

Next, Appellant called GCSO Investigator Bryan Threlkeld to the stand. Threlkeld assisted Cutting with interviewing three people, including Jenkins. He testified Jenkins told them there had been minor altercations at the club that night, but not involving Appellant. Threlkeld testified Jenkins said he had been approached by a female who pointed out Appellant’s vehicle, said he had a gun, and said Appellant “was here to do whatever.” Jenkins said that when they approached Appellant, he had at least one hand in his pocket, so Jenkins ordered him to remove his hand. When Appellant did, he was holding a gun. Jenkins told him to drop the

weapon, but Appellant refused and turned around, so Jenkins “fired a less than lethal rubber ball round from his shotgun.” (Tr.p.111-p.114).

Finally, Appellant called GCSO Investigator Alvin Tracy King to the stand. King testified he was the lead investigator for the incident. He interviewed Victim and took a written statement, which he read verbatim into the record. In that statement, Victim said he was patrolling the parking lot at Club Dolce with James when a young lady approached them about a guy who had just pulled in, in a pickup truck. She told them he was a known troublemaker and to keep an eye on him. Victim said he watched Appellant circle the parking lot several times, and when Appellant parked in a spot blocking traffic, Victim approached the truck and told him he had to move. King testified Victim said Appellant then got mad, stated he was not blocking the road, and lifted a gun near his face and said Victim “was not the only one with a gun” before moving his truck. Victim said James claimed to have also seen the gun so Victim called Jenkins on the radio to tell him what had happened. Victim said Appellant was standing in the parking lot talking to a group of people when Appellant regrouped with Jenkins and they approached. Victim said Jenkins began giving commands for Appellant to get on the ground and keep his hands out of his pockets, but when Appellant refused and started to reach in his pocket, Jenkins shot Appellant one time in the back with a bean-bag round. Victim said Appellant then began ducking behind cars and when Victim tried to cut him off, he saw Appellant with a gun in his hand, shooting in Victim’s area. Victim pulled a gun and returned two shots before Victim was hit and ended up on the ground. (Tr.p.115-p.118). King acknowledged the stories provided by

Victim, Jenkins, James, and Barksdale were a little different, but maintained it was entirely appropriate, under the circumstances they all described and the information they were given, for the security guards to approach Appellant in an attempt to get him to leave the club. King noted that, Appellant's actions in leaving the club, returning with a firearm, and circling the parking lot were consistent with him having had a beef with someone earlier and looking for them when he returned. Appellant attempted to get King to offer an opinion on whether Appellant's actions were reasonable after he had been shot in the back with the bean-bag gun; however, the State objected, arguing this was a determination that had to be made by the trial court in ruling on immunity. (Tr.p.118-p.141). On cross-examination, King identified each of the six State's Exhibits, and they were introduced into evidence without objection. (Tr.p.147-p.152).

After Appellant completed presenting evidence and rested, the State rested without calling any additional witnesses. (Tr.p.63-p.164).

Pretrial Immunity Hearing: Post-Evidentiary Arguments

At the conclusion of the pretrial immunity hearing, the trial court heard a closing argument from Appellant as to why he believed he was immune from prosecution under the Act. He argued immunity really boiled down to two things: the location of the incident [was he in a place he had a right to be] and his unlawful activity in carrying a firearm, and whether either or both of those things were the proximate cause of the shooting. Appellant initially acknowledged he had the burden to prove all the necessary elements for immunity by a preponderance of the evidence. However, he then confused his immunity burden of proof with the burden of proof at

trial, incorrectly arguing that once he merely asserted self-defense, the burden shifted to the State to disprove the elements of self-defense beyond a reasonable doubt. Appellant proceeded to challenge the notion that his unlawfully carrying a handgun was a proximate cause of the shooting, claiming Jenkins shot him in the back simply because he had his hands in his pockets and wasn't listening to Jenkins' commands. Ignoring the law enforcement testimony relaying accounts from multiple eyewitnesses who saw Appellant draw his gun before Jenkins fired his non-lethal shotgun, Appellant argued Jenkins gave inconsistent accounts to different people and appeared to be "scrambling, trying to figure out what he can say so that he doesn't get arrested, which is what should have happened in this case." (Tr.p.164, line 4-p.166, line 17). Appellant next argued he had proven the elements of self-defense by a preponderance of the evidence by showing he was not at fault for bringing on the difficulty, that he had a reasonable fear he was in imminent danger of death or great bodily injury, and that he had no other probable means of escape or avoiding the danger than to return fire. Finally, Appellant argued that even if the trial court found he had flashed his gun at Victim in a threatening way prior to the shooting, he effectively withdrew from the confrontation in good faith when he then moved his truck to another parking space. For all of these reasons, he argued he was entitled to a grant of immunity under the Act. (Tr.p.166, line 18-p.170, line 13).

In response, the State argued Appellant was not entitled to immunity under the terms of the Act because he failed to prove all of the necessary elements for each provision. The solicitor noted the language in the Act setting forth the intent and findings of the General Assembly that:

“ . . . it is proper for *law-abiding citizens* to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action in the defense of themselves and others.” S.C. Code Ann. § 16-11-420(B) (emphasis added). He argued Appellant was simply not acting as a “law-abiding citizen” when he shot Victim. The State then addressed the two possible avenues Appellant was pursuing in his attempt to prove immunity: (1) common law self-defense as “another applicable provision law” under subsection (A); or (2) responding when “attacked in another place where he has a right to be” under subsection (C). In regard to self-defense and subsection (A), the State primarily argued Appellant failed to show: (1) he was without fault in bringing on the difficulty and (2) he had no other possible means of avoiding the danger. In regard to subsection (C), the State continued to focus on Appellant’s unlawful activity of being in possession of a firearm, a firearm he: (1) brought to a crowded nightclub at 4 a.m. (either back to the club or to the club for the first time after he retrieved it from a friend’s house) in order to settle a beef and possibly “shoot somebody;” (2) showed to a club security guard in the parking lot when he got mad after returning and being asked to move his truck; (3) concealed in his pocket where his hands stayed despite multiple commands from security guards to show his hands when he was approached; and (4) ultimately pulled from his pocket before Jenkins shot Appellant with bean-bag rounds from a shotgun. The State neither relied upon nor even referenced the videotaped interview with Littles during its closing argument in opposition to a grant of immunity. (Tr.p.170-p.178).

Pretrial Immunity Hearing: Trial Court's Ruling

After hearing from the parties, the trial court quoted language from subsection (C) of the statute describing the elements needed to prove immunity, and then orally ruled as follows:

After listening to the testimony of both sides, the Court is inclined to make the following finding; The Court finds that the Defendant has not proven self-defense by a preponderance of the evidence. The Court would, therefore, deny him immunity and would not dismiss the current charge pending against him. That'll be the ruling of the Court.

(Tr.p.179, lines 9-14). The trial court then asked the State to prepare a proposed order.

(Tr.p.179, lines 15-25).

Four days later, on January 9, 2023, the trial court issued an eight-page "Order Denying Immunity." The first paragraph of the Order concludes: "Based on the testimony and evidence presented by both sides during the hearing, and *after weighing the credibility of all witnesses*, the Court *finds that the facts as set forth herein* have been established by a preponderance of the evidence." (Order, p.1) (emphasis added). The trial court then proceeded to find a litany of facts, mostly supporting the State's theory of the incident, before conducting a detailed written analysis of how those facts supported or failed to support the elements of immunity described in subsection (C) of the Act and/or the common-law elements of self-defense implicated by subsection (A) of the Act. The trial court ultimately concluded Appellant had failed to carry his burden of proof under either subsection (C) or subsection (A) of the Act by finding as follows:

Based on the factual findings and legal analysis set forth herein, the Court finds that the Defendant failed to prove the fourth element of self-defense by a preponderance of the evidence.

Moreover, under S.C. Code § 16-11-440(C), the Defendant failed to establish by a preponderance of the evidence that he reasonably believed it was necessary to use deadly force to prevent death or great bodily injury to himself or to prevent the commission of a violent crime as defined in S.C. Code § 16-1-60.

(Order, p.7). Although the Order ended with these broad conclusions, the trial court's overall analysis concluded Appellant failed to carry his burden of proof in four particular respects.

finding: (1) "the defendant was engaged in an unlawful activity, thus barring the defendant from immunity;" (2) "the defendant was at fault in brin[g]ing on the difficulty upon himself;" (3) "the defendant did have other probable or alternative means of avoiding the danger; and (4) "the defendant failed to establish by a preponderance of the evidence that he reasonably believed it was necessary to use deadly force to prevent death or great bodily injury to himself or to prevent the commission of a violent crime." (Order, p.5-p.7). Similarly, the trial court effectively concluded Appellant's decision to unlawfully possess a firearm was indeed a *proximate cause* of the shooting when it found:

Reasonably, had the defendant chose to stay at his friend's residence, or, had the defendant even chose to come back to the club, without the gun in his pocket, this shooting arguably likely would have never happened, and thereby could have been prevented by the defendant. According to State witnesses, *the defendant flashed a gun at club security personnel* around 4:05 AM, and club security personnel received information that *this defendant was coming back to the club, with a gun*, looking to settle some type of score with someone. Therefore, *it is reasonable to conclude that the defendant's own decisions and actions that early morning were a direct consequence of the events unfolding*, and that the defendant was at fault in brin[g]ing on the difficulty upon himself.

(Order, p.7) (emphasis added).

Trial

On October 16-19, 2023, the case proceeded to trial before Judge Kinlaw and a jury. After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Appellant guilty of all charges. (Trial Tr.p.624-p.627; p.634). He was sentenced by Judge Kinlaw to life imprisonment without the possibility of parole for attempted murder; five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime; and five (5) years' concurrent imprisonment for possession of a firearm by a person convicted of a violent crime. (Trial Tr.p.634-p.639; Verdict Forms & Sentencing Sheets).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard. *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022); *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). The appellate court, in turn, reviews an immunity determination for an abuse of discretion. *Id.*; *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). “An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when

grounded in factual conclusions, is without evidentiary support.” *McCarty*, 437 at 365, 878 S.E.2d at 908 (2022) (quoting *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)); see also *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (“In appeals of pretrial rulings, this Court is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’” (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge’s ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); see also *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) (“The trial court will only be reversed when there is no evidence to support the ruling below.”).

ARGUMENT

I.

Appellant's argument that the trial court erred in admitting the videotaped interview of a jail inmate from Appellant's dorm [Dwight Littles] during which Littles recounted Appellant's alleged statement describing the shooting for which he was on trial, is not preserved for appellate review because Appellant made no objection when the State introduced the Littles video into evidence at the immunity hearing. In any event, the trial court properly allowed use of Appellant's statement to Littles because: (1) the decision to not strictly follow the rules of evidence was within the trial court's broad discretion under the circumstances of an immunity hearing; and (2) the statement was not hearsay because (a) it was not offered to prove the truth of the matter asserted and (b) it constituted a prior inconsistent statement under Rule 801(d)(1), SCRE. Finally, any possible error in allowing the State to use the Littles video to cross-examine Appellant was harmless in this case because Appellant suffered no prejudice where the interview could not have reasonably contributed to the trial court's denial of immunity.

Appellant argues the trial court erred in admitting the videotaped interview of a jail inmate [Dwight Littles] who shared his dorm, an interview during which Littles recounted what he claimed was Appellant's statement to him, wherein Appellant described details about the shooting for which Appellant was now on trial. He particularly complains about the trial court's ruling that the South Carolina Rules of Evidence do not apply to immunity hearings, arguing this was the improper basis on which the court allowed the State to cross-examine Appellant about his alleged statement to Littles. Appellant acknowledges "Judge Kinlaw does not mention the Littles video by name," but argues the trial court's reference to "the State's evidence" suggests the "the judge credited the Littles video with finding Appellant brought upon the difficulty by

coming to the club.” (Brief of Appellant, p.7-p.11). The State disagrees and submits this argument should be denied and dismissed for several reasons.

First and foremost, the State submits this argument is not preserved for appellate review because Appellant affirmatively stated he had no objection when the Littles video was moved into evidence. In any event, even if somehow preserved, the trial court’s discretionary decision to allow use of the Littles video did not constitute reversible error because: (1) an immunity hearing could reasonably be construed as a proceeding in the nature of a preliminary hearing—a hearing during which the rules of evidence explicitly do not apply under Rule 1101(d)(3), SCRE; (2) the statement was not hearsay because (a) it was not offered to prove the truth of the matter asserted and (b) it constituted a prior inconsistent statement under Rule 801(d)(1), SCRE; (3) Appellant suffered no prejudice where the trial court rather than a jury was reviewing the evidence, acting as the fact-finder, and ruling on immunity under the appropriate burden of proof; and (4) Appellant suffered no prejudice where (a) the video evidence from the scene conclusively contradicted the only damaging claims recounted by Littles and (b) the State did not reference or mention the Littles video in arguing immunity should be denied. For all of these reasons, this argument should be rejected and the denial of immunity as well as Appellant’s convictions should be affirmed.

Issue Preservation

In order to preserve a trial error for appellate review, the appellant’s objection at [the hearing] must be contemporaneous to the introduction of the objectionable evidence. *State v.*

Byers, 392 S.C. 438, 710 S.E.2d 55 (2011); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999).

If no evidence is offered between a preliminary ruling and the admission of the evidence ruled upon, then “the decision is final” and there is no need for an additional objection. *State v. Morales*, 439 S.C. 600, 606–07, 889 S.E.2d 551, 555 (2023) (quoting *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021)). When additional evidence is offered in the meantime, however, an additional, contemporaneous objection is usually required “because ‘the evidence developed during [the interim] may warrant a change in the ruling.’” *Morales*, 439 S.C. at 607, 889 S.E.2d at 555 (quoting *Jones* at 144, 866 S.E.2d at 561 which in turn was quoting *State v. Mueller*, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995)).

Here, the trial court’s ruling—to permit the State to play the Littles video before questioning Appellant about the statement he allegedly made to Littles—was made during the State’s cross-examination of Appellant. It was entirely consistent with other actions permitted by the trial court that did not strictly comply with the rules of evidence, like allowing Appellant to play portions of the security camera video during direct examination of defense witness and having law enforcement officers read witness statements into the record. Although Appellant initially objected to the State’s use of the video (Tr.p.77, lines 13-18), the State did not move to admit the video into evidence at that time. Indeed, it was not until *after* Appellant’s quite effective testimony regarding the Littles video during redirect examination and *after* four intervening witnesses had testified for the defense that the State moved to admit the Littles video [State’s Exhibit 3] into evidence. The trial court asked Appellant if there was any objection and

Appellant responded: “No, Your Honor.” He made no reference to his prior objection or the State’s previous use of the Littles video. The Littles video was then admitted into evidence. (Tr.p.151, lines 3-22). Because Appellant failed to make a contemporaneous objection to the trial court’s decision to admit the Littles video into evidence when the State moved that it be admitted, the argument was waived and this issue is unpreserved for appellate review. *Morales; Byers; Aldret*.

Rules of Evidence - Applicability

Despite trial counsel’s clear decision to abandon any objection to the admission of the Littles video, on appeal Appellant complains that: “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.” (Brief of Appellant, p.4). He challenges the solicitor’s and trial court’s references to Rule 104, SCRE, and asks this Court to imagine a parade of horrors were the rules of evidence not applicable to immunity hearings. (Brief of Appellant, p.6-p.7). Appellant acknowledges the solicitor “may have also confused ‘preliminary hearing’ in Rule 1101(d)(3) with ‘pretrial hearing’” (Brief of Appellant, p.6); however, he fails to address why Rule 1101 might not render the rules of evidence inapplicable to a miscellaneous proceeding like a pretrial immunity hearing. And while Appellant “does not expect the [State] to contest the application of the Rules of Evidence in immunity hearings,” (Brief of Appellant, p.7), there are parallel circumstances and considerations of judicial economy which suggest the trial court may have acted well within its wide discretion in determining the rules need not strictly

apply, particularly where Appellant was given a full and fair immunity hearing where both parties relied on other evidence that would otherwise not have been admissible under those very same rules.

The rules of evidence provide in relevant part:

(d) **Rules Inapplicable.** The rules (other than with respect to privileges) do not apply to the following situations.

....

(3) *Miscellaneous Proceedings.* Proceedings for extradition; preliminary hearings in criminal cases; sentencing (except in the penalty phase of capital trials as required by statute); dispositional hearings in juvenile delinquency matters, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

Rule 1101(d), SCRE (emphasis added). Preliminary hearings in criminal cases are held before a magistrate, who must determine if there is probable cause to support the arrest. *See State v. Ramsey*, 381 S.C. 375, 376–77, 673 S.E.2d 428, 429 (2009) (noting the purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed the crime and to warrant the defendant's subsequent trial). The South Carolina Rules of Criminal Procedure provide: “If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged” Rule 2(c), SCRCrimP. Thus, the magistrate court functions in a similar fashion to a judge of the court of general sessions in an immunity hearing, such that a denial of immunity means the case is bound over for trial and a grant of immunity means the

defendant's charges are discharged from prosecution. Where the South Carolina Rules of Evidence explicitly do not apply to preliminary hearings, it is an entirely reasonable extension of the non-exhaustive list of examples of "miscellaneous proceedings" in Rule 1101(d)(3) to conclude they also should not apply to immunity hearings before the court of general sessions. *Cf. Hollis v. Lynch*, 827 F.3d 436, 443 (5th Cir. 2016) ("The statutory use of a non-exhaustive list of illustrative examples does not exclude items not expressly specified."); *United States v. Hawley*, 919 F.3d 252, 256 (4th Cir. 2019) (noting the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle).

Additionally, where the trial court is the sole finder of fact, it is well-suited to weigh whatever evidence is presented and to make relevant inferences in regard to the comparative weight to assign to such evidence in determining whether a defendant has carried his or her burden of proving entitlement to immunity. Finally, dispensing with a strict application of the rules of evidence would allow for an immunity hearing to proceed more quickly and efficiently so the trial court could move more directly to its analysis under the preponderance of evidence standard without getting bogged down with, as Appellant describes in another context, "time-wasting objections."

The State acknowledges this is a novel proposition and that this Court has recently suggested the Rules of Evidence *do* apply to immunity hearings. *See State v. Dennis*, 444 S.C. 353, 368, 907 S.E.2d 142, 150 (Ct. App. 2024), *petition for certiorari* filed December 9, 2024, ("While the use of contemporaneous, live testimony is the proper mode of evidence on the

remand of this case, neither party is precluded from requesting to use prior sworn testimony if it can prove under the Rules of Evidence that doing so is necessary.”). Nevertheless, the issue of whether a circuit court judge, acting as the finder of fact in a pretrial matter that will result in either dismissal of the prosecution or the case proceeding to trial, should be shackled by strict adherence to the rules of evidence where its decision is akin, at least in result, to the decision of a magistrate in a preliminary hearing, is effectively an unresolved issue of interest this Court may wish to address.

Rules of Evidence – If Applied

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Here, the Littles video was clearly not offered to prove the truth of what Littles or Appellant asserted—the details of the offense provided by Appellant—particularly where both parties to the hearing knew the video evidence from the scene was inconsistent with those assertions. Instead, it was offered in hopes of impeaching Appellant’s testimony by showing inconsistencies in the stories he told different people at different times regarding the details of the offense. As such, the Littles video was not hearsay. Alternatively, even if the statement technically meets the definition of hearsay in subsection (c), the Littles video was not hearsay because it was used as a prior statement by Appellant that was inconsistent with Appellant’s testimony at the immunity hearing. See Rule 801(d)(1)(A), SCRE (“A statement is not hearsay if . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning

the statement, and the statement is (A) inconsistent with the declarant's testimony . . ."). Again, under such circumstances, Appellant's alleged statement to Littles was not hearsay and was admissible. Whatever the case, as argued below, if the Littles video is considered excludable hearsay, its admission was nonetheless non-prejudicial such that the trial court's ruling does not constitute reversible error.

No General Prejudice – No Jury

The overarching purpose of the South Carolina Rules of Evidence is described in Rule 102, which provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Rule 102, SCRE. The rules then focus on preventing *jurors* from hearing evidence which might suggest a decision on an improper basis. *See, e.g.*, Rule 103(c), SCRE. ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to *prevent inadmissible evidence from being suggested to the jury by any means*, such as making statements or offers of proof or asking questions in the hearing of the jury.") (emphasis added); *see also State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (explaining that relevant evidence may be kept from the jury due to unfair prejudice, and that 'unfair prejudice' means an undue tendency to suggest a decision on an improper basis).

As argued above, where the trial court is acting as the sole fact-finder, it is well-suited to weigh whatever evidence is presented and to make relevant inferences in regard to the

comparative weight to assign to such evidence in determining whether a defendant has carried his or her burden of proving entitlement to immunity. Since a primary goal of the rules of evidence is to shield the jury from hearing evidence which might lead them to determine a case on an improper basis, that goal is not served by shielding a learned trial judge in the same fashion. Such concerns about prejudice have very little application to a circuit court judge acting alone, particularly where any objectionable evidence, proffers, etc., would be made in front of the same person who is rendering the ultimate decision. This is presumably the very reason the rules of evidence do not apply to probation revocation proceedings and other miscellaneous proceedings where a jury is not present. Rule 1101(d)(3), SCRE. As a general proposition, it is simply hard to imagine how either a criminal defendant or the State would suffer measurable prejudice from a trial court's failure to strictly adhere to the rules of evidence at an immunity hearing.

No Specific Prejudice – Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Only errors so substantial that they result in a [decision] which would not otherwise have been rendered require reversal. *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). “A harmless error analysis is contextual and specific to the circumstances of the case.” *State v. Byers*, 392 S.C. 438, 447, 447–48, 710 S.E.2d 55, 60 (2011). “No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be

determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the [proceeding].” *Id.* at 447–48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). A defendant seeking reversal based on error in admission of evidence has the burden of showing that evidence was prejudicial. *State v. McElveen*, 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

The State submits any error in the admission or use of the Littles video for cross-examination was harmless, first, because Appellant effectively nullified any possible prejudice during his redirect examination and, second, because Littles’ comments on the video were insubstantial in view of the evidence presented of Appellant’s failure to prove entitlement to immunity, such that it could not reasonably have affected the result of the immunity hearing. *See State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the [decision]). On redirect examination, Appellant referred to the videotaped interview with Littles as “the jail house snitch video.” He noted how the video evidence from the scene directly refuted one of Littles’ primary claims—that Appellant said he shot first—which proved Littles lied. He noted it was common for a jail house snitch to try to come forward with evidence in an effort to get a better deal and testified Littles was clearly “not accurate in what he was saying.” (Tr.p.83, line 18-p.84, line 17). In regard to prejudice, these efforts effectively rendered the Littles video either meaningless or even detrimental to the State’s case in response to the claim of immunity.

Furthermore, the State did not highlight or even mention the Littles video in its closing argument, and the trial court did not reference it in its ruling denying immunity. Thus, any error in admitting the Littles video was non-prejudicial and harmless. Even if the Littles video was improperly admitted, Appellant has not shown the requisite prejudice to support reversal of the denial of immunity. *State v. Price*, 368 S.C. at 499, 629 S.E.2d at 366. For all of these reasons, this argument should be denied and dismissed, and the denial of immunity under the Act as well as Appellant's convictions should be affirmed.

II.

The trial court properly found Appellant was *not* entitled to immunity from criminal prosecution under the Protection of Persons and Property Act because *he failed to carry his burden of proving by a preponderance of the evidence that: (1) he was not at fault in bringing on the difficulty; (2) he had no other means to avoid the danger than to act as he did; (3) his admitted engagement in an unlawful activity was not a proximate cause of the incident; and (4) he reasonably believed repeatedly shooting the victim was necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime.*

Appellant argues the trial court erred in denying him immunity from prosecution on grounds that he was illegally carrying a handgun and that he failed to avoid the difficulty, and that as a result he is entitled to a finding of immunity or, at a minimum, a new immunity hearing. (Brief of Appellant, p.8). He claims the trial court's order "is riddled with legal errors" that "normally would require a new immunity hearing." (Brief of Appellant, p.20). First, Appellant argues the trial court did not conduct the required *proximate cause* analysis before concluding his

unlawful activity precluded immunity under the Act. He contends the trial court instead “uncritically accepted the solicitor’s wrong argument that just because [Appellant] was a convicted felon and lacked a concealed weapons permit he could not qualify for immunity.” (Brief of Appellant, p.20-p.22). Appellant argues that “had the Court applied *Glenn* and conducted a proximate cause analysis, it could not have found [he] was barred from immunity.” (Brief of Appellant, p.23). Next, Appellant argues the trial court holding that he was at fault for bringing on the difficulty: (1) “makes no sense because nothing is wrong with leaving a place and then returning;” and (2) is unfounded where “no evidence in the record . . . supports the conclusion [he] left the club without a gun and returned with a gun.” (Brief of Appellant, p.23). Appellant then complains the trial court erred in “saddling [him] with a duty to retreat,” arguing that because “he was not acting unlawfully” and was “actually retreating” when he was shot. (Brief of Appellant, p.25). Finally, Appellant argues the trial court’s finding that he failed to prove he reasonably believed it was necessary to use deadly force under the circumstances constituted error because the court gave no reasons or facts for this conclusion. (Brief of Appellant, p.25-p.26).

The State disagrees and respectfully submits each of Appellant’s arguments is either misplaced or fails to adequately recognize the evidence and findings of fact that support the trial court’s conclusions that he failed to carry his burden by proving entitlement to immunity by a preponderance of the evidence. The State submits Appellant’s arguments should be rejected under this Court’s standard of review. In this case, the trial court followed the appropriate

procedure under rulings from this Court and our supreme court: holding a pretrial hearing, evaluating the credibility of the witnesses, weighing the evidence, and ultimately finding Appellant did not carry his burden of proving he was entitled to immunity under the Act. It then issued a detailed written order addressing Appellant's failure to establish entitlement to immunity under any provisions of the Act. The trial court's findings that Appellant failed to carry his burden of proving two elements of self-defense under subsection 16-11-440(A) and two elements of subsection 16-11-440(C) have evidentiary support and are not controlled by errors of law. The case was properly submitted to the jury, with the claim of self-defense being fully presented and considered, and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The trial judge's pretrial immunity ruling should be affirmed and Appellant's convictions should stand. If this court disagrees and concludes the ruling was not detailed enough to enable adequate appellate review, then the matter should be remanded to the trial court for further proceedings. *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022).

Law

In 2006, the South Carolina General Assembly promulgated the Protection of Persons and Property Act (the Act) to provide immunity from prosecution to persons acting in defense of themselves or others if they are found to be justified in using deadly force. *Glenn*, 429 S.C. at 117, 838 S.E.2d at 495; S.C. Code Ann. § 16-11-450 (2020). The Act codified the common law Castle Doctrine and extended its reach. *Id.*; S.C. Code Ann. § 16-11-420(A) (2020). Under the Castle Doctrine, one attacked, without fault on his part, on his own premises, has the right, in

establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense. *Glenn*, 429 S.C. at 117, 838 S.E.2d at 495-96 (citing *State v. Jones*, 416 S.C. 283, 291, 786 S.E.2d 132, 136 (2016)). The Legislature adopted the Act based on its finding that “no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” *Id.*; S.C. Code Ann. § 16-11-420(E) (2020).

A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496; *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).

Specifically, the immunity section of the Act provides:

A person who uses deadly force as permitted by the provisions of this article *or another applicable provision of law* is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (2020) (emphasis added). Our supreme court has acknowledged that “another applicable provision of law” includes the common law of self-defense. *Glenn*, 429 S.C. at 117, 838 S.E.2d at 496; *State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018). This means a defendant may seek immunity from prosecution under the Act by demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the

evidence. *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496. For immunity claims under this theory, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Id.* Accordingly, a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. *Id.* There are four elements a defendant must establish to justify the use of deadly force under the common law of self-defense:

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.

Glenn, 429 S.C. at 116, 838 S.E.2d at 495; *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable.

Glenn, 429 S.C. at 118, 838 S.E.2d at 496.

Section 16-11-440(A) may, under appropriate facts, replace the reasonable fear element of self-defense by providing a presumption that the person's fear was reasonable under certain circumstances. *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496; S.C. Code Ann. § 16-11-440(A)

(2020). The presumption of subsection (A) does not apply, however, if the victim has an equal right to be in the dwelling or residence. *Id.*; *Jones*, 416 S.C. at 292, 786 S.E.2d at 137 (citing *Curry*, 406 S.C. at 370, 752 S.E.2d at 266). Similarly, in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because that provision was enacted to extend the protections of the Castle Doctrine to “[]other place[s] where he has a right to be.” *Glenn*, 429 S.C. at 118-19, 838 S.E.2d at 496; *Scott*, 424 S.C. at 475, 819 S.E.2d at 121 (quoting S.C. Code Ann. § 16-11-440(C)). The section provides:

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

S.C. Code Ann. § 16-11-440(C) (2020) (emphasis added). Where the section is applicable, it replaces the duty to retreat element required to establish self-defense. *Glenn*, 429 S.C. at 119, 838 S.E.2d at 497; *Curry*, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4.

Generally, a defendant will be defaulted into satisfying subsection (C) when the Castle Doctrine does not apply, or he cannot otherwise show he was excused from the duty to retreat. *Glenn*, 429 S.C. at 119, 838 S.E.2d at 497. In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged

in an unlawful activity and was attacked in another place where he had a right to be. *Id.*; S.C. Code Ann. § 16-11-440(C) (Supp. 2020).

Our supreme court recognized in *Glenn* and *Jones* the irrationality of foreclosing immunity based on the location of the incident provoking the use of self-defense. *Glenn*, 429 S.C. at 119, 838 S.E.2d at 497; *Jones*, 416 S.C. at 297, 786 S.E.2d at 139 (“[W]e find the Legislature intended the protection of subsection (C) to apply to incidents, provided the other requirements are met, without a geographical restriction.”). Similarly, analyzing a defendant's “right to be” in a place where he is attacked under section 16-11-440(C) without considering *proximate cause* or a *causal connection* to the incident leaves an innocent person's ability to seek the Act's protection up to happenstance, which the supreme court concluded was not the intent of the Legislature. *Glenn*, 429 S.C. at 119-20, 838 S.E.2d at 497 (emphasis added). Indeed, to bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself. *Glenn*, 429 S.C. at 120, 838 S.E.2d at 497. In addition, the supreme court found a proximate cause analysis must also be applied to the unlawful activity element of subsection (C). *Id.*

Analysis / Discussion

As an undergirding principle, the legislative intent to significantly restrict when a court may grant pretrial immunity for the use of deadly force is evident when considered in the context of the principles of self-defense upon which the Act is founded. Prosecutors are already imbued

with broad discretion to decline to prosecute where they determine the circumstances of the case do not merit pursuit of criminal charges. *Ex parte Littlefield*, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000). Also, individuals may avail themselves of the common law Castle Doctrine and the common law defenses of habitation, of others, and self-defense in the event of a trial.

Granting an individual immunity from prosecution rather than letting a jury determine whether the State has disproven self-defense beyond a reasonable doubt is an extreme result and should occur only in circumstances where a defendant has adequately carried his burden of proof as to each and every aspect of the Act as determined by the trial court. Any other result would be absurd and would lead to a society akin to the wild-wild-west, where an individual in an altercation can shoot first, and if he kills another person, attempt to justify his actions by giving self-serving facts which cannot be contested by the person who has been killed. Even where a person fails to convince the trial judge of his entitlement to immunity under the Act, he may still be able to rely on self-defense before the jury where the State has the burden of proof. Thus, a pretrial denial of immunity does not eliminate the presumption of innocence or the State's high burden of proof for a criminal conviction. Here, the trial court properly considered whether Appellant carried his burden of proving, by a preponderance of the evidence, his entitlement to immunity when ruling on his request, and that ruling should be affirmed. It did so with specific findings which enable this Court to undertake its appellate review. *Compare State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022) (remanding for further proceedings where the circuit court improperly abdicated its role as fact-finder to determine defendant's entitlement to immunity

under the Act because there were no specific findings to enable the appellate court to undertake its appellate review).

In this case, the trial court followed the appropriate procedure under rulings from this Court and our supreme court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The trial court issued a detailed written order, ultimately concluding Appellant: (1) failed to carry his burden of proving the four necessary elements of self-defense under section 16-11-450(A) as “another applicable provision of law” and also (2) failed to carry his burden of proving the necessary statutory elements under section 16-11-450(C). In addition to: “weighing the credibility of all witnesses” the trial court detailed findings of fact which supported the denial of immunity for multiple reasons. Appellant’s arguments to the contrary simply cannot prevail under this Court’s standard of review. The trial court’s findings that Appellant failed to carry his burden of proving two elements of self-defense under section 16-11-440(A) and failed to carry his burden of proving two elements needed for immunity under section 16-11-440(C) have evidentiary support and are not controlled by errors of law. They should be affirmed.

In its Order denying immunity, the trial court found the following salient “FACTS:”

(1) “the defendant got into a verbal argument with an unknown patron earlier that night at the club, left the club on his motorcycle, came back to the club in his truck with a gun in his possession, looking to settle a “beef” with someone;” (2) “around 4:05 AM while circling the club in his pickup truck, the defendant flashed a gun at security officer/victim Monique

Green, and stated ‘*you are not the only one with a gun;*’” (3) “prior to this July 4, 2020 shooting, this defendant was a convicted violent felon pursuant to South Carolina and Federal Law;” (4) “defendant was a convicted violent felon, unlawfully in possession of a weapon when he arrived at the club around 4AM;” (5) “the defendant is seen walking to a group of individuals around 4:07 AM, with his hands in and/or near his short pockets;” (6) “having been tipped off by other club patrons . . . club security intended to approach this defendant, escort him away from the individuals and to his truck, as the club was closing at 4:00 AM, know this defendant had a handgun in his pocket and was looking to settle [a] “beef” with someone;” (7) “while club security was escorting the defendant away from the group, this defendant had his hands in his short pockets;” (8) “Carlos Jenkins and club security personnel . . . gave multiple orders for the defendant to take his hands out of his pocket, knowing that the defendant had a gun in his pockets and . . . was looking to settle “beef” with someone;” (9) “multiple commands were given to the defendant to take his hands out of his pockets. The defendant did not comply;” (10) “Carolos Jenkins and/or other club personal [sic] thought that this defendant was clutching his gun in his shorts pocket, and was going to take it out;” (11) “after the shooting, the defendant is seeing [sic] running away from the scene . . . jumping a barbed wire fence, and then getting into a blue BMW SUV, in which the Blue BMW SUV let police on a high speed chase/pursuit, which lasted several minutes, and ultimately ended in a dead end of a trailer park, in which this defendant is seen on in-car camera getting out of the Blue BMW SUV, and running/continuing to flee/evade law enforcement.”

(Order, p.1-p.3; State’s Exhibits 2 and 4). These factual findings were supported by evidence presented at the hearing, including the testimony of witnesses, security camera video footage from the club, and in-car videos of the car chase and arrest. Thus, there was ample evidence to support each of the dispositive findings described below.

Self-Defense: At Fault for Bringing on the Difficulty

The trial court concluded Appellant did not prove he was “not without fault in bringing on the difficulty.” This was based on factual findings that: (1) Appellant, after initially having left the club, returned with a gun in his possession, (2) security guards had been told Appellant was coming back to the club, with a gun, looking to settle a beef with someone, and (3) Appellant did in fact return to the club where he flashed his gun at a security guard. This certainly constitutes ample evidence to support the finding “that the defendant was at fault in brin[g]ing on the difficulty upon himself,” especially where the trial court also found Appellant refused to take his hands out of his pockets, where the gun was concealed, despite multiple commands to do so.

Appellant repeatedly takes issue with what he claims was the trial court’s finding he “left the club without a gun and returned with a gun,” arguing that finding was based in part on the “improperly admitted Littles video.” (Brief of Appellant, p.23). Yet, the trial court made no specific finding he had no gun when he initially left—likely because whether he had the gun before he left is of little import. Instead, the trial court properly focused on Appellant’s act of returning to the club to settle a beef, while carrying an unlawfully possessed and concealed gun which he flashed at a security guard and taunted with the statement that he was not the only one with a gun. Whether he had the gun before did not seem to significantly inform the trial court’s analysis—an analysis that appropriately concluded Appellant was at fault in brining on the difficulty.

Self-Defense: Duty to Retreat

The trial court concluded Appellant did not prove he had no other probable or alternative means of avoiding the danger—a duty to retreat. This was based on similar findings about bringing on the difficulty as well as the findings that Appellant: (1) could have chosen to stay home after initially leaving the club or (2) could have returned to the club without bringing a gun which he unlawfully concealed in his pocket. This certainly constitutes ample evidence to support the finding “the defendant could have avoided the danger.” As noted by the trial court, Appellant could have avoided the danger merely by choosing to do one of these two things.

Appellant claims “because he was not acting unlawfully, he had no duty to retreat.” (Brief of Appellant, p.25). Yet, the duty to retreat is an element a defendant would need to establish to justify self-defense under subsection (A). It is a separate inquiry from the “not engaged in an unlawful activity” element for establishing immunity under subsection (C). Indeed, the trial court arrived at its consideration of the elements of subsection (C) in part because Appellant failed to prove the duty to retreat element of self-defense. Rejecting self-defense as “another applicable provision of law” that could justify immunity because Appellant failed to meet the duty to retreat was an entirely appropriate and necessary step of the analysis by the trial court. *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496. That analysis appropriately concluded Appellant had a duty to retreat under a standard self-defense case.

Section 16-11-440(C): Unlawful Activity

The trial court concluded Appellant failed to prove he was *not* engaged in an unlawful activity which was a proximate cause of the shooting, which barred him from immunity under section 16-11-440(C). This was based on findings that: (1) Appellant was a convicted felon barred from lawfully possessing a firearm; (2) Appellant did not have a valid concealed weapons permit; (3) Appellant, after initially having left the club, returned with a gun in his possession, (4) security guards had been told Appellant was coming back to the club, with a gun, looking to settle a beef with someone, and (5) Appellant did in fact return to the club where he flashed his gun at a security guard. Although the trial court did not explicitly use the term “proximate cause,” the enumerated findings certainly constitute ample evidence to support the causal connection when finding “the defendant was engaged in an unlawful activity, thus barring [him] from immunity under this section,” especially where the trial court also found Appellant refused to take his hands out of his pockets, where the gun was concealed, despite multiple commands to do so.

In arguing to the contrary, Appellant relies on a citation in *Glenn* and contends “the State has the burden of proving the unlawful act is the proximate cause of the incident.” (Brief of Appellant, p.22). However, that citation references the State’s burden of proof at trial, in a case that predated the Act. *See State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) (“[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.”). In

contrast, the burden of proof at an immunity hearing rests squarely and solely on the defendant. *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496. Where, as it stated in *Glenn*, the supreme court applied “the foregoing legal principles to the facts of this case,” it was reviewing whether the trial court conducted a proximate cause analysis at all—not shifting the burden of proof in regard to that analysis. Indeed, the State submits that where a defendant commits a violent act, using deadly force, while unlawfully possessing a firearm, the burden must rest on him to prove, by a preponderance of the evidence, that it was *not* a proximate cause of the underlying incident.

The touchstone of proximate cause in South Carolina is foreseeability. *Hurd v. Williamsburg County*, 353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2005), *aff’d*, 363 S.C. 421, 611 S.E.2d 488 (2005). The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act. *Id.* One is not charged with foreseeing that which is unpredictable, or which would not be expected to happen as a natural and probable consequence of one’s act. *Hurd*, 363 S.C. at 612-13, 579 S.E.2d at 144-45. It is not necessary that the defendant should have foreseen the particular event which occurred, but merely that the defendant should have foreseen his or her [unlawful behavior] would probably cause an incident leading to the injury of someone. *Hurd*, 363 S.C. at 613; 579 S.E.2d at 145. Proximate cause does not mean the sole cause. *Id.* The defendant’s conduct can be a proximate cause if it was at least one of the direct, concurring causes of the incident. *Id.* Ordinarily, the question of proximate cause is one of fact for the fact-finder, and the appellate court’s sole function regarding the issue should be to inquire whether particular conclusions are

the only reasonable inferences that can be drawn from the evidence. *Id.* Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. *Hurd*, 353 S.C. at 613-14, 579 S.E.2d at 145.

Here, based on the evidence presented, the trial court appropriately concluded Appellant's unlawful activity was indeed a proximate cause of the incident. This conclusion was a reasonable inference to be drawn from the evidence. Indeed, Appellant's act to unlawfully possess and conceal a handgun was at least one of the direct, concurring causes of the incident where: he had an earlier argument at the club, he returned to the club to settle a beef, he flashed his gun at a security guard, and he refused repeated commands to remove his hands from his pockets when security guards were trying to get him to leave the club. A violent exchange of gunfire was a natural and probable consequence of Appellant's unlawful act. Because the incident was foreseeable, Appellant's unlawful activity was a proximate cause of the shooting, and the trial court's finding in this regard should be affirmed.

Section 16-11-440(C): No Reasonable Belief Actions were Necessary

The trial court concluded Appellant failed to prove he reasonably believed his actions were necessary to use deadly force to prevent death or great bodily injury to himself or to prevent the commission of a violent crime. This was based on findings that: (1) Appellant got into a verbal argument with an unknown patron earlier that night at the club, left the club on his motorcycle, and came back to the club in his truck with a gun in his possession, looking to settle a "beef" with someone;" (2) Appellant flashed a gun at Victim and stated "you are not the only

one with a gun;” (3) Appellant walked to a group of individuals with his hands in or near his pockets; (4) club security, after being tipped off by a club patron that Appellant had a handgun in his pocket and was looking to settle a “beef” with someone, attempted to approach Appellant and escort him to his truck as the club was closing; (5) while club security was escorting the defendant away from the group, Appellant kept his hands in his pockets and refused commands from the guards to take his hands out of his pockets, despite their multiple orders; and (6) club security guards reasonably believed Appellant was clutching his gun in his pocket and was going to take it out when Jenkins fired a less-than-lethal bean bag round at Appellant. This certainly constitutes ample evidence to support the finding “the defendant failed to establish by a preponderance of the evidence that he reasonably believed it was necessary to use deadly force to prevent death or great bodily injury to himself or to prevent the commission of a violent crime as defined in S.C. Code § 16-1-60.”

Evidence at the hearing was uncontradicted that Appellant was initially hit with less-than-lethal bean bag rounds fired by Jenkins before he returned fire. Appellant himself admitted he did not know what hit him, but acknowledged no bullet ever entered his flesh and he did not need emergency surgery after the incident. (Tr.p.63, line 16-p.63, line 1). Even though Appellant claimed he felt his back being “ripped apart,” the evidence showed he somehow managed to subsequently duck behind a car, aim his gun and shoot Victim multiple times, run across the parking lot, jump a fence, get in a car with a friend, and flee. Under these circumstances, there was ample evidence to support the trial court’s conclusion. The trial court

appropriately concluded Appellant did not have a reasonable belief his use of deadly force was necessary.

Conclusion

Where each of the four dispositive conclusions reached by the trial court was supported by evidence in the record, and where the factual findings made by the trial court were supported in part by the trial court weighing the credibility of the witnesses, each conclusion and the denial of immunity that followed should be affirmed under this Court's standard of review.

CONCLUSION


For all of the foregoing reasons, the State respectfully requests that the trial court's denial of immunity under the Protection of Persons and Property Act be affirmed, and that Appellant's convictions and sentence likewise be affirmed. If this Court concludes the trial court's denial of immunity was not sufficiently fleshed-out by the trial court, the State alternatively requests a remand for more specific findings consistent with this Court's decision.

Respectfully submitted,

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