

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Dec 09 2024

Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2024-002019

THE STATE,

Petitioner,

vs.

KIERIN MARCELLUS DENNIS,

Respondent.

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RECEIVED**Jan 22 2021****SC Court of Appeals**

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Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT

APPELLATE CASE NO. 2019-001486

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity?

2.

Whether the second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019)?

3.

Whether the second circuit court judge erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C)?

4.

Whether the second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned

that inconsistent evidence made self-defense a jury issue, that appellant had a duty to retreat, or even to avoid going to “a place he had the right to be” altogether?

5.

Whether, in the alternative if the first circuit court judge’s order alone controlled, he erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned that appellant had a duty to retreat, or even avoid going to “a place he had the right to be” altogether?

6.

Whether the trial court erred in allowing the state to introduce an aerial photograph of the incident location where the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to “retreat”?

7.

Whether the trial court erred in allowing the state to introduce a model car door of a Ford Explorer created by the state’s investigator where that model was substantially different from appellant’s actual vehicle and the use of the model was highly misleading and resulted in an inaccurate representation of the incident?

STATEMENT OF THE CASE

Appellant Kierin Dennis was indicted in Lexington County for the offense of murder. R. p. *. A pre-trial immunity hearing was held pursuant on November 17-19, 2014 before the Honorable Thomas Russo. Todd Rutherford and Simone Martin represented appellant. Richard S. Hubbard, III, and Shawn Graham were the solicitors. PT1. 1. On February 4, 2015, Judge Russo denied immunity in a written order. R. p. *.

A jury trial was then held from October 3-11, 2016 before the Honorable Eugene C. Griffith, Jr. R. p. *. Judge Griffith declared a mistrial on October 11, 2016 as the result of a hung jury. R. p. *.

When the state again chose to call the case to trial, a pre-trial immunity hearing was held before the Honorable Robert E. Hood from August 22-24, 2017 over the state's objection that appellant was not entitled to an immunity hearing despite the mistrial. Todd Rutherford again represented appellant. Shawn Graham and Rhonda Patterson were the assistant solicitors. PT1. 1. Arguments on appellant's entitlement to immunity were later held before Judge Hood on September 18, 2017, and appellant filed a supporting brief dated September 2, 2017. R. p. *. Judge Hood issued an order dated October 11, 2017, denying appellant immunity. R. p. *.

Appellant was tried before the Honorable Eugene C. Griffith, Jr., and a jury from August 19-27, 2019. Todd Rutherford and Nicole Simpson represented appellant. Solicitor Rick Hubbard and Assistant Solicitor Rhonda Patterson represented the state. R. p. *. On August 27, 2019, the jury found appellant guilty. Tr. 1180, ll. 13-20. Judge Griffith sentenced appellant to thirty years' imprisonment. Tr. 1197, ll. 2-6. This appeal follows.¹

¹ "PT1." refers to the pre-trial immunity hearing held before Judge Russo prior to the mistrial. "PT2." refers to the immunity hearing held before Judge Hood after the mistrial. "PT3." refers to the hearing on immunity arguments held before Judge Hood on September 18, 2017. "MT." refers to the mistrial. "Tr." refers to the trial held before Judge Griffith from August 19-27, 2019.

STATEMENT OF FACTS

The first immunity hearing before Judge Russo

On the night of February 17, 2014, appellant attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. PT1. 482, ll. 2-9. The game was held at Lexington. Appellant's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. PT1. 8, ll. 10-25; PT1. 162, ll. 19-22. Given past difficulties between students from the rival schools, additional security measures were taken as a precaution. After the game, which Dutch Fork won, Lexington High School students were directed to leave the building through the front of the gymnasium, while the Dutch Fork High School students were required to leave through the back to prevent the comingling of students from the two schools. PT1. 9, ll. 1-23; PT1. 160, ll. 13-24; PT1. 359, ll. 9-16.

As appellant and his friends were walking through the front lobby to the parking lot, numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, appellant became separated from his friends. A student from Dutch Fork followed appellant to his car. The school resource officer pulled a taser and ordered the students to leave. All the students scattered, and appellant got into his car and left. PT1. 246, l. 5 – 247, l. 23. Appellant never said a word to any of the Dutch Fork students in the parking lot. PT1. 247, l. 24 – 248, l. 6.

After the game, appellant and his friends went to the Cook Out. The Cook Out was a “hangout spot” for Lexington students after sporting events. It was only two to three miles from the school. PT1. 14, l. 21 – 15, l. 3; PT1. 222, l. 24 – 223, l. 1. Appellant, who was driving a gold Ford Explorer, parked at the carwash behind the Cook Out since the Cook Out parking lot was full. Will Zander, who was driving Morgan Zander and Lucky Cook, also parked at the

carwash while Keith Adams parked at the PetSmart adjacent to the Cook Out. PT1. 14, ll. 9-20; PT1. 250, ll. 7-10.

As appellant and his friends were walking toward the Cook Out, they ran into Austin Sanders, a fellow Lexington student, in the parking lot. PT1. 250, ll. 7-13. Sanders told appellant that while he was in the Cook Out drive thru line, several Dutch Fork students approached and began shaking his car. The students were “rowdy” and harassed other people in the drive thru as well. PT1. 250, l. 13 – 251, l. 9.

After speaking with Sanders, appellant and his friends entered the front door of the Cook Out. Despite the Cook Out being a Lexington High “hangout,” there were at least thirty to forty students from Dutch Fork inside. PT1. 17, ll. 8-16. As soon as appellant and his friends entered, Michael James, who attended Dutch Fork, approached appellant, threw his hands into the air, and asked, “That’s all y’all brought?” PT1. 251, ll. 10-21. Appellant calmly responded, “We just came here to eat.” PT1. 251, ll. 21-22. Appellant and his friends then went to wait in line to order food. PT1. 251, l. 23 – 252, l. 12.

While they were waiting in line, appellant overheard Dutch Fork students “picking on Lucky [Cook] about his sweater.” PT1. 252, l. 13 – 253, l. 3. Michael James, the same student who confronted appellant when he entered the restaurant, stood up on a chair behind Keith Adams, put his fist over Keith’s head, and motioned as if he was going to punch Keith. Appellant and his friends continued to ignore the Dutch Fork students and waited for their food. PT1. 253, ll. 3-13.

Given the uncomfortable atmosphere, appellant told his friends, “Let’s leave,” and “we just need to go,” but his friends wanted to wait for their food since they had already ordered. Appellant told his friends he would pay them back for the food they had ordered but that they

needed to leave. PT1. 253, l. 25 – 254, l. 11. Appellant received a phone call and he stepped outside. PT1. 16, ll. 12-13; PT1. 253, ll. 19-22. Keith Adams followed appellant outside because he did not want appellant “outside by himself.” PT1. 16, ll. 21-25. Shortly thereafter, Lucky Cook, Will Zander, and Morgan Zander walked outside without their food. The group of friends were all standing by a trashcan. PT1. 17, ll. 18-25. Michael James walked past them. When James reached the middle of the parking lot, he turned around, threw his hands in the air, and asked, “Are you still salty?” Appellant responded, “The game was thirty, thirty-five minutes ago. Y’all won. Congratulations.” PT1. 254, ll. 13-22. To avoid any confrontation, appellant then told his friends, “Guys come on, let’s go” and the group began walking toward their cars. PT1. 254, l. 22 – 255, l. 8.

As they were walking, appellant heard “a whole bunch of noise behind” him. PT1. 255, ll. 8-10. When he turned around, the Dutch Fork students were “rushing” out of the Cook Out. PT1. 19, ll. 1-3; PT1. 255, ll. 10-12. About thirty to forty students “poured out.” PT1. 84, ll. 4-21. They were yelling and “pulling their pants up . . . like they were getting ready to fight” or “jump” appellant and his friends. PT1. 255, ll. 12-14. Da’Von Capers, the decedent, called Morgan Zander “a bitch.” PT1. 18, l. 21 – 19, l. 1; PT1. 85, ll. 2-24; PT1. 255, l. 22 – 256, l. 4. Appellant continued to walk backwards toward his car. PT1. 255, ll. 14-16. Keith Adams was “speed walking” to his car while Will Zander ran to his car. PT1. 20, ll. 10-22; PT1. 86, ll. 3-6. The Dutch Fork students followed closely behind. After safely reaching his car, Will picked up his sister, Morgan, and Lucky Cook in the roadway near the Cook Out. PT1. 86, ll. 3-8.

After reaching their cars, Keith Adams and appellant met in the roadway between the PetSmart and the carwash. PT1. 256, ll. 13-20. They parked with their driver side windows next to each other. Appellant was facing the PetSmart and Keith was facing the Cook Out. They

spoke for about two to three minutes about their plans. Appellant told Keith he was going home because he had to be at work at 5:30 the following morning. Keith was going to his father's house. PT1. 256, l. 13 – 257, l. 17. While the pair talked, Will Zander turned his car around in the PetSmart parking lot and parked behind Keith. PT1. 22, ll. 2-8; PT1. 86, l. 19 – 87, l. 4.

Keith Adams eventually drove away first. PT1. 23, ll. 13-17; PT1. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. PT1. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith explained that he took this exit because it was closest to the interstate where he was headed and because the other exit had a traffic light that “takes forever.” PT1. 22, l. 21 – 23, l. 19. Keith eventually turned right out of the parking lot onto the main road. PT1. 22, l. 21 – 23, l. 19.

Will Zander, who was directly behind Keith, followed the same path past the Dutch Fork group of people who were standing on the curb and in the roadway. Will explained that he did not take the other exit near the Cook Out drive thru because it was “too congested” and he “always” took the exit between the Cook Out and the PetSmart. PT1. 87, ll. 5-17.

As Will was driving to the exit, he heard the Dutch Fork students in the roadway yelling. Will's driver's side window was already down. PT1. 87, ll. 18-21. Will stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. PT1. 87, l. 21 – 88, l. 23. There was testimony Will said: “Hey, this is what y'all are worth.” PT1. 543, l. 2 – 546, l. 15. Several students from Dutch Fork, including Devon Chatman and Tyreke Farrow, ran into the road to pick up the money. PT1. 89, ll. 7-20; PT1. 451, ll. 19-25.

After Keith Adams and Will Zander pulled away, appellant backed his car up so he could likewise leave through the main exit between the PetSmart and the Cook Out. After he reversed,

appellant put his car back in drive and looked forward. PT1. 258, ll. 7-11. He saw Will's car stopped in the roadway and surrounded by Dutch Fork students. PT1. 258, l. 25 – 259, l. 2. Appellant did not know at the time that Will had thrown money into the road. PT1. 258, ll. 12-21. He feared the Dutch Fork students were going to attack Will. Appellant sped forward to make sure Will was alright. PT1. 258, l. 24 – 259, l. 5; PT1. 259, ll. 14-24.

When appellant stopped behind Will's car, Dutch Fork students surrounded his vehicle and approached his window, which was still about halfway down. PT1. 281, ll. 3-7. The students were yelling at appellant, ordering him to get out of the car, and calling him names – “pussy” and “bitch.” PT1. 260, ll. 8-13; PT1. 262, ll. 10-15. Hands started reaching into appellant's window. He thought they were trying to attack him and “forcefully” pull him out of the car. PT1. 260, ll. 13-15. With his foot still on the brake, appellant leaned as far into the car as possible to get away from the Dutch Fork students. PT1. 260, ll. 15-19.

Appellant was scared, and he feared for his life. PT1. 260, ll. 19-20; PT1. 262, ll. 22-23. He could not leave because Will's car was parked in front of him and there were Dutch Fork students in front and around his car. PT1. 265, l. 22 – 266, l. 17. Appellant had a knife in his center console. PT1. 262, ll. 24-25. He grabbed it, reached across his body with his right hand, struck, and then drove away. PT1. 262, l. 24 – 263, l. 2. He did not realize he had stabbed anyone. PT1. 268, ll. 15-20.

Joshua Brooks, who attended Lexington High School, was at the Cook Out that night. PT1. 222, l. 11 – 223, l. 1. He watched as a “whole bunch” of Dutch Fork students crowded around appellant's car in the roadway. PT1. 224, ll. 13-25. The students were “banging” on appellant's car “trying to scare him.” Others were reaching in appellant's window. PT1. 225, ll. 1-3. Appellant could not leave because Will Zander's car was parked directly in front of

appellant. PT1. 226, ll. 14-21. Brooks saw Will get out of his car. Brooks told Will “to leave, get out of here, you don’t want any problems.” He knew Will and appellant were greatly outnumbered and they “were being threatened” by the Dutch Fork students. PT1. 225, ll. 10-15. Will eventually got back into his car. Brooks watched appellant drive off followed by Will. PT1. 224, ll. 13-19; PT1. 225, ll. 4-9.

Kenneth Williams, who attended Dutch Fork, was a prosecution witness. He testified that he was standing on the curb by the roadway at the Cook Out. PT1. 449, l. 20 – 450, l. 8. He saw Will Zander stop in the middle of the road and throw money out his window. PT1. 450, l. 12 – 451, l. 5. Several Dutch Fork students, including Tyreke Farrow and Devon Chatman, ran into the road to pick up the money. PT1. 451, ll. 9-25. Williams said appellant pulled up “pretty fast” behind Will and claimed that he almost hit Farrow and Chatman. PT1. 451, l. 23 – 452, l. 14. This upset the Dutch Fork students. PT1. 452, ll. 10-19. They all “lined up” outside appellant’s window. PT1. 452, ll. 20-22. Although Williams never approached appellant’s window, he maintained that he saw appellant’s hand come out of his window and strike Da’Von Capers, the decedent. PT1. 452, l. 20 – 453, l. 9. He thought appellant just pushed Capers until Capers said, “they got me” and ran to a vehicle. PT1. 453, ll. 10-24. Williams later admitted that he saw Capers reach into appellant’s window, but he strangely maintained it was after appellant had stabbed him. PT1. 469, l. 4 – 470, l. 5.

Devon Chatman, who attended Dutch Fork, was another prosecution witness. He agreed that Dutch Fork students surrounded appellant’s window and confronted appellant. PT1. 490, l. 1 – 491, l. 13. Alexis Brunson, who also attended Dutch Fork, approached appellant’s car after she maintained he almost hit several students in the roadway. PT1. 512, ll. 5-25. She confronted appellant and yelled, “What are you doing? Are you crazy? You almost ran over some of our

students.” PT1. 513, l. 12- 514, l. 19. She claimed no one touched appellant’s car or reached in his window. PT1. 515, ll. 16-23. Appellant had his hand down by his thigh, and Brunson maintained appellant said, “You don’t want this. You don’t want what I got.” Brunson saw appellant punch Da’Von Capers with his right hand. She claimed appellant’s hand came out of the window when he punched. PT1. 516, l. 14 – 517, l. 11. She did not see a knife. PT1. 529, ll. 1-5. After Capers was struck, Brunson said Capers tried to punch back, but appellant drove away. PT1. 517, ll. 16-21. Brunson said there was nothing stopping appellant from leaving. He was not blocked in, she claimed. PT1. 517, l. 25 – 518, l. 6. Brunson admitted that she did not know if Capers threatened appellant before appellant struck him. PT1. 537, ll. 4-24; PT1. 539, ll. 1-5.

Tyreke Farrow, another Dutch Fork student, said after he saw Will Zander throw money into the road, a car came full speed toward him. Farrow jumped and his cousin, Xavier Holiday pulled him out of the way. PT1. 543, l. 2 - 547, l. 5. Farrow identified appellant as the driver of this car. PT1. 547, ll. 6-12. Farrow walked up to appellant’s car and said, “What the fuck are you doing? Are you trying to hit me with your car?” PT1. 547, ll. 16-19. At least seven other Dutch Fork students approached the car, including Xavier Holiday, Lamar Butler, and Da’Von Capers. PT1. 547, l. 19 – 548, l. 4. Capers confronted appellant. He yelled, “What are you doing? You’re trying to hit people in the road. Get out of your car if you want to hit people.” PT1. 548, ll. 3-6. Farrow claimed appellant said, “I got something for y’all. Hey, yo, come here, come here.” PT1. 548, ll. 7-10. Farrow said appellant then struck Capers with his right hand and drove away. PT1. 548, ll. 10-14. Farrow saw appellant’s hand come out the window, but he did not see a knife. PT1. 553, l. 6 – 554, l. 11. According to Farrow, no one touched appellant’s car or reached into the window. PT1. 550, ll. 20-24.

Lamar Butler, who also attended Dutch Fork, saw Will Zander throw money into the road. He also testified that Will said, “This is what y’all are worth.” PT1. 568, l. 17 – 569, l. 24. At least three Dutch Fork students went into the road to pick up the money, including Tyreke Farrow. PT1. 570, ll. 6-23. Appellant sped forward, and Butler maintained he almost struck them with his car. PT1. 371, ll. 1-25.

When appellant stopped in the roadway, Farrow, Holiday, Butler, and Da’Von Capers all approached appellant’s car. PT1. 574, l. 4 – 575, l. 24. Capers was the closest to the window. PT1. 575, ll. 14-24. Butler claimed appellant motioned for Capers to come closer. PT1. 577, ll. 5-20. However, he admitted that he could not really see what was going on because his view was blocked by the other students. Butler thought appellant pushed Capers because Capers stumbled back into Farrow, but Butler never saw appellant strike Capers or saw appellant’s hand come out the window. PT1. 577, l. 21 – 578, l. 11. After Capers stumbled, appellant drove away. PT1. 578, ll. 12-15. Butler claimed he never heard Capers say anything to appellant and that Capers never reached into appellant’s window. PT1. 575, l. 25 – 576, l. 5. However, again, Butler admitted his view was blocked by the others who were standing in front of him. PT1. 577, l. 5 – 578, l. 11.

Facts from second immunity hearing before Judge Hood

Officer Caitlin Voravudhi received a call from dispatch indicating there was a fight in progress at the Cook Out. PT2. 49, ll. 4-14. When she arrived, there were about forty younger people in the parking lot and some adults. PT2. 47, ll. 8-21. Voravudhi spoke to Beth Bettini, the original complainant who called 911. As will be seen infra, even though Beth, Cook Out employee Zachery Lynch, and Ervin Chauncy Meggett were key eyewitnesses, they were not revealed to the defense or called as witnesses at the first immunity hearing. PT2. 53, l. 11 – 54, l.

20. Voravudhi's interview with Bettini was captured on the officer's dash camera. Voravudhi also took a written statement from Bettini. PT2. 54, ll. 22-24. Bettini said she was in the Cook Out drive thru. She saw thirty "kids" in the parking lot. They were "cussing" and screaming. A light-colored Ford SUV stopped. One person ran to the car and threw a drink at it. About ten other male teenagers approached the car. The driver of the SUV was black and had dreadlocks. The SUV "peeled out" followed by a smaller car. PT2. 55, l. 20 – 56, l. 14; See R. p. * (Def. 1–Bettini Statement).

Voravudhi also interviewed Zachery Lynch, an employee of the Cook Out, and had him write a written statement. PT2. 60, l. 10 – 61, l. 4; See R. p. * (State's Ex. 1–Lynch Statement). In his statement, Lynch said that a black male wearing a white shirt walked toward a car parked in the driveway. The male reached in the car "as if to stab somebody." Then another male walked up and threw a cup at the car. The two black males got into a gold two door Ford Explorer and drove off. PT2. 74, ll. 9-20.

Beth Bettini testified that she entered the Cook Out through the rear entrance. When she turned the corner, she saw thirty to forty teenagers in the Cook Out parking lot. They were "screaming, hollering, cussing, acting crazy." PT2. 115, ll. 1-9. She saw a light-colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at the driver. They were calling him names and threatening him. PT2. 115, ll. 10-19. They were yelling, "Fuck you. We'll kick your ass." PT2. 116, l. 22 – 117, l. 1. She saw a student throw a drink at the car. PT2. 115, ll. 10-19. The driver said, "Y'all leave me the fuck alone or get the fuck away from me." PT2. 117, ll. 3-6.

Bettini called 911 and described what she was witnessing. PT2. 115, ll. 10-19. She thought there was about "to be a fight." PT2. 115, ll. 20-24. She told the dispatcher that the

driver of the light-colored SUV -- whom she identified as appellant --“looked scared to death” and she thought the other students were going to hurt him. PT2. 115, ll. 22-25; PT2. 117, ll. 12-19; PT2. 118, ll. 8-15. She explained that appellant could not leave because there were students in front of his car. He would have had to have hit them to leave. PT2. 120, ll. 5-7. Lexington County 911 destroyed the recording of Bettini’s call before it could be preserved because the call was not “properly linked” to the CAD report for the incident. PT2. 220, l. 4 – 224, l. 18; PT2. 227, ll. 7-21.

Zachery Lynch worked at the Cook Out. PT2. 161, ll. 3-11. He was outside taking a break when the stabbing occurred. PT2. 162, ll. 9-15. Lynch was smoking near the dumpsters. PT2. 168, ll. 1-3. Lynch saw appellant attempt to pull out and leave. Students were blocking appellant from leaving. PT2. 170, ll. 2-4. Students standing along the sidewalk were “taunting” appellant, calling him names, and acting “malicious.” They all gathered outside appellant’s window. PT2. 170, ll. 5-8. One student threw a drink at appellant’s car. PT2. 169, ll. 7-23. Lynch saw a student reach inside appellant’s window with his hand “forward.” Lynch thought this person was trying to grab appellant. PT2. 170, ll. 13-24. When he later learned there had been a stabbing, Lynch thought it was the person who leaned into appellant’s window who “[d]id the stabbing.” PT2. 170, ll. 10-24. After the person who leaned into appellant’s car came back out, appellant drove away. PT2. 171, l. 18 – 172, l. 5.

Ervin Meggett, who attended Dutch Fork, was interviewed by the solicitor’s office on August 26, 2016, shortly before the mistrial due to the hung jury. PT2. 364, ll. 18-22. Why Meggett was not interviewed earlier is not revealed from this record. Meggett was standing outside appellant’s window when the decedent was stabbed. PT2. 367, l. 19 – 368, l. 3. He told the state during his August 2016 interview that the decedent “was in the wrong” and that

appellant was trying to leave when the stabbing occurred. PT2. 366, ll. 10-16. He said the decedent was “banging” on appellant’s car when appellant stabbed him. PT2. 369, l. 14 – 370, l. 3. Meggett said at the second immunity hearing that he did not remember telling the state the decedent was in the wrong and that appellant was trying to leave. PT2. 368, ll. 19-23; PT2. 370, l. 22 – 371, l. 1. All he remembered was some students were banging on appellant’s car, but he did not know if the decedent was one of the individuals who was banging. PT2. 366, ll. 10-24.

Meggett admitted that he was subpoenaed to testify during appellant’s first trial that ended in a mistrial. He was placed in a room with other potential witnesses. However, Meggett denied that those witnesses confronted him for previously saying “things that were unfriendly to Cape [the decedent].” PT2. 369, ll. 3-13. The decedent was a friend of his. PT2. 368, l. 24 – 369, l. 2.

ARGUMENT

1.

The second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity.

Introduction

After appellant's first trial ended in a mistrial due to a hung jury, he was denied his right to a full immunity hearing before his second trial. As will be seen *infra*, the solicitor argued that appellant was not entitled to any hearing despite the mistrial, and Judge Hood ruled the defense would only be allowed to present witnesses during the second immunity hearing that counsel Rutherford maintained he did not know about before the first immunity hearing. Judge Hood said he would read the first immunity hearing transcript, the mistrial transcript, hear the new witnesses, and then hear the arguments of counsel before ruling. The defense made the best it could out of this bad ruling. However, Judge Hood was relying on evidence from a prior immunity hearing before a mistrial where both were nullities. Further, a judge at an immunity hearing must evaluate the credibility of the witnesses and weigh the evidence, which cannot be done by reading a transcript. See Goss v. State, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018); Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019).

Relevant facts

At the first immunity hearing held before Judge Russo, prior to the mistrial, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, Bill Howard, and Appellant Kierin

Dennis testified for the defense. PT1. 7-357. Witnesses Deshon Chatman, Walden Roberson, Brent Carter, Kenneth Williams, Devon Chatman, Alexis Brunson, Tyreke Farrow, and Lamar Butler testified for the state. PT1. 358-588.

Defense counsel Rutherford told the judge at the second immunity hearing that the defense wanted the pathologist to testify and that she could be in the courtroom around noon that day. PT2. 9, l. 8 – 10, l. 8. Solicitor Graham then stated:

Your Honor, the motion that Mr. Rutherford filed *is asking for an entirely new hearing* and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers [the decedent] attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence. Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial. [Number] Seven talks about the manager of the Cook Out Restaurant on duty the night in question. His name is Zachary Lynch was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

PT2. 10, l. 11 – 11, l. 8. (emphasis added). Renewed Motion for Hearing Pursuant to S.C. Code §16-11-440 (A) & (C). R. p. *.

The state argued there was no basis to give appellant what the state considered, “[a] second stand your ground hearing. There is nothing that says you get two bites at that apple.” PT2. 10, l. 11 – 13, l. 19. The state contended that to be allowed another hearing, the defense should have to file a Rule 29 motion under the rules of civil procedure, based on after discovered evidence. PT2. 13, l. 3 – 21, l. 18.

In his argument, defense counsel noted that in the event of a mistrial, there may never even be another trial. “It’s up to the Solicitor’s Office. It’s not up to us.” The defense correctly

argued it was entitled to an immunity hearing. PT2. 32, l. 10 – 33, l. 2. The solicitor also incorrectly faulted the defense with not filing an appeal from the “stand your ground hearing that was denied.” PT2. 12, ll. 3-7. However, in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), our Supreme Court held that the denial of a defendant’s request for immunity was no longer immediately appealable. It was an interlocutory order that was not appealable. Further, appellant therefore could not appeal the denial of immunity by Judge Russo because he had not been convicted. See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016). Moreover, as argued below, a mistrial is the equivalent of no trial, and it leaves the cause pending in the circuit court. “A court ruling as to the admissibility and competency of testimony during a trial, which is later declared a mistrial results in no binding adjudication of the rights of the parties.” State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009).

Defense counsel Rutherford noted the investigation continued after the first immunity hearing and the defense was now aware of the fact that Beth Bettini said appellant could not have left at the time of the stabbing because he would have had to run over two people to escape. The solicitor’s office had claimed there was no evidence of Bettini calling 911. However, the state later confirmed that Bettini called 911. There was also a statement from Zachary Lynch, a Cook Out employee. The point of the defense was that, because of a deliberately sloppy investigation, where it was decided early on that appellant was guilty, Judge Russo had not considered relevant and compelling defense evidence at the prior immunity hearing. The solicitor’s office in Lexington had also been less than forthcoming with exculpatory evidence. PT2. 21, l. 20 – 33, l. 2.

After hearing arguments, the judge said that he would allow the defense to “proffer all of his testimony because let’s play this out. Scenario number one is I say no, you’re not entitled to

another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered. So, I'm gonna skip that step all together. I'm gonna let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?" The solicitor confirmed there was a copy of the prior Judge Russo immunity hearing transcript. The judge said he would review that prior transcript, as well as any "new evidence" the defense wanted to present at the immunity hearing. As will be seen, the judge also said he would read and consider evidence from the jury trial, the mistrial. PT2. 39, l. 6 – 42, l. 1.

When the defense began telling the judge about Dr. Ross and other witnesses it wanted to present, the court interrupted and said, "We're not gonna rehash the entire stand your ground [hearing]." PT2. 42, l. 2 – 44, l. 4. The judge said that he was only allowing the defense a limited hearing. PT2. 43, l. 23 – 45, l. 20. Judge Hood heard *live testimony* from: Officer Caitlin Voravudhi, pathologist Dr. Janice Ross, Beth Bettini, Zachary Lynch, and Ervin Meggett as defense witnesses. PT2. 47-219. The prosecution then presented 911 operator Nikki Rogers, Alexis Brunson, Devon Chatman, investigator Marc Miramontes, and investigator Brent Carter as witnesses. PT2. 220-376. Thus, the only defense witnesses Judge Hood heard from and saw in person were officer Caitlin Voravudhi, Dr. Janice Ross, Beth Bettini, Zachary Lynch, and Chauncy Meggett. Given the limited scope of the immunity hearing allowed, Judge Hood did not hear the testimony of appellant Kierin Dennis, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, or Bill Howard.

At the conclusion of the hearing, deputy solicitor Graham noted the judge had the transcript of the stand your ground hearing and testimony from the trial (mistrial). PT2. 376, l. 24 – 377, l. 18. Graham asked: “[I]f I could inquire what is your plan from here? I guess my question is, I don’t know whether I need to renew all of my objections.” The judge wondered if the attorneys thought he could get three weeks from court administration to review all of the evidence. PT2. 377, l. 19 – 378, l. 18. The judge said he would have read “everything,” but he wanted to have a final hearing on “whatever legal arguments you want to [make].” PT2. 378, l. 18 – 379, l. 7. The judge said he expected the featured arguments to last about an hour, but that he needed “enough time [first] to get everything read.” PT2. 379, l. 2 – 380, l. 21. The judge said his plan “right now is to reconvene September the 18th at 2:00 p.m. I will have everything read and then you all can make your legal arguments at that time. Fair enough?” PT2. 380, l. 22 – 383, l. 19.

An argument hearing was then held on September 18, 2017 before Judge Hood. Defense counsel Rutherford noted that Beth Bettini was an independent witness who tried to describe what happened to the solicitor’s office before the trial. Bettini was told the prosecution had no record of her calling 911 on the night of the incident. “She is made to believe that they don’t want to hear what she has to say, so much so that she calls my office two days into the trial to say, hey, I described what happened to the Solicitor’s Office and they don’t want to hear me.” PT3. 6, l. 8 – 7, l. 22. The failure to preserve the 911 call or recording called the integrity of the state’s investigation into question. Lynch said, “He [the decedent] reached in the car and that’s when he stabbed him.” PT3. 7, ll. 2-22. Defense counsel argued the court was not bound by the first immunity hearing:

The fact that we are entitled to a new hearing should be clear. The fact that other evidence exists that Judge Russo did not hear when he made his initial

ruling is also clear. The fact that that evidence all points to more than a preponderance that my client was acting the way that the law allows under 16-11-440 we believe is clear and based on that we would ask Your Honor to not only allow this hearing or allow the culmination of this hearing, but find that he is immune to prosecution.

PT3. 12, l. 16 – 13, l. 15.

The solicitor continued to insist that appellant was not entitled to the “new hearing” and that the evidence presented at the hearing before Judge Hood was improper and that it was only after discovered evidence. PT3. 14, l. 7 – 18, l. 3. The judge then noted that it was clear that Beth Bettini had called 911 and that “no one in the Solicitor’s Office nor the defense knew about it until just before the last hearing.” The solicitor verified that was correct. PT3. 18, ll. 4-15. The solicitor nonetheless argued the defense had failed to prove the evidence he presented before Judge Hood was new, entitling him to another hearing. The solicitor further contended that even if the judge considered the evidence presented before him, that appellant had still failed to prove by a preponderance of the evidence that he was entitled to immunity. PT3. 32, l. 5 – 39, l. 8.

The solicitor cited testimony from the first hearing regarding William Zander and Keith Adams and Morgan Zander, in addition to Tyreke Farrow and Devon Chatman. PT3. 34, l. 5 – 41, l. 7. The solicitor also discussed the testimony of Michael James (who testified during the mistrial only at 541-595. The solicitor incorrectly said he “thought” the James testimony on his “duty to retreat theme” was from the “stand your ground hearing. PT3 at 26). He also cited to the testimony of William and Morgan Zander from the immunity hearing before Judge Russo. He admitted he could not prove his contention that William Zander planned to throw down the money or that appellant was angry before he went to the Cook Out hangout, and respectfully those self-serving assertions are not supported by the record in this case. PT3. 34, l. – 41, l. 7.

Defense counsel Rutherford countered that the first immunity hearing before Judge Russo was held on the state's timeframe because they called the case to trial. PT3. 41, l. 10 – 42, l. 3. Defense counsel specifically cited the testimony of Beth Bettini, who the solicitor continued to call “a liar,” even though the state “lost her information. He continues to question what she would have told 911 based on nothing but his imagination,” and Ms. Bettini was naturally angry about being called a liar simply because she was an eyewitness. PT3. 44, ll. 8-15. Counsel noted that appellant was not convicted by the jury, yet the solicitor continued to argue “finality.” PT3. 46, l. 10 – 47, l. 12. Graham responded, “As far as a timeline and I honestly don’t remember, *if Mr. Rutherford says he was forced to have a trial and have a stand your ground hearing at the last minute, I’ll concede to that.* I don’t know—I honestly don’t remember.” PT3. 47, ll. 17-21. (emphasis added). The judge said he would issue a written order, which would also address whether or not the defense was even entitled to the immunity hearing before him. PT3. 50, l. 14 – 52, l. 7. The judge issued an order stating the matter was before the court for a “second” hearing. R. p. *.

The order cited to “inconsistent testimony” and evidence being “in direct contradiction” and ruled, “Under the facts before this Court, the Defendant’s claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).” Order at 6; R. p. *. “The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond (sic) a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence.” Order at 6-7. The order concluded, “Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a

second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the evidence. The state was allowed to respond. Further, *the Court read the testimony from the original immunity hearing and the jury trial*. The testimony has been heard and the record has been protected.” Order at 7; R. p. * (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

Judge Hood erred by considering evidence from the first pretrial immunity hearing before Judge Russo and from the mistrial held before Judge Griffith. Appellant was entitled to a new immunity hearing. Counsel was obligated under Rule 18(a), SCRCrimP to not argue with the court once it limited what would be allowed to be considered. The solicitor in this case was successful in having Judge Hood consider the evidence from the first immunity hearing and the mistrial, where that evidence should not have been considered. The solicitor did not even want the defense to have another immunity hearing – much less a full immunity hearing. Again, “a mistrial is equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties ‘as though no trial had taken place.’ Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (ruling of trial judge in proceeding ending in mistrial represents no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to the admissibility and competency of testimony during a trial, which was later declared a mistrial results ‘in no binding

adjudication of the rights of the parties.’ Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).” State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

In State v. Woods, the state consented to a change of venue in a death penalty case, which resulted in a jury being selected from Marion County and transported to Clarendon County. That trial ended in a hung jury and a mistrial, as here. The defendant, Woods, argued on appeal that the trial judge committed error because the jury was selected from Clarendon County for the second trial, where the court during the first trial had brought a jury from Marion County to Clarendon County for the trial. The Court found no error because the mistrial was a nullity, and therefore the case began anew when the state called it for trial again. The Court noted that when a mistrial occurs because of the inability of the jury to reach a verdict, it is the same as if no trial took place. State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009). The same is true of the pre-trial hearing in this case in which Judge Russo denied immunity. It was a nullity, and appellant was entitled to begin anew. Instead, he was forced to accept what limited hearing Judge Hood would allow him. In State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), this Court found error where during the first trial the judge held an *in-camera* hearing at which time informant Hall identified defendant Smith as a person from whom he purchased crack cocaine on February 26, 1996. The judge allowed Hall to identify defendant Smith in the jury’s presence. However, the first trial ended in a mistrial because of the admission of other evidence.

A second trial was held before the same judge on September 12, 1996. Smith requested a hearing on the in-court identification. The judge ruled that defendant Smith was not entitled to another hearing on the same issue because Hall identified Smith during the prior trial where Smith had an *in camera* hearing on that same issue. However, this Court noted and held that a

mistrial was equivalent of no trial at all, and therefore the prior court's rulings on the admissibility and competency of testimony were not binding on the rights of the parties.

The same is true as to the pre-trial immunity hearing, and the mistrial in this case. It was evident that Judge Hood relied on evidence offered during a mistrial and from the prior pre-trial immunity hearing, which was also nugatory because the proceeding ended in a mistrial. That was error on the part of the court. Moreover, the Supreme Court held in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), that a court's ruling on immunity must be based solely on the evidence presented at the pre-trial immunity hearing. On remand, the Supreme Court instructed the circuit court to only rely on that evidence presented at the new immunity hearing.

The pre-trial hearing held before Judge Russo and the subsequent mistrial held before Judge Griffith were both nullities, and Judge Hood was obligated to proceed as if those nugatory proceedings did not exist. Appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new immunity hearing.

Further, a new immunity hearing was mandated in this case regardless. The defense did not have the opportunity to present compelling defense evidence before Judge Russo because of the bungling of law enforcement and the solicitor's office. PT2. 28, l. 23 – 32, l. 13.

Here, the defense had at least three new key witnesses: Bettini, Lynch and Meggett. Meggett's testimony that the decedent was beating on appellant's vehicle before he was stabbed was crucial and needed to be weighed against the witnesses that Judge Hood only read about and did not see or hear. See State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982)(prior inconsistent statement can be substantive evidence where the declarant testifies and is subject to cross-examination).

The judge had the discretion to grant appellant a second immunity hearing because of the new evidence. The Beth Bettini, Zachary Lynch, and Ervin “Chauncy” Meggett evidence was not known at the time of the first hearing before Judge Russo, and it would have violated “the essential demands of fairness” to deny appellant another immunity hearing under these circumstances. Cf. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991) (unkept promise to instruct on the law deprived defendant of a fair exercise of his peremptory challenges even though peremptory challenges are without a constitutional basis). Further, the evidence offered at the second hearing was “after-discovered” evidence since it was discovered after the first immunity hearing, it could not have been discovered before then by the exercise of due diligence, it was material and not merely cumulative or impeaching and it probably would have changed the result of the first immunity hearing if this evidence had been heard then. See State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). The court erred in refusing appellant his right to a full immunity hearing and this Court should reverse.

2.

The second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019).

The court abdicated its duty to weigh the evidence at the immunity hearing. The court improperly adopted the solicitor’s argument that because the evidence conflicted it was a “quintessential jury question.” See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019). The court failed to understand that an immunity hearing is not a directed verdict and not governed by the same standard. The solicitor argued:

State versus Curry, Your Honor, 406 South Carolina 364, 2013 Supreme Court case, in that case, Your Honor, you had witnesses on both sides of the issue, people saying this and people saying that in direct contradiction of each other. After looking and analyzing immunity, the Court said that a murder defendant was not entitled to immunity from prosecution under the protection of the Persons And Property Act *where the testimony of the defendant and eye witnesses was in direct conflict as to whether the victim attacked defendant. That's exactly what we have here. That is a quintessential -- I didn't pronounce that right -- quintessential jury question.*

PT3. 39, ll. 9-21. (emphasis added).

The solicitor strangely urged that the prosecution had proven appellant's guilt during the mistrial, and he reasoned "they [the jury] looked beyond a reasonable doubt, rejected self-defense, rejected the presumption of fear, how can the defendant's evidence rise to the preponderance of the evidence now?" PT3. 39, l. 22 – 40, l. 18. The solicitor continued to argue appellant was even not entitled to the immunity hearing before Judge Hood. PT3. 40, l. 18 – 41, l. 7.

In Judge Hood's order denying relief, he repeatedly referred to inconsistent or contradictory evidence. The judge noted that "the Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students. Additionally, the testimony as to the 'fear in his eyes,' given by Beth Bettinni and the Defendant, *are in direct contradiction* with the testimony of the Dutch Fork students." Order at 6; R. p. *.

"Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary fitness and courage would have entertained the same belief. *Id.* This standard has not been established by the preponderance of evidence, *based upon the inconsistent testimony.*" R. p. *.

The judge concluded:

Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (Murder defendant was not entitled to immunity from prosecution under Protection of Persons and Property Act where testimony of defendant and eyewitnesses *was in direct conflict as to whether victim attacked defendant*). **The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.** Therefore immunity does not apply because the Defendant has not proven beyond a preponderance of evidence standard of self-defense.¹

Order at 6-7; R. p. *. (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

This issue is controlled by our Supreme Court's opinion in *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019), wherein the Court held the circuit court erred in finding that the immunity issue presented a jury question. "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Judge Hood did not have the benefit of our Supreme Court's opinion in *State v. Cervantes-Pavon* at the time the state successfully urged him that conflicting evidence made self-defense a jury issue under *State v. Curry*, and that immunity therefore had to be denied. The Supreme Court in *State v. Cervantes-Pavon* noted that "the act requires the circuit court to determine whether a movant is entitled to immunity. See *State v. Duncan*, 392 S.C. 404, 709

¹ The "beyond a preponderance of evidence standard of self-defense" error is not insignificant since in *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019) the Supreme Court reversed in part because the circuit court cited to this incorrect standard in making its ruling.

S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination.).” Cervantes-Pavon, 626 S.C. at 451, 827 S.E.2d at 568.

Because the circuit court’s order here was based upon an error of law as explained in State v. Cervantes-Pavon, appellant’s conviction should be reversed and he should be granted a new immunity hearing.

3.

The second circuit court judge erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C).

The defense alleged in this case that appellant was entitled to immunity from prosecution under both S.C. Code §16-11-440(A) and S.C. Code §16-11-440(C). S. C. Code §16-11-440 (A) provides that “A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, *or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle*; and

(2) who uses deadly force knows or has reason to believe that *an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred*.

(emphasis added).

Appellant had no duty to retreat. S.C Code §16-11-440 (C), the stand your ground provision, 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.” (emphasis added).

At the September 18, 2017 argument hearing before Judge Hood, solicitor Graham argued that appellant “chose to go inside” after he saw Dutch Fork students at the Cook Out. However, appellant had a right to go to the Cook Out. It is a public business and Lexington High “hangout” after basketball games. PT3. 37, ll. 8-24. The solicitor admitted that appellant said his friends only wanted to eat, but the solicitor nonetheless argued:

But the defendant and his friends **chose to stay** there. The defendant steps outside when he gets a call back from the same person he texted which I believe is his cousin. When he steps out to take the call, you see the video, the other Lexington students step out. Shortly thereafter Michael James goes by and there's a dispute about who says what first, but what's clear on the video is you see Morgan Zander lean forward and bark something at Michael James' back, and Michael James turns around, they start talking to each other and that's when the Dutch Fork students come out. *If he didn't want to bring on the difficulty, Mr. Dennis could have left right then and there* and Your Honor knows from watching the video that he doesn't leave.

PT3. 37, l. 25 – 38, l. 13. (emphasis added).

The solicitor continued to blame appellant for going to the Cook Out—which again was a place he had a right to be, pursuant to S.C. Code § 16-11-440(C) and for not fleeing when the Dutch Fork students started trouble.

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

It is apparent from Judge Hood’s order denying immunity dated October 11, 2017 that he denied appellant immunity because he did not retreat, and because he went to the Cook Out. The judge noted, “While walking into the cookout, the defendant’s friend, Austin Sanders, was leaving the Cook-Out and told the group, ‘Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just—started getting rowdy in the drive-thru, shaking people’s cars, and stuff like that.’ *Despite this comment, Defendant and his group continued into the Cook-out.*” Order at 3. (emphasis added). The judge reasoned that appellant should not have gone into the Cook Out and that he should have retreated when he saw the Dutch Fork students there.

In the analysis section of Judge Hood’s order, he wrote, “The evidence, which consists of video surveillance and witness testimony, shows the Defendant seeking out the Cook-Out restaurant and the Dutch Fork students that night. The Defendant **chose the situation** that led to the altercation with the Dutch Fork students. The Defendant **also chose not to leave the other exits** that were available to him. He chose to drive into a crowd of Dutch Fork students.” Order at 5. (emphasis added).

The judge also wrote, strangely, “Second, the Defendant must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.* **The Defendant has failed to do so in this case.** The Defendant and his friends went to the Cook-Out, **knowing that Dutch Fork Students would be present.** *The Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.*” Order at

6. (emphasis added). The judge reasoned appellant was responsible for the situation because he went to the Cook Out and because he did not retreat. That is apparent from the judge's order.²

Further, S.C. Code §16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out restaurant was the Lexington High hangout after basketball games. Appellant was a recent graduate of Lexington High, who went to the basketball game. He had every right to go to the hangout that night, and he was not obligated to avoid it simply because he saw Dutch Fork students at the Cook Out upon his arrival. Appellant was not at fault for the difficulty for purposes of self-defense where he went to a public restaurant where he had a right to be.

Appellant also did not have to retreat or flee when the trouble began. The evidence showed his car was surrounded. Regardless, again, appellant had no duty to retreat, and the second circuit court judge's reasoning was an error of law in that regard. S.C. Code §16-11-420(E) states that "the general assembly finds 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." As our Supreme Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): "Section 16-11-440(C) is broadly worded" and it states a defendant has no duty to retreat and has a right to stand his ground.

Pursuant to §16-11-440(C), appellant was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington County hangout, was a place where appellant "had a right to be." It was therefore erroneous to reason appellant was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that appellant had the duty to

² It was strange that the judge reasoned appellant failed to prove he believed he was imminent danger or was in imminent danger because he did not avoid the situation at the Cook Out that night.

retreat from the Cook Out when trouble started. Judge Hood erred as a matter of law by reasoning appellant had a duty to retreat and that he had a duty to avoid the Cook Out restaurant where it was a place he had a right to be as long as he was acting lawfully, which he was. This Court should reverse.

4.

The second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance he was entitled to immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned appellant had a duty to retreat, or even a duty not to go to “a place he had the right to be” altogether.

Arguments by counsel below

The testimony of the immunity hearings has been discussed above at length. At the end of the first immunity hearing, defense counsel argued appellant proved by a preponderance of the evidence that he was immune from prosecution pursuant to the Act. PT1. 604, ll. 18-20. Counsel correctly argued appellant avoided conflict at every opportunity that night. Appellant, after having been chased out of the restaurant, chased from the parking lot, and pursued down the hill toward his car, saw Will stopped in the roadway and believed Will was in danger. PT1. 594, ll. 1-22. Appellant sped up toward that area. Defense counsel argued appellant was not “using an occupied vehicle for an unlawful purpose.” He was merely “trying to make sure [his] friends were okay.” PT1. 594, l. 22 – 595, l. 5.

Defense counsel correctly argued appellant had a right to act on appearances even if he was mistaken. Appellant thought Will Zander was in trouble. Regardless of whether appellant could have left, defense counsel correctly maintained appellant was not required to retreat. PT1.

598, ll. 7-10. Appellant was in his occupied vehicle. He was “in his bubble.” PT1. 599, ll. 9-14. Appellant only stabbed that night because the students made him feel he was in danger of imminent peril and refused to back away from his car. PT1. 603, l. 7 – 604, l. 17. As shown in the previous arguments, Judge Hood denied immunity in an order rife with legal errors.

Standard of review

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Discussion

The South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to “codify the common law Castle Doctrine which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). The General Assembly recognized “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. § 16-11-420(D). It explained “that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to “[a] person who uses deadly force as permitted by the provisions of this

article or another applicable provision of law.” S.C. Code Ann. § 16-11-450(A). Section 16-11-440(A) of the Act provides: “A person is *presumed to have a reasonable fear of imminent peril of death or great bodily injury* to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person *if the person* against whom the deadly force is used is in the process of *unlawfully and forcefully entering*, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or *if he removes or is attempting to remove another person* against his will from the dwelling, residence, or *occupied vehicle*; and the person using deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act *is occurring or has occurred*.” S.C. Code Ann. § 16-11-440(A) (emphasis added).

Section 16-11-440(C) of the Act, the stand your ground provision, 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) (emphasis added).

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out “a valid case of self-defense,” excluding the duty to retreat, “and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. To establish self-defense, four elements must be present: (1) the defendant must be without

fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

The Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. Jones and Lee were involved in a physical altercation. Id. *Jones left the residence and returned when she had “cooled down.”* Id. at 288, 786 S.E.2d at 134. (emphasis added). While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. *Believing Lee was going to hit her again*, Jones grabbed the knife out of her shirt and stabbed him. Id. The Court found there was “nothing in the record to suggest that Jones was at fault in bringing on the difficulty” because she attempted to leave the apartment before the first altercation, returned to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police she believed Lee “was going to hit her again and that had she not acted as she did, then she would have been killed.” Id. at 302, 786 S.E.2d at 142. Next, the Court held

Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). After spending the day on the golf course drinking, Douglas and his friend, Charles Smith, went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. The men got in a fight and Douglas shot Smith. This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' belief that Smith was about to inflict serious bodily injury upon him if he did not act was reasonable. Id. at 320, 768 S.E.2d at 240. According to this Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas, and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Section 16-11-440(A) states that when an individual is occupying his or her car and someone is using force to enter the vehicle or to remove him or her from the vehicle that individual is presumed to have a reasonable fear of imminent peril of death or great bodily injury such that deadly force is permitted. Appellant was occupying his vehicle when he was

attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant's car and reaching into the window, grasping at whatever they could reach. Appellant feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car.

The state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). That was fundamentally incorrect. The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. When he looked up, appellant saw a crowd of Dutch Fork students around Will's vehicle. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the Dutch Fork students were threatening Will and his friends in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Appellant's actions were as reasonable as the defendants in State v. Jones, and State v. Douglas, *supra* especially where appellant repeatedly avoided confrontations with the aggressive students from the other school. Moreover, under the common law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the "Stand Your Ground" provision of the Act. This

subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person.

Here, appellant was on public property on an open roadway at a public restaurant. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. He avoided conflict every step of the way. First, when he entered the Cook Out and was confronted by Michael James, appellant responded, “We just came here to eat,” ignored the Dutch Fork students, and waited in line to order food. Then when Michael James followed appellant and his friends out of the restaurant and asked if they were “still salty,” appellant merely congratulated James on Dutch Fork’s win and began walking to his car. When thirty to forty Dutch Fork students then rushed out of the Cook Out and began threatening and taunting appellant, appellant continued to walk backward to his car and not engage with the students.

Judge Hood found appellant failed to prove he was without fault in bringing on the difficulty because he “chose the situation that led to the altercation with the Dutch Fork students,” he “chose not to leave [through] the other exits that were available to him,” and he

“chose to drive into a crowd of Dutch Fork students.” R. p. * (Order at 5). The judge essentially reasoned that appellant was at fault because he went into the Cook Out where he had a right to be and should have retreated when he saw the Dutch Fork students there. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the “hangout spot” for Lexington High students after basketball games. Appellant was a recent graduate of Lexington High and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Appellant further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant’s car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night. The evidence established the students were banging on appellant’s car, reaching into his window, and yelling threats and profanity. Appellant reasonably feared the students were “trying to attack” him and “forcefully pull [him] out of the car.” PT1. 260, ll. 8-15. Appellant feared for his life. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on appellant’s car “trying to scare him” while others were reaching in the window. PT1. 224, l. 22 – 225, l. 3. Brooks believed appellant was being threatened and he himself “felt a sense of threat.” PT1. 225, ll. 14-18. Beth Bettini, another independent witness, testified appellant “looked scared to death” as the Dutch Fork students surrounded his car and screamed threats at him. PT2. 115, l. 10 – 118, l. 15. Zachery Lynch, also

an independent witness, testified that he saw a student reach inside appellant's window with his hand "forward." Lynch thought this person was trying to grab appellant. PT2. 170, ll. 13-24.

Oddly, Judge Hood found appellant failed to prove this second element, that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in imminent danger, because appellant did not avoid the situation at the Cook Out. He stated, "The Defendant and his friends went to the Cook Out knowing that Dutch Fork students would be present. The Defendant could have left the Cook Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students." R. p. * (Order at 6). This strange reasoning, respectfully, has no basis or support in the record, and, as argued above, appellant did not have a duty to retreat that night.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger. Appellant proved by a preponderance of the evidence that the circumstances were such as would warrant a person 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. Again, a mob of Dutch Fork students surrounded appellant's car, threatened appellant, banged on his car, and reached in his window. Appellant was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow.

In his order denying immunity, Judge Hood found appellant failed to establish this third element of self-defense because of "inconsistent testimony," but did not specify what the alleged inconsistent testimony was. R. p. * (Order at 6). Moreover, citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge determined appellant's "claim of self-defense presents a

quintessential jury question.” R. p. * (Order at 6). He asserted, “The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.” R. p. * (Order at 6). This finding was an error of law.

As argued in issue two above, in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), our Supreme Court held the trial judge erred in denying immunity because a jury question would have existed had the judge been deciding a directed verdict motion. The Court exclaimed, “[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act.” Id. at 451, 827 S.E.2d at 569. The Court emphasized that “the act requires the circuit court to determine whether a movant is entitled to immunity.” Id. at 451, 827 S.E.2d at 568; See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). While Judge Hood did not have the benefit of the Court’s opinion in Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue, and that immunity therefore had to be denied, his ruling nonetheless resulted in an abdication of judicial responsibility under the Act.

Because appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act, respectfully, this Court should reverse appellant’s conviction and sentence and hold he is immune from prosecution.

5.

In the alternative, if this Court were to hold that the first circuit court judge’s ruling controls, the first circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence he was entitled to immunity under both S.C. Code § 16-11-440(A) and the “stand your ground”

provision of § 16-11-440(C), particularly where the judge erroneously reasoned appellant had a duty to retreat, or even a duty not to go to “a place he had the right to be” altogether.

This Court has a lengthy statement of facts above. To avoid unnecessary repetition factually, it is sufficient to point out that Judge Russo did not have the benefit of Beth Bettini, Zachary Lynch, and Ervin Meggett who testified at the second immunity hearing. While the testimony of those three witnesses was undoubtedly important, Judge Russo heard the same evidence on appellant continuously avoiding confrontations with the Dutch Fork students in the Lexington High parking lot, and at the Cook Out, which was the Lexington High hangout until his car was surrounded by the angry mob.

Judge Russo found appellant was not entitled to immunity under both subsection (A) and (C) of § 16-11-440 of the Act. Regarding § 16-11-440(A), the judge determined appellant failed to meet his burden of proving the decedent was in the process of unlawfully and forcefully entering an occupied vehicle. R. p. * (Order at 8). The judge further found appellant failed to prove he had reason to believe the decedent was in the process of unlawfully entering his occupied vehicle. The judge noted that while appellant testified the decedent was forcefully entering his car, he found it not credible. R. p. * (Order at 8). Judge Russo also found appellant failed to establish the elements of self-defense. R. p. * (Order at 9). He concluded appellant did not show he was without fault in bringing on the difficulty. Appellant “approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side.” R. p. * (Order at 9). He further found appellant’s testimony that he was unable to leave after he stopped in the roadway was not credible. R. p. * (Order at 9). Assuming appellant established the second element of self-defense, that he actually believed he was in imminent danger of losing his life or

sustaining serious bodily injury, Judge Russo found appellant failed to show that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. R. p. * (Order at 9). As far as § 16-11-440(C) of the Act, the judge without any explanation determined that even if this subsection applied, appellant would not be entitled to immunity because he failed to establish the elements of self-defense as he had found. R. p. * (Order at 10).

Standard of review

Immunity is determined from a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013), and an abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Discussion

Even under the abuse of discretion standard, the court erred. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). Appellant was entitled to immunity under the statute. See S.C. Code §16-11-440 (A) & (C) & 16-11-450.

Section 16-11-440(A) of the Act provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force. A person is entitled to the reasonable fear presumption if (1) the person against whom the deadly force is used is in the process of *unlawfully and forcefully entering* or has unlawfully and forcefully entered . . . an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred. S.C. Code Ann. §16-11-440(A)(1)-(2). (emphasis added). Further, Section 16-11-440(C) of the Act provides that 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). During the pretrial hearing, a defendant must set out a valid case of self-defense, excluding the duty to retreat, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Id.* at 371, 752 S.E.2d at 266. *Curry* at 370, 752 S.E.2d at 266.

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Appellant was occupying his vehicle when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant's car and reaching into the window, grasping at whatever they could reach. Appellant feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car. As to § 16-11-440(A), Judge Russo found appellant failed to prove that the decedent was in the process of unlawfully and forcefully entering appellant's vehicle. R. p. * (Order at 8). The judge emphasized that while one witness, without naming who, testified that he saw several students reach inside appellant's car from a distance, other witnesses, who were standing directly outside appellant's car, testified that no one touched the vehicle or reached inside. Additionally, no fingerprints were found on or in the vehicle. R. p. * (Order at 8). While Judge Russo did not have the benefit of the testimony from Beth Bettini, Zachery Lynch, or Chauncy Meggett, appellant nonetheless proved by a preponderance of the evidence that the decedent was forcefully trying to enter his car. Josh Brooks, the only independent witness to testify at the first immunity hearing,

testified that a “whole bunch” of Dutch Fork students crowded around appellant’s car in the roadway. PT1. 224, ll. 13-25. The students were “banging” on appellant’s car “trying to scare him.” Brooks asserted that other students were reaching in appellant’s window. PT1. 225, ll. 1-3.

Brooks’ testimony along with appellant’s vivid account of the attack was sufficient to satisfy his burden of proof. The witnesses cited by Judge Russo to support his finding were all Dutch Fork students who remained loyal to their deceased friend. Additionally, the state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the students were threatening Will in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Moreover, under the common law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant’s action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the “Stand Your Ground” provision of the Act. This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in

unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person. Appellant was on public property on an open roadway. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, as explained above, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. Appellant did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. He was not at fault in bringing on the difficulty. He actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant's car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night.

Finally, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger because of the mob's attack on his car. Under the Act, appellant, as argued above, had no duty to retreat and had a right to stand his ground and meet force with force.

If this Court were to determine that Judge Russo's order solely controls the issue of immunity in this case, then because appellant proved by a preponderance of the evidence that he was entitled to immunity his conviction should be reversed.

6.

The trial judge erred in allowing the state to introduce an aerial photograph of the incident location because the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to “retreat.”

Relevant facts

Prior to trial, defense counsel moved to exclude an aerial photograph of the incident location where law enforcement had staged three vehicles side by side in a two-lane road. Tr. 92, ll. 2 – 10. Defense counsel argued that the photograph was confusing and misleading. Tr. 92, ll. 11 – 13. Counsel further argued that by staging the cars in the photograph, the state had manipulated the scene and therefore, it did not accurately depict the scene and was unfairly prejudicial. Tr. 92, ll. 14 – 22.

The solicitor argued that the photograph was necessary to rebut appellant’s self-defense case by showing that he had “so many different ways to leave” the scene. Tr. 92, l. 24 – 93, l. 15. According to the solicitor, the photograph was not confusing because it showed how wide the road was. Tr. 95, ll. 5 – 20. Defense counsel argued that by showing a photograph with three vehicles side by side, the state was giving the false impression to the jury that the road was a three-lane road when in fact it was only a two-lane road. Tr. 96, l. 15 – 97, l. 22.

The solicitor stated that his objective was not to show that this was a three-lane road but to show that three vehicles could fit in the road. Tr. 97, l. 23 – 98, l. 15. Defense counsel pointed out that none of the witnesses at the incident location on the night in question saw the area from above. Counsel further argued that people do not make decisions based on “overhead shot[s]” because they

only see what is in front of them. Tr. 100, ll. 1 – 23. The judge took the issue under advisement. Tr. 102, ll. 5 – 9.

Prior to the state calling its lead investigator, Brent Carter, the solicitor brought up the issue regarding the aerial photograph. The solicitor again argued that he was not trying to show that the road was three lanes wide, but instead that it was wide enough to fit three vehicles. Tr. 352, ll. 7 – 18. Defense counsel responded that the photograph was confusing and misleading because there was no indication as to the widths of the vehicles or the amount of space between the vehicles. Tr. 352, ll. 19 – 25. Counsel also maintained that the photograph was unfairly prejudicial. Tr. 353, ll. 2 – 19. Ultimately, the judge ruled that the aerial photograph was admissible. Tr. 358, ll. 4 – 13.

The state was permitted to introduce the staged aerial photograph with three vehicles parked side by side through Brent Carter's testimony as Exhibit 23 over defense counsel's objection. Tr. 389, ll. 17 – 22; R. p.*. State's Ex. 23 – aerial photograph on file with this Court. The photograph showed a black truck, a silver sedan, and a black SUV parked side by side in the roadway which separates the Cookout from a pet store. All three of the vehicles are parked facing the same direction. See State's Ex. 23 on file with this Court. The photograph was taken from above and to the front side of the vehicles, and showed several other vehicles parked in the parking lots on either side of the roadway. The parking lot visible on the right side of the photograph, where a white SUV and white truck are parked, is the Cookout parking lot. There were no people standing in the roadway in the photograph. See State's Ex. 23.

On the left side of the photograph, bushes grow all the way to the curb of the road and dirt is visible in the roadway next to the bushes. See State's Ex. 23. The dirt is the lighter colored portion of the roadway directly to the right of the bushes and extends in front of and behind the black truck

parked in the roadway.³ There are no white or yellow lines painted on the road demarcating lanes of travel. As this Court will see when viewing State’s Exhibit 23, the black truck in the roadway, if traveling with the normal flow of traffic, would continue straight and turn right onto the main road. The silver sedan and black SUV are parked facing the “wrong” direction, i.e. these cars would be head on with any car that pulled into the Cookout parking lot using the proper lane of travel. See State’s Ex. 23.

Carter testified that the road could “comfortably” fit three vehicles. Tr. 389, l. 23 – 390, l. 1. However, on cross-examination, Carter admitted that he did not know the actual measurements of the width or the length of the road because he did not measure it. Tr. 459, l. 17 – 460, l. 22. Carter further admitted that the road was not a three-lane road and that part of the road was covered in dirt. Tr. 460, ll. 23 – 461, l. 13.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).”

Discussion

Rule 403, SCRE, permits relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). “[A] photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant

³ Investigator Carter, and the trial court both agreed that this was dirt in the road. Tr. 357, ll. 5 – 16; tr. 461, ll. 1 – 13.

or unnecessary to substantiate facts.” State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

Here, the trial judge erred in allowing the state to introduce a staged aerial photograph of the scene because the photograph gave the false impression that the road was three lanes wide when in fact it was only two. The solicitor’s argument that he was not intending to show that the road was three lanes wide but only that three cars could fit was illogical. By showing the jury a photograph with three vehicles parked side by side in the roadway, the solicitor was conveying to the jury that the road was three lanes wide which, as the solicitor’s own lead investigator acknowledged, was not the case. Tr. 459, l. 17 – 461, l. 13.

In State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244 (Ct. App. 2019), this Court determined that the trial judge acted within his discretion in excluding photographs that the defendant sought to admit in support of his third-party guilt defense. In Brooks, the defendant was accused of “unleash[ing] a hail of gunfire toward [the decedent]” in a bar room argument over a female. Id. at 623-24, 837 S.E.2d at 238-39. Specifically, the defendant in Brooks wanted to admit photographs from the cell phone of a third party who was present at the bar when the shooting happened which showed a .22 caliber pistol because there were ten .22 caliber shell casings discovered at the scene after the shooting. Id. at 635, 837 S.E.2d at 245. The defendant further argued that the third party whose cell phone contained the photograph was in communication with her ex-boyfriend who sent her a text message regarding the shooting stating that “his home dog just shot his other home dog.” Id.

The defendant in Brooks argued the photographs were admissible because they showed that the ex-boyfriend was the shooter. Id. at 636, 837 S.E.2d at 245. This Court disagreed, finding that the photographs did not clearly point to the guilt of the ex-boyfriend since the pistol in the

photograph was capable of holding fewer rounds of ammunition than were found on the scene and the description given of the shooter by the eye-witnesses did not match the ex-boyfriend. Id. at 636-37, 837 S.E.2d at 245-56.

As in Brooks, the aerial photograph in this case was confusing, misleading, and it did not refute appellant's self-defense argument because the photograph was substantially different from the scene as it existed on the night of the incident. Law enforcement deliberately manipulated the scene to show the roadway in a condition that was favorable to the state. There were no aerial photographs of where appellant's vehicle was parked in the roadway nor were there any aerial photographs showing where the other cars were parked around appellant. Because of this, the aerial photograph simply served to confuse the issue of "how many cars could fit" in the road with the actual question of whether appellant could have reasonably avoided the danger of the mob of students surrounding his car by driving away or retreating.

The state conspicuously did not include a large group of people standing around one of the vehicles in their manipulation of the scene with their staged photograph. This was because the state did not want to depict the condition of the roadway at the time of the incident, but rather to show the scene in a substantially different condition to support their retreat argument. Furthermore, the aerial photograph did not strengthen the state's argument that appellant should have retreated even though he was under no such duty. Any such argument was legally irrelevant because appellant had no duty to retreat. See S.C. Code §16-11-440 (C). However, the judge charged the jury that appellant had a duty to retreat. Tr. 1169. The Supreme Court in State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) left open for "another day" whether charging the "full reach of the Act" - including no duty to retreat -- would be proper.

Appellant was not looking down on the scene from a bird's-eye view. Tr. 100, ll. 1 – 23. Instead, he was sitting in his car surrounded by angry people who were yelling at him. Therefore, the aerial photograph misled the jury as to whether appellant could have reasonably and safely retreated. Cf. Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019).

The photograph also did not depict any relevant information as to the central issues in the case. Cf. State v. Brockmeyer, 406 S.C. 324, 354-55, 751 S.E.2d 645, 661-62 (2013) (holding that photograph of defendant with his shirt off shortly after the crime was relevant because it depicted the defendant's agitated demeanor which was relevant to undercut his claim of accident); State v. McConnell, 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986) (holding that evidence of .22 and .25 caliber bullets, a .22 caliber pistol, and a photograph showing a bullet hole in the window of an apartment were inadmissible where the alleged murder weapon was a .357 caliber pistol because “[t]here was insufficient connection between the evidence and the crime with which appellant was charged, and the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value”).

In State v. Livingston, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997), the Supreme Court held that a photograph of the victim in a felony DUI case of her and her husband on a prior occasion along with her husband's testimony was inadmissible because it was irrelevant and prejudicial. The state contended in Livingston that the photograph of the victim and her husband's testimony were necessary to explain “the reason the victim was in Beaufort County, the time she normally left work, and the route she usually took home.” Id. The Court noted that none of those facts were in dispute, so the picture and testimony were irrelevant. Id. Here, while the state disputed the fact that appellant could not have reasonably avoided the danger by fleeing the scene, the aerial photograph with the three vehicles side by side did not make appellant's self-defense argument more or less

probable. Again, appellant did not have a bird's-eye view of the scene and therefore would not have had any way to know that three cars could fit side by side. The fact that three cars could fit in the roadway side by side was wholly immaterial to whether appellant could have retreated.

The trial judge erred by allowing the state to introduce the staged aerial photograph of the scene because it was grossly misleading, confusing, and highly prejudicial. The photograph was a staged misrepresentation of the scene by the state which showed the roadway in a substantially different condition than it was in when appellant was surrounded by a mob of angry students while he was lawfully occupying his own vehicle. Appellant was trying to leave the Cookout when he was surrounded by a group of angry students. The state sought to manipulate the scene to make it appear that appellant had "so many ways to leave" by showing a staged photograph that was inaccurate and prejudicial where self-defense was the critical issue in this case. The trial judge erred by allowing this photograph into evidence and appellant's conviction should be reversed.

7.

The trial judge erred in allowing the state to introduce a model car door of a Ford Explorer created by the state's investigator because that model was substantially different from appellant's actual vehicle and use of the model was highly misleading and resulted in an inaccurate representation of the incident.

Relevant facts

The state sought to proffer the testimony of James Sullivan, who was an investigator with the solicitor's office, to lay the foundation for a model of a car door he made. Tr. 513, l. 11 – 514, l. 4. Sullivan testified *in camera* that he had been an investigator with the Solicitor's Office for five years. Tr. 515, l. 25 – 516, l. 2. Sullivan recalled that he had been asked by the solicitor to create a

“visual aid to assist witnesses in providing testimony.” Tr. 517, ll. 1 – 2. Sullivan was never qualified as an expert in anything.

Sullivan described the visual aid he created: “It was a door mounted to a frame that was powered to allow the window to go up and down and it was done so with the measurements taken by Investigator Carter to make sure it’s the correct height, but it’s nothing more than a door.” Tr. 517, ll. 3 – 8. The door that Sullivan used came from a “1998 Ford Explorer Sport.” Appellant’s vehicle was a 2001 Ford Explorer Sport. Tr. 517, ll. 12 – 18. Sullivan claimed that the difference in years was not “an issue” because “the second generation [Ford Explorer Sport] was built from 1995 to 2003 so the model basically did not change.” Tr. 517, ll. 19 – 23.

Sullivan recalled that “just the door” was used during appellant’s first trial and immunity hearing. Tr. 519, ll. 14 – 19. After appellant’s first trial ended in a mistrial, Sullivan added a car seat to his model “[t]o provide an extra layer of testimony . . . [and] so it’s a more accurate representation.” Tr. 519, l. 23 – 520, l. 6. According to Sullivan, the seat, the frame and the center console that he used for his model all came from a 1998 Ford Explorer Sport. Tr. 520, ll. 7 – 16. Sullivan stated that the seat on the model could not be moved up or down, but that it could slide back and forth “like [appellant’s].” Tr. 521, ll. 12 – 23.

Sullivan said that the height of the frame of his model was based off measurements he received from Investigator Carter. Tr. 521, ll. 3 – 11. Sullivan later admitted that *he had never even seen appellant’s car in person* but only photographs of it *and that his entire model was only based on a single measurement taken by Carter*. Tr. 573, ll. 18 – 24; tr. 578, ll. 12 – 18. The sole measurement used by Sullivan to create his entire model was from the ground to the window seal which Investigator Carter had measured to be forty-four and one quarter inches. Tr. 525, ll. 8 – 23.

The state requested to use the model for demonstrative purposes arguing that it would be helpful and not confusing. Tr. 524, ll. 1 – 10.

On cross-examination, Sullivan admitted that there were numerous measurements that he did not take of a 2001 Ford Explorer, including the distance between the seat and the door frame, and the distance between the seat and the steering wheel. Tr. 524, l. 14 – 525, l. 7; tr. 532, ll. 3 – 21. Sullivan also admitted that tire pressure could change the height of a vehicle and that Sullivan was not aware of what the tire pressure was on appellant's vehicle or what kind of tires and wheels that it had on it. Tr. 529, ll. 15 – 24. Sullivan also failed to consider the level of the ground where the stabbing occurred and the level of the ground where Carter took his measurements of appellant's car. Tr. 530, ll. 2 – 14.

Sullivan did not know what the condition was of the suspension springs or seat springs in appellant's car and he did not do any research regarding what Ford Motor Company said about wear and tear on the springs. Tr. 532, l. 22 – 533, l. 6. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and he acknowledged that appellant's foot was on the brake during the incident. Tr. 533, l. 7 – 534, l. 1.

Defense counsel argued that using the model was improper because the state had access to appellant's actual vehicle which they could have used. Furthermore, the model did not include a steering wheel or other critical measurements like the distance between the seat and the steering wheel or how far back the seat was when appellant was sitting in it. Tr. 537, l. 7 – 538, l. 23. Counsel further argued that the state also failed to take into consideration the type of tire or tire pressure of appellant's car. Tr. 539, l. 1 – 540, l. 1.

The solicitor then introduced a photograph of the model that was used in appellant's first trial which was taken by The State Newspaper which showed appellant and defense counsel using

the model during appellant's testimony at his first trial. Tr. 541, ll. 2 – 25; R. p.* (Court's Exhibit 2 – photograph of car door model on file with this Court). The solicitor stated that the car seat was added to the model after appellant's first trial which he argued made the model more realistic. The solicitor also claimed that the only measurement that mattered was the height of the seat in appellant's vehicle. According to the solicitor, appellant could sit in the seat and move it forward or backward to where he thought it was on the night of the incident. Tr. 542, ll. 1 – 21.

Defense counsel pointed out that it was not appellant's burden to show what happened and that suggesting appellant be required to position the seat in the correct location was improper burden shifting. Tr. 542, l. 23 – 544, l. 7. Counsel argued that the model was inaccurate and misleading and should not be used as a demonstrative exhibit. Tr. 544, ll. 16 – 17. Counsel further argued that allowing the model to be used as a demonstrative exhibit would place appellant in the position of having to demonstrate what happened using an inaccurate model. Tr. 545, ll. 13 – 20.

The judge ruled that the model was admissible for demonstrative purposes and that defense counsel's arguments regarding the inaccuracies "went to the weight and not the admissibility" of the exhibit. Tr. 546, ll. 21 – 25. The Court then asked Investigator Carter to demonstrate how he measured the height of the door and to measure the height of the model Sullivan made. Tr. 549, ll. 2 – 7. Defense counsel pointed out that measuring the demonstrative was not the same as measuring appellant's actual car. Tr. 550, ll. 14 – 25.

After the lunch recess, with nothing under oath, the solicitor informed the judge that Sullivan and Carter *measured the model* during the break and that "at most it would be off less than one sixteenth of one inch basically to the benefit of the defense." Tr. 551, ll. 19 – 24. Defense counsel responded that appellant could not benefit from the model being "off" and that the model still did not accurately depict the inside parameters of the vehicle. Tr. 552, ll. 1 – 19. Counsel again

argued that it was improper for the state to use a model that did not match appellant's actual vehicle. Tr. 555, l. 7 – 556, l. 4. The judge again ruled that the model could be used as a demonstrative exhibit and that counsel for both sides could manipulate the model in the courtroom and defense counsel could cross-examine the witnesses on the inconsistencies of the model. Tr. 558, ll. 15 – 22.

Sullivan then testified in front of the jury about how he put the model together and he was cross-examined about the numerous differences between his model and appellant's actual vehicle. Tr. 559, l. 15 – 585, l. 10. Sullivan admitted in front of the jury that there were numerous measurements that he did not take of appellant's car, including the distance between the seat and the pedals, and the distance between the seat and the steering wheel. Tr. 573, ll. 4 – 17. In fact, *Sullivan never even physically examined appellant's car* but instead only saw photographs of it. Tr. 573, ll. 18 – 24. Sullivan further admitted that *his model was based on a single measurement taken by Investigator Carter and that Carter had not marked exactly on appellant's car where the measurement even came from*, nor did Sullivan know whether Carter had used a level when he took the measurement of appellant's car. Tr. 570, l. 19 – 571, l. 3; tr. 578, ll. 12 – 18. Sullivan acknowledged that he did not know whether his model door and appellant's door had the same curvature to them either. Tr. 571, ll. 7 – 18. Sullivan also failed to measure the height of appellant's seat in relation to the roof of the car. Tr. 574, ll. 11 – 16. Sullivan did not know what the condition was of the shocks in appellant's car and admitted that in a car as old as appellant's, the shocks may have deteriorated. Tr. 569, l. 5 – 18. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and acknowledged that appellant's foot was on the brake during the incident. Tr. 569, l. 19 – 570, l. 4. Finally, Sullivan did not know how far forward or backward appellant's seat was. Tr. 577, l. 7 – 578, l. 11.

Two of the state's fact witnesses used the inaccurate model during their testimony. Alexis Brunson was a student at Dutch Fork High School who was present at the Cookout the night of the incident. Brunson claimed that appellant "looked like" he was trying to run her friends over in the street and was "driving really fast" but then stopped "abruptly." Tr. 742, l. 17 – 743, l. 18. However, Brunson admitted that she did not know whether appellant had even seen her friends in the street and that she "just assumed that he did." Tr. 751, ll. 17 – 20. She recalled she was "very upset" and admitted that she was one of the individuals who approached appellant's car window when he was stopped in the Cookout parking lot. Tr. 743, l. 19 – 744, l. 16. Brunson continued: "I went up to the window and I was basically like, what the fuck are you doing? Like you need to get out of here." Tr. 745, ll. 1 – 6. According to Brunson, appellant had his hand in his pocket, and he said "you don't want what I have" to the students who approached his car. Tr. 745, ll. 13 – 19. Brunson maintained that it "looked like" appellant threw a punch out the window with his right arm and then drove away. Tr. 746, ll. 4 – 15. Brunson claimed that none of the people who approached appellant's car reached inside his window or threw anything into his car. Tr. 746, ll. 16 – 22. Brunson then used the car door model to reenact her recollection of the incident over defense counsel's renewed objection. Tr. 748, l. 10 – 749, l. 14.

Lamar Butler was a junior at Dutch Fork High School on the night of the incident. Tr. 759, ll. 6 – 15. Butler attended the basketball game and went to Cookout afterwards with the other students. Tr. 759, l. 18 – 762, l. 11. Butler also claimed that appellant "almost hit" his friends as appellant was leaving the Cookout but that appellant stopped his car before hitting anyone. Tr. 766, l. 18 – 767, l. 8. Butler admitted that approximately six people, including himself, approached appellant's car window. Tr. 768, ll. 9 – 16. Butler further admitted that "everybody [was] pretty much . . . yelling [and] cussing" at appellant and that appellant's window was rolled halfway down.

Tr. 769, ll. 1 – 8. However, Butler denied that anyone reached into appellant’s car or threw anything inside the car. Tr. 770, ll. 1 – 7. Butler was then asked by the solicitor to step off the witness stand and reenact the incident using the state’s demonstrative exhibit. Butler was asked to indicate using the model how far appellant’s window was rolled down at the time of the incident. Tr. 770, ll. 11 – 22. The solicitor also asked Butler to sit in the car chair to demonstrate how appellant was sitting during the incident. Tr. 771, ll. 5 – 21. Butler then claimed appellant made a “quick jab” out the window and then drove off which Butler demonstrated using the demonstrative exhibit. Tr. 772, ll. 2 – 14.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).”

Discussion

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court dealt with the admissibility of a videotaped animation of a car accident in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell’s videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

In analyzing this issue, the Cantrell Court noted:

Computer animation allows attorneys to convert witnesses’ verbal testimony into dynamic, visual demonstrations capable of mentally transporting jurors to the scene. . . . *However, a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical*

data, and engineering assumptions that drive its images. The computer maxim “garbage in, garbage out” applies to computer animations.

Id. at 383-384, 529 S.E.2d at 536 quoting G. Ross Anderson, Jr., *Computer Animation; Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995) (emphasis added). The Court continued:

The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. *If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great.* Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id., at 369, 384, 529 S.E.2d at 536 quoting *State v. Trahan*, 576 So.2d 1, 8 (1990) (emphasis added).

The Cantrell Court affirmed the trial judge’s refusal to admit the evidence and noted potential problems with computer animations: “[T]he potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence . . .” Id. at 384, 529 S.E.2d at 536. The Court then established a new rule regarding the admissibility of computer animations:

We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCORE; (2) relevant under Rules 401 and 402, SCORE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCORE.

Id. The Court also urged trial judges to give a limiting instruction that “the animation represents only a re-creation of the proponent’s version of the event; it should in no way be viewed as the absolute truth.” Id. at 387, 529 S.E.2d at 537. In this case the model of the car door used by the state was a wholly inaccurate representation of appellant’s car because it was “just a door” with a

car seat added to it. The car door model was based on a single measurement taken by Investigator Carter which was then used by a *different* investigator, Sullivan, in building the model as a “visual aid.” Tr. 578, ll. 12 – 18. The model did not take into account critical measurements and features like the location of the seat or the distance between the seat and the steering wheel. In fact, the model did not even have a steering wheel or dashboard. Furthermore, Sullivan failed to consider how far forward or backward appellant’s seat was located on the night of the incident. All of these measurements and features were critical to appellant’s self-defense case because his argument hinged on the fact that at least one of the angry students reached into appellant’s car door before he stabbed the decedent in self-defense. These measurements were necessary to create a model that accurately depicted the dimensions of the interior and exterior of appellant’s car.

In State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009), the Supreme Court held that “[n]on-scientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.” In White, the state argued that “reliability need not be shown for the admission of non-scientific expert testimony” and the Supreme Court specifically rejected that argument. Id. at 272-273, 676 S.E.2d at 687-688. The White Court held:

[T]he trial courts of this state have *a gatekeeping role* with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications *and reliability* and further find that the proposed evidence will assist the trier of fact.

White, at 274, 676 S.E.2d at 689 (emphasis added).

Here, the trial judge failed to exercise his gatekeeping function and exclude the exhibit for being grossly unreliable and inaccurate. Sullivan’s model simply could not be reliable when Sullivan *never even saw appellant’s car in person and the model was based on a single measurement taken by another person.* See Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019).

The trial judge could not disregard his gatekeeping duty as he did by saying that the inaccuracies in the model went to “weight and not admissibility.” Tr. 546, ll. 21 – 25. The trial judge had an affirmative duty to make a determination as to reliability before allowing this demonstrative exhibit to be shown and used in front of the jury. The judge also failed to give a limiting instruction to the jury, disregarding the Supreme Court’s ruling in Cantrell, 339 S.C. at 387, 529 S.E.2d at 537.

Similar to the computer animation at issue in Cantrell, the phrase “garbage in, garbage out,” applies with equal force here. The model simply could not be construed as an accurate representation of appellant’s vehicle when it was based on only a single measurement – the height of appellant’s driver’s side window from the ground. If Sullivan’s goal was to make an accurate model of appellant’s vehicle he should have used additional measurements including the distance between the seat and the door frame, the distance between the seat and the steering wheel, the distance between the seat and the pedals, and the distance between the seat and the ceiling of the car. Sullivan admitted that he did not take any of these critical measurements in creating his model. Tr. 524, l. 14 – 525, l. 7; tr. 532, ll. 3 – 21; tr. 573, ll. 4 – 17; tr. 574, ll. 11 – 16. Instead of taking the numerous measurements that would have been required to make an accurate model of appellant’s car, the state cut corners to produce something that the solicitors could use for theatrical purposes during appellant’s trial. As the Cantrell Court noted: “If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party’s version of those facts, the danger that the jury may confuse art with reality is particularly great.” Id. at 369, 384, 529 S.E.2d at 536. Here, the model car door did not portray any original facts in controversy, nor was it based on any witness testimony. Instead, it was a prop created by the Solicitor’s Office to be used for dramatic reenactments by hostile witnesses to appellant, Brunson and Butler. These theatrical

performances had no place in appellant's trial and the trial court erred in allowing the state to use such a crude and inaccurate demonstrative.

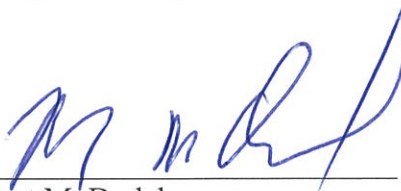
Although the rule laid out in Cantrell dealt specifically with computer animations, it provides an important framework for dealing with any recreation of events by a party. Here, the recreation was even more vivid than a computer animation as it was live witnesses acting out the event using an inaccurate prop created by the state. The state had its witnesses use the demonstrative exhibit to refute the second and third elements of self-defense which are that the defendant either was actually in imminent danger of losing his life or sustaining serious bodily injury or he believed he was in such danger, and that a reasonable person in the defendant's circumstances would have stuck the fatal blow himself, or a reasonable person would have entertained the same belief as the defendant. See State v. Wiggins 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). The state did this by purportedly showing that none of the people who approached appellant's car ever reached into his car, i.e. appellant was not actually in imminent danger nor did he have a reasonable belief he was in imminent danger. The solicitor even had Butler sit in the seat of the model and pretend to be appellant in order to act out his version of events and specifically to claim that only appellant reached out of the car when nobody had reached into the car. Allowing witnesses to act out the event using an inaccurate demonstrative was extremely prejudicial and had a very high likelihood of misleading and confusing the jury.

The state's model was inaccurate and therefore, it could only be used by witnesses to confuse and mislead the jury about the incident. The use of the model was extremely prejudicial to appellant because his argument of self-defense depended on where he was and where the angry mob of students were in relation to his car. Specifically, appellant was prejudiced by the state's misleading attempt to refute the second and third elements of self-defense by "acting out" how none

of the students who approached appellant's car ever reached into his car. The prejudice to appellant was compounded by the fact that Butler physically sat down in the seat of the model and pretended to be appellant and claimed that only appellant reached through the window to strike the decedent. Again, this painted a misleading, confusing and highly inaccurate picture of what actually happened. The trial court abdicated his discretionary gatekeeping function and erred in allowing the state to use this inaccurate car door model for courtroom theatrics and further failed to give a limiting instruction to the jury to place the demonstrative exhibit in its proper context. Appellant's conviction should be reversed. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

CONCLUSION

By reason of the foregoing arguments, this Court should reverse the circuit court's order that appellant was not entitled to immunity from prosecution pursuant to S.C. Code §16-11-410 et seq., specifically §16-11-440 (A) & (C). In the alternative, this Court should reverse appellant's conviction and remand his case to the Lexington County Court of General Sessions for a new trial.



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January 22, 2021

RECEIVED**Jan 22 2021****SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington CountyHonorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

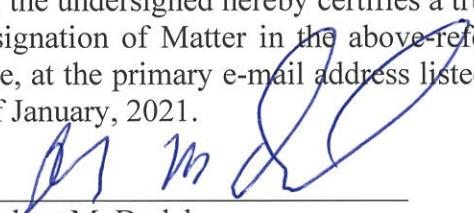
V.

KIERIN MARCELLUS DENNIS,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Amended Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 22nd day of January, 2021.



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ATTORNEYS FOR APPELLANT

RECEIVED**Jul 07 2021****SC Court of Appeals**

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-001486

THE STATE RESPONDENT,

v.

KIERIN MARCELLUS DENNIS APPELLANT.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the second circuit judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity?

2. Whether the second circuit judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to *State v. Cervantes-Pavon*, 426 S.C. 442, 824 S.E.2d 564 (2019)?

3. Whether the second circuit court judge erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation of the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §§ 16-11-440 (A) & (C)?

4. Whether the second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440 (C), particularly where the court erroneously reasoned that inconsistent

- evidence made self-defense a jury issue, that appellant had a duty to retreat, or even to avoid going to “a place he had the right to be” altogether?
5. Whether, in the alternative if the first circuit court judge’s order alone controlled, he erred by denying appellant immunity the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned that appellant had a duty to retreat, or even going to “a place he had the right to be” altogether?
 6. Whether the trial court erred in allowing the State to introduce an aerial photograph of the incident location where the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to “retreat”?
 7. Whether the trial court erred in allowing the State to introduce a model car door of a Ford Explorer created by the State’s investigator where that model was substantially different from appellant’s actual vehicle and the use of the model was highly misleading and resulted in an inaccurate representation of the incident?

RESPONDENT’S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court improperly granted Appellant a second immunity hearing after a mistrial when the Appellant himself moved for a new hearing over the Solicitor’s objection and the court allowed the Appellant to introduce testimony from seven new witnesses, all the while incorporating and expanding the testimony from the fourteen witnesses heard at the first hearing, for the Appellant’s benefit alone, when case law dictates that a party cannot complain of an alleged error his own conduct induced and a party cannot complain that he received the remedy he himself asked for.

2. Whether the Honorable Judges Russo and Hood properly denied Appellant immunity as he did not prove by a preponderance of the evidence either at the first hearing or the second, expanded hearing that he was (A) without fault in bringing on the difficulty; (B) a reasonable man of ordinary courage and fitness would have feared for his life; and (C) he had no other probable means of avoiding the danger, and thus had a duty to retreat before meeting force with force.

3. Whether the trial court properly admitted an aerial photograph of the scene in order to help the triers of fact orient themselves to the area where the stabbing occurred when the three police vehicles parked in the photograph were standard-sized vehicles that would show the width of the roadway from which the Appellant could have retreated: a material issue the State was entitled to address to disprove self-defense.

4. Whether the trial court properly allowed the Solicitor to use a demonstrative of the Appellant’s Ford Explorer’s door and window in order to help the jury understand how and where the Appellant was sitting in his vehicle when he stabbed the victim as the Appellant was allowed to adjust his seat and window to match how they were the night of the crime and the investigator who created the demonstrative was available for and was thoroughly cross-examined by the defense.

STATEMENT OF THE CASE

Kierin Marcellus Dennis was indicted for Murder, 2014-GS-32-01440, and Possession of a Weapon during the Commission of a Violent Crime, 2014-GS-32-01441, at the June 2014 term of the Grand Jury for Lexington County. Indictments. The case was prosecuted by Richard Hubbard, III, Senior Deputy Solicitor, Shawn Graham, Deputy Solicitor, and Rhonda Patterson, Assistant Solicitor, and the Appellant was represented by Todd Rutherford, Esquire, Simone Martin, Esquire, and Nicole Simpson, Esquire. Nov. 2014 Tr. 1; Oct. 2016 Tr. 1; Aug. 2017 Tr. 1; Sept. 2017 Tr. 1; Aug. 2019 Tr. 1. Prior to trial, Appellant made a motion for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450 (2015), and a hearing took place pursuant to the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) from November 17 to 19, 2014. Nov. 2014 Tr. 1-618. The Honorable Thomas A. Russo denied Appellant immunity through a February 4, 2015 Order, and the case proceeded to trial by jury on October 3, 2016, which concluded in a mistrial due to an 11-1 hung jury on October 11, 2016. Feb. 2015 Order 1-10; Oct. 2016 Tr. 1, 1284.

Appellant moved for a new immunity hearing in June of 2017, alleging newly discovered evidence, and a second immunity hearing was held before the Honorable Robert E. Hood on August 22 and 24, 2017 and September 18, 2017. June 2017 Motion; Aug. 2017 Tr.; Sept. 2017 Tr. Judge Hood issued an Order denying immunity on October 11, 2017 and the case proceeded to trial by jury a second time from August 19 to 27, 2019, pursuant to which Appellant was found guilty of murder. Oct. 2017 Order; Aug. 2019 Tr. 1180-1182. He was sentenced by the Honorable Eugene C. Griffith to 30 years' imprisonment. Aug. 2019 Tr. 1197. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Dutch Fork High School played its long-time rival Lexington High School in basketball on the evening of February 17, 2014. Nov. 2014 Tr. 8, 227, 246; Aug. 2019 Tr. 258-259. The game was a nail-biter, but Dutch Fork ended up winning the rowdy game by a handful of points. Nov. 2014 Tr. 246, 443; Aug. 2019 Tr. 275-277. Kierin Dennis (“Appellant”) left the game with his four friends Keith Adams, Ketura “Lucky” Cook, Will Zander, and Morgan Zander, Will’s 14-year-old sister, all of whom were current or former students of Lexington High School.¹ Nov. 2014 Tr. 8-9, 161; Aug. 2019 Tr. 277-278. Students from the two high schools had had post-game altercations before, so extra security was on hand that night to separate the students after the game concluded. Nov. 2014 Tr. 9-13, 160-161, 482-483. Lexington High students were directed to exit the gym out of the front door, while Dutch Fork High students were directed out of the back. Nov. 2014 Tr. 9, 160; Aug. 2019 Tr. 275, 284-285.

Students from Dutch Fork were celebrating their win by dancing in a loosely-formed circle in the parking lot when the Appellant approached them and interrupted their celebrations. Nov. 2014 Tr. 161, 178, 252; Aug. 2019 Tr. 332, 788-789. Things got tense, and the Appellant challenged them to meet up at the local Cook-Out later to settle things as a police officer ordered everyone to leave the parking lot. Nov. 2014 Tr. 247, 359-362, Aug. 2017 Tr. 351-352; Aug. 2019 Tr. 289, 319-320.

The Appellant left the high school in his gold Ford Explorer Sport followed by Keith in his White Nissan Armada, and Will, Morgan, and Ketura in Will’s Silver Infinity Crossover. Nov. 2014 Tr. 14-15; Aug. 2019 Tr. 159. They initially drove to a gas station, then to Sonic, then to

¹ 18-year-old Keith Adams, 18-year-old Will Zander, and Ketura “Lucky” Cook were Lexington High School graduates. Nov. 2014 Tr. 7, 74, 245. Morgan Zander was a current Lexington High School student. Nov. 2014 Tr. 159.

McDonald's, but finally ended up at the Cook-Out, even though it was noticeably full. Nov. 2014 Tr. 14-15; Aug. 2019 Tr. 613. Keith parked by a Petco while Will and the Appellant parked their cars further down by a car wash and an old Blockbuster. Nov. 2014 Tr. 14, 119; Aug. 2017 Tr. 275-277; Aug. 2019 Tr. 378-388. One of the Appellant's long-time friends, Austin Sanders, was leaving the Cook-Out when the Appellant and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." Nov. 2014 Tr. 250. The Appellant and his friends chose to go into the Cook-Out anyway. Nov. 2014 Tr. 250. Inside were between thirty to forty current and former Dutch Fork High School students, including Devon Chatman, Alexis Brunson, Michael James, Lamar Butler, Kenneth Williams, and the 18-year-old victim, Da'Von Capers.² Nov. 2014 Tr. 213, 592; Aug. 2019 Tr. 229.

Once the Appellant was inside the restaurant, Michael James, a current Dutch Fork student, stood up and said, "Is that all y'all brought?" Nov. 2014 Tr. 37, 428. The Appellant replied, "We just came here to eat." Nov. 2014 Tr. 251. Surveillance footage shows the students from the two high schools eating quietly inside the Cook-Out for approximately seventeen minutes before the Appellant decided to go outside. Nov. 2014 Tr. 316; Aug. 2017 Tr. 297-298; Aug. 2019 Tr. 674-676; State's Exhibit 12; Defense Exhibit 3. The Appellant had previously texted his cousin, Tobias Davis, that Dutch Fork students were "trying to fight [them] at Cook-Out" and stepped outside to take a phone call from him. Nov. 2014 Tr. 16, 317-319. The Appellant's four other friends followed him outside along with Michael James, who was seen on the surveillance footage dressed in a white, long-sleeved shirt. Michael James was walking to his

² Devon Chatman, Alexis Brunson, and Kenneth Williams were Dutch Fork graduates; Lamar Butler, Michael James, and Da'Von Capers were current Dutch Fork students. Nov. 2014 Tr. 442, 481, 502-503, 566; Aug. 2019 Tr. 229.

car when Morgan Zander, Will's sister, said something to him, so he turned around and threw his hands up, and said, "Are y'all still salty?" Nov. 2014 Tr. 16-18, 80; Aug. 2017 Tr. 270.

Surveillance video shows the Dutch Fork students then immediately came out the restaurant. Nov. 2014 Tr. 81-85, 323-324; Aug. 2017 Tr. 269-277. The Appellant and his friends walked to their cars, but no one assaulted or attempted to assault them as they were on their way. Nov. 2014 Tr. 448, 463. Once they were in their three cars, they pulled up next to each other and discussed how they would exit the parking lot for approximately five minutes. Nov. 2014 Tr. 126-127, 257-258. Keith left the parking lot first and turned right toward Main Street. Nov. 2014 Tr. 45-46. Will Zander drove next to the Dutch Fork crowd and stopped his car, rolled down the window, and threw money out of the car, saying, "Hey, this what y'all are worth." Nov. 2014 Tr. 544, 569. The Appellant had pulled into the Petco parking lot and turned his car around to face the Dutch Fork students while Will was doing this. Nov. 2014 Tr. 51, 327-328. He then pointed his car at the crowd and rapidly accelerated his vehicle into the wrong lane of traffic and almost hit two Dutch Fork students, Tyreke Farrow and Devon Chatman, before finally stopping his car by the opposite curb. Nov. 2014 Tr. 451-452, 543-547. Xavier Holliday had to push Tyreke out of the way to prevent the Appellant's car from hitting him. Nov. 2014 Tr. 547.

Dutch Fork students then gathered around the Appellant's vehicle and the two groups exchanged heated words because the Appellant had almost hit them. Nov. 2014 Tr. 412-413, 506, 547; Aug. 2017 Tr. 384. Will parked his car diagonally in front of the Appellant's, exited his vehicle, and got a metal pipe out of his trunk. Nov. 2014 Tr. 50, 62, 135, 151. After approximately one minute of this heated exchange, the Appellant motioned in a "come here" fashion to two of the Dutch Fork students, rolled his window down further, and told them, "You

don't want what I got. You don't want what I got.”³ Nov. 2014 Tr. 436-438, 516, 548. The Appellant was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and abruptly stabbed Da'Von Capers, who was outside his driver's side window, in the chest. Nov. 2014 Tr. 262-263, 285, 375-377, 453; Aug. 2019 Tr. 390-394. Some witnesses testified that Da'Von Capers did not reach inside the Appellant's vehicle and others testified that he did, but only months or years after the fact. Aug. 2017 Tr. 73-75, 237-238. The Appellant then sped out of the parking lot and the victim was pronounced dead at Lexington Medical Center shortly after. Nov. 2014 Tr. 154, 372; Aug. 2017 Tr. 251; Aug. 2019 Tr. 390-391.

The Appellant went home and changed his clothes and his shoes then decided to bury the knife. Nov. 2014 Tr. 269-271, 343-344; Aug. 2017 Tr. 252-256. He did not call or talk to law enforcement until they picked him up from his house later and never told them he was afraid for his life or that he had to act in self-defense. Nov. 2014 Tr. 270-271; State's Exhibits 2 and 35. The Appellant admitted he stabbed the victim but, at trial, claimed he did it in self-defense because the Dutch Fork students were reaching into his car to attack him. Nov. 2014 Tr. 277-355; Aug. 2019 Tr. 493, 608-610, 864-865; State's Exhibits 2 and 35. However, no DNA or fingerprints from Dutch Fork students were found on or in the Appellant's vehicle. Nov. 2014 Tr. 293-294, 403; Aug. 2019 Tr. 976-985. The Appellant did tell law enforcement that his car was blocked and he could not leave the parking lot, but surveillance footage shows one or two cars driving past the Appellant's vehicle while it was parked by the curb. Nov. 2014 Tr. 204-208, 276-277; Aug. 2019 Tr. 388-389. Law enforcement arrested the Appellant for Murder and Possession of a Weapon during the Commission of a Violent Crime. Indictments.

³ The Appellant's window was already rolled down halfway before he accelerated toward the Dutch Fork crowd. Aug. 2019 Tr. 395, 412, 493, 517, 742, 980-981.

STANDARD OF REVIEW

South Carolina trial courts, when so moved, hold pretrial hearings to determine whether a defendant is entitled to immunity from prosecution under the Protection of Persons and Property Act (“the Act”). *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); S.C. Code Ann. §§ 16-11-410 to 450 (2015). The appellate court reviews an immunity determination for abuse of discretion. *Id.* at 45, 791 S.E.2d at 151. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). “[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court’s assessment of witness credibility.” *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). Abuse occurs when the determination of the trial court lacks factual support or is controlled by an error of law. *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008). The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court and if the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it. *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988).

ARGUMENT

I. Judge Hood Improperly Issued a Second Immunity Ruling but the Error was Harmless; The Appellant Cannot Complain that He was Granted the Relief he Asked For

Appellant moved for an immunity hearing under the Protection of Persons and Property Act prior to his first trial and the Honorable Thomas A. Russo denied immunity after hearing testimony from fourteen witnesses, including the Appellant. After the first trial ended with an 11-1 hung jury in favor of conviction, Appellant moved for a second immunity hearing based on “newly-discovered evidence,” even though the Solicitor later established that all of the evidence Appellant argued was “new” had been turned over to him prior to the first hearing and trial.

The second judge, the Honorable Robert E. Hood, heard testimony from Appellant’s additional witnesses that purportedly had “new” evidence to bring forth in order to avoid a future post-conviction relief issue, and incorporated the transcript from Judge Russo’s hearing into his analysis of whether the Appellant was entitled to immunity. Judge Hood also denied Appellant relief. Now the Appellant argues that Judge Hood improperly incorporated and relied on the evidence presented at the first hearing in deciding whether to grant immunity. The State strongly disagrees with this allegation of error and submits Appellant’s argument is without merit.

Appellant cannot complain of an issue his own actions induced. Appellant failed to discover or elucidate the “new” testimony the first time and was not entitled to a second “bite at the apple” just because he failed to thoroughly review properly disclosed discovery or interview witnesses before his first hearing. No case law, statute, or regulation exists that would have entitled the Appellant to a new hearing. The Appellant himself moved for the hearing and Judge Hood’s actions of allowing the Appellant to proffer his “new” evidence cannot be shown to have prejudiced the Appellant in any way, as he was allowed to present additional evidence that could have established the elements of self-defense by a preponderance of the evidence. He was given

a *second* immunity analysis and Order by a Circuit Court judge: something no South Carolina defendant has ever been allowed to have.⁴ This Court should hold that the judge improperly, yet harmlessly, issued a second immunity Order and establish a bright-line rule that defendants are not entitled to a “second bite” at the immunity apple.

Relevant Facts

A. June 2017 – Defense’s Motion for a New Hearing

After the Appellant’s first trial ended in a hung jury in October of 2016, the defense moved for a new immunity hearing in June of 2017. They alleged that Elizabeth “Beth” Bettini, a witness who testified at the first hearing, had witnessed the attack and had called 911 while in the Cook-Out drive-thru, and that as neither the State nor the defense had obtained the 911 call recording prior to the last immunity hearing or trial, they should be allowed to present it at a new hearing.⁵ June 2017 Tr. 1, 10. They also alleged that the manager of the Cook-Out, Zach Lynch, had seen Da’Von Capers reach inside the Appellant’s vehicle from across the parking lot, and that this was “newly discovered” evidence, even though the defense was aware he was a witness prior to and at the first immunity hearing and trial. Lynch also testified at the first hearing but failed to tell the judge he had seen Capers’ alleged hand movement. June 2017 Tr. 1-2.

B. August 22 and 24, 2017: Second Immunity hearing before Judge Robert E. Hood

The Honorable Robert E. Hood heard arguments from both the State and the defense before the hearing as to why or why not the defense should be allowed to proffer the “new” evidence. Aug. 2017 Tr.

Keep in mind I have never worked on this case before so I need a kind of a procedural history of what occurred and when it occurred so I can wrap my own mind about it . . . I need to understand the procedural history of the case before we start.

⁴ Pursuant to the thorough, yet open to correction, research of the State.

⁵ Beth Bettini’s 911 call was never obtained or presented in open court.

Aug. 2017 Tr. 6.

The State, referencing the written motion the defense had previously filed:

Your Honor, the motion that Mr. Rutherford filed is asking for an entirely new hearing and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da’Von Capers attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence.

Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini’s present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.

Seven talks about the manager of the Cook-Out Restaurant on duty the night in question. His name is Zachary Lynch . . . [and he] was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da’Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis’ occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

Aug. 2017 Tr. 10-11.

The State then argued the defense had no rule, statute, or case law to stand on to prove they were authorized to have a second “stand your ground” hearing. Aug. 2017 Tr. 11. They argued the defense had chosen to call the hearing when they did and that it was their burden to prove by a preponderance of the evidence the Appellant was entitled to immunity. That it was the Appellant’s choice as to who to call as witnesses and the Appellant’s choice of what to present as evidence at that first hearing. Aug. 2017 Tr. 11. They argued that Beth Bettini was listed as the *complainant* in the police report, had given a written statement to law enforcement, and had given her statement on two dash camera videos that were all turned over to the defense prior to the hearing. Aug. 2017 Tr. 11. The State argued that Zachary Lynch had also written two statements and had given a recorded interview at police headquarters that were also turned over before the first hearing and that their testimony could not, in fact, be “new”. Aug. 2017 Tr. 12.

The State argued alternatively that the only rule that was close enough in comparison was Rule 29(b), SCRCF, that addressed the grounds for a new trial based on newly-discovered evidence. Aug. 2017 Tr. 12-13. They argued that the evidence was not newly-discovered and that it could have been ascertained with the exercise of reasonable diligence prior to the last immunity hearing. Aug. 2017 Tr. 13. They presented *State v. Harris*, 381 S.C. 539 (Ct. App. 2011)⁶ to the judge, where the Court held the denial of a new trial was not an abuse of discretion as the decision was well within the sound discretion of the trial judge. Aug. 2017 Tr. 15. The defense then argued why they should get a new hearing. Aug. 2017 Tr. 21-37.

Judge Hood then stated:

I think the only way to do this and this is what I've been thinking about this now for a while, I think the only way to do this is to let Mr. Rutherford proffer all of his testimony because let's play this out. Scenario number 1 is I say no, you're not entitled to another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered.

So I'm gonna skip that step all together. I'm going to let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?

I will review whatever anybody wants me to review. Now, we're talking, one, seven, ten plus pages of testimony, right? Eight, nine, 10 days of testimony if I'm considering them all together so I'm not gonna be able to review it today, you know, or maybe even this week, but I will – What I want to do is create a record on what Mr. Rutherford believes he should have presented at the original hearing and let's create that so it exists, so that that factor exists. So I don't want to put us in a situation where we're creating some kind

⁶ The test for a new trial is the movant must show: (1) The evidence is such as will probably change the result if a new trial is granted; (2) The evidence has been discovered since the trial; (3) The evidence could not have been discovered before the trial by the exercise of due diligence; (4) The evidence is material to the issue; and (5) The evidence is not merely cumulative or impeaching. *State v. Harris*, 381 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (“The issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court’s discretion”); *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

of precedent where everybody and their mother can come back and ask for a stand your ground hearing upon stand your ground hearing upon stand your ground hearing.

I also don't want to create a situation where it just gets appealed for us to come back and have this, you know, quote, unquote, hearing to proffer this evidence. I think the safest way to do it is to allow the evidence to be proffered and then I can consider everything and then even at that point I can make the decision. I can make multiple decisions. I can make the decision that he's entitled to immunity. I can make the decision that he's not even entitled to a hearing and there's no rule that permits it. Or I can make the decision that he was entitled to another hearing and he's not entitled to immunity.

So I'm not foregoing any of those legal arguments by allowing him to present this evidence. Does that make sense? So I'm still gonna allow the State to argue he shouldn't even be allowed to do this, there is no rule, that line of thought process, but I think the safest way to do it is to create a full and complete record of everything, let me review everything and then maybe once I've reviewed everything, we can get everybody back together and y'all can put your thoughts together and organize them the way you want to and do a hearing where there's no testimony, where it's just legal arguments once I've had a chance to process everything, okay? So that's what we're gonna do and you ready to go forward with that?

Aug. 2017 Tr. 39-44.

The defense then called the following witnesses to proffer the evidence they claimed was “newly discovered”: Caitlin Voravudhi, Janice Edwards Ross, M.D., Beth Bettini, Zachary Lynch, Nikki Rogers, Alexis Brunson, Devon Chatman, Marc Miramontes, Brent Carter, and Ervin Chauncy Meggett.⁷

C. September 18, 2017 – Immunity Argument before Judge Hood

As promised, the judge allowed the State and the defense to put their arguments for and against a new immunity hearing on the record a few weeks later on September 18, 2017. He began the hearing with a summary of what he had allowed on August 22 and 24, 2017 and why:

⁷ Witnesses who testified at the first immunity hearing were Lexington High School graduates Keith Adams, Will Zander, Joshua Brooks, and the Appellant; Lexington High School student Morgan Zander; Dutch Fork High School graduates Deshon Chatman, Devon Chatman, Alexis Brunson, and Kenneth Williams; Dutch Fork High School students Walden Roberson, Tyreke Farrow, and Lamar Butler; independent witness Pastor Bill Howard, who testified as a character witness for the Appellant; and Investigator Brent Carter with the Town of Lexington Police Department.

[You] were essentially allowed to proffer that testimony so that a record was created so that one day in the future, depending on whatever happens with this case, we don't need to be guessing as to what the defense would have shown or what these witnesses would have said

[T]o get them on the record, to get them cross-examined they called those witnesses along with Dr. Ross, and then I allowed the State to respond to that and then I was provided the transcripts from the original immunity hearing and the original trial I told the State that they would still be allowed to make the argument that the hearing itself isn't even proper and shouldn't even happen. I wasn't gonna preclude them from doing that and so let's start.

Sept. 2017 Tr. 3-4.

The defense then argued why their evidence was newly-discovered and the State argued why they were not entitled to a new hearing. Sept. 2017 Tr. 6-39. The Solicitor first gave the judge a 15-page memorandum and then argued that S.C. Code § 16-11-450 and *State v. Duncan* laid out the procedure for a stand your ground hearing, and that neither said a defendant was entitled to multiple immunity hearings. The Solicitor told the judge he had conducted research and had not been able to find a single state anywhere in the United States that allowed a second stand your ground hearing.

[A]t what point would it ever end? Every time the defendant comes up with a new piece of evidence that they claim changes something, you would have to have another hearing. Every time that you schedule a trial date, if the defendant came up with something new that hasn't been considered, you would have to have another hearing. You would never be able to have any finality. I think that's why it's not – I think that's why it's not allowed. It may be silent on that, but I think that's why it's not allowed and why we haven't seen it.

It was their motion to seek immunity. They chose that date and time. They had their hearing on the information they chose to present. They knew about Beth Bettini and Zachary Lynch. They knew about Dr. Ross. They chose not to call them for whatever reason. It's not new evidence he's asking you to set new precedent with no supporting law to back it up.

Aug. 2017 Tr. 12-15.

The Solicitor then discussed the five factors the Court set forth in *State v. Spann*, 334 S.C. 618, 513 S.E2d 98 (1999), that a defendant would have to prove to be granted a new trial, as it was the only legal rule anywhere close to being relevant to the argument at hand.⁸

I can't imagine a scenario for a hearing where they would be allowed to say less and to have another hearing. [*Spann* discussed] a trial where someone has been convicted. It seems like that any benefit would go to the individual who has been convicted. The purpose of the immunity statute was to allow a defendant to convince the Court that they shouldn't have to face the publicity and the rigors of a trial, and he's had that opportunity.

Aug. 2017 Tr. 16-17.

The Solicitor told the judge that neither side had obtained a copy of the 911 call and that it was no longer available for retrieval. However, Beth Bettini's dash camera testimony and her written statement had been produced prior to the last hearing. Aug. 2017 Tr. 17-19. She did not report at that point that she had called 911, had seen the stabbing, or had seen fear in the Appellant's eyes. *Id.* The Solicitor argued that went to her credibility. Aug. 2019 Tr. 20. He then analyzed the five *Spann* factors and argued why the Appellant had not met them in order to be entitled to a new immunity hearing. Aug. 2017 Tr. 17-22. He did the same thing with the alleged "newly-discovered" testimony of Zachary Lynch and argued that the testimony presented on August 22 and 24, 2017 was cumulative at best. Aug. 2017 Tr. 22-29. He concluded by making an argument as to why the Appellant had not established he was entitled to immunity by a preponderance of the evidence. Aug. 2017 Tr. 32-41.

There is no precedent for a second immunity hearing. [But if you have to, you could] adopt the five-factor test and agree that the defendant failed to establish proper testimony that entitles [him] to a new hearing. If you find [he] are entitled to a new hearing, find he has failed to prove his burden by a preponderance.

⁸ Like *Harris*, *Spann* included the following factors: (1) The results would probably change if a new trial is granted; (2) The evidence was discovered since the trial; (3) It could not have been discovered through the exercise of due diligence; (4) Is material to the issue; and (5) Is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 620, 513 S.E.2d 98, 99 (1999).

Aug. 2017 Tr. 41.

The Court then stated, “No one can say anything anyone of us did was right or wrong without making a record of it. That’s why I did that and that’s why I did it that way. I did it that way so that we could be clear.” Aug. 2017 Tr. 51.

Relevant Law and Analysis

First, the Appellant was not entitled to a second immunity hearing under South Carolina law. There is no case law, statute, or regulation that would allow him one because the judicial system has a compelling interest in finality.

Finality in the criminal law is an end, which must always be kept in plain view At some point, the criminal process, if it is to function at all [or if it is] worth having and enforcing, it must at some time provide a definite answer to the question litigants present or else it never provides an answer at all. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment . . . [that is] tomorrow and every day thereafter . . . subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error

Anderson v. Leeke, 271 S.C. 425, 441-442, 248 S.E.2d 120, 123 (1978).

The proper remedy for a party who disagrees with the outcome of an immunity hearing is a direct appeal to this Court. The determination of whether a party may immediately appeal an order issued before or during trial is governed by statute. *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008).⁹ The Protection of Persons and Property

⁹ S.C. Code Ann. § 14-5-440 (1976) sets forth the categories of interlocutory orders from which a party may immediately appeal: Those affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be

statute does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial. S.C. Code §§ 16-11-410 to 445 (2016). *See Brown v. County of Berkely*, 366 S.C. 354, 358, 622 S.E.2d 533, 362 (2005) (The trial court's interlocutory order denying the Appellant's Motion to Dismiss based on a qualified immunity claim was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013) (Order denying the defendant's request for an immunity hearing on charges of murder under the Protection of Persons and Property Act was not a final determination and thus was not an immediately appealable interlocutory order.) As an immunity hearing ruling cannot be immediately appealed to this Court, the Appellant certainly was not entitled to a new hearing and ruling below before a final judgment had been rendered at all.

Instead of waiting to exercise his legal remedy of a direct appeal after trial (if he had been found guilty the second time), the Appellant instead attempted to and halfway successfully convinced the trial court to redo the immunity hearing altogether, making superfluous the court's expenditure of time and effort by hearing testimony that had already been presented for the record over the course of multiple days, wasting the witnesses' time, only prejudicing the State, and bypassing this Court's usual direct appeal process. There was no and is no legal purpose to conduct a second hearing and the Appellant was not entitled to a second ruling on whether he was entitled to immunity. Judge Hood improperly, yet harmlessly, issued a second judgment regarding the Appellant's immunity. To rule any other way would create mass chaos in the Courts of General Sessions.

taken or discontinues the action; (b) grants or refuses a new trial; or (c) strikes out an answer or any part thereof or any pleading in any action.

Second, the Appellant complains that the second trial court judge, Judge Hood, improperly incorporated the testimony and findings of Judge Russo in his decision, and argues he should have been entitled to an entirely new immunity hearing where he would present the testimony of the fourteen witnesses who had already testified for the record, plus the additional witnesses he called at the second hearing. As has been argued, the Appellant was not entitled to a new hearing at all. Instead, he only benefitted from the second trial judge allowing him to proffer testimony from an additional seven witnesses a second time and only benefitted from the second trial judge's second ruling on immunity entitlement, as the second holding very well could have gone a different way. He had nothing to lose.

The Appellant himself chose the witnesses for the first hearing and complains he did not have the chance to call them all over again to proffer the exact same testimony. Appellant himself moved for the new hearing over the objection of the State and now complains it was conducted incorrectly. Appellant cannot complain of an error which his own conduct has induced. *State v. McCrary*, 242 S.C. 506, 508, 131 S.E.2d 687, 688 (1963). Appellant, also, cannot complain on appeal that he received the relief in the trial court for which he asked. *State v. Brown*, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant had received the relief requested from the trial court, there is no issue for the appellate court to decide.) This Court should find Judge Hood improperly issued a second, albeit harmless, immunity ruling and affirm.

II. Stand Your Ground – Both Trial Judges Property Denied Immunity

The Appellant argues both Judge Russo and Judge Hood erred in denying Appellant immunity because they improperly relied on inconsistent testimony as a basis for their independent decisions. The State disagrees with this allegation of error and submits Appellant's

argument is without merit. Both judges properly analyzed whether the Appellant was entitled to immunity by individually analyzing whether the Appellant had met the four elements of self-defense and Sections A and C of the Protections of Persons and Property Act for the record and in their published Orders. Both judges found the Appellant had not established he was without fault in bringing on the difficulty by a preponderance of the evidence. As a result, both judges properly found the Appellant, therefore, had a duty to retreat under the law before meeting force with force. Both judges listed conflicting evidence as a reason for denying immunity, but both made it clear that they were denying Appellant immunity *because* he did not meet his burden by a preponderance not because conflicting evidence simply existed. This Court should affirm.

Relevant Facts

A. Appellant's Issue 5: November 17-19, 2014 Immunity Hearing and February 4, 2015 Order from the Honorable Thomas A. Russo

Upon the Appellant's motion for immunity under the Protection of Persons and Property Act, a hearing was held from November 17, 2014 to November 19, 2014 before the Honorable Thomas A. Russo pursuant to the procedure established in *State v. Duncan*. Nov. 2014 Tr. 1-10. The judge heard testimony from fourteen witnesses,¹⁰ including the Appellant, and heard closing arguments from both the defense and the prosecution. Nov. 2014 Tr.

The State argued the Appellant had brought on the difficulty by inserting himself into the Dutch Fork circle at the high school, inviting them to the Cook-Out to fight, and then driving his vehicle straight at Dutch Fork students, nearly hitting two of them in the parking lot of the Cook-

¹⁰ Witnesses included Lexington High School graduates Keith Adams, Will Zander, Joshua Brooks, and the Appellant; Lexington High School student Morgan Zander; Dutch Fork High School graduates Deshon Chatman, Devon Chatman, Alexis Brunson, and Kenneth Williams; Dutch Fork High School students Walden Roberson, Tyreke Farrow, and Lamar Butler; independent witness Pastor Bill Howard, who testified as a character witness for the Appellant; and Investigator Brent Carter with the Town of Lexington Police Department.

Out. Nov. 2014 Tr. 604-614. They argued the Appellant had gone first to Sonic, then McDonald's, then Cook-Out to look for Dutch Fork students, and that as he had not met his burden of proving the elements of self-defense, he had a duty to retreat before using force. Nov. 2014 Tr. 614-617. The defense argued the Appellant was entitled to immunity because he and his friends were outnumbered five to thirty or forty, they were chased out of the Cook-Out and pursued down the hill, and that the Appellant had only pulled his vehicle up to the curb, nearly hitting Dutch Fork students, in order to make sure his friend was ok. Nov. 2014 Tr. 589-595. They argued the Appellant should be granted immunity because he was in an occupied vehicle, "in his bubble," the Dutch Fork students "stuck their hands in his windows and tried his door handle," and that he reacted out of fear by sticking his knife out of the window in order to defend himself. Nov. 2014 Tr. 596-604.

Judge Russo issued an Order denying immunity on February 4, 2015. Feb. 2015 Order 1-10. In it, after establishing findings of fact, he laid out the burden of the Appellant to prove he was entitled to immunity by a preponderance of the evidence, and systematically analyzed the elements of self-defense and of S.C. Code 16-11-440(A) and (C). Feb. 2015 Order 1-10. He concluded the Appellant was not entitled to immunity because he had not proven the elements of self-defense by a preponderance of the evidence or the requirements of Section (A) or (C). Feb. 2015 Order 7-10:

The defendant claims immunity under both subsections A and C of the Act. Section A has two requirements: you are entitled to reasonable fear presumption if (1) the person against whom deadly force is used is in the process of unlawfully and forcefully entering or has unlawfully or forcefully entered an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Regarding the first requirement, the Court finds that the Defendant has not met his burden of proving by the greater weight of the evidence that Da'Von Capers was in the

process of unlawfully and forcefully entering an occupied vehicle or that he had unlawfully and forcefully entered an occupied vehicle.

Although one witness testified that while he was standing a few dozen feet from the Defendant's vehicle, he saw what appeared to be several students reach inside the Defendant's vehicle, several other witnesses who were actually standing right next to the Defendant's vehicle testified that no one was touching the vehicle or reaching inside, but that they were simply standing next to the vehicle talking to the Defendant, albeit in a heated manner.

Further, no fingerprints other than that of the Defendant were found on or in the vehicle. Based on the testimony of witnesses and other evidence, including an iPad video tape, the Court finds that the Defendant has not established the first requirement of Subsection (A) by a preponderance of the evidence.

Regarding the second requirement, the Court finds that the Defendant has failed to prove by the greater weight of the evidence that the Defendant, the person who used deadly force, did not know and had no reason to believe that an unlawful and forcible entry or an unlawful and forcible act was occurring or was about to occur.

The Defendant alleges that he had reason to know or believe that Da'Von Capers was in the process of unlawfully and forcefully entering his occupied vehicle. However, the Court finds that based on the totality of the circumstances in this case, that is not credible. Again, several witnesses in the immediate area of the Defendants' vehicle testified that no one was touching or placing their hands on or inside the Defendant's vehicle, and the only fingerprints found on or in the vehicle were that of the Defendant. Therefore, the Court finds that the Defendant has not established the second requirement of Subsection (A) by a preponderance of the evidence.

In addition to failing to establish the provisions of Subsection (A) of the Act by a preponderance of the evidence, the Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence. Regarding the first element, the Defendant has not shown by a preponderance of the evidence that he was without fault in bringing on the difficulty.

The Defendant approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side. Such an act was reasonably calculated to bring about the difficulty that arose. *See Slater*, 373 S.C. at 70, 644 S.E.2d at 52.¹¹ Then, rather than attempting to leave, the Defendant kept his vehicle stationary.

While the Defendant testified that he was unable to leave, the Court finds that based on the totality of the circumstances in the case, that testimony is not credible. The iPad video showing the Defendant's vehicle stationed at the curb shows one or two vehicles driving

¹¹ *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

past the Defendant's vehicle, indicating that he could have left, as these vehicles were clearly able to leave. Thus, the Court finds that he has not established that he was not without fault in bringing on the difficulty.

As to the third element, even if the Defendant established the second element, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, the Defendant has not established by a preponderance of the evidence that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. As noted above, the Dutch Fork students who testified indicated that no one had even touched the Defendant's vehicle, nor was anyone attempting to remove the Defendant from his vehicle. Also, fingerprint analysis and DNA testing did not reveal that anyone other than the Defendant had their hands on or in the vehicle. Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(A) is denied.

The Defendant also claims immunity from prosecution under Subsection (C) of the Act. Even if Subsection (C) applied, the Defendant would not be entitled to immunity under that subsection because he has not established the elements of self-defense by a preponderance of the evidence as noted above. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(C) is denied.

Feb. 2015 Order 7-10 (emphasis added).

B. Appellant's Issues 2, 3, and 4: August 22 and 24, 2017 and September 18, 2017 Immunity Hearing; October 11, 2017 Order from the Honorable Robert E. Hood

The Honorable Robert E. Hood issued an Order on October 11, 2017 that spelled out his reasons for denying the Appellant immunity from prosecution a second time.¹² He summarized the requirements of the Protection of Persons and Property Act and *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) and then made the following conclusions of law:

Regarding the first element of self-defense:

He did not prove he was not without fault in bringing on the difficulty. The video surveillance footage and witness testimony show the Defendant seeking out the Cook-Out restaurant and Dutch Fork students. He chose the situation that led to the altercation with the Dutch Fork students. He chose not to leave the other exits that were available to him. He chose to drive into a crowd of Dutch Fork students.

¹² A summary of the August 22 and 24, 2017 immunity hearing before the Honorable Robert E. Hood is summarized in Section 1 of this brief.

Regarding the second element of self-defense:

He must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury or actually be in imminent danger. He did not do so. They could have left the Cook-Out without coming into contact with any Dutch Fork students but he chose the route that led to the assault and by doing so incited the Dutch Fork students. The testimony from Beth Bettini . . . that there was fear in his eyes was in direct contradiction with the testimony of the Dutch Fork students.

Regarding the third and fourth elements of self-defense: “A reasonably prudent man of ordinary firmness and courage would not have entertained the same belief He had other probable means of avoiding the danger.” Oct. 2017 Order 6 (emphasis added).

He concluded as follows:

Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Under the facts before this Court, the Defendant’s claim of self-defense presents a quintessential jury question.¹³ *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).¹⁴ (Murder defendant was not entitled to immunity from prosecution . . . where testimony of defendant and eyewitnesses was in direct conflict as to whether victim attacked defendant.)

The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence.

Based upon denial of immunity, the Court does not need to reach a ruling on the merits of whether or not Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the

¹³ Respondent acknowledges and highlights the difference between *Curry*’s “quintessential jury question” factual scenario and the cases that followed it, namely *State v. Cervantes-Pavon* and *State v. Andrews*, which clarified a trial judge’s responsibilities at an immunity hearing when there is conflicting evidence presented. *State v. Curry*, 406 S.C. at 372, 406 S.E.2d at 267; *State v. Cervantes-Pavon*, 426 S.C.442, 451, 827 S.E.2d 564, 569 (2019); *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019).

“[T]he 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.” *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13. Respondent asserts the judge’s use of the phrase does not affect the propriety of his analysis.

evidence. The State was allowed to respond. Further, the Court read the testimony from the original immunity hearing and the jury trial. The testimony has been heard and the record has been protected.

Oct. 2017 Order 6-7 (emphasis added).

Relevant Law and Analysis

The Protection of Persons and Property Act (“The Act”) provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2015); *Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (setting forth the procedure, standard of review, and burden of proof for an immunity determination).

To put it plainly, to obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance, to the trial court’s satisfaction, or three of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance “stated simply is that evidence which convinces us as to its truth.” *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

(1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If the judge finds a defendant has failed to satisfy one of the first two elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”) However, if a trial court finds a defendant

has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it accordingly. S.C. Code §§16-11-440(A) and (B) (2015). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2015); *Jones*, 416 S.C. at 294–97, 301, 786 S.E.2d at 138–39, 142. If he proves all of the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *Douglas*, 411 S.C. at 320, 768 S.E.2d at 239.

Both judges properly found the Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. “Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element.” *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). Judge Russo found the Appellant had not proven by preponderance that the victim was unlawfully entering his vehicle at any time before or while the Appellant stabbed him as no fingerprints or DNA from the victim or any Dutch Fork student or former student was found on or in the Appellant’s vehicle. Further, the testimony of whether the victim had put his hand inside the Appellant’s window varied wildly. Judge Russo found the Appellant’s testimony was not credible regarding

his belief that unlawful or deadly force was about to or was occurring and that he had not proven by a preponderance that he was not without fault without the difficulty. The Appellant challenged the Dutch Fork students to a fight at the Cook-Out while they were all still at the high school, he voluntarily went into the Cook-Out even though it was full of Dutch Fork students, and he accelerated his vehicle directly at Dutch Fork students. Judge Russo found his actions were reasonably calculated to bring on the difficulty, that no reasonable man would have believed he was in danger, and, as a result, he had a duty to retreat before meeting force with force. Judge Russo properly analyzed the elements of self-defense and Sections (A) and (C) of the Act and properly denied immunity.

Similarly, Judge Hood also denied the Appellant immunity as the Appellant had not proven elements one and two of self-defense by a preponderance of the evidence. He found the Appellant had not proven he was not without fault in bringing on the difficulty and that he had a duty to retreat as a result, but failed to. He found the Appellant could have left the scene by any number of available exits. This conclusion was proper under the law. This Court should accord both judges the deference they are due and affirm as both judges properly analyzed the elements of self-defense according to their discretion and found the Appellant was not entitled to immunity because he failed to meet his burden by a preponderance of the evidence.

III. The Trial Court Properly Allowed the Aerial Photograph

The Appellant argues the trial court improperly admitted an aerial photograph of the road the Appellant could have exited the Cook-Out parking lot on prior to the stabbing because law enforcement lined up three unmarked police cars side-by-side to show the width of the road, and argues that would be confusing to the jury. The State disagrees with this allegation of error. The photograph was used at trial to orient the trier of fact as to where the crime occurred and in

tracing the alleged movements of the Appellant and others before, during, and after Da’Von Capers was killed, and the unmarked, standard-sized cars only served to demonstrate the width of the road to the jury. The photograph makes a material in the issue in the case more or less probable, and thus is relevant. The Solicitor properly laid the foundation for its admissibility, demonstrated its relevance, and showed why it was more prejudicial than probative. The trial judge properly instructed the defense that they could cross-examine law enforcement about the width of the road. The trial judge properly found the photograph was admissible and this Court should affirm as the defense has not shown how the trial court abused its discretion.

Relevant Facts

The defense moved to exclude the aerial photograph during pre-trial motions before the Appellant’s second trial on August 19, 2019. Aug. 2019 Tr. 92.

It’s my understanding that what law enforcement did in this case was subsequent They have a section where three police cars were lined up, one, two, three, and then marked on that map. We would object to that as being both confusing, misleading to the jury, it is not an accurate depiction of anything and does not go to reflect anything

I believe the argument was to show the dimensions and things of that nature, but they have the aerial photographs or Google maps, whatever they are, but to manipulate it by putting police cars lined up at one specific entrance that doesn’t have people around it, it doesn’t show what actually occurred or not even a re-enactment essentially of what’s on the video, that that would be unfairly prejudicial, and like I said, completely misleading and confusing to the jury.

Aug. 2019 Tr. 92.

The State responded:

[H]ere’s why they’re not only not confusing, but they’re absolutely necessary. They have raised the issue of self-defense. Our argument, and you heard it repeatedly in that trial, he had so many different ways to leave. I can’t expect 12 jurors to know exactly what we’re talking about, so a photograph is a photograph. These officers will identify, yes, that is where this restaurant is. There’s all these places and ways to leave or come. That’s critical. Why did he choose to take the path he took?

The three cars are very important, too, because you will remember the testimony was other cars were leaving in the proper lane, but Mr. Dennis drove into a crowd and almost or possibly did hit the curb in the oncoming lane. It's unmarked. And it would only be confusing if we just talked about it but . . . they put unmarked vehicles

[These photographs are] very important to us because it goes to their defense and it also goes to what happened and where those cars are (sic) where the defendant was, his vehicle, right in that area near the curb so it's directly related to our testimony

Basically what I intend to do, we'll have the videos, we'll discuss what's on there, but this is a daylight, clear day series of photographs and the ones we're talking about you will notice there's no marked vehicles here, but you can probably get a fourth one in there, right there So it's not marked. It's not marked at all, but to say that it's confusing, this jury, if they haven't been out here, they don't know any of this. They don't know how wide this road is. They don't know any of that. All of this is going to be very important to their observations and to our argument, where Will Zander was.

Now, this incident occurred right about here. This is where when you see that Ford Explorer, it's right here except a little closer right here to this curb. That's where that is. So they're just showing the space because the argument was self-defense. I couldn't get out. I was trapped in the oncoming lane next to the curb where all the students were, and I had no other way to get out, or I went there for a specific reason, all of that is gonna be important and I've got the burden so that's why. I'm fine with cross all day long.

Aug. 2019 Tr. 92-96.

The defense countered:

Your Honor, if I might, the problem is, and if you remember after they brought that picture in, the line of questioning was, was he in lane one, lane two, or lane three. It's a two-lane road and as Your Honor just stated, we can introduce – well, they've pushed the presumption over to us that we then have to rebut to say this is not a three-lane road

Can they go drive all at the same time? We don't know and it creates something that we would have to rebut which we're unable to do so because we don't have a helicopter and we don't have the ability to go out there that day and say this doesn't work. We don't know whether they had to drive two miles an hour to get there. We don't know the elevation. We don't know a number of things which we would have to do to rebut the fact that this is not a three-lane road which they have since created, the Solicitor's Office in just parking three cars there.

Aug 2019 Tr. 96-97.

The State:

My objective is to say this is a wide road. I don't know why it's wide. I didn't create it, but it's so wide you can fit just from practical purposes three cars there. It doesn't matter. I don't expect three cars to drive up and down there. That's not my point either. My point is when a witness is on the stand without reference to anything saying where was this car and then the defendant saying I couldn't get around it, I've got to show space.

Now, I can take a measurement, but again this jury doesn't, if they don't have the aerial, they don't know what I'm talking about. They see a visual, they go, okay, I get it. Now, when I talk about when Will Zander pulls up, is he in the middle of that road? Yes. That's where Mr. Graham was referencing two lanes just for factual purposes.

Aug. 2019 Tr. 98.

The Court: "Is that the one who threw the money out?" Aug. 2019 Tr. 98.

The State:

He's the one that threw the money out. Mr. Adams went out the proper lane which you would think is the proper lane. It is wide though. He had no problem getting out. You will see that, and you'll remember when Mr. Dennis came into that crowd, he's going up on the curb if not on it and there's even cars going past him at some point. It is extremely important just not to say that the highway department has or hasn't created lanes. We're talking about the width of a road.

And Your Honor, the best way to do it is visual and not with some number the jury can't understand. If somebody says something is 20 feet, these people would have all different ideas what 20 feet is I want this jury to know if they go out there, God, you can get three cars. Heck, you might even get four just to show the amount of space so when a man says this was the only way I could get out, they can consider that or if he says that's the way I had to go or there's a reason why I went, they can get that.

Aug. 2019. Tr. 98-99.

The Court: "All right. I understand your point." Aug. 2019 Tr. 99.

The Defense:

Your Honor, the problem he just testified. He called it an adjective, which is wide. It is not. It is at best a two-lane road and we have standards in this state and around this country for how wide a lane is. DOT can come in and say the standard lane is -- feet, this road is 30 feet. It's enough for three lanes. They wouldn't say that. The road is not wide at all. It is at best two cars and to throw a third car in or move it real far up against the curb in trying to get a fourth one in, it's creating something that my client then has to

rebut. It is not wide. Our contention is it is extremely narrow and again, and I objected the last time to the overhead shots as well.

We don't do anything based on an overhead shot. We didn't walk in this courtroom today based on an overhead shot. You drive up and you go in the door and what you see is what's in front of you. If you're looking at an overhead, maybe you then find out that there's another entrance on the other side or another entrance in the front, but that's not how anybody does it.

What he's asking is that these jurors see what nobody saw that night which is an overhead shot of three cars lined up this way, an overhead shot of an exit back around the other way that nobody possibly knows exists. So again, to add to this dimension that the Solicitor's Office has always added in by use of a helicopter that my client doesn't already have, he now has added cars in to show width that does not exist but for a possible overhead shot and someone being able to lineup three cars. It is inconsistent with anyone's testimony. They can only react off of what was saw. (sic) No one that night saw that overhead shot. No one that night saw three cars standing there to know that they could possibly get around, period.

Aug. 2019 Tr. 99-100.

The State:

We're not offering it for any of that. It would simply be so jurors know a visual, not to see how many lanes are or aren't there, visually you can fit three cars there so when he's talking about what he could and couldn't do, that's relevant and then as far as the other aerials there's gonna be testimony that Mr. Dennis had been to Cook-Out many times.

He lives around here and those of us that live on his side of town when we're up there, we're pretty much familiar with those alternatives how to get in and out. He's talked about it. So all of that becomes relevant with testimony and, Your Honor, that's what it would be brought in for. It's not anything to do with DOT. It's not anything to do with creating lanes or make believe. And it does nothing to shift the burden.

It's my duty to attack self-defense. I've got to disprove it beyond a reasonable doubt and this goes to my argument on that. And, yeah, nobody knew about this aerial. That's not for the people there that night. Most of them were Dutch Fork kids that didn't know anything about how to get in and out of there. They just knew the front door, too. But for somebody that's been to Cook-Out multiple times sunny days, rainy days, dark, light, he knows the ins and outs. By where he parked he showed he knows that area down at [the] car wash. His friend is parked over at the pet shop. Judge, I mean, just everybody knows that lives around here.

Aug. 2019 Tr. 101.

The Court: “Let me sit on this. I’ve heard enough talk about the map. I think we can get it resolved. Let’s move on . . . I’m gonna take that under advisement.” Aug. 2019 Tr. 102.

The defense renewed their motion during trial before the State introduced the aerial photographs and the following exchange occurred:

The State:

I want to go back to the one that Your Honor I believe last trial allowed . . . in. We had the argument over lanes and all of that for which for us is our purpose is not to show lanes, but width of visual to show that because measurement means whatever to everybody individually. I know 20 feet to me may be 20 yards to my wife. So this just shows width. That’s all. As you know the vehicle Kierin Dennis was driving ended up being here. There’s gonna be a question of did he have room. We just want to show how much room there is. Your Honor let it in last time.

Aug. 2019 Tr. 352.

The defense:

[N]ot to belabor the point, but we are in a new trial and due to new strategies we are objecting because this does not fairly and accurately depict the scene and it’s confusing and misleading to the jury. Quite frankly we don’t know the size of the vehicles, we don’t know how much space is in between them, and quite frankly having gone out there, this is not a three-lane road and so to put up police cars side by side does not fairly and accurately depict anything. They continue to talk about dimensions and measurements and width. Crime scene investigators . . . could go out there and measure it . . .

The probative value does not substantially outweigh any unfair prejudice and it’s confusing and misleading to the jury and cumulative.

Aug. 2019 Tr. 352-353.

The Court: “How is that not fair and accurate?” Aug. 2019 Tr. 354, line 20. The Defense: “It’s a three-lane road. Three cars were not there that night like that. It’s irrelevant. We have no measurements.” Tr. 353-354. The Court: “That’s what his point was. His measurements, people don’t under[stand] measurements all the time so he wanted to have a visual demonstrative showing of that and say, all right, the road is 27 and a half feet wide. What does that mean to you or me or whoever. It means different things.” Tr. 354. The State: “Nothing has been manipulated

here. Nothing's been altered." The Court: "I don't disagree with you. I mean, you have not repaved that road." Tr. 355.

The State:

I'm not declaring lanes where they're not, but I'm helping the jury understand and an officer to assist in testifying where a car is positioned in relation to the rest of the road. That's why this is beneficial. It helped in the last trial. It helped both sides last time.

Aug 2019 Tr. 355.

The Court:

I think that's fair. I think it's an accurate depiction. Now, what I don't want is for to keep putting that up, Kierin's car position one, two, three. You can show that. I would like to use one without vehicles to show his car was about here on the video so that will be my caveat.

Aug. 2019 Tr. 356, lines 11-17.

The State: "Now, as far as what part of the road, can we use it for that? Because that's how this officer is discussing [it]. So, for instance, the last time . . . Will Zander's car was up in here in the middle of the road." Tr. 356, lines 18-22.

The Court:

Have we got another picture without those cars there that he can say that? I mean, where you just pointed there's no car there so I think that's fair testimony. It looks to me like those bushes on the pet store side of the drive are close enough to the car doors to where the cars avoid it because there's sand in the road.

You can see where they go around that bush so as not to hit it. Cars don't normally travel through there. You can tell. They come closer to the Cook-Out. It's clear to me that's a sandy area where cars don't normally drive and the sand is built up there and kind of avoid that bush to not scuff up your car. I don't see how that's not maybe helpful to the defense.

Aug. 2019 Tr. 357, lines 5-16.

The defense: "The defense didn't object to another aerial photo depicting the same stuff with only two police cars." Tr. 357. The Court: "We're very cumulative and so I'm gonna . . .

rule on cumulative. All of them can come in subject to your objections. You're pointing to the three cars, I understand, but they're all coming in so we can move on, all right?" Tr. 358.

The State then introduced the photographs to the jury through the testimony of Sergeant Brent Carter. Aug. 2019 Tr. 379-461. He testified the photos were of the aerial view over the Cook-Out that also showed the surrounding areas where the Appellant and his friends had parked, met, and turned around. Aug. 2019 Tr. 379. He told the jury what State's Exhibits 20-22 depicted, and pointed out where the Cook-Out, the Petco, the Taco Bell, the Lexington Urgent Care, and the car wash were in the photos. Tr. 379-380. He then showed the jury where the Appellant, Keith Adams, and Will Zander were parked before the incident. Aug. 2019 Tr. 381. He testified that law enforcement was aware the driveway was not three lanes and that they did not know the width or the length of the area, but that the photograph was meant to show how wide the area was. Aug. 2019 Tr. 381.

Relevant Law and Analysis

The admissibility of a photograph is a matter resting in the sound discretion of the trial judge, whose decision will not be reversed without a showing of an abuse of that discretion. *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). As long as a photograph is admitted to corroborate testimony and a proper foundation has been laid, it is not an abuse of discretion to admit it. *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010); *State v. Kelley*, 319 S.C. 173, 460 S.E.2d 368 (1995). To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-371; *State v. Jackson*, 364 S.C. 329, 613 S.E.2d 374 (2005); *Nance*, 320 S.C. at 501, 466 S.E.2d at 349. As long as a photograph corroborates testimony or shows the jury the circumstances of the crime, it will be admissible.

In *Nelson v. Charleston & W.C. Ry. Co.*, the Court held that a photograph of a grade crossing that was taken two days after a collision between an automobile and a freight train was admissible because even though it was taken after the fact because it showed the conditions of the grass and the weeds in the roadbed, and was therefore relevant. *Nelson*, 231 S.C. 351, 98 S.E.2d 798 (1957). Similarly, in *State v. Todd*, the Court held that a photograph of a murder and rape victim's body that exposed her breast to reveal her bullet wound was admissible even though her blouse had been removed by medical personnel beforehand because it corroborated the pathologist's testimony. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). In *State v. Jones*, four color photographs of the victim and a color videotape of the crime scene were properly admitted to show the jury the circumstances of the crime. *Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001).

Here, the aerial photograph showing the width of the roadway the Appellant could have exited from prior to the stabbing only served to corroborate testimony and show the jury the circumstances of the crime. The trial judge properly ruled that the defense could cross-examine law enforcement on how and why they took the photo with the three police cars lined up in a row, but that it was useful to the jury because it showed the jury the width of the road. He properly found that it was properly authenticated by someone who had knowledge of the scene the day of the crime, was relevant, and did not serve to inflame the passions of the jury. The defense did not show how the aerial photograph would serve as a means for the jury to make a decision about the case on an unfair, improper, or emotional basis. This Court should affirm, as the photograph helped the jury understand and decide one of the ultimate issues: whether the Appellant was blocked in at the Cook-Out or if he had an open road by which to travel out of the Cook-Out.

IV. The Trial Court Properly Allowed the Ford Explorer Demonstrative

The defense argues the trial court improperly allowed the Solicitor's Office to use a replica of the Appellant's Ford Explorer door at trial because it was not identical to the one the Appellant had on his vehicle the night of the stabling. The State disagrees with this allegation of error. Demonstrative evidence is not required to be exact, even though, here, the Solicitor's Office proved the door was only 1/16th of an inch off to the benefit of the Appellant. The Solicitor properly laid the foundation for the demonstrative to be admitted, established its relevance through showing how it was logically connected to the material issues before the jury, demonstrated how it would assist the trier of fact in understanding the issues, and showed that its probative value substantially outweighed any prejudicial effect. The trial court properly ruled the defense could thoroughly cross-examine the Investigator who created it and that any inconsistencies in the model would go to the weight of the testimony, not its admissibility. This Court should affirm the trial court.

Relevant Facts

The State called Investigator James Patrick Sullivan to the stand during the Appellant's second trial in 2019. Aug. 2019 Tr. 514. He testified that he worked for the Eleventh Circuit Solicitor's Office as an Investigator and had previous Crime Scene Investigations experience, had served with the Marine Corps, and with the West Columbia Police Department. Aug. 2019 Tr. 515-516. He also testified he had a Bachelor's and Master's degree in Criminal Justice, Aug. 2019 Tr. 516, and that the Solicitor's Office had instructed him to do the following:

You asked me to create an aid, a visual aid to assist witnesses in providing testimony just to help out It was a door mounted to a frame that was powered to allow the window to go up and down and it was done so with the measurements taken by Investigator Carter to make sure it's the correct height, but it's nothing more than a door

The Solicitor and the investigator then had the following exchange:

Those are the measurements from Mr. Dennis' Explorer? Yes, sir. So this door, what year is this door? The door is off of a 1998 Ford Explorer Sport. Okay. And what year was Mr. Dennis' vehicle? His vehicle was a 2001 Ford Explorer Sport. Now, there's a difference in years. Is that an issue? No, sir. The Ford Explorer Sport was built, the second generation was built from 1995 to 2003 so the model basically did not change. So all those doors should be the same? Yes, sir.

Aug. 2019 Tr. 517.

The defense objected, arguing the investigator was not an automobile expert who could testify to the difference of a 1998 versus 2001 Ford door. Aug. 2019 Tr. 518.

The State then questioned Investigator Sullivan about how he created the demonstrative and they had the following exchange:

I'll follow up and clarify. You're an investigator? Yes, sir. In investigating the second generation of Ford Sport, two-door Sport, from what year to what year did you determine under your investigation Ford Motor Company made those two-door Sports? From 1995 to 2003, the second generation. From your investigation, were all those models interchangeable? Yes, sir. Thank you.

Now, using those measurements is that how you got the height of this door, the placement of this door? Yes, sir. And then you made the window operational? Yes, sir. I wired directly to a circuit to allow the switch interior to operate the window. Now, in 2016 when we had the first trial this door was used? Just the door. Yes, sir. And in 2014 when we had the stand your ground hearing this door was used? Yes, sir. At that trial there's a lot of talk about where the defendant was in this vehicle; is that correct? That is correct.

The purpose for the seat inside that you have built onto this exhibit, what was that purpose? To provide an extra layer of testimony so they see the face or how certain things were done. If a person reached out, how the person was positioned, the seat belt functions, the floor pan is the right height, so it puts the seat in the correct height given the door frame so it's a more accurate representation or more accurate visual aid for the witnesses, sir.

Aug. 2019 Tr. 519-521.

The State asked the Investigator more questions about how he made the demonstrative and how he ensured the model was substantially similar to the Appellant's gold Ford Explorer's door. Tr. 510-521. The Investigator testified he had run the VIN number from the door and the

frame on both the Appellant's door and the demonstrative's door and he discovered they had both been built at the same plant in Kentucky. Aug. 2019 Tr. 520-521. He testified the seat of the demonstrative was a manual seat like the Appellant's that could slide backwards and forwards but not up and down. Aug. 2019 Tr. 521, lines 14-23. He also testified that all other parts of the demonstrative were standard to that of the doors and seats of a second generation Ford. Aug. 2019 Tr. 522, lines 1-6.

The Investigator said he had installed a power switch so the window could go up and down. Aug. 2019 Tr. 523, lines 1-39. He explained how the demonstrative was useful as an aid to determine how a five-foot-seven victim like Da'Von Capers could be stabbed under the nipple from the inside of the vehicle. Aug. 2019 Tr. 523, lines 12-25. White tape demarcated where the Appellant and other witnesses indicated the positions of the window and the seat were the night of the stabbing at the 2014 and 2016 hearing and trial and the Investigator explained that to the jury. Aug. 2019 Tr. 523, lines 1-25, Tr. 524, lines 1-10.

On cross-examination, the defense asked the Investigator about measurements and other factors he did not take into consideration when making the demonstrative. Aug. 2019 Tr. 524, line 14 to Tr. 536, line 5. The Investigator explained that he created the demonstrative from measurements Sergeant Carter had made when law enforcement executed a search warrant at the Appellant's home. Aug. 2019 Tr. 529, lines 5-11. He also said that at the previous trial, Dr. Ross testified while using a person who was five-foot-seven, the height of the victim, to show how someone could be stabbed outside of the vehicle with the window and seat at the height they were at that night. Aug. 2019 Tr. 531, lines 1-23.

On redirect, the Investigator clarified that it did not matter what type of tires the Appellant had or the tire height because the suspension would have made everything even. Aug.

2019 Tr. 536, lines 8-24. After other questions, the Solicitor finished by clarifying they were introducing the model of the Ford door for demonstrative purposes only. Aug. 2019 Tr. 537, lines 2-5. The defense then renewed its objection. Aug. 2019 Tr. 537, line 7 to Tr. 541, line 1.

The Solicitor then followed up by showing the Court a photograph taken by the state newspaper during the 2016 trial when the Appellant explained to that jury how he stabbed the victim through the window. Aug. 2019 Tr. 541, lines 17-25. “Mr. Dennis can get in this car and put that seat wherever he thinks it was. Any witness who says they believe the seat was this way or that way, it’s all testimony and there may be variables in the testimony. All that’s fine. But this is purely demonstrative.” Aug. 2019 Tr. 542, lines 4-8.

The Court held the following:

If this comes in evidence – I agree with everything you’ve said. It’s demonstrative. You can move the seat up and down, seat back and forth, window up and down, the seat belt can be moved. It’s demonstrative. Everything you said can be argued. Everything he said can be argued. It’s approximation, it’s demonstrative. It still can be manipulated. It’s not going in the jury room. I think it’s allowed I mean, it doesn’t have to be perfect, but it’s the height that was measured from the seal of the door to the ground which is consistent with Mr. Dennis’ car.

Aug. 2019 Tr. 545.

The defense argued they did not know what the elevation or slant of the ground was at the Cook-Out. Aug. 2019 Tr. 546, lines 13-16. The Court responded, “That goes to weight. It’s demonstrative You can argue all these inaccuracies” Aug. 2019 Tr. 546, lines 16-17, 23. The defense and the Court then went back and forth about measurements for quite some time. Aug. 2019 Tr. 547-550. The defense objected that the Appellant’s original vehicle was not available for comparison purposes. Aug. 2019 Tr. 558, lines 21-25. When the jury was on a break, the investigators measured the difference between the demonstrative and the model of the

Appellant’s original vehicle and testified that it would be “off less than one sixteenth of one inch to the benefit of the defense.” Aug. 2019 Tr. 551, lines 19-24.

The Court then said to the defense, “I understand your argument. I think it’s a piece of demonstrative evidence. It doesn’t go back to the jury. The jury can’t play with it. Y’all can manipulate it in here to your heart’s content and you’re welcome to use that cross examination questions of the inconsistencies there. You’re welcome to do that.” Aug. 2019 Tr. 558, lines 15-22. The State then asked questions of Investigator Sullivan while the jury was present about how he built it and for what purpose, Aug. 2019 Tr. 559, line 15 to Tr. 568, line 6, and the defense then thoroughly cross-examined him on the measurements. Aug. 2019 Tr. 568, line 8 to Tr. 582, line 11.

Relevant Law and Analysis

The Trial Handbook for South Carolina Lawyers summarizes the definition and requirements for using demonstrative evidence during a criminal jury trial. Alex Sanders and John S. Nichols, § 19.1 *Real and Demonstrative Evidence, Generally*, Trial Handbook for South Carolina Lawyers (4th ed. Sept. 2020).

Courts have tended to divide demonstrative evidence into two categories: original or real evidence – evidence directly related to the occurrence at issue; and prepared or illustrative evidence – evidence which is prepared for litigation solely to aid the comprehension of the jury. Original evidence includes items such as an alleged murder weapon the defective product, and photographs taken at the scene of an accident. Prepared evidence includes such items as charts, maps, skeletal sections, and working demonstrative models.

The difference between real and illustrative demonstrative evidence is significant for two reasons. First, that which is proved to be original is always relevant and will go to the jury unless the court excludes it for a specific, reviewable reason On the other hand, purely illustrative demonstrative evidence is admitted only as a tool to help the jury understand the relevant facts of the case and, therefore, is subject to much broader discretionary exclusion. In other words, real demonstrative evidence is evidence; illustrative demonstrative evidence is an advocate’s educational tool

§ 19.1, *Real and Demonstrative Evidence, Generally.*

Before introducing a demonstrative, the party seeking to introduce it must properly lay the foundation and establish a link between the item and the matter in issue. *State v. Hart*, 306 S.C. 344, 412 S.E.2d 380 (1991) (all evidence is subject to challenge on the ground that a proper foundation has not been laid.) Then, the introducing party must show its relevance. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). “Any evidence that assists in arriving at the truth is relevant and admissible unless rendered incompetent by some legal rule.” *State v. Petit*, 14 S.C. 452, 142 S.E. 725 (1928). Evidence is considered relevant and admissible if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. *South Carolina Dept. of Social Services v. Bacot*, 280 S.C. 485, 313 S.E.2d 45 (Ct. App. 1984). Finally, the Court must conduct a Rule 403, SCRE, analysis and determine if the item’s probative value is outweighed by the danger of unfair prejudice. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). Unfair prejudice is defined as an undue tendency to suggest a decision on an improper basis. *State v. Brown*, 306 S.C. 448, 412 S.E.2d 440 (Ct. App. 1991).

If the party seeking to introduce the demonstrative has done all of the above, and the court concludes the item is relevant and has probative value, “[I]t is for the jury to determine the weight, if any, [it] is to be given.” *Benton & Rhodes, Inc. v. Boden*, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993). The determination of relevancy and the ultimate admission of demonstratives is a matter largely within the trial court’s discretion and his discretion will not be disturbed on appeal in the absence of an abuse of such discretion amounting to a manifest error of law. *Ward*, 290 S.C. at 557, 351 S.E.2d at 873; *Grand Strand Const. Co., Inc. v. Graves*, 269

S.C. 594, 595, 239 S.E.2d 81, 81 (1977). Wide latitude and freedom is allowed to the parties seeking to introduce demonstratives. *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962).

In *Holmes v. Black River Elec. Co-Op, Inc.*, the Court held the trial judge did not abuse his discretion in admitting in evidence of the plaintiff's injured and amputated arm, even though the picture did not accurately reflect the plaintiff and his injuries at the time. *Holmes*, 274 S.C. 252, 258, 262, S.E.2d 875, 878 (1980). The Court found that the demonstrative evidence aided the jury in its evaluation of the injuries and pain suffered by the appellant and that they were not introduced with the sole purpose of inflaming the jury. "They served the proper purpose of bringing vividly to the jurors the details of tremendous injuries. The pictures were certainly admissible as a matter of discretion of the trial judge, if not as a matter of right. We find no error." *Holmes*, 274 S.C. at 258, 262 S.E.2d at 878.

Here, the Solicitor properly laid the foundation for the demonstrative by questioning the Investigator on how it was made and why it was important to the current matter at issue. The Investigator testified that the Ford Explorer door model was substantially similar to that of the Appellant's the night of the stabbing and that it would help the trier of fact understand and visualize where the Appellant was standing and whether he could have stabbed the victim outside or inside the vehicle. The Solicitor showed it was relevant by demonstrating it made the ultimate question of whether the victim had reached his hand into the Appellant's occupied vehicle that night more or less probable. The Solicitor then argued with the defense about why the item had more probative value than prejudicial risk of unfair prejudice. The trial court properly allowed the Solicitor's Office to admit the door as demonstrative evidence, placing on the record that the jury would not have access to it in the jury room and that the defense could argue the inconsistencies and thoroughly cross-examine the Investigator. The trial court properly

concluded the inconsistencies of the model went to the weight of the evidence, and not the admissibility. The defense has not shown how the trial court has manifestly abused its discretion with an error of law and this Court should affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
July 7, 2021

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-001486

THE STATE RESPONDENT,

v.

KIERIN MARCELLUS DENNIS APPELLANT.

PROOF OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Certificate of Service has been forwarded to Appellant's counsel, Robert M. Dudek, Esquire at Rdudek@sccid.sc.gov, Lara M. Caudy, Esquire at lcaudy@sccid.sc.gov and Adam S. Ruffin, Esquire at aruffin@sccid.sc.gov via email today, July 7, 2021 to and to their assistants Lindsey Matthews, at lmattthews@sccid.sc.gov; Haley Kellner at hkellner@sccid.sc.gov and Scott Leverett at sleverett@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 7th day of July, 2021.

s/ Angela Brown
Angela Brown
Legal Assistant to Julianna E. Battenfield
Assistant Attorney General

Melody Brown

From: Melody Brown
Sent: Wednesday, July 7, 2021 7:01 PM
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Subject: FW: The State v. Kierin Dennis
Attachments: Initial Brief of Respondent Kierin Dennis.pdf

Good evening,

We realized at filing that not everyone was copied on the service email. We are providing a copy of the Initial Brief in the referenced case. The brief and designation will be filed with the Court today.

Thank you,
Melody

Melody J. Brown
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Subject: The State v. Kierin Dennis

Counsel, please find attached the Initial Brief of Respondent and Designation of Matter in regards to the above matter. The brief and designation will be filed with the South Carolina Court of Appeals on today's date.

Thank you,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Aug 19 2021

SC Court of Appeals

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT.

APPELLATE CASE NO. 2019-001486

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ARGUMENT IN REPLY

1.

The state had no counter response to binding legal precedent, which holds the rulings of the trial judge in proceedings which end in a mistrial represent no binding adjudication upon the parties, and it leaves the parties as though no trial had taken place.

Appellant had a pre-trial immunity hearing before Judge Russo. Judge Russo denied appellant immunity. Appellant's subsequent trial before Judge Russo ended in a mistrial.

In State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct.App. 1999), this Court remanded for a new *in camera* hearing. This Court agreed with Smith that the trial judge erred by refusing to allow Smith to present new evidence that the confidential informant's identification of him was tainted. Smith correctly argued that the informant's identification testimony during the first trial was nugatory because of the mistrial and the trial judge therefore should have held a new hearing.

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. When the trial of this case was thus terminated, the status of the litigation and of the parties became the same as though no trial had taken place." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965), *citing* Keels v. Powell, 213 S.C. 570, 50 S.E.2d 704(1948).

In State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009), a death penalty case, the trial court granted the defendant's pre-trial motion for a change of venue. However, after granting that motion for a change of venue, the first trial ended in a mistrial.

When the case was called for a re-trial, the state took the position that the mistrial resulted in the case going back to "ground zero," and that its consent before the prior trial for a jury from Marion County being transported to Clarendon County for trial was no longer binding.

The Supreme Court agreed, noting that “a mistrial is the equivalent of no trial and leaves the cause pending in the circuit court,” *citing State v. Smith*, 336 S.C. 39, 518 S.E.2d 294 (Ct.App.1999). “The case having resulted in a mistrial; it was a nullity and therefore began anew when called again for trial.” *State v. Woods*, 382 S.C. 153, 157-58, 676 S.E.2d 128, 130-31 (2009).

Despite this precedent, the state asserts, “No case law, statute, or regulation exists that would have entitled the appellant to a new [immunity] hearing [after the mistrial].” Brief of Respondent at 10, 17. It then claimed that having a second pre-trial hearing on this legal issue after a mistrial “would create mass chaos in the courts of general session.” Brief of Respondent at 18. Despite this prediction of calamity, the state admits it cannot point to another case where a mistrial occurred after there was an immunity hearing. Brief of Respondent at 10-11, n. 4.

The second trial judge, Judge Hood, relied on evidence from the nullity mistrial immunity hearing, and he also did not observe the demeanor of the witnesses at that hearing. The judge also limited evidence at his immunity hearing to that testimony he determined to be “after-discovered evidence” following the mistrial. Both were errors of law, and unfortunate. The only way to now remedy these errors of law is to grant Appellant Dennis a new immunity hearing unencumbered by the remnants of the nullity mistrial.

2.

While the state admits “both judges listed conflicting evidence as a reason for denying immunity,” it ignores the fact that the court ceded to the solicitor’s position that conflicting evidence made self-defense a “quintessential jury question,” now making the assertion on appeal that both judges denied immunity because “he did not meet his burden by a preponderance of the evidence.”

Appellant does not need to repeat his argument made in his initial brief that the judge found conflicting evidence as a reason to deny appellant immunity. The solicitor successfully urged that the conflicting evidence created a quintessential jury question.¹ PT3. 39, ll. 11-21.

In Judge Hood’s order, he cited conflicting and inconsistent testimony and ruled, “the direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. *Therefore*, immunity does not apply because the defendant has not proven beyond a preponderance of evidence standard of self-defense.” R. p. * (Order of Judge Hood at 6-7).

There was evidence that as appellant and his friends were walking through the front lobby to the parking lot after the basketball game that numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, appellant became separated from his friends. A student from Dutch Fork followed appellant to his car. The school resource officer pulled a taser and ordered the students to leave. All the students scattered, and appellant got into his car and left. PT1. 246, l. 5 – 247, l. 23. *Appellant never said a word to any of the Dutch Fork students in the parking lot.* PT1. 247, l. 24

¹ Just as in the Initial Brief of Appellant, in this reply brief, “PT1.” refers to the pre-trial immunity hearing before Judge Russo prior to the mistrial. “PT2.” refers to the immunity hearing held before Judge Hood after the mistrial. “PT3.” refers to the hearing on immunity arguments held before Judge Hood on September 18, 2017. “MT.” refers to the mistrial. “Tr.” refers to the trial held before Judge Griffith from August 19-27, 2019.

– 248, l. 6. As seen in the brief of appellant, and infra, this was *consistent* with appellant’s behavior at the Cook Out where he avoided conflict, advised his friends to dodge conflict by leaving, and did not take the bait at least twice from Dutch Fork student Michael James when James was seeking a confrontation.

The state points to a claim by Dutch Fork student Deshon Chatman, who maintained that appellant said, “Meet us at the Cook-Out, we’ve got something for you.” Chatman said he did not know what was going on in the parking lot at that point, “[a]nd I had to go pick my mom up, so I had to go straight home.” PT1. 361, l. 6 – 362, l. 24.

Detective Brent Carter said there was a “lot of jawing back and forth between a lot of different people [in the parking lot after the basketball game].” However, Carter admitted his recommendation to the solicitor to not grant appellant immunity from prosecution, and to instead charge him [seemingly with murder] was influenced by the claim of Dutch Fork student Deshon Chatman and Dutch Fork graduate Waldon Roberson (who also was not at the Cook Out) that appellant made this earlier statement in the parking lot. PT. 2, 351, l. 13 – 352, l. 3.

Judge Hood unfortunately did not have the benefit of our Supreme Court’s opinion in State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019), where the Court held, “[J]ust because conflicting evidence as to an immunity issue exists, does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act.” While it is unfortunate Judge Hood did not have the benefit of State v. Cervantes-Pavon, this record reveals the solicitor successfully argued that the presence of inconsistent evidence made this a “quintessential jury question.”

The court's denial of immunity was impermissibly and irrevocably tainted by its ruling that "the direct contradiction between witnesses creates an issue for a jury to decide, not the trial court." R. p. *. A new immunity hearing untainted by this error of law is the proper remedy.

3.& 4.

Appellant did not have a duty to retreat. He had the right to stand his ground because the Cook Out was “a place he had a right to be.”

The state asserts that the first immunity judge, Judge Russo, properly ruled that appellant “had a duty to retreat before meeting force with force.” Brief of Respondent at 27. The state also maintained that the second immunity judge, Judge Hood, properly found that appellant had not proven he was without fault in bringing on the difficulty, and that he had a duty to retreat as a result, but failed to retreat. Brief of Respondent at 27. Both judges were respectfully incorrect in their legal analysis.

Appellant had every right to be at the Cook Out restaurant that evening. The Cook-Out was a Lexington High hangout, not a Dutch Fork venue, and appellant was a one year removed alumnus of Lexington High.

Further, although appellant had no duty to retreat since he was acting lawfully in a place he had a right to be, pursuant to S.C. Code §16-11-440 (C), appellant’s actions while at the Cook Out restaurant showed he was avoiding confrontation, not seeking it. The state cherry picked the testimony in an attempt to create a narrative that “[t]he appellant challenged them to meet up at the local Cook-Out later to settle things as a police officer ordered everyone to leave the parking lot.” Brief of Respondent at 5.

However, no objective reading of what occurred at the Cook Out supports the state’s wishful, cherry picked narrative. When appellant was approached by Dutch Fork student Michael James, who objectively seemed to be looking for trouble, appellant told James: “We just came here to eat.” PT1. 251, ll. 11-21. When James later asked appellant, “Are you still salty?” Appellant responded, “The game was thirty – thirty, thirty-five minutes ago, y’all won,

congratulations.” PT1. 254, ll. 13-22. Appellant also told his friends that they needed to leave before they even got the food they had ordered, and the group began walking to their respective cars. PT1. 254, l. 22 – 255, l. 8.

Objective witness Beth Bettini described at the second immunity hearing before Judge Hood what she saw at about this time at the Cook Out. Thirty to forty teenagers in the parking lot were “screaming, hollering, cussing, acting crazy.” PT2. 115, ll. 1-9. She saw a light-colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at appellant, the driver. They were calling him names and threatening him. PT2. 115, ll. 10-19. They were yelling, “Fuck you. We’ll kick your ass.” PT2. 116, l. 22 – 117, l. 1. She saw a student throw a drink at the car. PT2. 115, ll. 10-19.

Appellant responded, “Y’all leave me the fuck alone or get the fuck away from me.” PT2. 117, ll. 3-6. She told the dispatcher that appellant “*looked scared to death*” and she thought the other students were going to hurt him. PT2, 115, ll. 22-25; PT2. 117, ll. 12-19; PT2. 118, ll. 8-15. (emphasis added). She explained *that appellant could not leave because there were students in front of his car*. He would have had to hit them to leave. PT2. 120, ll. 5-7.

The legislature enacted 16-11-440(C), the stand your ground provision, which provides “a person who is not engaged in 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 §16-1-60.”

Appellant had every right to go to the Lexington county Cook-Out hangout after the basketball game. The state on appeal essentially takes issue with the wisdom of the stand your

ground provision enacted by our General Assembly by arguing that appellant had a duty to stay away from the Cook Out restaurant, even though it was “a place where he had a right to be.” Appellant was not obligated to run home and hide after the game because the emotions of the partisan fans had run high during and right after the game. Any reasonable reading of appellant’s actions at the Cook Out restaurant showed that, even though he did not have a duty to avoid confrontation because he had a right to “stand his ground,” appellant sought to avoid confrontation.

The state’s Monday morning quarterbacking given its apparent dislike of the stand your ground law is respectfully of the worst kind. Regardless, it cannot overcome the intent of the legislature that “no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code Ann. § 16-11-420(E).

Appellant was also entitled to the legislature’s presumption set forth in S.C. Code § 16-11-440(A) that he had a reasonable fear of imminent peril of death or great bodily harm while a hostile person was invading his occupied vehicle. Further, since appellant had a right to be at the Cook Out restaurant, he had no duty to retreat, and he had a right to stand his ground and meet force with force, pursuant to S.C. Code § 16-11-440(C), even though the evidence showed appellant tried to avoid confrontation.

Appellant is entitled to a new immunity hearing, untainted and unencumbered by the legal errors enumerated in his briefs.

5.

The staged aerial photograph of the incident location was not admissible because it did not corroborate witness testimony or show the jury the circumstances of the crime but instead depicted a misleading image of the area which was not representative of the actual events as perceived and experienced by the witnesses who were present at the time of the incident.

Respondent argues that the trial judge did not err in allowing the state to introduce the staged aerial photograph of the incident location because the photograph oriented the jury to where the incident occurred, helped to trace the movements of appellant, and showed the width of the road. Brief of Respondent at 27-28. Respondent maintains that the trial judge did not abuse his discretion in allowing the photograph because it was relevant and more probative than prejudicial. Brief of Respondent at 28.

In support of its argument, respondent cited to Nelson v. Charleston & W.C. Ry. Co., 231 S.C. 351, 98 S.E.2d 798 (1957), State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). None of these cases have any applicability to appellant's situation, and they are therefore irrelevant.

In each of these cases, Nelson, Todd, and Jones, the disputed photographs were photographs that showed the *actual condition* of something pertinent to the case at the time of the disputed incidents. The photograph that was introduced in Nelson was used to show the actual condition of the railroad track at the time of the incident. The photographs in Todd and Jones showed the victim's actual injuries that had been caused by the defendants.

In Nelson v. Charleston & W.C. Ry. Co., 231 S.C. 351, 354-55, 98 S.E.2d 798, 799 (1957), the Railway Company appealed a verdict for the plaintiff in a wrongful death case arising out of a collision between a freight train and an automobile. The Railway Company argued on

appeal that the trial judge erred by “permitting [the plaintiff] to prove abandonment of the spur track involved.” Id. at 357, 98 S.E.2d at 800. The Supreme Court in Nelson stated that the Railway Company “misapprehended” the plaintiff’s position because the plaintiff did not argue that the track had been abandoned but rather that the track was only used seldomly. The Court thus held that a photograph introduced by the plaintiff which showed the condition of the track at the time of the collision was admissible to show that the track was “very infrequently used.” Id. at 357-58, 98 S.E.2d at 800.

In State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986), the appellant argued that the trial judge erred in allowing the state to introduce a photograph which showed the actual location of the victim’s gunshot wound. Specifically, the appellant argued that the photograph was unnecessary because the location of the wound was not in dispute. The appellant further argued that the photograph was inflammatory because it showed the victim’s upper right chest area including her breast and the appellant was also on trial for criminal sexual conduct. Id. at 213, 349 S.E.2d at 340. The Supreme Court held that the photograph was properly admitted into evidence because it corroborated the pathologist’s testimony regarding the location of the wound and that the appellant was not prejudiced by its admission because there was testimony that the victim’s clothing had been removed by medical personnel in order to render medical aid. Id. at 214, 349 S.E.2d at 340.

Finally, the state relies on State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), in which the Supreme Court held that four color photographs showing the victims’ bodies “in substantially the same condition in which [they] were left by the defendant” and which “demonstrate[d] the circumstances of crime and the character of the defendant” were admissible in the *sentencing phase of a death penalty trial*. Id. at 579, 541 S.E.2d at 822. In reaching this conclusion, the

Court relied on State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998), which held that color photographs at the *sentencing phase of a death penalty trial* are admissible “so long as they demonstrate the circumstances of the crime and the character of the defendant, or they depict the victim’s body in substantially the same condition in which the defendant left it.” Id. at 46-47, 501 S.E.2d at 120-21. It is elementary that the penalty phase of a capital trial is about the defendant’s character and the circumstances of the crime. “[T]he sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant.” State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

The aerial photograph in this case was not used to show the condition of the road at the time of the incident, but it was rather a staged manipulation of the scene which was used to mislead the jury as to the character of the road. Contrary to respondent’s assertion, the photograph did not show whether appellant was blocked in at the Cook Out or not. This staged photograph bore zero resemblance to what appellant was faced with on the night of the incident, and he did not have the luxury of viewing the area from a bird’s-eye-view before making his decisions. As defense counsel argued at trial, the witnesses did not see the scene from overhead, and they did not make their decisions based on what things looked like from an aerial view because the witnesses could only see what was in front of them. Tr. 100, ll. 1-23.

The trial judge erred in allowing the staged aerial photograph into evidence which gave the jury the false and misleading impression that the road was *three lanes wide* even though it was in fact only *a two-lane road*. Instead of showing the actual condition of a pertinent fact, as was the case in Nelson, Todd, and Jones, here, law enforcement had deliberately manipulated the scene to show the road in a manipulated and false condition favorable to the state. Furthermore,

the photograph was not an accurate portrayal of the incident location as it was perceived by appellant and the witnesses. In sum, the aerial photograph was confusing, misleading, and unduly prejudicial. Appellant's convictions should be reversed given this misleading evidence on a critical matter at issue for the jury.

6.

The model car door created by the state's investigator did not help the jury determine whether the decedent reached his hand into appellant's vehicle or whether the decedent was stabbed inside or outside the vehicle because the model was substantially different from appellant's actual vehicle and the demonstrative use of the model was highly misleading and resulted in an inaccurate representation of the incident.

Respondent argues that the trial judge did not err in allowing the state to use a model car door of a Ford Explorer created by the state's investigator because the model was substantially similar to appellant's actual vehicle and "it would help the [jury] understand and visualize where appellant was standing and whether he could have stabbed the [decedent] outside or inside the vehicle." Brief of Respondent at 42. Respondent contends that the model was relevant to the question of whether the decedent reached his hand into appellant's vehicle. Brief of Respondent at 42.

Respondent relies on Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 262 S.E.2d 875 (1980). Holmes has no relevance to the current dispute. In Holmes, the plaintiff was injured after suffering from an electrical shock while he was fishing on the Santee Cooper Lake near low hanging power lines. Id. at 255, 262 S.E.2d at 876-77. As a result of the horrific electrical shock, the plaintiff had to have his left hand and part of his arm amputated. Id. The defendant electric company argued that the trial judge erred in allowing into evidence photographs of the plaintiff's amputated arm because "they may have aroused the sympathy of the jury" and were "hideous, grotesque, and grossly unfair." Id. at 258, 262 S.E.2d at 878. The Supreme Court held that the photographs were admissible because they showed the extent of the plaintiff's injuries.

The Court also noted that the parties agreed that the photographs accurately showed the plaintiff's injuries. Id.

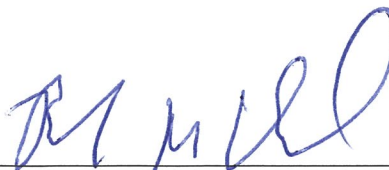
Again, Holmes has no application to the legal issue in this case. The photographs in Holmes were not demonstrative exhibits but rather photographs of the *actual injuries* sustained by the plaintiff. Not only was the model car door used in appellant's trial not his actual car door, it was not even similar, let alone substantially similar. The model was not used to show the actual events that occurred on the night of the incident but was instead used by the solicitor to give a dramatic reenactment. In fact, two of the state's witnesses used the misleading demonstrative of the model car door to physically reenact the incident in front of the jury. Tr. 748, l. 10 – 749, l. 14. This included at least one of the witnesses physically sitting in the car seat of the model and pretending to be appellant while reenacting what appellant supposedly did on the night of the incident. Tr. 770, l. 11 – 772, l. 14.

Respondent acknowledged that demonstrative evidence is subjected to broader discretionary exclusion because of its use as an illustrative tool as opposed to real evidence in the case. Brief of Respondent at 40. However, respondent failed to recognize the principles laid out by the Supreme Court in Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), which dealt with a videotaped animation of a car accident. In Cantrell, the Supreme Court warned how a computer animation could be highly misleading to a jury and that a party's staged reproduction of their version of facts in controversy carries with it a particularly great danger that "the jury may confuse art with reality." Id. at 383-384, 529 S.E.2d at 536. The Court further warned that a misleading recreation of the disputed incident has "the potential to create lasting impressions that unduly override other testimony or evidence." Id.

Contrary to respondent's assertion, the model car door in this case was not substantially similar to appellant's car because the model was based on only a single measurement and the solicitor's investigator admitted that there were numerous other critical measurements that he did not take of appellant's car before constructing the model. Tr. 524, l. 14 – 525, l. 7; tr. 532, ll. 3-21; tr. 573, ll. 4-17; tr. 574, ll. 11-16. Because the model created by the state was inaccurate, the use of the model by the witnesses was necessarily misleading and confusing. Furthermore, the model did not corroborate the witnesses' testimony but instead was used as a prop by the witnesses to conduct a theatrical performance of the incident. Both of the witnesses who acted out the event were biased as they were both friends of the decedent. The trial judge erred in allowing the state to use the inaccurate model car door for witness reenactments of the incident, and appellant's conviction should be reversed because the model was critically misleading to the jury.

CONCLUSION

For the reasons argued in appellant's initial brief, and in this reply brief, this Court should reverse appellant's conviction and remand this case to the Lexington County Court of General Sessions for a new immunity hearing.



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Appellate Defender

ATTORNEYS FOR APPELLANT

This 19th day of August, 2021.

RECEIVED**Aug 19 2021****SC Court of Appeals**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

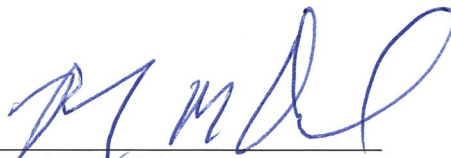
V.

KIERIN MARCELLUS DENNIS,

APPELLANT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above-referenced case has been served upon Julianna E. Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 19th day of August, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

RECEIVED**Oct 05 2021****SC Court of Appeals**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT

APPELLATE CASE NO. 2019-001486

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity?

2.

Whether the second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019)?

3.

Whether, in the alternative, both circuit court judges erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C)?

4.

Whether the second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned

that inconsistent evidence made self-defense a jury issue, that appellant had a duty to retreat, or even to avoid going to “a place he had the right to be” altogether?

5.

Whether, in the alternative if the first circuit court judge’s order alone controlled, he erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned that that appellant had a duty to retreat, or even avoid going to “a place he had the right to be” altogether?

6.

Whether the trial court erred in allowing the state to introduce an aerial photograph of the incident location where the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to “retreat.”?

7.

Whether the trial court erred in allowing the state to introduce a model car door of a Ford Explorer created by the state’s investigator where that model was substantially different from appellant’s actual vehicle and the use of the model was highly misleading and resulted in an inaccurate representation of the incident?

STATEMENT OF THE CASE

Appellant Kierin Dennis was indicted at the June, 2014 term of the Lexington County grand jury for the offense of murder. R. 2939. A pre-trial immunity hearing was held pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-440 (A)&(C), on November 17-19, 2014 before the Honorable Thomas Russo. Todd Rutherford and Simone Martin represented appellant. Richard S. Hubbard, III, and Shawn Graham were the solicitors. R. 1. On February 4, 2015, Judge Russo issued a written order denying immunity. R. 2905-2914.

A jury trial was then held from October 3-11, 2016 before the Honorable Eugene C. Griffith, Jr. R. 619-1656. Judge Griffith declared a mistrial on October 11, 2016 as the result of a hung jury. R. 1656.

When the state again chose to call the call to trial, a pre-trial immunity hearing was held before the Honorable Robert E. Hood from August 22-24, 2017 over the state's objection that appellant was not entitled to an immunity hearing despite the mistrial. Todd Rutherford again represented appellant. Shawn Graham and Rhonda Patterson were the assistant solicitors. R. 1. Arguments on appellant's entitlement to immunity were later held before Judge Hood on September 18, 2017. Todd Rutherford represented appellant. Shawn Graham and Rhonda Patterson were the assistant solicitors. R. 1.

Through counsel, appellant filed a Brief in Support of Defendant's Renewed Motion for Hearing Pursuant to S.C. Code §16-11-440 (A)&(C) dated September 21, 2017. R. 2926-2935. Judge Hood issued an order dated October 11, 2017, denying appellant immunity. R. 2915-2921.

Appellant's case then came on for trial before the Honorable Eugene C. Griffith, Jr., and a jury from August 19-27, 2019. Todd Rutherford and Nicole Simpson represented appellant.

Solicitor Rick Hubbard and Assistant Solicitor Rhonda Patterson represented the state. R. 2095-2904.

On August 27, 2019, the jury found appellant guilty. R. 2901, ll. 13-20. Judge Griffith sentenced appellant to thirty years' imprisonment. R. 2904, ll. 2-6.

This appeal follows.

STATEMENT OF FACTS

The first immunity hearing before Judge Russo

On the night of February 17, 2014, appellant attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. R. 482, ll. 2-9. The game was held in the Lexington High School Gymnasium. Appellant's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. R. 8, ll. 10-25; r. 162, ll. 19-22. Given past difficulties between students from the rival schools, additional security measures were taken as a precaution. After the game, which Dutch Fork won, Lexington High School students were directed to leave the building through the front of the gymnasium, while the Dutch Fork High School students were required to leave through the back to prevent the comingling of students from the two schools. R. 9, ll. 1-23; r. 160, ll. 13-24; r. 359, ll. 9-16.

As appellant and his friends were walking through the front lobby to the parking lot, numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, appellant became separated from his friends. A student from Dutch Fork followed appellant to his car. The school resource officer pulled a taser and ordered the students to leave. Eventually all the students scattered, and appellant safely got

into his car and left. R. 246, l. 5 – 247, l. 23. Appellant never said a word to any of the Dutch Fork students in the parking lot. R. 247, l. 24 – 248, l. 6.

After the game, appellant and his friends went to the Cook Out. The Cook Out was a “hangout spot” for Lexington students after sporting events. It was only two to three miles from the school. R. 14, l. 21 – 15, l. 3; r. 222, l. 24 – 223, l. 1. Appellant, who was driving a gold Ford Explorer, parked at the carwash behind the Cook Out since the Cook Out parking lot was full. Will Zander, who was driving Morgan Zander and Lucky Cook, also parked at the carwash while Keith Adams parked at the PetSmart adjacent to the Cook Out. R. 14, ll. 9-20; r. 250, ll. 7-10.

As appellant and his friends were walking toward the Cook Out, they ran into Austin Sanders, a fellow Lexington student, in the parking lot. R. 250, ll. 7-13. Sanders told appellant that while he was in the Cook Out drive thru line, several Dutch Fork students approached and began shaking his car. The students were “rowdy” and harassed other people in the drive thru as well. R. 250, l. 13 – 251, l. 9.

After speaking with Sanders, appellant and his friends entered the front door of the Cook Out. Despite the Cook Out being a Lexington High “hangout,” there were at least thirty to forty students from Dutch Fork inside. R. 17, ll. 8-16. As soon as appellant and his friends entered, Michael James, who attended Dutch Fork, approached appellant, threw his hands into the air, and asked, “That’s all y’all brought?” R. 251, ll. 10-21. Appellant calmly responded, “We just came here to eat.” R. 251, ll. 21-22. Appellant and his friends then went to wait in line to order food. R. 251, l. 23 – 252, l. 12.

While they were waiting in line, appellant overheard Dutch Fork students “picking on Lucky [Cook] about his sweater.” R. 252, l. 13 – 253, l. 3. Michael James, the same student

who confronted appellant when he entered the restaurant, stood up on a chair behind Keith Adams, put his fist over Keith's head, and motioned as if he was going to punch Keith. Appellant and his friends continued to ignore the Dutch Fork students and waited for their food. R. 253, ll. 3-13.

Given the uncomfortable atmosphere, appellant told his friends, "Let's leave," and "we just need to go," but his friends wanted to wait for their food since they had already ordered. Appellant told his friends he would pay them back for the food they had ordered but that they needed to leave. R. 253, l. 25 – 254, l. 11. Appellant received a phone call and he stepped outside. R. 16, ll. 12-13; R. 253, ll. 19-22. Keith Adams followed appellant outside because he did not want appellant "outside by himself." R. 16, ll. 21-25. Shortly thereafter, Lucky Cook, Will Zander, and Morgan Zander walked outside too without their food. The group of friends were all standing by a trashcan outside. R. 17, ll. 18-25. Michael James walked past them. When James reached the middle of the parking lot, he turned around, threw his hands in the air, and asked, "Are you still salty?" Appellant responded, "The game was thirty, thirty-five minutes ago. Y'all won. Congratulations." R. 254, ll. 13-22. To avoid any confrontation, appellant then told his friends, "Guys come on, let's go" and the group began walking toward their cars. R. 254, l. 22 – 255, l. 8.

As they were walking, appellant heard "a whole bunch of noise behind" him. R. 255, ll. 8-10. When he turned around, the Dutch Fork students were "rushing" out of the Cook Out. R. 19, ll. 1-3; r. 255, ll. 10-12. About thirty to forty students "poured out." R. 84, ll. 4-21. They were yelling and "pulling their pants up . . . like they were getting ready to fight" or "jump" appellant and his friends. R. 255, ll. 12-14. Da'Von Capers, the decedent, called Morgan Zander "a bitch." R. 18, l. 21 – 19, l. 1; r. 85, ll. 2-24; r. 255, l. 22 – 256, l. 4. Appellant

continued to walk backwards toward his car. R. 255, ll. 14-16. Keith Adams was “speed walking” to his car while Will Zander ran to his car. R. 20, ll. 10-22; R. 86, ll. 3-6. The Dutch Fork students followed closely behind. After safely reaching his car, Will picked up his sister, Morgan, and Lucky Cook in the roadway near the Cook Out. R. 86, ll. 3-8.

After reaching their cars, Keith Adams and appellant met in the roadway between the PetSmart and the carwash. R. 256, ll. 13-20. They parked with their driver side windows next to each other. Appellant was facing the PetSmart and Keith was facing the Cook Out. They spoke for about two to three minutes about their plans. Appellant told Keith he was going home because he had to be at work at 5:30 the following morning. Keith was going to his father’s house. R. 256, l. 13 – 257, l. 17. While the pair talked, Will Zander turned his car around in the PetSmart parking lot and parked behind Keith. R. 22, ll. 2-8; r. 86, l. 19 – 87, l. 4.

Keith Adams eventually drove away first. R. 23, ll. 13-17; r. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. R. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith explained that he took this exit because it was closest to the interstate where he was headed and because the other exit had a traffic light that “takes forever.” R. 22, l. 21 – 23, l. 19. Keith eventually turned right out of the parking lot onto the main road. R. 22, l. 21 – 23, l. 19.

Will Zander, who was directly behind Keith, followed the same path past the Dutch Fork group of people who were standing on the curb and in the roadway. Will explained that he did not take the other exit near the Cook Out drive thru because it was “too congested” and he “always” took the exit between the Cook Out and the PetSmart. R. 87, ll. 5-17.

As Will was driving to the exit, he heard the Dutch Fork students in the roadway yelling. Will's driver's side window was already down. R. 87, ll. 18-21. Will stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. R. 87, l. 21 – 88, l. 23. There was testimony Will said: "Hey, this is what y'all are worth." R. 543, l. 2 – 546, l. 15. Several students from Dutch Fork, including Devon Chatman and Tyreke Farrow, ran into the road to pick up the money. R. 89, ll. 7-20; R. 451, ll. 19-25.

After Keith Adams and Will Zander pulled away, appellant backed his car up so he could likewise leave through the main exit between the PetSmart and the Cook Out. After he reversed, appellant put his car back in drive and looked forward. R. 258, ll. 7-11. When he looked up, he saw Will's car stopped in the roadway. It was surrounded by Dutch Fork students. R. 258, l. 25 – 259, l. 2. Appellant did not know at the time that Will had thrown money into the road. R. 258, ll. 12-21. He feared the Dutch Fork students were going to attack Will. Appellant sped forward to make sure Will was alright. R. 258, l. 24 – 259, l. 5; R. 259, ll. 14-24.

Appellant stopped behind Will's car. As soon as appellant stopped, Dutch Fork students surrounded his vehicle and approached his window, which was still about halfway down from when he was talking to Keith. R. 281, ll. 3-7. The students were yelling at appellant, ordering him to get out of the car, and calling him names – "pussy" and "bitch." R. 260, ll. 8-13; R. 262, ll. 10-15. Hands started reaching into appellant's window. He thought they were trying to attack him and "forcefully" pull him out of the car. R. 260, ll. 13-15. With his foot still on the brake, appellant leaned as far into the car as possible to get away from the Dutch Fork students. R. 260, ll. 15-19.

Appellant was scared and he feared for his life. R. 260, ll. 19-20; R. 262, ll. 22-23. He could not leave because Will's car was parked in front of him and there were Dutch Fork

students in front and around his car. R. 265, l. 22 – 266, l. 17. Appellant had a knife in his center console. R. 262, ll. 24-25. He grabbed it, reached across his body with his right hand, struck, and then drove away. R. 262, l. 24 – 263, l. 2. He did not realize he had stabbed anyone. R. 268, ll. 15-20.

Joshua Brooks, who attended Lexington High School, was at the Cook Out that night. R. 222, l. 11 – 223, l. 1. He watched as a “whole bunch” of Dutch Fork students crowded around appellant’s car in the roadway. R. 224, ll. 13-25. The students were “banging” on appellant’s car “trying to scare him.” Others were reaching in appellant’s window. R. 225, ll. 1-3. Appellant could not leave because Will Zander’s car was parked directly in front of appellant. R. 226, ll. 14-21. Brooks saw Will get out of his car. Brooks told Will “to leave, get out of here, you don’t want any problems.” He knew Will and appellant were greatly outnumbered and they “were being threatened” by the Dutch Fork students. R. 225, ll. 10-15. Will eventually got back into his car. Brooks watched appellant drive off followed by Will. R. 224, ll. 13-19; r. 225, ll. 4-9.

Kenneth Williams, who attended Dutch Fork, was a prosecution witness. He testified that he was standing on the curb by the roadway at the Cook Out. R. 449, l. 20 – 450, l. 8. He saw Will Zander stop in the middle of the road and throw money out his window. R. 450, l. 12 – 451, l. 5. Several Dutch Fork students, including Tyreke Farrow and Devon Chatman, ran into the road to pick up the money. R. 451, ll. 9-25. Williams said appellant pulled up “pretty fast” behind Will and claimed that he almost hit Farrow and Chatman. R. 451, l. 23 – 452, l. 14. This upset the Dutch Fork students. R. 452, ll. 10-19. They all “lined up” outside appellant’s window. R. 452, ll. 20-22. Although Williams never approached appellant’s window, he maintained that he saw appellant’s hand come out of his window and strike Da’Von Capers, the

decedent. R. 452, l. 20 – 453, l. 9. He thought appellant just pushed Capers until Capers said, “they got me” and ran to a vehicle. R. 453, ll. 10-24. Williams later admitted that he saw Capers reach into appellant’s window, but he strangely maintained it was after appellant had stabbed him. R. 469, l. 4 – 470, l. 5.

Devon Chatman, who attended Dutch Fork, was another prosecution witness. He was also standing on the curb by the roadway near the exit between the Cook Out and the PetSmart. R. 485, l. 13 – 486, l. 4. He saw Will Zander pull up, stop his car, and throw money out the window. Chatman ran into the road to pick up the money. R. 486, ll. 5-7. When Chatman was in the middle of the road with several other students, appellant sped around the corner, pulled forward, and Chatman said he was almost struck in the leg. He estimated for the solicitor that the car missed his leg by about three to five feet. R. 488, ll. 4-15. Chatman claimed that if he had not jumped out of the way, he would have been hit. R. 488, ll. 16-19. Numerous Dutch Fork students surrounded appellant’s window and confronted appellant. Chatman was not one of the students who approached appellant’s window. R. 490, l. 1 – 491, l. 13.

Alexis Brunson, who also attended Dutch Fork, did approach appellant’s car after she maintained he almost hit several students in the roadway. R. 512, ll. 5-25. She confronted appellant and yelled, “What are you doing? Are you crazy? You almost ran over some of our students.” R. 513, ll. 12-21. Brunson was livid. R. 514, ll. 17-19. She claimed she did not see anyone touch appellant’s car or reach in his window. R. 515, ll. 16-23. Appellant had his hand down by his thigh and Brunson maintained appellant said, “You don’t want this. You don’t want what I got.” Brunson saw appellant punch Da’Von Capers with his right hand. She claimed appellant’s hand came out of the window when he punched. R. 516, l. 14 – 517, l. 11. She did not see a knife. R. 529, ll. 1-5. After Capers was struck, Brunson said Capers tried to punch

back, but appellant drove away. R. 517, ll. 16-21. Brunson said there was nothing stopping appellant from leaving. He was not blocked in, she claimed. R. 517, l. 25 – 518, l. 6. Brunson admitted that she did not know if Capers threatened appellant before appellant struck him. R. 537, ll. 4-24; r. 539, ll. 1-5.

Tyreke Farrow, another Dutch Fork student, was crossing the street to the PetSmart where his friend's car was parked when he saw Will Zander throw money into the road. R. 543, l. 2 – 546, l. 15. When Farrow was in the road, he said he saw “a car coming full speed” toward him. Farrow jumped and his cousin, Xavier Holiday pulled him out of the way. R. 546, l. 16 – 547, l. 5. Farrow identified appellant as the driver of this car. R. 547, ll. 6-12. He claimed he would have been hit if he had not jumped out of the way. R. 547, ll. 13-15.

Farrow walked up to appellant's car and said, “What the fuck are you doing? Are you trying to hit me with your car?” R. 547, ll. 16-19. At least seven other Dutch Fork students approached the car, including Xavier Holiday, Lamar Butler, and Da'Von Capers. R. 547, l. 19 – 548, l. 4. Capers confronted appellant. He yelled, “What are you doing? You're trying to hit people in the road. Get out of your car if you want to hit people.” R. 548, ll. 3-6. Farrow claimed appellant said, “I got something for y'all. Hey, yo, come here, come here.” R. 548, ll. 7-10. Farrow said appellant then struck Capers with his right hand and drove away. R. 548, ll. 10-14. Farrow saw appellant's hand come out the window, but he did not see a knife. R. 553, l. 6 – 554, l. 11. According to Farrow, no one touched appellant's car or reached into the window. R. 550, ll. 20-24.

Lamar Butler, who also attended Dutch Fork, saw Will Zander throw money into the road. He also testified that Will said, “This is what y'all are worth.” R. 568, l. 17 – 569, l. 24. At least three Dutch Fork students went into the road to pick up the money, including Tyreke

Farrow. R. 570, ll. 6-23. Appellant sped forward and Butler maintained he almost struck them with his car. Xavier Holiday pulled Farrow out of the roadway. R. 371, ll. 1-25.

When appellant stopped in the roadway, Farrow, Holiday, Butler, and Da'Von Capers all approached appellant's car. R. 574, l. 4 – 575, l. 24. Capers was the closest to the window. R. 575, ll. 14-24. Butler claimed appellant motioned for Capers to come closer. R. 577, ll. 5-20. However, he admitted that he could not really see what was going on because his view was blocked by the other students. Butler thought appellant pushed Capers because Capers stumbled back into Farrow, but Butler never saw appellant strike Capers or saw appellant's hand come out the window. R. 577, l. 21 – 578, l. 11. After Capers stumbled, appellant drove away. R. 578, ll. 12-15. Butler claimed he never heard Capers say anything to appellant and that Capers never reached into appellant's window. R. 575, l. 25 – 576, l. 5. However, again, Butler admitted his view was blocked by the others who were standing in front of him. R. 577, l. 5 – 578, l. 11.

As stated above, Judge Russo denied appellant immunity in his order dated February 4, 2015. R. 2905-2914.¹

Facts from second immunity hearing before Judge Hood

Caitlin Voravudhi, a patrol officer with the Lexington Police Department, was one of the first officers who responded to the scene. R. 1702, l. 24 – 1703, l. 4. She received a call from dispatch indicating there was a fight in progress at the Cook Out. R. 1705, ll. 4-14. When she arrived, there were about forty younger people in the parking lot and some adults. R. 1703, ll. 8-21. Voravudhi attempted to control the scene and speak with witnesses. R. 1703, ll. 8-12.

¹ Judge Russo and Judge Hood are referred to throughout this brief respectfully by their name rather than simply as “judge” or “the court” for ease of reference, and to more easily distinguish between the facts of the first immunity hearing and the second immunity hearing.

While Voravudhi was not wearing a body camera that night, the dash camera from her patrol car was recording both audio and video. Her dash camera was pointed toward the carwash and not the Cook Out. R. 1706, ll. 9-24; r. 1704, l. 12 – 1706, l. 1. Voravudhi spoke to Beth Bettini, known as Beth Goodwin at the time. Bettini was the original complainant who called 911. As will be seen infra, even though Beth, Cook Out employee Zachery Lynch and Ervin Chauncy Meggett were key eyewitnesses they were not revealed to the defense or called as witnesses at the first immunity hearing. R. 1709, l. 11 – 1710, l. 20. Voravudhi's interview with Bettini was captured on her dash camera. Voravudhi also took a written statement from Bettini. R. 1710, ll. 22-24. In her statement, Bettini said she was in the Cook Out drive thru. She saw thirty "kids" in the parking lot. They were "cussing" and screaming. A light colored Ford SUV stopped in the roadway. One person ran to the car and threw a drink at it. About ten other male teenagers approached the car. The driver of the SUV was black and had dreadlocks. The SUV "peeled out" followed by a smaller car. R. 1711, l. 20 – 1712, l. 14; See Defendant's Exhibit No. 1 – Bettini Statement; R. 2937.

Voravudhi did not verify whether Bettini called 911 that night. As a patrol officer, she merely passed Bettini's statement off to investigators. R. 1712, l. 15 – 1713, l. 22. Voravudhi also interviewed Zachery Lynch, an employee of the Cook Out, and had him write a written statement. R. 1716, l. 10 – 1717, l. 4; See (State's Exhibit No. 1 – Lynch Statement); R. 2936. In his statement, Lynch said that a black male wearing a white shirt walked toward a car parked in the driveway. The male reached in the car "as if to stab somebody." Then another male walked up and threw a cup at the car. The two black males got into a gold two door Ford Explorer and drove off. R. 1730, ll. 9-20. Voravudhi also turned over Lynch's written statement

and her dash camera footage, which included her interview of Bettini and Lynch, to investigators. R. 1722, ll. 3-12; r. 1727, l. 12 – 1730, l. 5.

Beth Bettini testified that she entered the Cook Out through the rear entrance. When she turned the corner, she saw thirty to forty teenagers in the Cook Out parking lot. They were “screaming, hollering, cussing, acting crazy.” R. 1771, ll. 1-9. Bettini had her windows down. She saw a light-colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at the driver. They were calling him names and threatening him. R. 1771, ll. 10-19. They were yelling, “Fuck you. We’ll kick your ass.” R. 1772, l. 22 – 1773, l. 1. She saw a student throw a drink at the car. R. 1771, ll. 10-19. The driver said, “Y’all leave me the fuck alone or get the fuck away from me.” R. 1773, ll. 3-6.

Bettini called 911 and described what she was witnessing. R. 1771, ll. 10-19. She thought there was about “to be a fight.” R. 1771, ll. 20-24. She told the dispatcher that the driver of the light-colored SUV -- whom she identified as appellant -- “looked scared to death” and she thought the other students were going to hurt him. R. 1771, ll. 22-25; r. 1773, ll. 12-19; r. 1774, ll. 8-15. She explained that appellant could not leave because there were students in front of his car. He would have had to have hit them to leave. R. 1776, ll. 5-7.

After everyone left, Bettini stayed and spoke to law enforcement. R. 1776, l. 22 – 1778, l. 21. First, she spoke to Deputy Voravudhi and then she talked to Investigator Brent Carter. She told Carter she had called 911. R. 1777, l. 1 – 1780, l. 2. Lexington County 911 destroyed the recording of Bettini’s call before it could be preserved because the call was not “properly linked” to the CAD report for the incident. R. 1876, l. 4 – 1880, l. 18; r. 1883, ll. 7-21.

Zachery Lynch was working at the Cook Out on the night of February 17, 2014. R. 1817, ll. 3-11. He was outside taking a break when the stabbing occurred. R. 1818, ll. 9-15. Lynch was standing near the dumpsters smoking. R. 1824, ll. 1-3. He had a clear view of the parking lot and the driveway between the Cook Out and PetSmart. R. 1824, ll. 14-22. Lynch saw appellant attempt to pull out and leave. There were students in the roadway blocking appellant from leaving. R. 1826, ll. 2-4. There were also students standing along the sidewalk next to the roadway. The students were “taunting” appellant, calling him names, and acting “malicious.” They all gathered outside appellant’s window. R. 1826, ll. 5-8. One student threw a drink at appellant’s car. R. 1825, ll. 7-23. Lynch saw a student reach inside appellant’s window with his hand “forward.” Lynch thought this person was trying to grab appellant. R. 1826, ll. 13-24. When he later learned there had been a stabbing, Lynch thought it was the person who leaned into appellant’s window who “[d]id the stabbing.” R. 1826, ll. 10-24. After the person who leaned into appellant’s car came back out, appellant drove away. R. 1827, l. 18 – 1828, l. 5.

Lynch gave a statement that night in the Cook Out parking lot after law enforcement responded. R. 1818, l. 19 – 1820, l. 15. He also gave a statement to Investigator Carter around 5:00 am the following morning after he got off work. At the time, he had been awake for almost twenty-four hours. R. 1821, ll. 1-8; r. 1829, ll. 9-23. Carter did not show Lynch any of the videos during his interview. R. 1830, l. 19 – 1831, l. 20.

Dr. Janice Ross, the pathologist who conducted the autopsy, testified the decedent had a stab wound to the left chest just underneath the nipple. R. 1741, l. 16 – 1742, l. 1. The trajectory was “downward slightly toward the middle of the body and slightly backward.” R. 1742, ll. 1-2. Ross explained that based on the trajectory of the wound, “if the knife was going straight,” the decedent had to have been standing erect *or leaning over* with his head, neck, and chest parallel

with the ground. R. 1743, ll. 10-24; r. 1747, ll. 2-19. (emphasis added). “Every percentage that [the decedent] stands up” from a position parallel with the ground, “the knife . . . has to raise up that same percentage in order to get the same trajectory.” R. 1747, l. 25 – 1748, l. 17. If the decedent was standing erect, appellant’s hand would have had to have come up and struck downward, not straight across, in order to match the trajectory of the wound. R. 1748, ll. 18-20. She acknowledged, “if the defendant were leaning back in the vehicle against the arm rest . . . that would impact how far the victim had to lean in or had to lean over in order to receive that stab wound if the defendant stabbed him with his right hand.” R. 1750, ll. 4-9. “[I]f the victim was standing up, then the knife would have had to come up and down. If the victim was stooped over, then it [the knife] would have to go kind of straight parallel to the ground.” R. 1753, ll. 9-19. On cross-examination by the solicitor, while defense counsel Rutherford continued to object to the accuracy of the demonstration, Ross testified the stabbing would be “consistent” with someone stabbing outside the window. R. 1762, ll. 3 – 1764, l. 18.

Ervin Chauncy Meggett, who attended Dutch Fork, was interviewed by the solicitor’s office on August 26, 2016, shortly before the mistrial due to the hung jury. R. 2020, ll. 18-22. Why Meggett was not interviewed earlier is not revealed from this record. Meggett was standing outside appellant’s window when the decedent was stabbed. R. 2023, l. 19 – 2024, l. 3. He told the state during his August 2016 interview that the decedent “was in the wrong” and that appellant was trying to leave when the stabbing occurred. R. 2022, ll. 10-16. He said the decedent was “banging” on appellant’s car when appellant stabbed him. R. 2025, l. 14 – 2026, l. 3. Meggett said at the second immunity hearing that he did not remember telling the state the decedent was in the wrong and that appellant was trying to leave. R. 2024, ll. 19-23; r. 2026, l.

22 – 2027, l. 1. All he remembered was some students were banging on appellant’s car, but he did not know if the decedent was one of the individuals who was banging. R. 2022, ll. 10-24.

Meggett admitted that he was subpoenaed to testify during appellant’s first trial that ended in a mistrial. He was placed in a room with other potential witnesses. However, Meggett denied that those witnesses confronted him for previously saying “things that were unfriendly to Cape [the decedent].” R. 2025, ll. 3-13. The decedent was a friend of his. R. 2024, l. 24 – 2025, l. 2.

As seen, Judge Hood, issued an order dated October 11, 2017 denying immunity. R. 2915-2921.

ARGUMENT

1.

The second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity.

Introduction

Appellant Kierin Dennis, through his trial counsel, Todd Rutherford, “[m]oved pursuant to the Protection of Persons and Property Act, Section 16-11-410, et. seq., of the South Carolina Code of Laws to dismiss this case, asserting that his act was justified and that, as a result, he is absolved from prosecution pursuant to the immunity granted in Section 16-11-450 of the Act.” Order of Judge Russo at 1; R. 2905.

As seen, the incident in this case arose at the Cook Out restaurant in Lexington, which was a Lexington High School “hang out” following basketball games. Appellant, a recent graduate of Lexington High, had gone to the basketball game with his Lexington High School friends. They went to the Cook Out hangout after the basketball game. There had been some “talking” back and forth after the game between the students of the two schools, and some Dutch Fork students were present when appellant and his friends arrived at the Cook Out. Appellant’s car was subsequently surrounded, and appellant fatally stabbed the decedent, where the evidence showed the decedent reached into appellant’s vehicle. Appellant reasonably feared for his life or great bodily injury where being dragged out of his car during this mob scene was the reality facing him.

Relevant facts

A pre-trial hearing on appellant's right to immunity was held in Lexington County from November 17-19, 2014 before Judge Russo. Judge Russo issued an order dated February 4, 2015, denying Appellant Dennis immunity under both S.C. Code § 16-11-440(A) and S.C. Code § 16-11-440(C). See order at 10; R. 2914. Subsequently, a jury trial was held before the Honorable Eugene C. Griffith, Jr., from October 3-11, 2016. Todd Rutherford and Simone Martin represented appellant during this jury trial. Deputy solicitor Shawn Graham and assistant solicitor Rhonda Patterson represented the state. R. 619.

On October 11, 2016 at 10:20 p.m., after being charged and recharged on self-defense, accident and malice, the jury sent out a note, stating they were deadlocked. R. 1656, ll. 1-15. After further recharges and deliberations, the judge finally declared a mistrial due to the hung jury. R. 1656, ll. 18-24.

On August 22, 2017, a second immunity hearing was held before the Honorable Robert E. Hood in Lexington County. Todd Rutherford again represented appellant Dennis. Shawn Graham and Rhonda Patterson were again the solicitors. R. 1657.

Judge Hood asked for a procedural history of the case. R. 1662, ll. 4-20. Deputy Solicitor Graham told the judge that appellant was out on bond after spending five months in jail. R. 1662, l. 4 – 1663, l. 5. The attorneys confirmed there had been a prior immunity hearing held before Judge Russo. R. 1663, ll. 3-17. Graham told the judge that Judge Russo denied immunity in his order dated February 4, 2015. R. 1663, l. 20 – 1664, l. 10. A subsequent jury trial ended in a hung jury and a mistrial. R. 1664, l. 11 – 1665, l. 2. Defense counsel Rutherford then filed “a renewed motion for a hearing pursuant to 16-11-440 (a) and (c),” which was filed in June 2017. R. 1665, ll. 3-7. R. 2922.

At the first immunity hearing held before Judge Russo, prior to the mistrial, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, Bill Howard, and Appellant Kierin Dennis testified for the defense. R. 7-357. Witnesses Deshon Chatman, Walden Roberson, Brent Carter, Kenneth Williams, Devon Chatman, Alexis Brunson, Tyreke Farrow, and Lamar Butler testified for the state. R. 358-588.

Defense counsel Rutherford told the judge that the defense wanted the pathologist to testify and that she could be in the courtroom around noon that day. R. 1665, l. 8 – 1666, l. 8. Solicitor Graham then stated:

Your Honor, the motion that Mr. Rutherford filed *is asking for an entirely new hearing* and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers [the decedent] attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence. Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.

[Number] Seven talks about the manager of the Cook Out Restaurant on duty the night in question. His name is Zachary Lynch was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

R. 1666, l. 11 – 1667, l. 8. (emphasis added).

Solicitor Graham argued it was the state's position that there was no basis to give appellant what the state considered, "[a] second stand your ground hearing. There is nothing that says you get two bites at that apple." R. 1666, l. 11 – 1669, l. 19. The state contended that to be allowed another hearing, the defense should have to file a Rule 29 motion under the rules of civil procedure, based on after discovered evidence. R. 1669, l. 3 – 1677, l. 18.

In his argument, defense counsel Rutherford noted that in the event of a mistrial, there may never even be another trial. “It’s up to the Solicitor’s Office. It’s not up to us.” The defense correctly argued it was entitled to an immunity hearing. R. 1688, l. 10 – 1689, l. 2. The solicitor also incorrectly faulted the defense with not filing an appeal from the “stand your ground hearing that was denied.” R. 1668, ll. 3-7. However, in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), our Supreme Court held that the denial of a defendant’s request for immunity was no longer immediately appealable. It was an interlocutory order that was not appealable. Further, appellant therefore could not appeal the denial of immunity by Judge Russo because he had not been convicted. See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016). Moreover, as argued below, a mistrial is the equivalent of no trial and it leaves the cause pending in the circuit court. “A court ruling as to the admissibility and competency of testimony during a trial, which is later declared a mistrial results in no binding adjudication of the rights of the parties.” State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009).

Further, here, defense counsel Rutherford noted the investigation continued after the first immunity hearing and the defense was now aware of the fact that Beth Bettini said that appellant Dennis could not have left at the time of the stabbing because he would have had to run over two people to escape. The solicitor’s office had claimed there was no evidence of Bettini calling 911. However, the state later confirmed that Bettini called 911. There was also a statement from Zachary Lynch, a Cook Out employee. The point of the defense was that, because of a deliberately sloppy investigation, where it was decided early on that appellant was guilty, Judge Russo had not considered relevant and compelling defense evidence at the prior immunity hearing. The solicitor’s office in Lexington had also been less than forthcoming with exculpatory evidence. R. 1677, l. 20 – 1689, l. 2.

After hearing arguments, the judge said that he would allow the defense to “proffer all of his testimony because let’s play this out. Scenario number one is I say no, you’re not entitled to another hearing. There is no rule that permits it and I’m not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered. So, I’m gonna skip that step all together. I’m gonna let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don’t need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?” The solicitor confirmed there was a copy of the prior Judge Russo immunity hearing transcript. The judge said he would review that prior transcript, as well as any “new evidence” the defense wanted to present at the immunity hearing. As will be seen, the judge also said he would read and consider evidence from the jury trial, the mistrial. R. 1695, l. 6 – 1698, l. 1.

When the defense began telling the judge about Dr. Ross and other witnesses it wanted to present, the court interrupted and said, “We’re not gonna rehash the entire stand your ground [hearing].” R. 1698, l. 2 – 1700, l. 4. The judge said that he was only allowing the defense a limited hearing. R. 1699, l. 23 – 1701, l. 20.

At the immunity hearing held before Judge Hood on August 22 and August 24, 2017, he heard from Lexington police officer Caitlin Voravudhi, pathologist Dr. Janice Ross, Beth Bettini, Cook Out employee Zachary Lynch and Ervin Chauncy Meggett as defense witnesses. R. 1703-1875.

The prosecution then presented 911 operator Nikki Rogers, Alexis Brunson, former Dutch Fork student and witness Devon Chatman, investigator Marc Miramontes, and

investigator Brent Carter as witnesses. R. 1876-2032. Thus, the only defense witnesses Judge Hood heard from and saw in person were officer Caitlin Voravudhi, Dr. Janice Ross, Beth Bettini, Zachary Lynch, and Chauncy Meggett. Given the limited scope of the immunity hearing allowed, Judge Hood did not hear the testimony of appellant Kierin Dennis, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, or Bill Howard.

At the conclusion of the hearing, deputy solicitor Graham noted the judge had the transcript of the stand your ground hearing and testimony from the trial (mistrial). R. 2032, l. 24 – 2033, l. 18. Graham asked: “[I]f I could inquire what is your plan from here? I guess my question is, I don’t know whether I need to renew all of my objections.” The judge wondered if the attorneys thought he could get three weeks from court administration to review all of the evidence. R. 2033, l. 19 – 2034, l. 18. The judge said he would have read “everything,” but he wanted to have a final hearing on “whatever legal arguments you want to [make].” R. 2034, l. 18 – 2035, l. 7. The judge said he expected the featured arguments to last about an hour, but that he needed “enough time [first] to get everything read.” R. 2035, l. 2 – 2036, l. 21. The judge said his plan “right now is to reconvene September the 18th at 2:00 p.m. I will have everything read and then you all can make your legal arguments at that time. Fair enough?” R. 2036, l. 22 – 2039, l. 19.

An argument hearing was then held on September 18, 2017 before Judge Hood. Todd Rutherford again represented appellant. R. 2041. Defense counsel Rutherford argued the defense burden on immunity was only by a preponderance of the evidence. R. 2044, l. 22 – 2046, l. 7. Defense counsel noted that Beth Bettini was an independent witness who tried to describe what happened to the solicitor’s office before the trial. Bettini was told the prosecution had no record of her calling 911 on the night of the incident. “She is made to believe that they

don't want to hear what she has to say, so much so that she calls my office two days into the trial to say, hey, I described what happened to the Solicitor's Office and they don't want to hear me."

R. 2046, l. 8 – 2047, l. 22.

Defense counsel told the judge that he had practiced law for "a long time." He knew that 911 calls were recorded and documented. This called the integrity of the state's investigation into question. Counsel reminded the judge that he had now heard from employee Zachary Lynch, who was an eyewitness. Lynch said, "He [the decedent] reached in the car and that's when he stabbed him." R. 2047, ll. 2-22. Defense counsel told the judge:

This proposition that the Solicitor is arguing that you don't get a second chance at a hearing, well, where in the law anywhere does a defendant not have a right to another hearing? This is not a second trial wherein the burden would be much higher. This is simply a hearing. We believe that we would even meet the burden that they set forth that we would have to meet for a second trial much less simply another hearing. We're not bound by what happened in that trial. If we are, then the defendant should be set free because there was a mistrial. He was not found guilty. That's it. They want to rely on the count. The count doesn't matter. It's a mistrial pure and simple and if we're bound, then let's truly be bound. Your Honor knows we're not, the State knows we're not.

The fact that we are entitled to a new hearing should be clear. The fact that other evidence exists that Judge Russo did not hear when he made his initial ruling is also clear. The fact that that evidence all points to more than a preponderance that my client was acting the way that the law allows under 16-11-440 we believe is clear and based on that we would ask Your Honor to not only allow this hearing or allow the culmination of this hearing, but find that he is immune to prosecution.

R. 2052, l. 16 – 2053, l. 15.

The solicitor continued to insist that appellant was not entitled to the "new hearing" and that the evidence presented at the hearing before Judge Hood was improper and that it was only after discovered evidence. R. 2054, l. 7 – 2058, l. 3. The judge then noted that it was clear that Beth Bettini had called 911 and that "no one in the Solicitor's Office nor the defense knew about it until just before the last hearing." The solicitor verified that was correct. R. 2058, ll. 4-15.

The solicitor nonetheless argued the defense had failed to prove the evidence he presented before Judge Hood was new, entitling him to another hearing. The solicitor further contended that even if the judge considered the evidence presented before him, that appellant had still failed to prove by a preponderance of the evidence that he was entitled to immunity. R. 2072, l. 5 – 2079, l. 8.

The solicitor cited testimony from the first hearing regarding William Zander and Keith Adams and Morgan Zander, in addition to Tyreke Farrow and Devon Chatman. R. 2074, l. 5 – 2081, l. 7. The solicitor also discussed the testimony of Michael James (who testified during the mistrial only at R. 1066-1120. The solicitor incorrectly said he “thought” the James testimony on his “duty to retreat theme” was from the stand your ground hearing. R. 2076, ll. 18-23.). He also cited to the testimony of William and Morgan Zander from the immunity hearing before Judge Russo. He admitted he could not prove his contention that William Zander planned to throw down the money or that appellant was angry before he went to the Cook Out hangout, and respectfully those self-serving assertions are not supported by the record in this case. R. 2074, l. – 2081, l. 7.

Defense counsel Rutherford countered that the first immunity hearing before Judge Russo was held on the state’s timeframe because they called the case to trial. Defense counsel Rutherford said:

[F]irst of all, noting that this case occurred February 17th, 2014, *and nine months later we were having a hearing in a murder case in Lexington County. The Solicitor states that I chose to do so. That is a bold face untruth. We were told that the trial was going to be called and in doing so we needed to go ahead and file our motion so that we could get it heard.* Never in the history of Lexington County in my 20 years of practice have I seen a case go from, a murder case in particular, go from the date of incident to trial in nine months and to assert that I did that or that I’m the one that caused that to happen is just *absolutely untrue and the Solicitor knows that* because he and I talked about it. They chose when to have the hearing, they chose when to schedule it and all of that had to be completed before that date because they were worried that I would go back into

session and it would be into the next year before it got tried. It was certainly not on me as to when to call it.

R. 2081, l. 10 – 2082, l. 3. (emphasis added).

Defense counsel specifically cited the testimony of Beth Bettini, who the solicitor continued to call “a liar,” even though the state “lost her information. He continues to question what she would have told 911 based on nothing but his imagination,” and Ms. Bettini was naturally angry about being called a liar simply because she was an eyewitness. R. 2084, ll. 8-15. Counsel noted that appellant was not convicted by the jury, yet the solicitor continued to argue “finality.” R. 2086, l. 10 – 2087, l. 12.

Graham responded, “As far as a timeline and I honestly don’t remember, *if Mr. Rutherford says he was forced to have a trial and have a stand your ground hearing at the last minute, I’ll concede to that.* I don’t know—I honestly don’t remember.” R. 2087, ll. 17-21. (emphasis added).

The judge said at the end of the arguments that he would issue a written order, which would also address whether or not the defense was even entitled to the immunity hearing before him. R. 2090, l. 14 – 2092, l. 7.

The judge then issued an order dated October 11, 2017, which was filed on October 16, 2017, stating the matter was before the court for a hearing “on Defendant’s Motion for a second hearing, asserting Statutory Immunity from Prosecution based on Protection of Persons and Property Act, Section 16-11-440, et. seq., of the Code of Laws.” Order at 1; R. 2915. The order noted that the first immunity hearing was held before Judge Russo on November 17-19, 2014, and that Judge Russo issued an order denying immunity on February 4, 2015. R. 2915. The jury trial ended in a hung jury, and the judge declared a mistrial on October 11, 2016. R. 2915.

At the second immunity hearing, the court heard the testimony of “Beth Bettinni, Officer Caitlin Voravudhi, Chauncey Meggett, 911 Custodian of Records, Dr. Janice Ross, Zachary Lynch and the State’s reply witnesses.” Order at 2; R. 2916. Judge Hood’s order cited testimony from the first immunity hearing that was held before Judge Russo. Compare Judge Russo’s order at 2-5 with Judge Hood’s order at 2-5. R. 2906-2909; r. 2916-2919.

The order cited to “inconsistent testimony” and evidence being “in direct contradiction” and ruled, “Under the facts before this Court, the Defendant’s claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).” Order at 6; R. 2920. “The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond (sic) a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence.” Order at 6-7; R. 2920-2921.

The order concluded, “Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the evidence. The state was allowed to respond. Further, *the Court read the testimony from the original immunity hearing and the jury trial*. The testimony has been heard and the record has been protected.” Order at 7; R. 2921 (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

Judge Hood respectfully erred by considering evidence from the first pretrial immunity hearing before Judge Russo and from the mistrial held before Judge Griffith. Defense counsel Rutherford asked for the new immunity hearing to which appellant was entitled. Counsel was obligated under Rule 18(a), SCRCrimp to not argue with the court once it limited what would be allowed to be considered. The solicitor in this case was successful in having Judge Hood consider the evidence from the first immunity hearing and the mistrial, where that evidence should not have been considered. The solicitor did not even want the defense to have another immunity hearing – much less a full immunity hearing -- before Judge Hood even though appellant's first trial ended in a mistrial and the pretrial hearing and the mistrial were both nullities that should not have been considered. Again, “a mistrial is equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties ‘as though no trial had taken place.’ Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (ruling of trial judge in proceeding ending in mistrial represents no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to the admissibility and competency of testimony during a trial, which was later declared a mistrial results ‘in no binding adjudication of the rights of the parties.’ Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).” State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

In State v. Woods, the state consented to a change of venue in a death penalty case, which resulted in a jury being selected from Marion County and transported to Clarendon County. That trial ended in a hung jury and a mistrial, as here. The defendant, Woods, argued on appeal that the trial judge committed error because the jury was selected from Clarendon County for the

second trial, where the court during the first trial had brought a jury from Marion County to Clarendon County for the trial.

Our Supreme Court found no error, since the first trial resulted in a mistrial. It was a nullity, and therefore began anew when the state again called the case for trial. The Court noted that when a mistrial occurs because of the inability of the jury to reach a verdict, it is the same as if no trial took place. State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

The same is true of the pre-trial hearing in this case in which Judge Russo denied immunity. It was a nullity, and appellant was entitled to begin anew. Instead, he was forced to accept what limited hearing Judge Hood would allow him.

Further, in State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), this Court found error where during the first trial the judge held an *in-camera* hearing at which time informant Hall identified defendant Smith as a person from whom he purchased crack cocaine on February 26, 1996. The judge allowed Hall to identify defendant Smith in the jury's presence. However, the first trial ended in a mistrial because of the admission of other evidence.

A second trial was held before the same judge on September 12, 1996. Smith requested a hearing on the in-court identification. He claimed Hall's identification was tainted on the first day of the re-trial when Hall saw Smith in a holding cell. The judge ruled that defendant Smith was not entitled to another hearing on the same issue because Hall identified Smith during the prior trial where Smith had an *in camera* hearing on that same issue. However, this Court noted and held that a mistrial was equivalent of no trial at all. Therefore, the prior court's rulings on the admissibility and competency of testimony were not binding on the rights of the parties. Because the mistrial was equivalent of no trial, the trial judge could not rely on evidentiary rulings from the nugatory proceeding. This Court therefore remanded the case to the circuit

court for an *in-camera* hearing to determine whether Hall's identification of defendant Smith should be suppressed.

The same is true as to the pre-trial immunity hearing, and the mistrial in this case. It was evident that Judge Hood relied on evidence offered during a mistrial and from the prior pre-trial immunity hearing, which was also nugatory because the proceeding ended in a mistrial. That was error on the part of the court.

Moreover, the Supreme Court held in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), that a court's ruling on immunity must be based solely on the evidence presented at the pre-trial immunity hearing. On remand, the Supreme Court instructed the circuit court to only rely on that evidence presented at the new immunity hearing.

The pre-trial hearing held before Judge Russo and the subsequent mistrial held before Judge Griffith were both nullities, and Judge Hood was obligated to proceed as if those nugatory proceedings did not exist. Again, when a mistrial occurs because of the inability of the jury to agree on a verdict, it is the same as if no trial took place. That is also true of the pre-trial rulings before that trial. See State v. Mills, 281 S.C. 60, 314 S.E.2d 324 (1984); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999).

Appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new immunity hearing.

In the alternative, even if this Court were to disregard precedent, which respectfully it cannot, and hold that the prior mistrial and its attendant pretrial immunity hearing were not a nullity, the fact would still remain that appellant was entitled to the second immunity hearing held before Judge Hood. At the second immunity hearing before Judge Hood on August 22, 2017, defense counsel Rutherford noted that after a mistrial, everything starts over. Appellant

was not convicted, and there was no guarantee the case would even be called to trial again. In fact, what was highly unusual or unique in this case was that the defense came upon evidence that was newly discovered, and most of which would have been known before the first hearing but for the bungling of law enforcement and the solicitor's office. R. 1684, l. 23 – 1688, l. 13.

Here, the defense had at least three new key witnesses:

As of two weeks ago when we were talking to Beth Bettini who went to see the Solicitor on her own volition who was one of the people that is caught on a dash cam video 15 minutes into the video I believe or eight minutes into the video as this cop just pulls forward and looks at a wall, all of a sudden you hear her talking to this lady that we identify as Beth Bettini. She says I called 911. She goes on and talks about what happened *and she sees the fear in Mr. Dennis' face*. That is relevant because as you can tell from Judge Russo's ruling when you see it, part of the testimony was that he could have left at any time. *She said he couldn't have left. He would have run over them. He couldn't leave. I saw the fear in his face, an independent witness, not a Lexington kid, not a Dutch Fork kid*. These are statements again nine minutes into a video.

She says I called 911. We found her not because we were looking but because she called us two days into the trial and said, hey, I went to talk to the Solicitor's Office and they told me that I didn't call 911. They didn't have a record of it. They told us they didn't have any record of her calling 911. Well, two weeks ago we get something from the Solicitor's Office verifying that they do have the fact that she called 911. Two weeks ago. They don't have her actual recording because according to them I believe they said nobody requested it at the time, but they do now and are able or they are now able to show that she did actually call 911 after the Solicitor's Office tried to convince her they didn't have any record of her calling 911. She said she called that night and she called the next morning. Things that go to the credibility of a witness and whether we're going to actually use that witness. Information that was just now turned over two weeks ago.

R. 1680, l. 15 – 1681, l. 23. (emphasis added).

In addition to Beth Bettini, a “Dutch Fork kid,” Chauncy Meggett, gave a statement to the solicitor's office dated August 26, 2016. This was following Judge Russo's order denying immunity, which was dated February 4, 2015. Meggett told the solicitor's office, even as a “Dutch Fork kid,” *that appellant Dennis was trying to leave and “Cape [the decedent] went up*

and banged on his car. Cape was wrong. This is a statement that the Solicitor's Office got in August of 2016 that they turned over to us." R. 1677, l. 20 – 1678, l. 18. (emphasis added).

Defense counsel noted that the investigator decided to "charge my client five minutes after he interviewed him, five minutes according to the number that he gave, five minutes after he interviewed him on the night of the incident. He had investigated nothing at that point." Defense counsel again noted that the solicitor's office rushed the immunity hearing and the trial, in part, based on the fact that defense counsel Rutherford was a legislator. "We need to get it scheduled before you go back in session." R. 1678, l. 5 – 1680, l. 1.

Third, defense counsel cited the new testimony of Zachary Lynch, who was an employee of the Cook Out, who was out on break at the time appellant was attacked in the parking lot. "Apparently now literally today we believe that that [Lynch] statement was written with Officer Holiday. Didn't testify in the stand your ground [hearing]. Didn't testify in the trial and it comes out because we now, *the Solicitor's Office called us yesterday at 6:00 and said, hey, or emailed us at 6:00 and say, hey, Zach Lynch also appears and Beth Bettini also appeared seven minutes into Officer Holiday's tape...*" R. 1681, l. 24 – 1689, l. 2. Lynch had critical testimony that he saw the decedent and apparently others reaching into appellant's car at the time appellant stabbed the decedent. R. 1681, l. 24 – 1689, l. 2.

The solicitor incorrectly asserted, "There is nothing that allows the Court to have a second hearing." "When we found out about new stuff, we turned it over. He chose his timing when to have this stand your ground hearing." R. 1689, l. 4 – 1692, l. 16.

The judge said he was concerned about a future PCR action based on witnesses not being called, and he ruled he would allow the defense to present its evidence and allow the state to reply. R. 1694, l. 16 – 1696, l. 6. The judge then noted he would have to review the prior

testimony, which included eight to ten days of trial testimony, which would take him some time. R. 1696, l. 4 – 1698, l. 1.

As seen, Beth Bettini said at the hearing before Judge Hood that appellant could not leave because he would have hit the people surrounding his car, and that appellant looked “scared to death.” R. 1774-1776; 1790; 1796; 1799. Bettini testified that the teenagers attacking appellant were aggressive, mean, and out of control. R. 1811.

Zachary Lynch testified before Judge Hood that the teenagers were gathered at appellant’s car window. Lynch saw a person lean into the window with his hand forward as if he was attempting to grab something. Lynch even thought the decedent was the person who did the stabbing because of the way he leaned into appellant’s car. R. 1826. Lynch noted that after the person reached into appellant’s car window and came back out, the car drove away. R. 1827;1836.

Ervin “Chauncy” Meggett could not be found during the defense’s case-in-chief during the immunity hearing held before Judge Hood. The defense initially was going to rely on Meggett’s written statement, which was exculpatory evidence for the defense. R. 1868-1872. However, Meggett appeared later, and he testified at the hearing. He told Judge Hood he saw people around appellant’s car at the Cook Out and he heard “banging.” He did not know if the decedent was the one banging on the car. R. 2022. However, Meggett admitted that he previously told the state that the decedent was banging on appellant’s car, and Meggett thought the decedent was in the wrong for his actions. That was substantive evidence the decedent was beating on appellant’s vehicle before he was stabbed. See State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982)(prior inconsistent statement can be substantive evidence where the declarant testifies and is subject to cross-examination). When the decedent started banging,

appellant rolled down his window, grabbed a knife, and reached out the window. After appellant reached out the window, the decedent grabbed his chest. Meggett admitted he previously told authorities that appellant was trying to leave. R. 2025-2026. Meggett admitted he was interviewed by the state on August 26, 2016 after the first stand your ground hearing. R. 2020.

The judge had the discretion to grant appellant a second immunity hearing even if precedent that the first hearing was a nullity were disregarded by this Court. The Beth Bettini, Zachary Lynch, and Ervin “Chauncy” Meggett evidence was not known at the time of the first hearing before Judge Russo, and it would have violated “the essential demands of fairness” to deny appellant another immunity hearing under these circumstances. Cf. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991)(unkept promise to instruct on the law deprived defendant of a fair exercise of his peremptory challenges even though peremptory challenges are without a constitutional basis). Further, the evidence offered at the second hearing was “after-discovered” evidence since it was discovered after the first immunity hearing, it could not have been discovered before then by the exercise of due diligence, it was material and not merely cumulative or impeaching and it probably would have changed the result of the first immunity hearing if this evidence had been heard then. See State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).

For these additional reasons the immunity hearing before Judge Hood was properly allowed, and as argued infra, when the evidence from that second hearing is also considered, Judge Hood abused his discretion by ruling appellant failed to prove he was entitled to immunity by a preponderance of the evidence. State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016)(preponderance of the evidence is the defense burden of proof as to its entitlement to immunity under the Protection of Persons and Property Act).

2.

The second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019).

Relevant facts

After the second immunity hearing before Judge Hood held on August 22 and August 24, 2017, Judge Hood held a hearing for arguments only on September 18, 2017. The defense, through counsel Rutherford, noted that the burden on appellant was only by a preponderance of the evidence to prove that he was entitled to immunity. Appellant had proven that he was in his own vehicle when he was attacked, and he was only able to stab the decedent because of how close the decedent was to appellant's vehicle. Cook Out employee Zachary Lynch testified that he saw the altercation and that decedent Capers reached into appellant's car. That is when appellant stabbed him. R. 2044, l. 22 – 2046, l. 7.

Defense counsel reminded the judge that the pathologist, Dr. Ross, testified during the trial, but not during the initial stand your ground hearing. Counsel explained that the state did not initially use Dr. Ross because "Dr. Ross as late as this week which we submitted to the Solicitor's Office in an e-mail says that it is most likely, the most likely scenario given that the perpetrator is sitting in the car, the perpetrator of the stabbing, the most likely scenario is that the victim was parallel to the ground. The only way he could have done that is as if he was in the car. We know that because Dr. Ross, pathologist, states that. We have two independent witnesses [Lynch and Bettini] and Dr. Ross who is stating again that Mr. Capers had to have been leaning like this (indicating) before he got stabbed." R. 2049, l. 4 – 2050, l. 10.

Counsel argued that solicitors were ministers of justice and that appellant had proven to the court and to the solicitor's office by a preponderance of evidence that the decedent was the aggressor that evening and that he "would have had to have been in the car" to have gotten stabbed. Counsel emphasized that the evidence at the second immunity hearing before Judge Hood was even more telling in favor of the defense and that the defense was not bound by the first trial, which was a mistrial. The mistrial simply did not bind or limit the defense. R. 2051, l. 3 – 2053, l. 15.

Deputy solicitor Graham argued that appellant was told "[t]here's a lot of Dutch Fork students here [at the Cook Out] and there's some stuff going on and they choose to go inside. When they go inside, they are met by Michael James saying, is that all you brought? According, I believe, to everyone the defendant says we're not here to fight. We're just here to eat. And Your Honor can watch the inside video of the Cook Out. Nothing else happens. There's no threats. There's no fights. There's no arguments. The defendant and his friends sit around I think it's for 15 minutes inside. They order a drink or two and they go to leave." R. 2077, ll. 8-24.

The solicitor nonetheless faulted appellant for staying at the Cook Out restaurant, and he maintained there were "multiple ways" for appellant to leave the Cook Out restaurant. R. 2077, l. 25 – 39, l. 8. The solicitor argued:

State versus Curry, Your Honor, 406 South Carolina 364, 2013 Supreme Court case, in that case, Your Honor, you had witnesses on both sides of the issue, people saying this and people saying that in direct contradiction of each other. After looking and analyzing immunity, the Court said that a murder defendant was not entitled to immunity from prosecution under the protection of the Persons And Property Act *where the testimony of the defendant and eye witnesses was in direct conflict as to whether the victim attacked defendant. That's exactly what we have here. That is a quintessential -- I didn't pronounce that right -- quintessential jury question.*

R. 2079, ll. 9-21. (emphasis added).

The solicitor strangely urged that the prosecution had proven appellant's guilt during the mistrial and he reasoned "they [the jury] looked beyond a reasonable doubt, rejected self-defense, rejected the presumption of fear, how can the defendant's evidence rise to the preponderance of the evidence now?" R. 2079, l. 22 – 2080, l. 18. The solicitor continued to argue appellant was even not entitled to the immunity hearing before Judge Hood. R. 2080, l. 18 – 2081, l. 7.

In Judge Hood's order denying relief, he repeatedly referred to inconsistent or contradictory evidence. The judge noted that "the Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students. Additionally, the testimony as to the 'fear in his eyes,' given by Beth Bettinni and the Defendant, *are in direct contradiction* with the testimony of the Dutch Fork students." R. 2920.

"Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary fitness and courage would have entertained the same belief. *Id.* This standard has not been established by the preponderance of evidence, *based upon the inconsistent testimony.*" R. 2920.

The judge concluded:

Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (Murder defendant was not entitled to immunity from prosecution under Protection of Persons and Property Act where testimony of defendant and eyewitnesses *was in direct conflict as to whether victim attacked defendant*). **The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.** Therefore immunity does not apply **because the Defendant**

has not proven beyond a preponderance of evidence standard of self-defense.²

Order at 6-7; R. 2920-2921 (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.

State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

This issue is controlled by our Supreme Court's opinion in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), wherein the Court held the circuit court erred in finding that the immunity issue presented a jury question. "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Judge Hood did not have the benefit of our Supreme Court's opinion in State v. Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue under State v. Curry, and that immunity therefore had to be denied. However, the solicitor in this case was not the first solicitor to sell a circuit court judge that bag of goods that conflicting evidence made immunity by way of self-defense a jury issue.

The Supreme Court in State v. Cervantes-Pavon noted that "the act requires the circuit court to determine whether a movant is entitled to immunity. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination.)." Cervantes-Pavon, 626 S.C. at 451, 827 S.E.2d at 568.

² The "beyond a preponderance of evidence standard of self-defense" error is not insignificant since in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) the Supreme Court reversed in part because the circuit court cited to this incorrect standard in making its ruling.

Respectfully, therefore the state here successfully urging that conflicting evidence made self-defense a jury issue resulted in an abdication of judicial responsibility under the Protection of Persons and Property Act.

The court abused its discretion in this case in denying immunity, as the trial court's ruling was based on an error of law that conflicting evidence made self-defense a jury issue. State v. Douglas, 411 S.C. 307, 316, 468 S.E.2d 232, 237 (Ct. App. 2014) *quoting* State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

Our Supreme Court in State v. Manning, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) stated, "Here, the undisputed facts support a denial of immunity under subsection (A) and (C) of § 16-11-440." This language, and language from State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), has been impermissibly used to successfully urge that disputed evidence at the immunity hearing, conversely, made self-defense a "jury question." Because the circuit court's order here was based upon an error of law as explained in State v. Cervantes-Pavon, appellant's conviction should be reversed, and he should be granted a new immunity hearing.

3.

In the alternative, both circuit court judges erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C).

Relevant facts

The defense alleged in this case that appellant was entitled to immunity from prosecution under both S.C. Code §16-11-440(A) and S.C. Code §16-11-440(C). S. C. Code §16-11-440 (A)

provides that “A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, *or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle;* and

(2) who uses deadly force knows or has reason to believe that *an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.*

(emphasis added).

In addition, S.C Code §16-11-440 (C), the stand your ground provision, 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.”

(emphasis added).

At the September 18, 2017 argument hearing before Judge Hood, solicitor Graham argued that appellant Dennis “chose to go inside” after he saw Dutch Fork students at the Cook Out. However, appellant had a right to go to the Cook Out. It was a Lexington County High School “hangout” after basketball games. R. 2077, ll. 8-24. The solicitor admitted that appellant said his friends only wanted to eat, but the solicitor nonetheless argued:

But the defendant and his friends **chose to stay** there. The defendant steps outside when he gets a call back from the same person he texted which I believe is his cousin. When he steps out to take the call, you see the video, the other Lexington students step out. Shortly thereafter Michael James goes by and there's a dispute about who says what first, but what's clear on the video is you see Morgan Zander lean forward and bark something at Michael James' back, and

Michael James turns around, they start talking to each other and that's when the Dutch Fork students come out. *If he didn't want to bring on the difficulty, Mr. Dennis could have left right then and there* and Your Honor knows from watching the video that he doesn't leave.

R. 2077, l. 25 – 2078, l. 13. (emphasis added).

The solicitor continued to blame appellant for going to the Cook Out—which again was a place he had a right to be, pursuant to S.C. Code § 16-11-440(C) and for not fleeing when the Dutch Fork students started trouble.

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

It is apparent from Judge Hood's order denying immunity dated October 11, 2017 that he denied appellant immunity because he did not retreat, and because he went to the Cook Out. The judge noted, "While walking into the cookout, the defendant's friend, Austin Sanders, was leaving the Cook-Out and told the group, 'Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just—started getting rowdy in the drive-thru, shaking people's cars, and stuff like that.' *Despite this comment, Defendant and his group continued into the Cook-out.*" Order at 3; R. 2917 (emphasis added). The judge reasoned that appellant should not have gone into the Cook Out where he had a right to be and that he should have retreated when he saw the Dutch Fork students there.

Further, in the analysis section of Judge Hood's order, he wrote, "The evidence, which consists of video surveillance and witness testimony, shows the Defendant seeking out the Cook-Out restaurant and the Dutch Fork students that night. The Defendant **chose the situation** that

led to the altercation with the Dutch Fork students. The Defendant **also chose not to leave the other exits** that were available to him. He chose to drive into a crowd of Dutch Fork students.” Order at 5; R. 2919 (emphasis added).

The judge also wrote, strangely, “Second, the Defendant must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.* **The Defendant has failed to do so in this case.** The Defendant and his friends went to the Cook-Out, **knowing that Dutch Fork Students would be present.** *The Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.*” Order at 6; R. 2920 (emphasis added).

The judge reasoned appellant was responsible for the situation because he went to the Cook Out and because he did not retreat. That is apparent from the judge’s order.³

Further, S.C. Code §16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out restaurant was the Lexington County High School hangout after basketball games. Appellant was a recent graduate of Lexington County High School, who went to the basketball game. He had every right to go to the hangout that night, and he was not obligated to avoid it simply because he saw Dutch Fork students at the Cook Out upon his arrival. Appellant was not at fault for the difficulty for purposes of self-defense where he went to a public restaurant where he had a right to be.

³ It was strange that the judge reasoned appellant failed to prove he believed he was imminent danger or was in imminent danger because he did not avoid the situation at the Cook Out that night.

Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat, and the evidence showed his car was surrounded. Regardless, again, appellant had no duty to retreat, and the second circuit court judge's reasoning was an error of law in that regard.

S.C. Code §16-11-420(E) states that “the general assembly finds 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.” As our Supreme Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): “Section 16-11-440(C) is broadly worded” and it states a defendant has no duty to retreat and has a right to stand his ground.

Pursuant to §16-11-440(C), appellant was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington County hangout, was a place where appellant “had a right to be.” It was therefore erroneous to reason appellant was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that appellant had the duty to retreat from the Cook Out when trouble started that appellant did not cause.

Judge Hood erred as a matter of law by reasoning appellant had a duty to retreat and that he had a duty to avoid the Cook Out restaurant where it was a place he had a right to be as long as he was acting lawfully, which he was.

Judge Russo

Judge Russo also erred by ruling appellant “could have left,” and “rather than attempting to leave, the Defendant kept his vehicle stationary.” Judge Russo order at 9; R. 2913. The judge impermissibly found appellant was not “without fault” for purposes of self-defense for this reason, and that appellant could have retreated. Appellant should be granted a new trial and pre-trial immunity hearing.

Again, S.C. Code §16-11-420(E) states that “the general assembly finds 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.” As our Supreme Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): “Section 16-11-440(C) is broadly worded” and it states a defendant has no duty to retreat and has a right to stand his ground. Pursuant to §16-11-440(C), appellant was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington County hangout, was a place where appellant “had a right to be.” It was therefore erroneous to reason appellant was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that appellant had the duty to retreat from the Cook Out when trouble started that appellant did not cause. If this Court were to determine that Judge Russo’s order somehow solely controlled in this case, it should be reversed because it was based on a fundamental error of law as to immunity and a nonexistent duty to avoid going places a citizen has a right to be, and a nonexistent duty to retreat and flee from persons engaged in criminal behavior who are attempting to harm you.

4.

The second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance he was entitled to immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned appellant had a duty to retreat, or even a duty not to go to “a place he had the right to be” altogether.

Relevant facts

As seen, on February 17, 2014, appellant attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. R. 482, ll. 2-9. Appellant's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. R. 8, ll. 10-25; r. 162, ll. 19-22. Despite difficulty in the parking lot after the game between the rival schools, appellant avoided any conflict. R. 247, l. 24 – 248, l. 6.

After the game, appellant and his friends went to the Cook Out, which was the “hangout spot” for Lexington students after games. R. 14, l. 21 – 15, l. 3; r. 222, l. 24 – 223, l. 1. As soon as appellant and his friends entered the restaurant, Michael James, who attended Dutch Fork, approached appellant, threw his hands into the air, and asked, “That’s all y’all brought?” R. 251, ll. 10-21. In an effort to avoid any conflict, appellant responded, “We just came here to eat.” R. 251, ll. 21-22. While they were waiting in line, appellant saw Michael James, the same student who confronted appellant when he entered the restaurant, standing on a chair and motioning as if he was going to punch Keith Adams. R. 253, ll. 3-13. Again, in an attempt to avoid any conflict, appellant told his friends they should leave. The group stepped outside. R. 16, l. 12 – 17, l. 25; r. 253, ll. 19-22. Shortly thereafter, Michael James, the student who had antagonized the group earlier, walked outside, threw his hands in the air, and asked, “Are you still salty?” Appellant responded, “The game was thirty, thirty-five minutes ago. Y’all won. Congratulations.” To again avoid any confrontation, appellant then told his friends, “Guys come on, let’s go” and the group began walking toward their cars. R. 254, l. 13 – 255, l. 8.

As they were walking, about thirty to forty Dutch Fork students “rushed” out of the Cook Out and began taunting and threatening appellant and his friends. R. 19, ll. 1-3; r. 84, ll. 4-21; r. 255, ll. 10-14. After reaching their cars and briefly talking, Keith Adams eventually drove away

first. R. 23, ll. 13-17; r. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. R. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith ultimately turned right onto the main road. R. 22, l. 21 – 23, l. 19. Will Zander, who was directly behind Keith, followed the same path past the Dutch Fork students. As Will was driving past the students, he stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. R. 87, l. 21 – 88, l. 23. There was testimony Will said, “This is what y’all are worth.” R. 543, l. 2 – 546, l. 15. Several students from Dutch Fork ran into the road to pick up the money. R. 89, ll. 7-20; r. 451, ll. 19-25. Appellant, who was the last to pull away, looked up and saw Will’s car stopped in the roadway surrounded by the same Dutch Fork students who minutes earlier had threatened appellant and his friends. R. 258, l. 7 – 259, l. 2. Appellant did not know at the time that Will had thrown money into the road. R. 258, ll. 12-21. He feared the Dutch Fork students were going to attack Will. Appellant sped forward to make sure Will was alright. R. 258, l. 24 – 259, l. 24. Appellant stopped behind Will’s car. As soon as appellant stopped, Dutch Fork students aggressively swarmed his vehicle, yelled expletives at him, repeatedly threatened him, and ordered him to get out of the car. R. 260, l. 8 – 262, l. 15; R. 1771, l. 10 – 1773, l. 1; R. 1826, ll. 5-8. The students, including the decedent, Da’Von Capers, were “banging” on appellant’s car “trying to scare him.” R. 225, ll. 1-3; R. 2025, l. 14 – 2026, l. 3. One student threw a drink at appellant’s car. R. 1771, ll. 10-19; R. 1825, ll. 7-23. Hands started reaching into appellant’s window. R. 225, ll. 1-3; r. 260, ll. 13-15; r. 1826, ll. 13-24. He thought they were trying to attack him and “forcefully” pull him out of the car. R. 260, ll. 13-15. With his foot still on the brake, appellant leaned as far into the car as possible away from the Dutch Fork students. R. 260, ll. 15-19.

Appellant was scared and feared for his life. R. 260, ll. 19-20; R. 262, ll. 22-23. One independent witness maintained appellant “looked scared to death.” R. 1771, l. 22 – 1774, l. 15. Appellant could not leave because Will’s car was parked in front of him and there were students in front and around his car. R. 226, ll. 14-21; r. 265, l. 22 – 266, l. 17; r. 1776, ll. 5-7; r. 1826, ll. 2-4. Appellant had a knife in his center console. R. 262, ll. 24-25. He grabbed it, reached across his body with his right hand, struck, and then drove away. R. 262, l. 24 – 263, l. 2. He did not realize he had stabbed anyone. R. 268, ll. 15-20.⁴

Arguments by counsel below

At the end of the first immunity hearing, defense counsel argued appellant proved by a preponderance of the evidence that he was immune from prosecution pursuant to the Act. R. 604, ll. 18-20. Counsel correctly argued appellant avoided conflict at every opportunity that night, including when he first entered the restaurant and Michael James confronted him, and again in the parking lot of the Cook Out when James and others taunted him. Appellant and his friends retreated to their cars. R. 590, l. 7 – 592, l. 25. After reaching their cars, appellant and his friends began to drive away. Counsel admitted that Will Zander then did “something stupid.” He threw money out the window. Appellant, after having been chased out of the restaurant, chased from the parking lot, and pursued down the hill toward his car, saw Will stopped in the roadway and believed Will was in danger. R. 594, ll. 1-22. Appellant sped up toward that area.

⁴ The state presented the testimony of several Dutch Fork students who were standing outside appellant’s window when the stabbing occurred. Some of these witnesses claimed no one touched appellant’s car or reached into his window. R. 515, ll. 16-23; r. 550, ll. 20-24; r. 575, l. 25 – 576, l. 5. One witness admitted the decedent reached into appellant’s window, but claimed it was after appellant had stabbed him. R. 469, l. 4 – 470, l. 5. Others testified that while they did not see a knife, they saw appellant’s hand come out the window when he struck the decedent. R. 516, l. 14 – 517, l. 11; r. 529, ll. 1-5; r. 553, l. 6 – 554, l. 11. Additionally, some of these witnesses claimed there was nothing blocking appellant from leaving. R. 517, l. 25 – 518, l. 6. Despite this conflicting evidence, these witnesses admitted to aggressively approaching appellant’s window and threatening him. R. 513, ll. 12-21; r. 547, l. 19 – 548, l. 6.

Defense counsel argued appellant was not “using an occupied vehicle for an unlawful purpose.” He was merely “trying to make sure [his] friends were okay.” R. 594, l. 22 – 595, l. 5.

Defense counsel correctly argued appellant had a right to act on appearances even if he was mistaken. Appellant thought Will Zander was in trouble. Dutch Fork students surrounded appellant’s car. Counsel asserted appellant could not leave because Will Zander, his car, and other students were in the roadway in front of appellant. R. 596, ll. 9-19. He argued this fact was supported by the iPad video in which someone said appellant “almost hit his own man” when he pulled away. R. 597, l. 24 – 598, l. 6. Regardless of whether appellant could have left, defense counsel correctly maintained appellant was not required to retreat. R. 598, ll. 7-10. Appellant was in his occupied vehicle. He was “in his bubble.” Defense counsel said appellant testified students stuck their hands in his window and were pulling on his door handle. Appellant did not know what their intentions were. This caused fear. Appellant was scared. R. 599, ll. 9-14. He reacted quickly by stabbing. R. 600, ll. 3-14. Counsel argued “the General Assembly added occupied vehicle specifically” for situations like this. R. 599, ll. 9-19.

Counsel again argued appellant had no duty to retreat. He was not required to drive off and leave Will Zander in the road outnumbered forty to one. R. 602, ll. 5-9. Appellant made every effort that night to avoid conflict. R. 602, ll. 17-25. Counsel concluded that appellant was in his occupied vehicle as numerous students admittedly threatened and yelled at him. Appellant leaned as far as possible into the car and repeatedly said, “Back away, back away, you don’t want any of this.” Appellant only stabbed that night because the students made him feel he was in danger of imminent peril and refused to back away from his car. R. 603, l. 7 – 604, l. 17.

Order denying immunity by second circuit court judge

Judge Hood denied appellant immunity by order dated October 11, 2017. R. 2915-2921. The judge found appellant failed to set forth a valid case of self-defense. R. 2915-2921. First, the judge found appellant was not without fault in bringing on the difficulty. The judge determined appellant *sought* “*out the Cook Out* restaurant and the Dutch Fork students that night.” Order at 5; R. 2919 (emphasis added). He further concluded, “[*Appellant*] *chose the situation* that led to the altercation with the Dutch Fork students. [*Appellant*] *also chose not to leave* [through] the other exits that were available to him. He chose to drive into a crowd of Dutch Fork students.” R. 2919 (emphasis added). Second, the judge found appellant failed to show he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. In support of this finding, the judge asserted, “[*Appellant*] *and his friends went to the Cook Out knowing that Dutch Fork students would be present. [Appellant] could have left the Cook Out* without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.” Order at 6; R. 2920 (emphasis added). The judge further maintained that the testimony given by Beth Bettini as to the “fear in his eyes” and appellant’s testimony were “in direct contradiction with the testimony of the Dutch Fork students.” R. 2920. Third, the judge concluded appellant failed to establish that, if his defense was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. This finding was solely “based upon the inconsistent testimony.” R. 2920. Lastly, the judge noted appellant had no duty to retreat. R. 2920. Citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge asserted appellant’s “claim of self-defense presents a quintessential jury question.” R. 2920. He found the “direct contradiction between witnesses

creates an issue for a jury to decide, not the trial court.” R. 2920. Consequently, the judge denied appellant immunity from prosecution.

Standard of review

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Discussion

The South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to “codify the common law Castle Doctrine which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). The General Assembly recognized “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. § 16-11-420(D). It explained “that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to “[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law.” S.C. Code Ann. § 16-11-450(A). Section 16-11-440(A) of the Act provides: “A person is *presumed to have a reasonable fear of imminent peril*

of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person *if the person* against whom the deadly force is used is in the process of *unlawfully and forcefully entering*, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or *if he removes or is attempting to remove another person* against his will from the dwelling, residence, or *occupied vehicle*; and the person using deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act *is occurring or has occurred*.” S.C. Code Ann. § 16-11-440(A) (emphasis added).

Section 16-11-440(C) of the Act, the stand your ground provision, 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) (emphasis added).

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out “a valid case of self-defense,” excluding the duty to retreat, “and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in

imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. Jones and Lee were involved in a physical altercation. Id. *Jones left the residence and returned when she had “cooled down.”* Id. at 288, 786 S.E.2d at 134. (emphasis added). While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. *Believing Lee was going to hit her again*, Jones grabbed the knife out of her shirt and stabbed him. Id. The Court found there was “nothing in the record to suggest that Jones was at fault in bringing on the difficulty” because she attempted to leave the apartment before the first altercation, returned to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police she believed Lee “was going to hit her again and that had she not acted as she did, then she would have been killed.” Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones’ belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and

shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). After spending the day on the golf course drinking, Douglas and his friend, Charles Smith, went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. When Smith was two feet away, Douglas fired the pistol striking Smith. Id. This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' belief that Smith was about to inflict serious bodily injury upon him if he did not act was reasonable. Id. at 320, 768 S.E.2d at 240. According to this Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Section 16-11-440(A) states that when an individual is occupying his or her car and someone is using force to enter the vehicle or to remove him or her from the vehicle that individual is presumed to have a reasonable fear of imminent peril of death or great bodily injury such that deadly force is permitted. Appellant was occupying his vehicle when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant's car and reaching into the window, grasping at whatever they could reach. Appellant feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car.

The state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). That was fundamentally incorrect. The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. When he looked up, appellant saw a crowd of Dutch Fork students around Will's vehicle. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the Dutch Fork students were threatening Will and his friends in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Appellant's actions were as reasonable as the defendants in State v. Jones, and State v. Douglas, supra especially where appellant repeatedly avoided confrontations with the aggressive students from the other school. Moreover, under the common

law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the "Stand Your Ground" provision of the Act. This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person.

Here, appellant was on public property on an open roadway at a public restaurant. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. He avoided conflict every step of the way. First, when he entered the Cook Out and was confronted by Michael James, appellant responded, "We just came here to eat," ignored the Dutch Fork students, and waited in line to order food. Then when Michael James followed appellant and his friends out of the restaurant and asked if they were "still salty," appellant merely congratulated James on Dutch Fork's win and began walking to his car. When thirty to forty Dutch Fork

students then rushed out of the Cook Out and began threatening and taunting appellant, appellant continued to walk backward to his car and not engage with the students.

Judge Hood found appellant failed to prove he was without fault in bringing on the difficulty because he “chose the situation that led to the altercation with the Dutch Fork students,” he “chose not to leave [through] the other exits that were available to him,” and he “chose to drive into a crowd of Dutch Fork students.” Order at 5; R. 2919. The judge essentially reasoned that appellant was at fault because he went into the Cook Out where he had a right to be and should have retreated when he saw the Dutch Fork students there. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the “hangout spot” for Lexington High School students after basketball games. Appellant was a recent graduate of Lexington High School and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Appellant further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant’s car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night. The evidence established the students were banging on appellant’s car, reaching into his window, and yelling threats and profanity. Appellant reasonably feared the students were “trying to attack” him and “forcefully pull [him] out of the car.” R. 260, ll. 8-15. Appellant feared for his life. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on appellant’s car “trying to scare him” while others

were reaching in the window. R. 224, l. 22 – 225, l. 3. Brooks believed appellant was being threatened and he himself “felt a sense of threat.” R. 225, ll. 14-18. Beth Bettini, another independent witness, testified appellant “looked scared to death” as the Dutch Fork students surrounded his car and screamed threats at him. R. 1771, l. 10 – 1774, l. 15. Zachery Lynch, also an independent witness, testified that he saw a student reach inside appellant’s window with his hand “forward.” Lynch thought this person was trying to grab appellant. R. 1826, ll. 13-24.

Oddly, Judge Hood found appellant failed to prove this second element, that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in imminent danger, because appellant did not avoid the situation at the Cook Out. He stated, “The Defendant and his friends went to the Cook Out knowing that Dutch Fork students would be present. The Defendant could have left the Cook Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.” Order at 6; R. 2920. This strange reasoning, respectfully, has no basis or support in the record, and, as argued above, appellant did not have a duty to retreat that night.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger. Appellant proved by a preponderance of the evidence that the circumstances were such as would warrant a person 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. Again, a mob of Dutch Fork students surrounded appellant’s car, threatened appellant, banged on his car, and reached in his window. Appellant was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow.

In his order denying immunity, Judge Hood found appellant failed to establish this third element of self-defense because of “inconsistent testimony,” but did not specify what the alleged inconsistent testimony was. Order at 6; R. 2920. Moreover, citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge determined appellant’s “claim of self-defense presents a quintessential jury question.” R. 2920. He asserted, “The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.” R. 2920. This finding was an error of law.

As argued in issue two above, in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), our Supreme Court held the trial judge erred in finding whether Cervantes-Pavon was entitled to immunity pursuant to the Act presented a jury question. The Court exclaimed, “[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act.” Id. at 451, 827 S.E.2d at 569. The Court emphasized that “the act requires the circuit court to determine whether a movant is entitled to immunity.” Id. at 451, 827 S.E.2d at 568; See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). While Judge Hood did not have the benefit of the Court’s opinion in Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue, and that immunity therefore had to be denied, his ruling nonetheless resulted in an abdication of judicial responsibility under the Act.

Because appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act, respectfully, this Court should reverse appellant’s conviction and sentence and hold he is immune from prosecution.

5.

In the alternative, if this Court were to hold that the first circuit court judge's ruling controls, the first circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence he was entitled to immunity under both S.C. Code § 16-11-440(A) and the "stand your ground" provision of § 16-11-440(C), particularly where the judge erroneously reasoned appellant had a duty to retreat, or even a duty not to go to "a place he had the right to be" altogether.

Relevant facts

This Court has a lengthy statement of facts above, and also the relevant facts for issue 4 dealing with the immunity hearing before Judge Hood. To avoid unnecessary repetition factually, it is sufficient to point out that Judge Russo did not have the benefit of Beth Bettini, Zachary Lynch, and Ervin Meggett who testified at the second immunity hearing. While the testimony of those three witnesses was undoubtedly important, Judge Russo heard the same evidence on appellant continuously avoiding confrontations with the Dutch Fork students in the Lexington High parking lot, and at the Cook Out, which was the Lexington High hangout until his car was surrounded by the angry mob.

Arguments by counsel before Judge Russo

Defense counsel argued appellant proved by a preponderance of the evidence that he was immune from prosecution pursuant to the Act. R. 604, ll. 18-20. Counsel correctly argued appellant avoided conflict at every opportunity that night, including when he first entered the restaurant and Michael James confronted him, and again in the parking lot of the Cook Out when James and others taunted him. Appellant and his friends retreated to their cars. R. 590, l. 7 – 592, l. 25. After reaching their cars, appellant and his friends began to drive away. Counsel

admitted that Will Zander stopped and did “something stupid.” He threw money out the window. Appellant, after having been chased out of the restaurant, chased from the parking lot, and pursued down the hill toward his car, saw Will stopped in the roadway and believed he was in danger. R. 594, ll. 1-22. Appellant sped up toward that area. Defense counsel argued appellant was not “using an occupied vehicle for an unlawful purpose.” He was merely “trying to make sure [his] friends were okay.” R. 594, l. 22 – 595, l. 5. Defense counsel also correctly argued appellant had a right to act on appearances even if he was mistaken. Appellant thought Will Zander was in trouble. Dutch Fork students then surrounded appellant’s car. Counsel asserted appellant could not leave because Will, his car, and other students were in the roadway in front of appellant. R. 596, ll. 9-19. He argued this fact was supported by the iPad video in which someone said appellant “almost hit his own man” when he pulled away. R. 597, l. 24 – 598, l. 6. Regardless of whether appellant could have left, counsel correctly maintained appellant was not required to retreat. R. 598, ll. 7-10.

Appellant was in his occupied vehicle. He was “in his bubble.” Appellant testified students stuck their hands in his window and were pulling on his door handle. Appellant did not know what their intentions were. This caused fear. Appellant was scared. R. 599, ll. 9-14. He reacted quickly by stabbing. Once the decedent was away from his window and appellant was no longer in danger, he pulled away almost hitting his friend, Will Zander. R. 600, ll. 3-14. Counsel Rutherford argued “the General Assembly added occupied vehicle specifically” for situations like this. R. 599, ll. 9-19. Appellant had no duty to retreat, and he was not required to drive off and leave Will in the road outnumbered forty to one. R. 602, ll. 5-9. Appellant made every effort that night to avoid conflict. R. 602, ll. 17-25. Counsel concluded that appellant was in his occupied vehicle as numerous students admittedly threatened and yelled at him. Appellant

leaned as far as possible into the car and repeatedly said, “Back away, back away, you don’t want any of this.” Appellant only stabbed that night because the students made him feel he was in danger of imminent peril and refused to back away from his car. R. 603, l. 7 – 604, l. 17.

Order denying immunity by first circuit court judge

Judge Russo found appellant was not entitled to immunity under both subsection (A) and (C) of § 16-11-440 of the Act. Regarding § 16-11-440(A), the judge determined appellant failed to meet his burden of proving the decedent was in the process of unlawfully and forcefully entering an occupied vehicle. Order at 8; R. 2912. The judge further found appellant failed to prove he had reason to believe the decedent was in the process of unlawfully entering his occupied vehicle. The judge noted that while appellant testified the decedent was forcefully entering his car, he found it not credible. R. 2912. Judge Russo also found appellant failed to establish the elements of self-defense. Order at 9; R. 2913. He concluded appellant did not show he was without fault in bringing on the difficulty. Appellant “approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side.” R. 2913. He further found appellant’s testimony that he was unable to leave after he stopped in the roadway was not credible. R. 2913. Assuming appellant established the second element of self-defense, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, Judge Russo found appellant failed to show that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. R. 2913.

As far as § 16-11-440(C) of the Act, the judge without any explanation determined that even if this subsection applied, appellant would not be entitled to immunity because he failed to establish the elements of self-defense as he had found. Order at 10; R. 2914.

Standard of review

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Discussion

As seen above, the South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to “codify the common law Castle Doctrine which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). The General Assembly recognized “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. § 16-11-420(D). It explained “that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code Ann. § 16-11-420(E).

Section 16-11-440(A) of the Act provides a presumption of reasonable fear of imminent peril of death or greatly bodily injury to a person who uses deadly force. A person is entitled to the reasonable fear presumption if (1) the person against whom the deadly force is used is in the process of *unlawfully and forcefully entering* or has unlawfully and forcefully entered . . . an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an

unlawful and forcible entry or unlawful and forcible act is occurring or has occurred. S.C. Code Ann. §16-11-440(A)(1)-(2). (emphasis added). Further, Section 16-11-440(C) of the Act provides that a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60. S.C. Code Ann. §16-11-440(C). “A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out “a valid case of self-defense,” excluding the duty to retreat, “and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Appellant was occupying his vehicle when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant’s car and reaching into the window, grasping at whatever they could reach. Appellant feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car. As to § 16-11-440(A), Judge Russo found appellant failed to prove that the decedent was in the process of unlawfully and forcefully entering appellant’s vehicle. Order at 8; R. 2912. The judge emphasized that while one witness, without naming who, testified that he saw several

students reach inside appellant's car from a distance, other witnesses, who were standing directly outside appellant's car, testified that no one touched the vehicle or reached inside. Additionally, no fingerprints were found on or in the vehicle. R. 2912. While Judge Russo did not have the benefit of the testimony from Beth Bettini, Zachery Lynch, or Chauncy Meggett, appellant nonetheless proved by a preponderance of the evidence that the decedent was forcefully trying to enter his car. Josh Brooks, the only independent witness to testify at the first immunity hearing, testified that a "whole bunch" of Dutch Fork students crowded around appellant's car in the roadway. R. 224, ll. 13-25. The students were "banging" on appellant's car "trying to scare him." Brooks asserted that other students were reaching in appellant's window. R. 225, ll. 1-3. Brooks' testimony along with appellant's vivid account of the attack was sufficient to satisfy his burden of proof. The witnesses cited by Judge Russo to support his finding were all Dutch Fork students who remained loyal to their deceased friend. Additionally, the state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the students were threatening Will in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Moreover, under the common law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the “Stand Your Ground” provision of the Act. This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person. Appellant was on public property on an open roadway. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. He avoided conflict every step of the way. When he entered the Cook Out and was confronted by Michael James, appellant responded, “We just came here to eat,” ignored the Dutch Fork students, and waited in line to order food. Then when Michael James followed appellant and his friends out of the restaurant and asked if they were “still salty,” appellant merely congratulated James on Dutch Fork’s win and began walking to his car. When thirty to forty Dutch Fork students then rushed out of the Cook Out and began threatening and taunting appellant, appellant continued to walk backward toward his car and did not engage with the students. Judge Russo found appellant failed to prove he was without fault in bringing on the difficulty because he “approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the

oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side.” Order at 9; R. 2913. The judge further found appellant remained stationary in the roadway rather than attempt to leave. R. 2913. He concluded appellant’s testimony that he was unable to leave not credible. R. 2913. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the “hangout spot” for Lexington High School students after basketball games. Appellant was a recent graduate of Lexington High School and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Appellant further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant’s car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night. The evidence established the students were banging on appellant’s car, reaching into his window, and yelling threats and profanity. Appellant reasonably feared the students were “trying to attack” him and “forcefully pull [him] out of the car.” R. 260, ll. 8-15. Appellant feared for his life, as any rational reasonable person would have. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on appellant’s car “trying to scare him” while others were reaching in the window. R. 224, l. 22 – 225, l. 3. Brooks believed appellant was being threatened and he himself “felt a sense of threat.” R. 225, ll. 14-18.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger. Appellant proved by a preponderance of the evidence that the circumstances were such as would warrant a person 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. Again, a mob of Dutch Fork students surrounded appellant's car, threatened appellant, banged on his car, and reached in his window. Appellant was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow. Under the Act, appellant, as argued above, had no duty to retreat and had a right to stand his ground and meet force with force.

If this Court were to determine that Judge Russo's order solely controls the issue of immunity in this case, then because appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act, respectfully, this Court should reverse appellant's conviction and hold he is immune from prosecution.

6.

The trial judge erred in allowing the state to introduce an aerial photograph of the incident location because the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to "retreat."

Relevant facts

Prior to trial, defense counsel moved to exclude an aerial photograph of the incident location where law enforcement had staged three vehicles side by side in a two-lane road. R. 2097, ll. 2 –

10. Defense counsel argued that the photograph was confusing and misleading. R. 2097, ll. 11 – 13. Counsel further argued that by staging the cars in the photograph, the state had manipulated the scene and therefore, it did not accurately depict the scene and was unfairly prejudicial. R. 2097, ll. 14 – 22.

The solicitor argued that the photograph was necessary to rebut appellant's self-defense case by showing that he had "so many different ways to leave" the scene. Supp. R. 1, l. 24 – 2, l. 15. According to the solicitor, the photograph was not confusing because it showed how wide the road was. Supp. R. 4, ll. 5 – 20. Defense counsel argued that by showing a photograph with three vehicles side by side, the state was giving the false impression to the jury that the road was a three-lane road when in fact it was only a two-lane road. Supp. R. 5, l. 15 – 6, l. 22.

The solicitor stated that his objective was not to show that this was a three-lane road but to show that three vehicles could fit in the road. Supp. R. 6, l. 23 – 7, l. 15. Defense counsel pointed out that none of the witnesses at the incident location on the night in question saw the area from above. Counsel further argued that people do not make decisions based on "overhead shot[s]" because they only see what is in front of them. Supp. R. 9, ll. 1 – 23. The judge took the issue under advisement. R. 2098, ll. 5 -- 9.

Prior to the state calling its lead investigator, Brent Carter, the solicitor brought up the issue regarding the aerial photograph. The solicitor again argued that he was not trying to show that the road was three lanes wide, but instead that it was wide enough to fit three vehicles. R. 2192, ll. 7 – 18. Defense counsel responded that the photograph was confusing and misleading because there was no indication as to the widths of the vehicles or the amount of space between the vehicles. R. 2192, ll. 19 – 25. Counsel also maintained that the photograph was unfairly prejudicial. R. 2193, ll. 2 – 19. Ultimately, the judge ruled that the aerial photograph was admissible. R. 2198, ll. 4 – 13.

The state was permitted to introduce the staged aerial photograph with three vehicles parked side by side through Brent Carter's testimony as Exhibit 23 over defense counsel's objection. R. 2229, ll. 17 – 22. State's Exhibit #23 – aerial photograph – is on file with this Court. The photograph showed a black truck, a silver sedan, and a black SUV parked side by side in the roadway which separates the Cookout from a pet store. All three of the vehicles are parked facing the same direction. See State's Ex. 23 on file with this Court. The photograph was taken from above and to the front side of the vehicles, and showed several other vehicles parked in the parking lots on either side of the roadway. The parking lot visible on the right side of the photograph, where a white SUV and white truck are parked, is the Cookout parking lot. There were no people standing in the roadway in the photograph. See State's Ex. 23.

On the left side of the photograph, there were bushes which grow all the way to the curb of the road and there was visible dirt in the roadway next to the bushes. See State's Ex. 23. The dirt is the lighter colored portion of the roadway directly to the right of the bushes and extends in front of and behind the black truck parked in the roadway.⁵ There are no white or yellow lines painted on the road demarcating lanes of travel. As this Court will see when viewing State's Exhibit 23, the black truck in the roadway, if traveling with the normal flow of traffic, would continue straight and turn right onto the main road. The silver sedan and black SUV are parked facing the "wrong" direction, i.e. these cars would be head on with any car that pulled into the Cookout parking lot using the proper lane of travel. See State's Ex. 23.

Carter testified that the road could "comfortably" fit three vehicles. R. 2229, l. 23 – 2230, l. 1. However, on cross-examination, Carter admitted that he did not know the actual measurements of the width or the length of the road because he did not measure it. R. 2299, l. 17 – 2300, l. 22.

⁵ Investigator Carter, and the trial court both agreed that this was dirt in the road. R. 2197, ll. 5 – 16; r. 2301, ll. 1 – 13.

Carter further admitted that the road was not a three-lane road and that part of the road was covered in dirt. R. 2300, ll. 23 – 2301, l. 13.

Discussion

Rule 403, SCRE, permits relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). “[A] photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts.” State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

Here, the trial judge erred in allowing the state to introduce a staged aerial photograph of the scene because the photograph gave the false impression that the road was three lanes wide when in fact it was only two. The solicitor’s argument that he was not intending to show that the road was three lanes wide but only that three cars could fit was illogical. By showing the jury a photograph with three vehicles parked side by side in the roadway, the solicitor was conveying to the jury that the road was three lanes wide which, as the solicitor’s own lead investigator acknowledged, was not the case. R. 2299, l. 17 – 2301, l. 13.

In State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244 (Ct. App. 2019), this Court determined that the trial judge acted within his discretion in excluding photographs that the defendant sought to admit in support of his third-party guilt defense. In Brooks, the defendant was accused of “unleash[ing] a hail of gunfire toward [the decedent]” in a bar room argument over a female. Id. at 623-24, 837 S.E.2d at 238-39. The Brooks Court noted that evidence of third-party guilt offered by an accused “must be limited to such facts as are inconsistent with his own guilt and

to such facts as raise a reasonable inference or presumption as to his own innocence.” Id. at 634, 837 S.E.2d at 244, quoting State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941).

Specifically, the defendant in Brooks wanted to admit photographs from the cell phone of a third party who was present at the bar when the shooting happened which showed a .22 caliber pistol because there were ten .22 caliber shell casings discovered at the scene after the shooting. Id. at 635, 837 S.E.2d at 245. The defendant further argued that the third party whose cell phone contained the photograph was in communication with her ex-boyfriend who sent her a text message regarding the shooting stating that “his home dog just shot his other home dog.” Id.

The defendant in Brooks argued the photographs were admissible because they showed that the ex-boyfriend was the shooter. Id. at 636, 837 S.E.2d at 245. This Court disagreed, finding that the photographs did not clearly point to the guilt of the ex-boyfriend since the pistol in the photograph was capable of holding fewer rounds of ammunition than were found on the scene and the description given of the shooter by the eye-witnesses did not match the ex-boyfriend. Id. at 636-37, 837 S.E.2d at 245-56.

As in Brooks, the aerial photograph in this case was confusing, misleading, and it did not refute appellant’s self-defense argument because the photograph was substantially different from the scene as it existed on the night of the incident. Law enforcement deliberately manipulated the scene to show the roadway in a condition that was favorable to the state. It even was an inaccurate portrayal of the scene. There were no aerial photographs of where appellant’s vehicle was parked in the roadway nor were there any aerial photographs showing where the other cars were parked around appellant. Because of this, the aerial photograph simply served to confuse the issue of “how many cars could fit” in the road with the actual question of whether appellant could have reasonably avoided the danger of the mob of students surrounding his car by driving away or retreating.

The state conspicuously did not include a large group of people standing around one of the vehicles in their manipulation of the scene with their staged photograph. This was because the state did not want to depict the condition of the roadway at the time of the incident, but rather to show the scene in a substantially different condition to support their retreat argument. Furthermore, the aerial photograph did not strengthen the state's argument that appellant should have retreated. Appellant was not looking down on the scene from a bird's-eye view. Supp. R. 9, ll. 1 – 23. Instead, he was sitting in his car surrounded by angry people who were yelling at him. Therefore, the aerial photograph misled the jury as to whether appellant could have reasonably and safely retreated.

The photograph also did not depict any relevant information as to the central issues in the case. Cf. State v. Brockmeyer, 406 S.C. 324, 354-55, 751 S.E.2d 645, 661-62 (2013) (holding that photograph of defendant with his shirt off shortly after the crime was relevant because it depicted the defendant's agitated demeanor which was relevant to undercut his claim of accident); State v. McConnell, 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986) (holding that evidence of .22 and .25 caliber bullets, a .22 caliber pistol, and a photograph showing a bullet hole in the window of an apartment were inadmissible where the alleged murder weapon was a .357 caliber pistol because “[t]here was insufficient connection between the evidence and the crime with which appellant was charged, and the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value”).

In State v. Livingston, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997), the Supreme Court held that a photograph of the victim in a felony DUI case of her and her husband on a prior occasion along with her husband's testimony was inadmissible because it was irrelevant and prejudicial. The state contended in Livingston that the photograph of the victim and her husband's testimony were necessary to explain “the reason the victim was in Beaufort County, the time she normally left

work, and the route she usually took home.” Id. The Court noted that none of those facts were in dispute, so the picture and testimony were irrelevant. Id. Here, while the state disputed the fact that appellant could not have reasonably avoided the danger by fleeing the scene, the aerial photograph with the three vehicles side by side did not make appellant’s self-defense argument more or less probable. Again, appellant did not have a bird’s-eye view of the scene and therefore would not have had any way to know that three cars could fit side by side. The fact that three cars could fit in the roadway side by side was wholly immaterial to whether appellant could have retreated.

The trial judge erred by allowing the state to introduce the staged aerial photograph of the scene because it was grossly misleading, confusing, and highly prejudicial. The photograph was a staged misrepresentation of the scene by the state which showed the roadway in a substantially different condition than it was in when appellant was surrounded by a mob of angry students while he was lawfully occupying his own vehicle. Appellant was trying to leave the Cookout when he was surrounded by a group of angry students. The state sought to manipulate the scene to make it appear that appellant had “so many ways to leave” by showing a staged photograph that was inaccurate and prejudicial where self-defense was the critical issue in this case. The trial judge erred by allowing this photograph into evidence and appellant’s conviction should be reversed. See State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019).

7.

The trial judge erred in allowing the state to introduce a model car door of a Ford Explorer created by the state’s investigator because that model was substantially different from appellant’s actual vehicle and use of the model was highly misleading and resulted in an inaccurate representation of the incident.

Relevant facts

The state sought to proffer the testimony of James Sullivan, who was an investigator with the Eleventh Circuit Solicitor's Office, to lay the foundation for a model of a car door he made. R. 2342, l. 11 – 2343, l. 4. Sullivan testified *in camera* that he had been an investigator with the Solicitor's Office for five years. R. 2344, l. 25 – 2345, l. 2. Sullivan recalled that he had been asked by the solicitor to create a “visual aid to assist witnesses in providing testimony.” R. 2346, ll. 1 – 2. Sullivan was never qualified as an expert in anything.

Sullivan described the visual aid he created: “It was a door mounted to a frame that was powered to allow the window to go up and down and it was done so with the measurements taken by Investigator Carter to make sure it's the correct height, but it's nothing more than a door.” R. 2346, ll. 3 – 8. The door that Sullivan used came from a “1998 Ford Explorer Sport.” Appellant's vehicle was a “2001 Ford Explorer Sport.” R. 2346, ll. 12 – 18. Sullivan claimed that the difference in years was not “an issue” because “the second generation [Ford Explorer Sport] was built from 1995 to 2003 so the model basically did not change.” R. 2346, ll. 19 – 23.

Sullivan recalled that “just the door” was used during appellant's first trial and immunity hearing. R. 2348, ll. 14 – 19. After appellant's first trial ended in a mistrial, Sullivan added a car seat to his model “[t]o provide an extra layer of testimony . . . [and] so it's a more accurate representation.” R. 2348, l. 23 – 2349, l. 6. According to Sullivan, the seat, the frame and the center console that he used for his model all came from a 1998 Ford Explorer Sport. R. 2349, ll. 7 – 16. Sullivan stated that the seat on the model could not be moved up or down, but that it could slide back and forth “like [appellant's].” R. 2350, ll. 12 – 23.

Sullivan said that the height of the frame of his model was based off measurements he received from Investigator Carter. R. 2350, ll. 3 – 11. Sullivan later admitted that *he had never*

even seen appellant's car in person but only photographs of it and that his entire model was only based on a single measurement taken by Carter. R. 2402, ll. 18 – 24; r. 2407, ll. 12 – 18. The sole measurement used by Sullivan to create his entire model was from the ground to the window seal which Investigator Carter had measured to be forty-four and one quarter inches. R. 2354, ll. 8 – 23. The state requested to use the model for demonstrative purposes arguing that it would be helpful and not confusing. R. 2353, ll. 1 – 10.

On cross-examination, Sullivan admitted that there were numerous measurements that he did not take of a 2001 Ford Explorer, including the distance between the seat and the door frame, and the distance between the seat and the steering wheel. R. 2353, l. 14 – 2354, l. 7; r. 2361, ll. 3 – 21. Sullivan also admitted that tire pressure could change the height of a vehicle and that Sullivan was not aware of what the tire pressure was on appellant's vehicle or what kind of tires and wheels that it had on it. R. 2358, ll. 15 – 24. Sullivan also failed to consider the level of the ground where the stabbing occurred and the level of the ground where Carter took his measurements of appellant's car. R. 2359, ll. 2 – 14.

Sullivan did not know what the condition was of the suspension springs or seat springs in appellant's car and he did not do any research regarding what Ford Motor Company said about wear and tear on the springs. R. 2361, l. 22 – 2362, l. 6. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and he acknowledged that appellant's foot was on the brake during the incident. R. 2362, l. 7 – 2363, l. 1.

Defense counsel argued that using the model was improper because the state had access to appellant's actual vehicle which they could have used. Furthermore, the model did not include a steering wheel or other critical measurements like the distance between the seat and the steering wheel or how far back the seat was when appellant was sitting in it. R. 2366, l. 7 – 2367, l. 23.

Counsel further argued that the state also failed to take into consideration the type of tire or tire pressure of appellant's car. R. 2368, l. 1 – 2369, l. 1.

The solicitor then introduced a photograph of the model that was used in appellant's first trial which was taken by The State Newspaper which showed appellant and defense counsel using the model during appellant's testimony at his first trial. R. 2370, ll. 2 – 25. Court's Exhibit #2 – photograph of car door model – is on file with this Court. The solicitor stated that the car seat was added to the model after appellant's first trial which he argued made the model more realistic. The solicitor also claimed that the only measurement that mattered was the height of the seat in appellant's vehicle. According to the solicitor, appellant could sit in the seat and move it forward or backward to where he thought it was on the night of the incident. R. 2371, ll. 1 – 21.

Defense counsel pointed out that it was not appellant's burden to show what happened and that suggesting appellant be required to position the seat in the correct location was improper burden shifting. R. 2371, l. 23 – 2373, l. 7. Counsel argued that the model was inaccurate and misleading and should not be used as a demonstrative exhibit. R. 2373, ll. 16 – 17. Counsel further argued that allowing the model to be used as a demonstrative exhibit would place appellant in the position of having to demonstrate what happened using an inaccurate model. R. 2374, ll. 13 – 20.

The judge ruled that the model was admissible for demonstrative purposes and that defense counsel's arguments regarding the inaccuracies "went to the weight and not the admissibility" of the exhibit. R. 2375, ll. 21 – 25. The Court then asked Investigator Carter to demonstrate how he measured the height of the door and to measure the height of the model Sullivan made. R. 2378, ll. 2 – 7. Defense counsel pointed out that measuring the demonstrative was not the same as measuring appellant's actual car. R. 2379, ll. 14 – 25.

After the lunch recess, with nothing under oath, the solicitor informed the judge that Sullivan and Carter *measured the model* during the break and that “at most it would be off less than one sixteenth of one inch basically to the benefit of the defense.” R. 2380, ll. 19 – 24. Defense counsel responded that appellant could not benefit from the model being “off” and that the model still did not accurately depict the inside parameters of the vehicle. R. 2381, ll. 1 – 19. Counsel again argued that it was improper for the state to use a model that did not match appellant’s actual vehicle. R. 2384, l. 7 – 2385, l. 4. The judge again ruled that the model could be used as a demonstrative exhibit and that counsel for both sides could manipulate the model in the courtroom and defense counsel could cross-examine the witnesses on the inconsistencies of the model. R. 2387, ll. 15 – 22.

Sullivan then testified in front of the jury about how he put the model together and he was cross-examined about the numerous differences between his model and appellant’s actual vehicle. R. 2388, l. 15 – 2414, l. 10. Sullivan admitted in front of the jury that there were numerous measurements that he did not take of appellant’s car, including the distance between the seat and the pedals, and the distance between the seat and the steering wheel. R. 2402, ll. 4 – 17. In fact, *Sullivan never even physically examined appellant’s car* but instead only saw photographs of it. R. 2402, ll. 18 – 24. Sullivan further admitted that *his model was based on a single measurement taken by Investigator Carter and that Carter had not marked exactly on appellant’s car where the measurement even came from*, nor did Sullivan know whether Carter had used a level when he took the measurement of appellant’s car. R. 2399, l. 19 – 2400, l. 3; r. 2407, ll. 12 – 18. Sullivan acknowledged that he did not know whether his model door and appellant’s door had the same curvature to them either. R. 2400, ll. 7 – 18. Sullivan also failed to measure the height of appellant’s seat in relation to the roof of the car. R. 2403, ll. 11 – 16. Sullivan did not know what

the condition was of the shocks in appellant's car and admitted that in a car as old as appellant's, the shocks may have deteriorated. R. 2398, ll. 5 – 18. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and acknowledged that appellant's foot was on the brake during the incident. R. 2398, l. 19 – 2399, l. 4. Finally, Sullivan did not know how far forward or backward appellant's seat was. R. 2406, l. 7 – 2407, l. 11.

Alexis Brunson was a student at Dutch Fork High School who was present at the Cookout the night of the incident. Brunson claimed that appellant “looked like” he was trying to run her friends over in the street and was “driving really fast” but then stopped “abruptly.” R. 2552, l. 17 – 2553, l. 18. However, Brunson admitted that she did not know whether appellant had even seen her friends in the street and that she “just assumed that he did.” R. 2561, ll. 17 – 20. She recalled she was “very upset” and admitted that she was one of the individuals who approached appellant's car window when he was stopped in the Cookout parking lot. R. 2553, l. 19 – 2554, l. 16. Brunson continued: “I went up to the window and I was basically like, what the fuck are you doing? Like you need to get out of here.” R. 2555, ll. 1 – 6. According to Brunson, appellant had his hand in his pocket, and he said “you don't want what I have” to the students who approached his car. R. 2555, ll. 13 – 19. Brunson maintained that it “looked like” appellant threw a punch out the window with his right arm and then drove away. R. 2556, ll. 4 – 15. Brunson claimed that none of the people who approached appellant's car reached inside his window or threw anything into his car. R. 2556, ll. 16 – 22. Brunson then used the car door model to reenact her recollection of the incident over defense counsel's renewed objection. R. 2558, l. 10 – 2559, l. 14.

Lamar Butler was a junior at Dutch Fork High School on the night of the incident. R. 2569, ll. 6 – 15. Butler attended the basketball game and went to Cookout afterwards with the other students. R. 2569, l. 18 – 2572, l. 11. Butler also claimed that appellant “almost hit” his friends as

appellant was leaving the Cookout but that appellant stopped his car before hitting anyone. R. 2576, l. 18 – 2577, l. 8. Butler admitted that approximately six people, including himself, approached appellant’s car window. R. 2578, ll. 9 – 16. Butler further admitted that “everybody [was] pretty much . . . yelling [and] cussing” at appellant and that appellant’s window was rolled halfway down. R. 2579, ll. 1 – 8. However, Butler denied that anyone reached into appellant’s car or threw anything inside the car. R. 2580, ll. 1 – 7. Butler was then asked by the solicitor to step off the witness stand and reenact the incident using the state’s demonstrative exhibit. Butler was asked to indicate using the model how far appellant’s window was rolled down at the time of the incident. R. 2580, ll. 11 – 22. The solicitor also asked Butler to sit in the car chair to demonstrate how appellant was sitting during the incident. R. 2581, ll. 5 – 21. Butler then claimed appellant made a “quick jab” out the window and then drove off which Butler demonstrated using the demonstrative exhibit. R. 2582, ll. 2 – 14.

Discussion

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court dealt with the admissibility of a videotaped animation of a car accident in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell’s videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

In analyzing this issue, the Cantrell Court noted:

Computer animation allows attorneys to convert witnesses’ verbal testimony into dynamic, visual demonstrations capable of mentally transporting jurors to the scene. . . . *However, a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical*

data, and engineering assumptions that drive its images. The computer maxim “garbage in, garbage out” applies to computer animations.

Id. at 383-384, 529 S.E.2d at 536 quoting G. Ross Anderson, Jr., *Computer Animation; Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995) (emphasis added). The Court continued:

The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. *If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great.* Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id., at 369, 384, 529 S.E.2d at 536 quoting State v. Trahan, 576 So.2d 1, 8 (1990) (emphasis added).

The Cantrell Court affirmed the trial judge’s refusal to admit the evidence and noted potential problems with computer animations: “[T]he potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence . . .” Id. at 384, 529 S.E.2d at 536. The Court then established a new rule regarding the admissibility of computer animations:

We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCORE; (2) relevant under Rules 401 and 402, SCORE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCORE.

Id. The Court also urged trial judges to give a limiting instruction that “the animation represents only a re-creation of the proponent’s version of the event; it should in no way be viewed as the absolute truth.” Id. at 387, 529 S.E.2d at 537. In this case the model of the car door used by the state was a wholly inaccurate representation of appellant’s car because it was “just a door” with a

car seat added to it. The car door model was based on a single measurement taken by Investigator Carter which was then used by a *different* investigator, Sullivan, in building the model as a “visual aid.” R. 2407, ll. 12 – 18. The model did not take into account critical measurements and features like the location of the seat or the distance between the seat and the steering wheel. In fact, the model did not even have a steering wheel or dashboard. Furthermore, Sullivan failed to consider how far forward or backward appellant’s seat was located on the night of the incident. All of these measurements and features were critical to appellant’s self-defense case because his argument hinged on the fact that at least one of the angry students reached into appellant’s car door before he stabbed the decedent in self-defense. These measurements were necessary to create a model that accurately depicted the dimensions of the interior and exterior of appellant’s car.

In State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009), the Supreme Court held that “[n]on-scientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.” In White, the state specifically argued that “reliability need not be shown for the admission of non-scientific expert testimony” and the Supreme Court specifically rejected that argument. Id. at 272-273, 676 S.E.2d at 687-688. The White Court held:

[T]he trial courts of this state have *a gatekeeping role* with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications *and reliability* and further find that the proposed evidence will assist the trier of fact.

White, at 274, 676 S.E.2d at 689 (emphasis added).

Here, the trial judge failed to exercise his gatekeeping function and exclude the exhibit for being grossly unreliable and inaccurate. Sullivan’s model simply could not be reliable when Sullivan *never even saw appellant’s car in person and the model was based on a single measurement taken by another person*. The trial judge could not disregard his gatekeeping duty as

he did by saying that the inaccuracies in the model went to “weight and not admissibility.” R. 2375, ll. 21 – 25. The trial judge had an affirmative duty to make a determination as to reliability before allowing this demonstrative exhibit to be shown and used in front of the jury. The judge also failed to give a limiting instruction to the jury, disregarding the Supreme Court’s ruling in Cantrell, 339 S.C. at 387, 529 S.E.2d at 537.

Similar to the computer animation at issue in Cantrell, the phrase “garbage in, garbage out,” applies with equal force here. The model simply could not be construed as an accurate representation of appellant’s vehicle when it was based on only a single measurement – the height of appellant’s driver’s side window from the ground. If Sullivan’s goal was to make an accurate model of appellant’s vehicle he should have used additional measurements including the distance between the seat and the door frame, the distance between the seat and the steering wheel, the distance between the seat and the pedals, and the distance between the seat and the ceiling of the car. Sullivan admitted that he did not take any of these critical measurements in creating his model. R. 2353, l. 14 – 2354, l. 7; r. 2361, ll. 3 – 21; r. 2402, ll. 4 – 17; r. 2403, ll. 11 – 16. Instead of taking the numerous measurements that would have been required to make an accurate model of appellant’s car, the state cut corners to produce something that the solicitors could use for theatrical purposes during appellant’s trial. As the Cantrell Court noted: “If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party’s version of those facts, the danger that the jury may confuse art with reality is particularly great.” Id. at 369, 384, 529 S.E.2d at 536. Here, the model car door did not portray any original facts in controversy, nor was it based on any witness testimony. Instead, it was a prop created by the Solicitor’s Office to be used for dramatic reenactments by hostile witnesses to appellant, Brunson and Butler. These theatrical

performances had no place in appellant's trial and the trial court erred in allowing the state to use such a crude and inaccurate demonstrative.

Although the rule laid out in Cantrell dealt specifically with computer animations, it provides an important framework for dealing with any recreation of events by a party. Here, the recreation was even more vivid than a computer animation as it was live witnesses acting out the event using an inaccurate prop created by the state. The state had its witnesses use the demonstrative exhibit to refute the second and third elements of self-defense which are that the defendant either was actually in imminent danger of losing his life or sustaining serious bodily injury or he believed he was in such danger, and that a reasonable person in the defendant's circumstances would have stuck the fatal blow himself, or a reasonable person would have entertained the same belief as the defendant. See State v. Wiggins 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). The state did this by purportedly showing that none of the people who approached Appellant's car ever reached into his car, i.e. appellant was not actually in imminent danger nor did he have a reasonable belief he was in imminent danger. The solicitor even had Butler sit in the seat of the model and pretend to be appellant in order to act out his version of events and specifically to claim that only appellant reached out of the car when nobody had reached into the car. Allowing witnesses to act out the event using an inaccurate demonstrative was extremely prejudicial and had a very high likelihood of misleading and confusing the jury.

In State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), the Supreme Court noted that for an out-of-court experiment to be admissible, "substantial similarity" is required between the conditions of the experiment and the conditions existing at the time of the incident in dispute. The Kahan Court upheld the use of an out-of-court experiment done by the state's investigator to determine the maximum distance the alleged murder weapon could deposit gunshot residue on

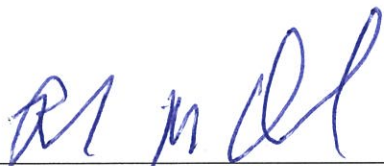
clothing. Id. at 245, 233 S.E.2d at 294. In Kahan, the investigator fired the alleged murder weapon at an article of clothing that was “made of similar material and of a similar weave pattern as the gown worn by the deceased” from various distances. The Court determined that the experiment was substantially similar to the conditions existing at the time of the incident and was properly admitted. Id. While Kahan dealt with an “experiment” and this case involved a prop used by witnesses to reenact the event, there needed to be a substantial similarity between appellant’s car and the model which was created. Otherwise, the reenactments by the witnesses in court simply could not be relied on as having any basis in reality. Furthermore, unlike in Kahan, this case involved dramatic reenactments by witnesses in court using an inaccurate demonstrative. This resulted in a much greater chance of misleading the jury and prejudicing appellant than an experiment conducted in a controlled environment.

The state’s model was inaccurate and therefore, it could only be used by witnesses to confuse and mislead the jury about the incident. The use of the model was extremely prejudicial to appellant because his argument of self-defense depended on where he was and where the angry mob of students were in relation to his car. Specifically, appellant was prejudiced by the state’s misleading attempt to refute the second and third elements of self-defense by “acting out” how none of the students who approached appellant’s car ever reached into his car. The prejudice to appellant was compounded by the fact that Butler physically sat down in the seat of the model and pretended to be appellant and claimed that only appellant reached through the window to strike the decedent. Again, this painted a misleading, confusing and highly inaccurate picture of what actually happened. The trial court abdicated his discretionary gatekeeping function and erred in allowing the state to use this inaccurate car door model for courtroom theatrics and further failed to give a limiting instruction to the jury to place the demonstrative exhibit in its proper context. Appellant’s

conviction should be reversed. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

CONCLUSION

By reason of the foregoing arguments, this Court should reverse the circuit court's order that appellant was not entitled to immunity from prosecution pursuant to S.C. Code §16-11-410 et seq., specifically §16-11-440 (A) & (C). In the alternative, this Court should reverse appellant's conviction and remand his case to the Lexington County Court of General Sessions for a new trial.



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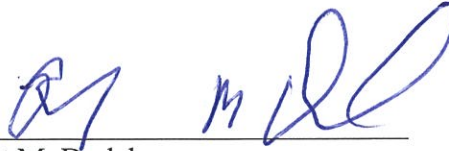
Oct 05 2021

SC Court of Appeals

CERTIFICATE OF COUNSEL

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

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-001486

THE STATE, ...RESPONDENT,

v.

KIERIN MARCELLUS DENNIS, ...APPELLANT.

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I. The Appellant complains of an alleged error his own conduct induced. He complains that although he received the remedy he asked for, it was in a format he did not like, and the court erred as a result. Nevertheless, this Court should find the Appellant was <i>not</i> entitled to a second ruling on whether he was entitled to immunity and that the Honorable Robert E. Hood erred by issuing a second ruling, but the error was ultimately harmless for the purposes of this appeal. [Appellant’s Issue 1]	10
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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the second circuit judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity?
2. Whether the second circuit judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to *State v. Cervantes-Pavon*, 426 S.C. 442, 824 S.E.2d 564 (2019)?
3. Whether the second circuit court judge erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation of the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §§ 16-11-440 (A) & (C)?
4. Whether the second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440 (C), particularly where the court erroneously reasoned that inconsistent

evidence made self-defense a jury issue, that appellant had a duty to retreat, or even to avoid going to “a place he had the right to be” altogether?

5. Whether, in the alternative if the first circuit court judge’s order alone controlled, he erred by denying appellant immunity the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the “stand your ground” provision of § 16-11-440(C), particularly where the court erroneously reasoned that appellant had a duty to retreat, or even going to “a place he had the right to be” altogether?
6. Whether the trial court erred in allowing the State to introduce an aerial photograph of the incident location where the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to “retreat”?
7. Whether the trial court erred in allowing the State to introduce a model car door of a Ford Explorer created by the State’s investigator where that model was substantially different from appellant’s actual vehicle and the use of the model was highly misleading and resulted in an inaccurate representation of the incident?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court improperly granted Appellant a second immunity hearing after a mistrial when the Appellant himself moved for a new hearing over the Solicitor's objection and the court allowed the Appellant to introduce testimony from seven new witnesses, all the while incorporating and expanding the testimony from the fourteen witnesses heard at the first hearing, for the Appellant's benefit alone, when case law dictates that a party cannot complain of an alleged error his own conduct induced and a party cannot complain that he received the remedy he himself asked for.
2. Whether the Honorable Judges Russo and Hood properly denied Appellant immunity as he did not prove by a preponderance of the evidence either at the first hearing or the second, expanded hearing that he was (A) without fault in bringing on the difficulty; (B) that a reasonable man of ordinary courage and fitness would have feared for his life; and (C) that he had no other probable means of avoiding the danger, and thus had a duty to retreat before meeting force with force.
3. Whether the trial court properly admitted an aerial photograph of the scene in order to help the triers of fact orient themselves to the area where the stabbing occurred when the three police vehicles parked in the photograph were standard-sized vehicles that would show the width of the roadway from which the Appellant could have retreated: a material issue the State was entitled to address to disprove self-defense.
4. Whether the trial court properly allowed the Solicitor to use a demonstrative of the Appellant's Ford Explorer's door and window in order to help the jury understand how and where the Appellant was sitting in his vehicle when he stabbed the victim as the Appellant was allowed to adjust his seat and window to match how they were the night of the crime and the investigator who created the demonstrative was available for and was thoroughly cross-examined by the defense.

STATEMENT OF THE CASE

Kierin Marcellus Dennis was indicted for Murder and Possession of a Weapon during the Commission of a Violent Crime at the June 2014 term of the Grand Jury for Lexington County. Public Index. The case was prosecuted by Richard Hubbard, III, Senior Deputy Solicitor, Shawn Graham, Deputy Solicitor, and Rhonda Patterson, Assistant Solicitor, and the Appellant was represented by Todd Rutherford, Esquire, Simone Martin, Esquire, and Nicole Simpson, Esquire. Nov. 2014 R. 1; Oct. 2016 R. 619; Aug. 2017 R. 1657; Sept. 2017 R. 2041; Aug. 2019 R. 2095. Prior to trial, Appellant made a motion for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450 (2006), and a hearing took place pursuant to the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), from November 17 to 19, 2014. Nov. 2014 R. 1-618. The Honorable Thomas A. Russo denied Appellant immunity through a February 4, 2015 Order, and the case proceeded to trial by jury on October 3, 2016, which concluded in a mistrial due to an 11-1 hung jury on October 11, 2016. Feb. 2015 Order R. 2905-14; Oct. 2016 R. 1001, 1656.

Appellant moved for a new immunity hearing in June of 2017, alleging newly discovered evidence, and a second immunity hearing was held before the Honorable Robert E. Hood on August 22 and 24, 2017 and September 18, 2017. June 2017 Motion, R. 1665; Aug. 2017 R. 1657; Sept. 2017 R. 2041. Judge Hood issued an Order denying immunity on October 11, 2017 and the case proceeded to trial by jury a second time from August 19 to 27, 2019, pursuant to which Appellant was found guilty of murder. Oct. 2017 Order; Aug. 2019 R. 2901-2902. He was sentenced by the Honorable Eugene C. Griffith to 30 years' imprisonment. Aug. 2019 R. 2904. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Dutch Fork High School played its long-time rival Lexington High School in basketball on the evening of February 17, 2014. Nov. 2014 R. 8, 227, 246; Aug. 2019 R. 2121-22. The game was a nail-biter, but Dutch Fork ended up winning the rowdy game by a handful of points. Nov. 2014 R. 246, 443; Aug. 2019 R. 2125-27. Kierin Dennis (“Appellant”) left the game with his four friends Keith Adams, Ketura “Lucky” Cook, Will Zander, and Morgan Zander, Will’s 14-year-old sister, all of whom were current or former students of Lexington High School.¹ Nov. 2014 R. 8-9, 161; Aug. 2019 R. 2127-28. Students from the two high schools had had post-game altercations before, so extra security was on hand that night to separate the students after the game concluded. Nov. 2014 R. 9-13, 160-161, 482-483. Lexington High students were directed to exit the gym out of the front door, while Dutch Fork High students were directed out of the back. Nov. 2014 R. 9, 160; Aug. 2019 R. 2125, 2134-35.

Students from Dutch Fork were celebrating their win by dancing in a loosely-formed circle in the parking lot when the Appellant approached them and interrupted their celebrations. Nov. 2014 R. 161, 178, 252; Aug. 2019 R. 2181, 2598-99. Things got tense, and the Appellant challenged them to meet up at the local Cook-Out later to settle things as a police officer ordered everyone to leave the parking lot. Nov. 2014 R. 247, 359-362; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69.

The Appellant left the high school in his gold Ford Explorer Sport followed by Keith in his White Nissan Armada, and Will, Morgan, and Ketura in Will’s Silver Infinity Crossover. Nov. 2014 R. 14-15; Aug. 2019 R. 2099. They initially drove to a gas station, then to Sonic, then to

¹ 18-year-old Keith Adams, 18-year-old Will Zander, and Ketura “Lucky” Cook were Lexington High School graduates. Nov. 2014 R. 7, 74, 245. Morgan Zander was a current Lexington High School student. Nov. 2014 R. 159.

McDonald's, but finally ended up at the Cook-Out, even though it was noticeably full. Nov. 2014 R. 14-15; Aug. 2019 R. 2442. Keith parked by a Petco while Will and the Appellant parked their cars further down by a car wash and an old Blockbuster. Nov. 2014 R. 14, 119; Aug. 2017 R. 1931-33; Aug. 2019 R. 2218-28. One of the Appellant's long-time friends, Austin Sanders, was leaving the Cook-Out when the Appellant and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." Nov. 2014 R. 250. The Appellant and his friends chose to go into the Cook-Out anyway. Nov. 2014 R. 250. Inside were between thirty to forty current and former Dutch Fork High School students, including Devon Chatman, Alexis Brunson, Michael James, Lamar Butler, Kenneth Williams, and the 18-year-old victim, Da'Von Capers.² Nov. 2014 R. 213, 592; Aug. 2019 R. 2100.

Once the Appellant was inside the restaurant, Michael James, a current Dutch Fork student, stood up and said, "Is that all y'all brought?" Nov. 2014 R. 37, 428. The Appellant replied, "We just came here to eat." Nov. 2014 R. 251. Surveillance footage shows the students from the two high schools eating quietly inside the Cook-Out for approximately seventeen minutes before the Appellant decided to go outside. Nov. 2014 R. 316; Aug. 2017 R. 1953-54; Aug. 2019 R. 2486-88; State's Exhibit 12; Defense Exhibit 3. The Appellant had previously texted his cousin, Tobias Davis, that Dutch Fork students were "trying to fight [them] at Cook-Out" and stepped outside to take a phone call from him. Nov. 2014 R. 16, 317-319. The Appellant's four other friends followed him outside along with Michael James, who was seen on the surveillance footage dressed in a white, long-sleeved shirt. Michael James was walking to his

² Devon Chatman, Alexis Brunson, and Kenneth Williams were Dutch Fork graduates; Lamar Butler, Michael James, and Da'Von Capers were current Dutch Fork students. Nov. 2014 R. 442, 481, 502-503, 566; Aug. 2019 R. 2100.

car when Morgan Zander, Will's sister, said something to him, so he turned around and threw his hands up, and said, "Are y'all still salty?" Nov. 2014 R. 16-18, 80; Aug. 2017 Tr. 270.

Surveillance video shows the Dutch Fork students then immediately came out of the restaurant. Nov. 2014 R. 81-85, 323-324; Aug. 2017 R. 1925-33. The Appellant and his friends walked to their cars, but no one assaulted or attempted to assault them as they were on their way. Nov. 2014 R. 448, 463. Once they were in their three cars, they pulled up next to each other and discussed how they would exit the parking lot for approximately five minutes. Nov. 2014 R. 126-127, 257-258. Keith left the parking lot first and turned right toward Main Street. Nov. 2014 R. 45-46. Will Zander drove next to the Dutch Fork crowd and stopped his car, rolled down the window, and threw money out of the car, saying, "Hey, this what y'all are worth." Nov. 2014 R. 544, 569. The Appellant had pulled into the Petco parking lot and turned his car around to face the Dutch Fork students while Will was doing this. Nov. 2014 R. 51, 327-328. He then pointed his car at the crowd and rapidly accelerated his vehicle into the wrong lane of traffic and almost hit two Dutch Fork students, Tyreke Farrow and Devon Chatman, before finally stopping his car by the opposite curb. Nov. 2014 R. 451-452, 543-547. Xavier Holliday had to push Tyreke out of the way to prevent the Appellant's car from hitting him. Nov. 2014 R. 547.

Dutch Fork students then gathered around the Appellant's vehicle and the two groups exchanged heated words because the Appellant had almost hit them. Nov. 2014 R. 412-413, 506, 547; Aug. 2017 R. 2040. Will parked his car diagonally in front of the Appellant's, exited his vehicle, and got a metal pipe out of his trunk. Nov. 2014 R. 50, 62, 135, 151. After approximately one minute of this heated exchange, the Appellant motioned in a "come here" fashion to two of the Dutch Fork students, rolled his window down further, and told them, "You

don't want what I got. You don't want what I got.”³ Nov. 2014 R. 436-438, 516, 548. The Appellant was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and abruptly stabbed Da'Von Capers, who was outside his driver's side window, in the chest. Nov. 2014 R. 262-263, 285, 375-377, 453; Aug. 2019 R. 2230-34. Some witnesses testified that Da'Von Capers did not reach inside the Appellant's vehicle and others testified that he did, but only months or years after the fact. Aug. 2017 R. 1729-31, 1893-94. The Appellant then sped out of the parking lot and the victim was pronounced dead at Lexington Medical Center shortly after. Nov. 2014 R. 154, 372; Aug. 2017 R. 1907; Aug. 2019 R. 2230-31.

The Appellant went home and changed his clothes and his shoes then decided to bury the knife. Nov. 2014 R. 269-271, 343-344; Aug. 2017 R. 1908-12. He did not call or talk to law enforcement until they picked him up from his house later and never told them he was afraid for his life or that he had to act in self-defense. Nov. 2014 R. 270-271; State's Exhibits 2 and 35. The Appellant admitted he stabbed the victim but, at trial, claimed he did it in self-defense because the Dutch Fork students were reaching into his car to attack him. Nov. 2014 R. 277-355; Aug. 2019 R. 2322, 2337-39, 2663-64; State's Exhibits 2 and 35. However, no DNA or fingerprints from Dutch Fork students were found on or in the Appellant's vehicle. Nov. 2014 R. 293-294, 403; Aug. 2019 R. 2753-62. The Appellant did tell law enforcement that his car was blocked and he could not leave the parking lot, but surveillance footage shows one or two cars driving past the Appellant's vehicle while it was parked by the curb. Nov. 2014 R. 204-208, 276-277; Aug. 2019 R. 2228-29. Law enforcement arrested the Appellant for Murder and Possession of a Weapon during the Commission of a Violent Crime. Indictments.

³ The Appellant's window was already rolled down halfway before he accelerated toward the Dutch Fork crowd. Aug. 2019 R. 2235, 2252, 2322, 2346, 2552, 2757-58.

STANDARD OF REVIEW

South Carolina trial courts, when so moved, hold pretrial hearings to determine whether a defendant is entitled to immunity from prosecution under the Protection of Persons and Property Act (“the Act”). *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); S.C. Code Ann. §§ 16-11-410 to 450 (2006). The appellate court reviews an immunity determination for abuse of discretion. *Id.* at 45, 791 S.E.2d at 151. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). “[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court’s assessment of witness credibility.” *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). Abuse occurs when the determination of the trial court lacks factual support or is controlled by an error of law. *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008). The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court and if the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it. *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988).

ARGUMENT

I. Judge Hood Improperly Issued a Second Immunity Ruling but the Error was Harmless; The Appellant Cannot Complain that He was Granted the Relief he Asked For

Appellant moved for an immunity hearing under the Protection of Persons and Property Act prior to his first trial and the Honorable Thomas A. Russo denied immunity after hearing testimony from fourteen witnesses, including the Appellant. After the first trial ended with an 11-1 hung jury in favor of conviction, Appellant moved for a second immunity hearing based on “newly-discovered evidence,” even though the Solicitor later established that all of the evidence Appellant argued was “new” had been turned over to him prior to the first hearing and trial.

The second judge, the Honorable Robert E. Hood, heard testimony from Appellant’s additional witnesses that purportedly had “new” evidence to bring forth in order to avoid a future post-conviction relief issue, and incorporated the transcript from Judge Russo’s hearing into his analysis of whether the Appellant was entitled to immunity. Judge Hood also denied Appellant relief. Now the Appellant argues that Judge Hood improperly incorporated and relied on the evidence presented at the first hearing in deciding whether to grant immunity. The State strongly disagrees with this allegation of error and submits Appellant’s argument is without merit.

Appellant cannot complain of an issue his own actions induced. Appellant failed to discover or elucidate the “new” testimony the first time and was not entitled to a second “bite at the apple” just because he failed to thoroughly review properly disclosed discovery or interview witnesses before his first hearing. No case law, statute, or regulation exists that would have entitled the Appellant to a new hearing. The Appellant himself moved for the hearing and Judge Hood’s actions of allowing the Appellant to proffer his “new” evidence cannot be shown to have prejudiced the Appellant in any way, as he was allowed to present additional evidence that could have established the elements of self-defense by a preponderance of the evidence. He was given

a *second* immunity analysis and Order by a Circuit Court judge: something no South Carolina defendant has ever been allowed to have.⁴ This Court should hold that the judge improperly, yet harmlessly, issued a second immunity Order and establish a bright-line rule that defendants are not entitled to a “second bite” at the immunity apple.

Relevant Facts

A. June 2017 – Defense’s Motion for a New Hearing

After the Appellant’s first trial ended in a hung jury in October of 2016, the defense moved for a new immunity hearing in June of 2017. They alleged that Elizabeth “Beth” Bettini, a witness who testified at the first hearing, had witnessed the attack and had called 911 while in the Cook-Out drive-thru, and that as neither the State nor the defense had obtained the 911 call recording prior to the last immunity hearing or trial, they should be allowed to present it at a new hearing.⁵ June 2017 R. 2922, 2935. They also alleged that the manager of the Cook-Out, Zach Lynch, had seen Da’Von Capers reach inside the Appellant’s vehicle from across the parking lot, and that this was “newly discovered” evidence, even though the defense was aware he was a witness prior to and at the first immunity hearing and trial. Lynch also testified at the first hearing but failed to tell the judge he had seen Capers’ alleged hand movement. June 2017 R. 2922-23.

B. August 22 and 24, 2017: Second Immunity hearing before Judge Robert E. Hood

The Honorable Robert E. Hood heard arguments from both the State and the defense before the hearing as to why or why not the defense should be allowed to proffer the “new” evidence. Aug. 2017 R. 1657.

⁴ Pursuant to the thorough, yet open to correction, research of the State.

⁵ Beth Bettini’s 911 call was never obtained or presented in open court.

Keep in mind I have never worked on this case before so I need a kind of a procedural history of what occurred and when it occurred so I can wrap my own mind about it . . . I need to understand the procedural history of the case before we start.

Aug. 2017 R. 1662.

The State, referencing the written motion the defense had previously filed:

Your Honor, the motion that Mr. Rutherford filed is asking for an entirely new hearing and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da’Von Capers attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence.

Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini’s present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.

Seven talks about the manager of the Cook-Out Restaurant on duty the night in question. His name is Zachary Lynch . . . [and he] was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da’Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis’ occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

Aug. 2017 R. 1666-67.

The State then argued the defense had no rule, statute, or case law to stand on to prove they were authorized to have a second “stand your ground” hearing. Aug. 2017 R. 1667. They argued the defense had chosen to call the hearing when they did and that it was their burden to prove by a preponderance of the evidence the Appellant was entitled to immunity. That it was the Appellant’s choice as to who to call as witnesses and the Appellant’s choice of what to present as evidence at that first hearing. Aug. 2017 R. 1667. They argued that Beth Bettini was listed as the *complainant* in the police report, had given a written statement to law enforcement, and had given her statement on two dash camera videos that were all turned over to the defense prior to the hearing. Aug. 2017 R. 1667. The State argued that Zachary Lynch had also written

two statements and had given a recorded interview at police headquarters that were also turned over before the first hearing and that their testimony could not, in fact, be “new”. Aug. 2017 R. 1668.

The State argued alternatively that the only rule that was close enough in comparison was Rule 29(b), SCRCF, that addressed the grounds for a new trial based on newly-discovered evidence. Aug. 2017 R. 1668-69. They argued that the evidence was not newly-discovered and that it could have been ascertained with the exercise of reasonable diligence prior to the last immunity hearing. Aug. 2017 R. 1669. They presented *State v. Harris*, 381 S.C. 539 (Ct. App. 2011)⁶ to the judge, where the Court held the denial of a new trial was not an abuse of discretion as the decision was well within the sound discretion of the trial judge. Aug. 2017 R. 1671. The defense then argued why they should get a new hearing. Aug. 2017 R. 1677-93.

Judge Hood then stated:

I think the only way to do this and this is what I’ve been thinking about this now for a while, I think the only way to do this is to let Mr. Rutherford proffer all of his testimony because let’s play this out. Scenario number 1 is I say no, you’re not entitled to another hearing. There is no rule that permits it and I’m not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered.

So I’m gonna skip that step all together. I’m going to let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don’t need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?

⁶ The test for a new trial is the movant must show: (1) The evidence is such as will probably change the result if a new trial is granted; (2) The evidence has been discovered since the trial; (3) The evidence could not have been discovered before the trial by the exercise of due diligence; (4) The evidence is material to the issue; and (5) The evidence is not merely cumulative or impeaching. *State v. Harris*, 381 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (“The issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court’s discretion”); *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

I will review whatever anybody wants me to review. Now, we're talking, one, seven, ten plus pages of testimony, right? Eight, nine, 10 days of testimony if I'm considering them all together so I'm not gonna be able to review it today, you know, or maybe even this week, but I will – What I want to do is create a record on what Mr. Rutherford believes he should have presented at the original hearing and let's create that so it exists, so that that factor exists. So I don't want to put us in a situation where we're creating some kind of precedent where everybody and their mother can come back and ask for a stand your ground hearing upon stand your ground hearing upon stand your ground hearing.

I also don't want to create a situation where it just gets appealed for us to come back and have this, you know, quote, unquote, hearing to proffer this evidence. I think the safest way to do it is to allow the evidence to be proffered and then I can consider everything and then even at that point I can make the decision. I can make multiple decisions. I can make the decision that he's entitled to immunity. I can make the decision that he's not even entitled to a hearing and there's no rule that permits it. Or I can make the decision that he was entitled to another hearing and he's not entitled to immunity.

So I'm not foregoing any of those legal arguments by allowing him to present this evidence. Does that make sense? So I'm still gonna allow the State to argue he shouldn't even be allowed to do this, there is no rule, that line of thought process, but I think the safest way to do it is to create a full and complete record of everything, let me review everything and then maybe once I've reviewed everything, we can get everybody back together and y'all can put your thoughts together and organize them the way you want to and do a hearing where there's no testimony, where it's just legal arguments once I've had a chance to process everything, okay? So that's what we're gonna do and you ready to go forward with that?

Aug. 2017 R. 1695-1700.

The defense then called the following witnesses to proffer the evidence they claimed was “newly discovered”: Caitlin Voravudhi, Janice Edwards Ross, M.D., Beth Bettini, Zachary Lynch, Nikki Rogers, Alexis Brunson, Devon Chatman, Marc Miramontes, Brent Carter, and Ervin Chauncy Meggett.⁷

⁷ Witnesses who testified at the first immunity hearing were Lexington High School graduates Keith Adams, Will Zander, Joshua Brooks, and the Appellant; Lexington High School student Morgan Zander; Dutch Fork High School graduates Deshon Chatman, Devon Chatman, Alexis Brunson, and Kenneth Williams; Dutch Fork High School students Walden Roberson, Tyreke Farrow, and Lamar Butler; independent witness Pastor Bill Howard, who testified as a character witness for the Appellant; and Investigator Brent Carter with the Town of Lexington Police Department.

C. September 18, 2017 – Immunity Argument before Judge Hood

As promised, the judge allowed the State and the defense to put their arguments for and against a new immunity hearing on the record a few weeks later on September 18, 2017. He began the hearing with a summary of what he had allowed on August 22 and 24, 2017 and why:

[You] were essentially allowed to proffer that testimony so that a record was created so that one day in the future, depending on whatever happens with this case, we don't need to be guessing as to what the defense would have shown or what these witnesses would have said

[T]o get them on the record, to get them cross-examined they called those witnesses along with Dr. Ross, and then I allowed the State to respond to that and then I was provided the transcripts from the original immunity hearing and the original trial I told the State that they would still be allowed to make the argument that the hearing itself isn't even proper and shouldn't even happen. I wasn't gonna preclude them from doing that and so let's start.

Sept. 2017 R. 2043-44.

The defense then argued why their evidence was newly-discovered and the State argued why they were not entitled to a new hearing. Sept. 2017 R. 2046-79. The Solicitor first gave the judge a 15-page memorandum and then argued that S.C. Code § 16-11-450 and *State v. Duncan* laid out the procedure for a stand your ground hearing, and that neither said a defendant was entitled to multiple immunity hearings. The Solicitor told the judge he had conducted research and had not been able to find a single state anywhere in the United States that allowed a second stand your ground hearing.

[A]t what point would it ever end? Every time the defendant comes up with a new piece of evidence that they claim changes something, you would have to have another hearing. Every time that you schedule a trial date, if the defendant came up with something new that hasn't been considered, you would have to have another hearing. You would never be able to have any finality. I think that's why it's not – I think that's why it's not allowed. It may be silent on that, but I think that's why it's not allowed and why we haven't seen it.

It was their motion to seek immunity. They chose that date and time. They had their hearing on the information they chose to present. They knew about Beth Bettini and

Zachary Lynch. They knew about Dr. Ross. They chose not to call them for whatever reason. It's not new evidence . . . he's asking you to set new precedent with no supporting law to back it up.

Aug. 2017 R. 2052-55.

The Solicitor then discussed the five factors the Court set forth in *State v. Spann*, 334 S.C. 618, 513 S.E2d 98 (1999), that a defendant would have to prove to be granted a new trial, as it was the only legal rule anywhere close to being relevant to the argument at hand.⁸

I can't imagine a scenario for a hearing where they would be allowed to say less and to have another hearing. [*Spann* discussed] a trial where someone has been convicted. It seems like that any benefit would go to the individual who has been convicted. The purpose of the immunity statute was to allow a defendant to convince the Court that they shouldn't have to face the publicity and the rigors of a trial, and he's had that opportunity.

Aug. 2017 R. 2056-57.

The Solicitor told the judge that neither side had obtained a copy of the 911 call and that it was no longer available for retrieval. However, Beth Bettini's dash camera testimony and her written statement had been produced prior to the last hearing. Aug. 2017 R. 2057-59. She did not report at that point that she had called 911, had seen the stabbing, or had seen fear in the Appellant's eyes. *Id.* The Solicitor argued that went to her credibility. Aug. 2017 R. 2096. He then analyzed the five *Spann* factors and argued why the Appellant had not met them in order to be entitled to a new immunity hearing. Aug. 2017 R. 2057-62. He did the same thing with the alleged "newly-discovered" testimony of Zachary Lynch and argued that the testimony presented on August 22 and 24, 2017 was cumulative at best. Aug. 2017 R. 2062-69 He concluded by making an argument as to why the Appellant had not established he was entitled to immunity by a preponderance of the evidence. Aug. 2017 R. 1688-97.

⁸ Like *Harris*, *Spann* included the following factors: (1) The results would probably change if a new trial is granted; (2) The evidence was discovered since the trial; (3) It could not have been discovered through the exercise of due diligence; (4) Is material to the issue; and (5) Is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 620, 513 S.E.2d 98, 99 (1999).

There is no precedent for a second immunity hearing. [But if you have to, you could] adopt the five-factor test and agree that the defendant failed to establish proper testimony that entitles [him] to a new hearing. If you find [he] are entitled to a new hearing, find he has failed to prove his burden by a preponderance.

Aug. 2017 R. 2080.

The Court then stated, “No one can say anything anyone of us did was right or wrong without making a record of it. That’s why I did that and that’s why I did it that way. I did it that way so that we could be clear.” Aug. 2017 R. 2091.

Relevant Law and Analysis

First, the Appellant was not entitled to a second immunity hearing under South Carolina law. There is no case law, statute, or regulation that would allow him one because the judicial system has a compelling interest in finality.

Finality in the criminal law is an end, which must always be kept in plain view At some point, the criminal process, if it is to function at all [or if it is] worth having and enforcing, it must at some time provide a definite answer to the question litigants present or else it never provides an answer at all. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment . . . [that is] tomorrow and every day thereafter . . . subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error

Anderson v. Leeke, 271 S.C. 425, 441-442, 248 S.E.2d 120, 123 (1978).

The proper remedy for a party who disagrees with the outcome of an immunity hearing is a direct appeal to this Court. The determination of whether a party may immediately appeal an order issued before or during trial is governed by statute. *Pocisk v. Sea Coast Const. of Beaufort*,

380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008).⁹ The Protection of Persons and Property statute does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial. S.C. Code §§ 16-11-410 to 450 (2006). *See Brown v. County of Berkely*, 366 S.C. 354, 358, 622 S.E.2d 533, 362 (2005) (The trial court's interlocutory order denying the Appellant's Motion to Dismiss based on a qualified immunity claim was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013) (Order denying the defendant's request for an immunity hearing on charges of murder under the Protection of Persons and Property Act was not a final determination and thus was not an immediately appealable interlocutory order.) As an immunity hearing ruling cannot be immediately appealed to this Court, the Appellant certainly was not entitled to a new hearing and ruling below before a final judgment had been rendered at all.

Instead of waiting to exercise his legal remedy of a direct appeal after trial (if he had been found guilty the second time), the Appellant instead attempted to and halfway successfully convinced the trial court to redo the immunity hearing altogether, making superfluous the court's expenditure of time and effort by hearing testimony that had already been presented for the record over the course of multiple days, wasting the witnesses' time, only prejudicing the State, and bypassing this Court's usual direct appeal process. There was no and is no legal purpose to conduct a second hearing and the Appellant was not entitled to a second ruling on whether he was entitled to immunity. Judge Hood improperly, yet harmlessly, issued a second judgment

⁹ S.C. Code Ann. § 14-5-440 (1976) sets forth the categories of interlocutory orders from which a party may immediately appeal: Those affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action; (b) grants or refuses a new trial; or (c) strikes out an answer or any part thereof or any pleading in any action.

regarding the Appellant's immunity. To rule any other way would create mass chaos in the Courts of General Sessions.

Second, the Appellant complains that the second trial court judge, Judge Hood, improperly incorporated the testimony and findings of Judge Russo in his decision, and argues he should have been entitled to an entirely new immunity hearing where he would present the testimony of the fourteen witnesses who had already testified for the record, plus the additional witnesses he called at the second hearing. As has been argued, the Appellant was not entitled to a new hearing at all. Instead, he only benefitted from the second trial judge allowing him to proffer testimony from an additional seven witnesses a second time and only benefitted from the second trial judge's second ruling on immunity entitlement, as the second holding very well could have gone a different way. He had nothing to lose.

The Appellant himself chose the witnesses for the first hearing and complains he did not have the chance to call them all over again to proffer the exact same testimony. Appellant himself moved for the new hearing over the objection of the State and now complains it was conducted incorrectly. Appellant cannot complain of an error which his own conduct has induced. *State v. McCrary*, 242 S.C. 506, 508, 131 S.E.2d 687, 688 (1963). Appellant, also, cannot complain on appeal that he received the relief in the trial court for which he asked. *State v. Brown*, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant had received the relief requested from the trial court, there is no issue for the appellate court to decide.) This Court should find Judge Hood improperly issued a second, albeit harmless, immunity ruling and affirm.

II. Stand Your Ground – Both Trial Judges Property Denied Immunity

The Appellant argues both Judge Russo and Judge Hood erred in denying Appellant immunity because they improperly relied on inconsistent testimony as a basis for their independent decisions. The State disagrees with this allegation of error and submits Appellant's argument is without merit. Both judges properly analyzed whether the Appellant was entitled to immunity by individually analyzing whether the Appellant had met the four elements of self-defense and Sections A and C of the Protections of Persons and Property Act for the record and in their published Orders. Both judges found the Appellant had not established he was without fault in bringing on the difficulty by a preponderance of the evidence. As a result, both judges properly found the Appellant, therefore, had a duty to retreat under the law before meeting force with force. Both judges listed conflicting evidence as a reason for denying immunity, but both made it clear that they were denying Appellant immunity *because* he did not meet his burden by a preponderance not because conflicting evidence simply existed. This Court should affirm.

Relevant Facts

A. Appellant's Issue 5: November 17-19, 2014 Immunity Hearing and February 4, 2015 Order from the Honorable Thomas A. Russo

Upon the Appellant's motion for immunity under the Protection of Persons and Property Act, a hearing was held from November 17, 2014 to November 19, 2014 before the Honorable Thomas A. Russo pursuant to the procedure established in *State v. Duncan*. Nov. 2014 R. 1-10. The judge heard testimony from fourteen witnesses,¹⁰ including the Appellant, and heard closing arguments from both the defense and the prosecution. Nov. 2014 Tr.

¹⁰ Witnesses included Lexington High School graduates Keith Adams, Will Zander, Joshua Brooks, and the Appellant; Lexington High School student Morgan Zander; Dutch Fork High School graduates Deshon Chatman, Devon Chatman, Alexis Brunson, and Kenneth Williams; Dutch Fork High School students Walden Roberson, Tyreke Farrow, and Lamar Butler;

The State argued the Appellant had brought on the difficulty by inserting himself into the Dutch Fork circle at the high school, inviting them to the Cook-Out to fight, and then driving his vehicle straight at Dutch Fork students, nearly hitting two of them in the parking lot of the Cook-Out. Nov. 2014 R. 604-614. They argued the Appellant had gone first to Sonic, then McDonald's, then Cook-Out to look for Dutch Fork students, and that as he had not met his burden of proving the elements of self-defense, he had a duty to retreat before using force. Nov. 2014 R. 614-617. The defense argued the Appellant was entitled to immunity because he and his friends were outnumbered five to thirty or forty, they were chased out of the Cook-Out and pursued down the hill, and that the Appellant had only pulled his vehicle up to the curb, nearly hitting Dutch Fork students, in order to make sure his friend was ok. Nov. 2014 R. 589-595. They argued the Appellant should be granted immunity because he was in an occupied vehicle, "in his bubble," the Dutch Fork students "stuck their hands in his windows and tried his door handle," and that he reacted out of fear by sticking his knife out of the window in order to defend himself. Nov. 2014 R. 596-604.

Judge Russo issued an Order denying immunity on February 4, 2015. Feb. 2015 Order 2905-14. In it, after establishing findings of fact, he laid out the burden of the Appellant to prove he was entitled to immunity by a preponderance of the evidence, and systematically analyzed the elements of self-defense and of S.C. Code 16-11-440(A) and (C). Feb. 2015 Order 2905-14. He concluded the Appellant was not entitled to immunity because he had not proven the elements of self-defense by a preponderance of the evidence or the requirements of Section (A) or (C). Feb. 2015 Order 2911-14:

independent witness Pastor Bill Howard, who testified as a character witness for the Appellant; and Investigator Brent Carter with the Town of Lexington Police Department.

The defendant claims immunity under both subsections A and C of the Act. Section A has two requirements: you are entitled to reasonable fear presumption if (1) the person against whom deadly force is used is in the process of unlawfully and forcefully entering or has unlawfully or forcefully entered an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Regarding the first requirement, the Court finds that the Defendant has not met his burden of proving by the greater weight of the evidence that Da'Von Capers was in the process of unlawfully and forcefully entering an occupied vehicle or that he had unlawfully and forcefully entered an occupied vehicle.

Although one witness testified that while he was standing a few dozen feet from the Defendant's vehicle, he saw what appeared to be several students reach inside the Defendant's vehicle, several other witnesses who were actually standing right next to the Defendant's vehicle testified that no one was touching the vehicle or reaching inside, but that they were simply standing next to the vehicle talking to the Defendant, albeit in a heated manner.

Further, no fingerprints other than that of the Defendant were found on or in the vehicle. Based on the testimony of witnesses and other evidence, including an iPad video tape, the Court finds that the Defendant has not established the first requirement of Subsection (A) by a preponderance of the evidence.

Regarding the second requirement, the Court finds that the Defendant has failed to prove by the greater weight of the evidence that the Defendant, the person who used deadly force, did not know and had no reason to believe that an unlawful and forcible entry or an unlawful and forcible act was occurring or was about to occur.

The Defendant alleges that he had reason to know or believe that Da'Von Capers was in the process of unlawfully and forcefully entering his occupied vehicle. However, the Court finds that based on the totality of the circumstances in this case, that is not credible. Again, several witnesses in the immediate area of the Defendants' vehicle testified that no one was touching or placing their hands on or inside the Defendant's vehicle, and the only fingerprints found on or in the vehicle were that of the Defendant. Therefore, the Court finds that the Defendant has not established the second requirement of Subsection (A) by a preponderance of the evidence.

In addition to failing to establish the provisions of Subsection (A) of the Act by a preponderance of the evidence, the Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence. Regarding the first element, the Defendant has not shown by a preponderance of the evidence that he was without fault in bringing on the difficulty.

The Defendant approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch

Fork students, and with a weapon at his side. Such an act was reasonably calculated to bring about the difficulty that arose. *See Slater*, 373 S.C. at 70, 644 S.E.2d at 52.¹¹ Then, rather than attempting to leave, the Defendant kept his vehicle stationary.

While the Defendant testified that he was unable to leave, the Court finds that based on the totality of the circumstances in the case, that testimony is not credible. The iPad video showing the Defendant's vehicle stationed at the curb shows one or two vehicles driving past the Defendant's vehicle, indicating that he could have left, as these vehicles were clearly able to leave. Thus, the Court finds that he has not established that he was not without fault in bringing on the difficulty.

As to the third element, even if the Defendant established the second element, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, the Defendant has not established by a preponderance of the evidence that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. As noted above, the Dutch Fork students who testified indicated that no one had even touched the Defendant's vehicle, nor was anyone attempting to remove the Defendant from his vehicle. Also, fingerprint analysis and DNA testing did not reveal that anyone other than the Defendant had their hands on or in the vehicle. Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(A) is denied.

The Defendant also claims immunity from prosecution under Subsection (C) of the Act. Even if Subsection (C) applied, the Defendant would not be entitled to immunity under that subsection because he has not established the elements of self-defense by a preponderance of the evidence as noted above. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(C) is denied.

Feb. 2015 Order 2911-14 (emphasis added).

B. Appellant's Issues 2, 3, and 4: August 22 and 24, 2017 and September 18, 2017 Immunity Hearing; October 11, 2017 Order from the Honorable Robert E. Hood

The Honorable Robert E. Hood issued an Order on October 11, 2017 that spelled out his reasons for denying the Appellant immunity from prosecution a second time.¹² He summarized the requirements of the Protection of Persons and Property Act and *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) and then made the following conclusions of law:

¹¹ *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

¹² A summary of the August 22 and 24, 2017 immunity hearing before the Honorable Robert E. Hood is summarized in Section 1 of this brief.

Regarding the first element of self-defense:

He did not prove he was not without fault in bringing on the difficulty. The video surveillance footage and witness testimony show the Defendant seeking out the Cook-Out restaurant and Dutch Fork students. He chose the situation that led to the altercation with the Dutch Fork students. He chose not to leave the other exits that were available to him. He chose to drive into a crowd of Dutch Fork students.

Regarding the second element of self-defense:

He must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury or actually be in imminent danger. He did not do so. They could have left the Cook-Out without coming into contact with any Dutch Fork students but he chose the route that led to the assault and by doing so incited the Dutch Fork students. The testimony from Beth Bettini . . . that there was fear in his eyes was in direct contradiction with the testimony of the Dutch Fork students.

Regarding the third and fourth elements of self-defense: “A reasonably prudent man of ordinary firmness and courage would not have entertained the same belief He had other probable means of avoiding the danger.” Oct. 2017 Order 2920 (emphasis added).

He concluded as follows:

Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Under the facts before this Court, the Defendant’s claim of self-defense presents a quintessential jury question.¹³ *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).¹⁴ (Murder defendant was not entitled to immunity from prosecution . . . where testimony of defendant and eyewitnesses was in direct conflict as to whether victim attacked defendant.)

¹³ Respondent acknowledges and highlights the difference between *Curry*’s “quintessential jury question” factual scenario and the cases that followed it, namely *State v. Cervantes-Pavon* and *State v. Andrews*, which clarified a trial judge’s responsibilities at an immunity hearing when there is conflicting evidence presented. *State v. Curry*, 406 S.C. at 372, 406 S.E.2d at 267; *State v. Cervantes-Pavon*, 426 S.C.442, 451, 827 S.E.2d 564, 569 (2019); *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019).

“[T]he 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.” *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13. Respondent asserts the judge’s use of the phrase does not affect the propriety of his analysis.

The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence.

Based upon denial of immunity, the Court does not need to reach a ruling on the merits of whether or not Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the evidence. The State was allowed to respond. Further, the Court read the testimony from the original immunity hearing and the jury trial. The testimony has been heard and the record has been protected.

Oct. 2017 Order 2920-21 (emphasis added).

Relevant Law and Analysis

The Protection of Persons and Property Act (“The Act”) provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2006); *Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (setting forth the procedure, standard of review, and burden of proof for an immunity determination).

To put it plainly, to obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance, to the trial court’s satisfaction, or three of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance “stated simply is that evidence which convinces us as to its truth.” *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

(1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If the judge finds a defendant has failed to satisfy one of the first two elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”) However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it accordingly. S.C. Code §§16-11-440(A) and (B) (2006). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2006); *Jones*, 416 S.C. at 294–97, 301, 786 S.E.2d at 138–39, 142. If he proves all of the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *Douglas*, 411 S.C. at 320, 768 S.E.2d at 239.

Both judges properly found the Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. “Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element.” *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). Judge Russo

found the Appellant had not proven by preponderance that the victim was unlawfully entering his vehicle at any time before or while the Appellant stabbed him as no fingerprints or DNA from the victim or any Dutch Fork student or former student was found on or in the Appellant's vehicle. Further, the testimony of whether the victim had put his hand inside the Appellant's window varied wildly. Judge Russo found the Appellant's testimony was not credible regarding his belief that unlawful or deadly force was about to or was occurring and that he had not proven by a preponderance that he was not without fault without the difficulty. The Appellant challenged the Dutch Fork students to a fight at the Cook-Out while they were all still at the high school, he voluntarily went into the Cook-Out even though it was full of Dutch Fork students, and he accelerated his vehicle directly at Dutch Fork students. Judge Russo found his actions were reasonably calculated to bring on the difficulty, that no reasonable man would have believed he was in danger, and, as a result, he had a duty to retreat before meeting force with force. Judge Russo properly analyzed the elements of self-defense and Sections (A) and (C) of the Act and properly denied immunity.

Similarly, Judge Hood also denied the Appellant immunity as the Appellant had not proven elements one and two of self-defense by a preponderance of the evidence. He found the Appellant had not proven he was not without fault in bringing on the difficulty and that he had a duty to retreat as a result, but failed to. He found the Appellant could have left the scene by any number of available exits. This conclusion was proper under the law. This Court should accord both judges the deference they are due and affirm as both judges properly analyzed the elements of self-defense according to their discretion and found the Appellant was not entitled to immunity because he failed to meet his burden by a preponderance of the evidence.

III. The Trial Court Properly Allowed the Aerial Photograph

The Appellant argues the trial court improperly admitted an aerial photograph of the road the Appellant could have exited the Cook-Out parking lot on prior to the stabbing because law enforcement lined up three unmarked police cars side-by-side to show the width of the road, and argues that would be confusing to the jury. The State disagrees with this allegation of error. The photograph was used at trial to orient the trier of fact as to where the crime occurred and in tracing the alleged movements of the Appellant and others before, during, and after Da'Von Capers was killed, and the unmarked, standard-sized cars only served to demonstrate the width of the road to the jury. The photograph makes a material in the issue in the case more or less probable, and thus is relevant. The Solicitor properly laid the foundation for its admissibility, demonstrated its relevance, and showed why it was more prejudicial than probative. The trial judge properly instructed the defense that they could cross-examine law enforcement about the width of the road. The trial judge properly found the photograph was admissible and this Court should affirm as the defense has not shown how the trial court abused its discretion.

Relevant Facts

The defense moved to exclude the aerial photograph during pre-trial motions before the Appellant's second trial on August 19, 2019. Aug. 2019 R. 2097.

It's my understanding that what law enforcement did in this case was subsequent They have a section where three police cars were lined up, one, two, three, and then marked on that map. We would object to that as being both confusing, misleading to the jury, it is not an accurate depiction of anything and does not go to reflect anything

I believe the argument was to show the dimensions and things of that nature, but they have the aerial photographs or Google maps, whatever they are, but to manipulate it by putting police cars lined up at one specific entrance that doesn't have people around it, it doesn't show what actually occurred or not even a re-enactment essentially of what's on the video, that that would be unfairly prejudicial, and like I said, completely misleading and confusing to the jury.

Aug. 2019 R. 2097.

The State responded:

[H]ere's why they're not only not confusing, but they're absolutely necessary. They have raised the issue of self-defense. Our argument, and you heard it repeatedly in that trial, he had so many different ways to leave. I can't expect 12 jurors to know exactly what we're talking about, so a photograph is a photograph. These officers will identify, yes, that is where this restaurant is. There's all these places and ways to leave or come. That's critical. Why did he choose to take the path he took?

The three cars are very important, too, because you will remember the testimony was other cars were leaving in the proper lane, but Mr. Dennis drove into a crowd and almost or possibly did hit the curb in the oncoming lane. It's unmarked. And it would only be confusing if we just talked about it but . . . they put unmarked vehicles

[These photographs are] very important to us because it goes to their defense and it also goes to what happened and where those cars are (sic) where the defendant was, his vehicle, right in that area near the curb so it's directly related to our testimony

Basically what I intend to do, we'll have the videos, we'll discuss what's on there, but this is a daylight, clear day series of photographs and the ones we're talking about you will notice there's no marked vehicles here, but you can probably get a fourth one in there, right there So it's not marked. It's not marked at all, but to say that it's confusing, this jury, if they haven't been out here, they don't know any of this. They don't know how wide this road is. They don't know any of that. All of this is going to be very important to their observations and to our argument, where Will Zander was.

Now, this incident occurred right about here. This is where when you see that Ford Explorer, it's right here except a little closer right here to this curb. That's where that is. So they're just showing the space because the argument was self-defense. I couldn't get out. I was trapped in the oncoming lane next to the curb where all the students were, and I had no other way to get out, or I went there for a specific reason, all of that is gonna be important and I've got the burden so that's why. I'm fine with cross all day long.

Aug. 2019 Supp. Rec. 1-11.

The defense countered:

Your Honor, if I might, the problem is, and if you remember after they brought that picture in, the line of questioning was, was he in lane one, lane two, or lane three. It's a two-lane road and as Your Honor just stated, we can introduce – well, they've pushed the presumption over to us that we then have to rebut to say this is not a three-lane road

Can they go drive all at the same time? We don't know and it creates something that we would have to rebut which we're unable to do so because we don't have a helicopter and

we don't have the ability to go out there that day and say this doesn't work. We don't know whether they had to drive two miles an hour to get there. We don't know the elevation. We don't know a number of things which we would have to do to rebut the fact that this is not a three-lane road which they have since created, the Solicitor's Office in just parking three cars there.

Aug 2019 Supp. Rec. 5-6.

The State:

My objective is to say this is a wide road. I don't know why it's wide. I didn't create it, but it's so wide you can fit just from practical purposes three cars there. It doesn't matter. I don't expect three cars to drive up and down there. That's not my point either. My point is when a witness is on the stand without reference to anything saying where was this car and then the defendant saying I couldn't get around it, I've got to show space.

Now, I can take a measurement, but again this jury doesn't, if they don't have the aerial, they don't know what I'm talking about. They see a visual, they go, okay, I get it. Now, when I talk about when Will Zander pulls up, is he in the middle of that road? Yes. That's where Mr. Graham was referencing two lanes just for factual purposes.

Aug. 2019 Supp. Rec. 7.

The Court: "Is that the one who threw the money out?" Aug. 2019 Supp. Rec. 7.

The State:

He's the one that threw the money out. Mr. Adams went out the proper lane which you would think is the proper lane. It is wide though. He had no problem getting out. You will see that, and you'll remember when Mr. Dennis came into that crowd, he's going up on the curb if not on it and there's even cars going past him at some point. It is extremely important just not to say that the highway department has or hasn't created lanes. We're talking about the width of a road.

And Your Honor, the best way to do it is visual and not with some number the jury can't understand. If somebody says something is 20 feet, these people would have all different ideas what 20 feet is . . . I want this jury to know if they go out there, God, you can get three cars. Heck, you might even get four just to show the amount of space so when a man says this was the only way I could get out, they can consider that or if he says that's the way I had to go or there's a reason why I went, they can get that.

Aug. 2019. Supp. Rec. 7-8.

The Court: "All right. I understand your point." Aug. 2019 Supp. Rec. 8.

The Defense:

Your Honor, the problem he just testified. He called it an adjective, which is wide. It is not. It is at best a two-lane road and we have standards in this state and around this country for how wide a lane is. DOT can come in and say the standard lane is -- feet, this road is 30 feet. It's enough for three lanes. They wouldn't say that. The road is not wide at all. It is at best two cars and to throw a third car in or move it real far up against the curb in trying to get a fourth one in, it's creating something that my client then has to rebut. It is not wide. Our contention is it is extremely narrow and again, and I objected the last time to the overhead shots as well.

We don't do anything based on an overhead shot. We didn't walk in this courtroom today based on an overhead shot. You drive up and you go in the door and what you see is what's in front of you. If you're looking at an overhead, maybe you then find out that there's another entrance on the other side or another entrance in the front, but that's not how anybody does it.

What he's asking is that these jurors see what nobody saw that night which is an overhead shot of three cars lined up this way, an overhead shot of an exit back around the other way that nobody possibly knows exists. So again, to add to this dimension that the Solicitor's Office has always added in by use of a helicopter that my client doesn't already have, he now has added cars in to show width that does not exist but for a possible overhead shot and someone being able to lineup three cars. It is inconsistent with anyone's testimony. They can only react off of what was saw. (sic) No one that night saw that overhead shot. No one that night saw three cars standing there to know that they could possibly get around, period.

Aug. 2019 Supp. Rec. 8-9.

The State:

We're not offering it for any of that. It would simply be so jurors know a visual, not to see how many lanes are or aren't there, visually you can fit three cars there so when he's talking about what he could and couldn't do, that's relevant and then as far as the other aerials there's gonna be testimony that Mr. Dennis had been to Cook-Out many times.

He lives around here and those of us that live on his side of town when we're up there, we're pretty much familiar with those alternatives how to get in and out. He's talked about it. So all of that becomes relevant with testimony and, Your Honor, that's what it would be brought in for. It's not anything to do with DOT. It's not anything to do with creating lanes or make believe. And it does nothing to shift the burden.

It's my duty to attack self-defense. I've got to disprove it beyond a reasonable doubt and this goes to my argument on that. And, yeah, nobody knew about this aerial. That's not for the people there that night. Most of them were Dutch Fork kids that didn't know anything about how to get in and out of there. They just knew the front door, too. But for somebody that's been to Cook-Out multiple times sunny days, rainy days, dark, light, he knows the ins and

outs. By where he parked he showed he knows that area down at [the] car wash. His friend is parked over at the pet shop. Judge, I mean, just everybody knows that lives around here.

Aug. 2019 Supp. Rec. 10.

The Court: “Let me sit on this. I’ve heard enough talk about the map. I think we can get it resolved. Let’s move on . . . I’m gonna take that under advisement.” Aug. 2019 Supp. Rec. 11.

The defense renewed their motion during trial before the State introduced the aerial photographs and the following exchange occurred:

The State:

I want to go back to the one that Your Honor I believe last trial allowed . . . in. We had the argument over lanes and all of that for which for us is our purpose is not to show lanes, but width of visual to show that because measurement means whatever to everybody individually. I know 20 feet to me may be 20 yards to my wife. So this just shows width. That’s all. As you know the vehicle Kierin Dennis was driving ended up being here. There’s gonna be a question of did he have room. We just want to show how much room there is. Your Honor let it in last time.

Aug. 2019 R. 2192.

The defense:

[N]ot to belabor the point, but we are in a new trial and due to new strategies we are objecting because this does not fairly and accurately depict the scene and it’s confusing and misleading to the jury. Quite frankly we don’t know the size of the vehicles, we don’t know how much space is in between them, and quite frankly having gone out there, this is not a three-lane road and so to put up police cars side by side does not fairly and accurately depict anything. They continue to talk about dimensions and measurements and width. Crime scene investigators . . . could go out there and measure it . . .

The probative value does not substantially outweigh any unfair prejudice and it’s confusing and misleading to the jury and cumulative.

Aug. 2019 R. 2192-93.

The Court: “How is that not fair and accurate?” Aug. 2019 R. 2194, line 20. The Defense: “It’s a three-lane road. Three cars were not there that night like that. It’s irrelevant. We have no measurements.” R. 2193-94. The Court: “That’s what his point was. His measurements, people

don't under[stand] measurements all the time so he wanted to have a visual demonstrative showing of that and say, all right, the road is 27 and a half feet wide. What does that mean to you or me or whoever. It means different things." R. 2194. The State: "Nothing has been manipulated here. Nothing's been altered." The Court: "I don't disagree with you. I mean, you have not repaved that road." R. 2195.

The State:

I'm not declaring lanes where they're not, but I'm helping the jury understand and an officer to assist in testifying where a car is positioned in relation to the rest of the road. That's why this is beneficial. It helped in the last trial. It helped both sides last time.

Aug 2019 R. 2195.

The Court:

I think that's fair. I think it's an accurate depiction. Now, what I don't want is for to keep putting that up, Kierin's car position one, two, three. You can show that. I would like to use one without vehicles to show his car was about here on the video so that will be my caveat.

Aug. 2019 R. 2196, lines 11-17.

The State: "Now, as far as what part of the road, can we use it for that? Because that's how this officer is discussing [it]. So, for instance, the last time . . . Will Zander's car was up in here in the middle of the road." R. 2196, lines 18-22.

The Court:

Have we got another picture without those cars there that he can say that? I mean, where you just pointed there's no car there so I think that's fair testimony. It looks to me like those bushes on the pet store side of the drive are close enough to the car doors to where the cars avoid it because there's sand in the road.

You can see where they go around that bush so as not to hit it. Cars don't normally travel through there. You can tell. They come closer to the Cook-Out. It's clear to me that's a sandy area where cars don't normally drive and the sand is built up there and kind of avoid that bush to not scuff up your car. I don't see how that's not maybe helpful to the defense.

Aug. 2019 R. 2197, lines 5-16.

The defense: “The defense didn’t object to another aerial photo depicting the same stuff with only two police cars.” R. 2197. The Court: “We’re very cumulative and so I’m gonna . . . rule on cumulative. All of them can come in subject to your objections. You’re pointing to the three cars, I understand, but they’re all coming in so we can move on, all right?” R. 2198.

The State then introduced the photographs to the jury through the testimony of Sergeant Brent Carter. Aug. 2019 R. 2219-2301. He testified the photos were of the aerial view over the Cook-Out that also showed the surrounding areas where the Appellant and his friends had parked, met, and turned around. Aug. 2019 R. 2219. He told the jury what State’s Exhibits 20-22 depicted, and pointed out where the Cook-Out, the Petco, the Taco Bell, the Lexington Urgent Care, and the car wash were in the photos. Aug. 2019 R. 2219-20. He then showed the jury where the Appellant, Keith Adams, and Will Zander were parked before the incident. Aug. 2019 R. 2221. He testified that law enforcement was aware the driveway was not three lanes and that they did not know the width or the length of the area, but that the photograph was meant to show how wide the area was. Aug. 2019 R. 2221.

Relevant Law and Analysis

The admissibility of a photograph is a matter resting in the sound discretion of the trial judge, whose decision will not be reversed without a showing of an abuse of that discretion. *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). As long as a photograph is admitted to corroborate testimony and a proper foundation has been laid, it is not an abuse of discretion to admit it. *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010); *State v. Kelley*, 319 S.C. 173, 460 S.E.2d 368 (1995). To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an

emotional one. *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-371; *State v. Jackson*, 364 S.C. 329, 613 S.E.2d 374 (2005); *Nance*, 320 S.C. at 501, 466 S.E.2d at 349. As long as a photograph corroborates testimony or shows the jury the circumstances of the crime, it will be admissible.

In *Nelson v. Charleston & W.C. Ry. Co.*, the Court held that a photograph of a grade crossing that was taken two days after a collision between an automobile and a freight train was admissible because even though it was taken after the fact because it showed the conditions of the grass and the weeds in the roadbed, and was therefore relevant. *Nelson*, 231 S.C. 351, 98 S.E.2d 798 (1957). Similarly, in *State v. Todd*, the Court held that a photograph of a murder and rape victim's body that exposed her breast to reveal her bullet wound was admissible even though her blouse had been removed by medical personnel beforehand because it corroborated the pathologist's testimony. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). In *State v. Jones*, four color photographs of the victim and a color videotape of the crime scene were properly admitted to show the jury the circumstances of the crime. *Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001).

Here, the aerial photograph showing the width of the roadway the Appellant could have exited from prior to the stabbing only served to corroborate testimony and show the jury the circumstances of the crime. The trial judge properly ruled that the defense could cross-examine law enforcement on how and why they took the photo with the three police cars lined up in a row, but that it was useful to the jury because it showed the jury the width of the road. He properly found that it was properly authenticated by someone who had knowledge of the scene the day of the crime, was relevant, and did not serve to inflame the passions of the jury. The defense did not show how the aerial photograph would serve as a means for the jury to make a decision about the case on an unfair, improper, or emotional basis. This Court should affirm, as

the photograph helped the jury understand and decide one of the ultimate issues: whether the Appellant was blocked in at the Cook-Out or if he had an open road by which to travel out of the Cook-Out.

IV. The Trial Court Properly Allowed the Ford Explorer Demonstrative

The defense argues the trial court improperly allowed the Solicitor's Office to use a replica of the Appellant's Ford Explorer door at trial because it was not identical to the one the Appellant had on his vehicle the night of the stabling. The State disagrees with this allegation of error. Demonstrative evidence is not required to be exact, even though, here, the Solicitor's Office proved the door was only 1/16th of an inch off to the benefit of the Appellant. The Solicitor properly laid the foundation for the demonstrative to be admitted, established its relevance through showing how it was logically connected to the material issues before the jury, demonstrated how it would assist the trier of fact in understanding the issues, and showed that its probative value substantially outweighed any prejudicial effect. The trial court properly ruled the defense could thoroughly cross-examine the Investigator who created it and that any inconsistencies in the model would go to the weight of the testimony, not its admissibility. This Court should affirm the trial court.

Relevant Facts

The State called Investigator James Patrick Sullivan to the stand during the Appellant's second trial in 2019. Aug. 2019 R. 2343. He testified that he worked for the Eleventh Circuit Solicitor's Office as an Investigator and had previous Crime Scene Investigations experience, had served with the Marine Corps, and with the West Columbia Police Department. Aug. 2019 R. 2344-45. He also testified he had a Bachelor's and Master's degree in Criminal Justice, Aug. 2019 R. 2345, and that the Solicitor's Office had instructed him to do the following:

You asked me to create an aid, a visual aid to assist witnesses in providing testimony just to help out It was a door mounted to a frame that was powered to allow the window to go up and down and it was done so with the measurements taken by Investigator Carter to make sure it's the correct height, but it's nothing more than a door

The Solicitor and the investigator then had the following exchange:

Those are the measurements from Mr. Dennis' Explorer? Yes, sir. So this door, what year is this door? The door is off of a 1998 Ford Explorer Sport. Okay. And what year was Mr. Dennis' vehicle? His vehicle was a 2001 Ford Explorer Sport. Now, there's a difference in years. Is that an issue? No, sir. The Ford Explorer Sport was built, the second generation was built from 1995 to 2003 so the model basically did not change. So all those doors should be the same? Yes, sir.

Aug. 2019 R. 2346.

The defense objected, arguing the investigator was not an automobile expert who could testify to the difference of a 1998 versus 2001 Ford door. Aug. 2019 R. 2347.

The State then questioned Investigator Sullivan about how he created the demonstrative and they had the following exchange:

I'll follow up and clarify. You're an investigator? Yes, sir. In investigating the second generation of Ford Sport, two-door Sport, from what year to what year did you determine under your investigation Ford Motor Company made those two-door Sports? From 1995 to 2003, the second generation. From your investigation, were all those models interchangeable? Yes, sir. Thank you.

Now, using those measurements is that how you got the height of this door, the placement of this door? Yes, sir. And then you made the window operational? Yes, sir. I wired directly to a circuit to allow the switch interior to operate the window. Now, in 2016 when we had the first trial this door was used? Just the door. Yes, sir. And in 2014 when we had the stand your ground hearing this door was used? Yes, sir. At that trial there's a lot of talk about where the defendant was in this vehicle; is that correct? That is correct.

The purpose for the seat inside that you have built onto this exhibit, what was that purpose? To provide an extra layer of testimony so they see the face or how certain things were done. If a person reached out, how the person was positioned, the seat belt functions, the floor pan is the right height, so it puts the seat in the correct height given the door frame so it's a more accurate representation or more accurate visual aid for the witnesses, sir.

Aug. 2019 R. 2348-50.

The State asked the Investigator more questions about how he made the demonstrative and how he ensured the model was substantially similar to the Appellant's gold Ford Explorer's door. Aug. 2019 R. 2339-50. The Investigator testified he had run the VIN number from the door and the frame on both the Appellant's door and the demonstrative's door and he discovered they had both been built at the same plant in Kentucky. Aug. 2019 R. 2349-50. He testified the seat of the demonstrative was a manual seat like the Appellant's that could slide backwards and forwards but not up and down. Aug. 2019 R. 2350, lines 14-23. He also testified that all other parts of the demonstrative were standard to that of the doors and seats of a second generation Ford. Aug. 2019 R. 2351, lines 1-6.

The Investigator said he had installed a power switch so the window could go up and down. Aug. 2019 R. 2352, lines 1-25. He explained how the demonstrative was useful as an aid to determine how a five-foot-seven victim like Da'Von Capers could be stabbed under the nipple from the inside of the vehicle. Aug. 2019 R. 2352, lines 12-25. White tape demarcated where the Appellant and other witnesses indicated the positions of the window and the seat were the night of the stabbing at the 2014 and 2016 hearing and trial and the Investigator explained that to the jury. Aug. 2019 R. 2352, lines 1-25, R. 2353, lines 1-10.

On cross-examination, the defense asked the Investigator about measurements and other factors he did not take into consideration when making the demonstrative. Aug. 2019 R. 2353, line 14 to R. 2365, line 5. The Investigator explained that he created the demonstrative from measurements Sergeant Carter had made when law enforcement executed a search warrant at the Appellant's home. Aug. 2019 R. 2358, lines 5-11. He also said that at the previous trial, Dr. Ross testified while using a person who was five-foot-seven, the height of the victim, to show how

someone could be stabbed outside of the vehicle with the window and seat at the height they were at that night. Aug. 2019 R. 2360, lines 1-23.

On redirect, the Investigator clarified that it did not matter what type of tires the Appellant had or the tire height because the suspension would have made everything even. Aug. 2019 R. 2365, lines 8-24. After other questions, the Solicitor finished by clarifying they were introducing the model of the Ford door for demonstrative purposes only. Aug. 2019 Tr. 537, lines 2-5. The defense then renewed its objection. Aug. 2019 R. 2366, line 7 to R. 2370, line 1.

The Solicitor then followed up by showing the Court a photograph taken by the state newspaper during the 2016 trial when the Appellant explained to that jury how he stabbed the victim through the window. Aug. 2019 R. 2370, lines 17-25. “Mr. Dennis can get in this car and put that seat wherever he thinks it was. Any witness who says they believe the seat was this way or that way, it’s all testimony and there may be variables in the testimony. All that’s fine. But this is purely demonstrative.” Aug. 2019 R. 2371, lines 4-8.

The Court held the following:

If this comes in evidence – I agree with everything you’ve said. It’s demonstrative. You can move the seat up and down, seat back and forth, window up and down, the seat belt can be moved. It’s demonstrative. Everything you said can be argued. Everything he said can be argued. It’s approximation, it’s demonstrative. It still can be manipulated. It’s not going in the jury room. I think it’s allowed I mean, it doesn’t have to be perfect, but it’s the height that was measured from the seal of the door to the ground which is consistent with Mr. Dennis’ car.

Aug. 2019 R. 2374.

The defense argued they did not know what the elevation or slant of the ground was at the Cook-Out. Aug. 2019 R. 2375, lines 13-16. The Court responded, “That goes to weight. It’s demonstrative You can argue all these inaccuracies” Aug. 2019 R. 2375, lines 16-17, 23. The defense and the Court then went back and forth about measurements for quite some time.

Aug. 2019 R. 2376-79. The defense objected that the Appellant's original vehicle was not available for comparison purposes. Aug. 2019 R. 2387, lines 21-25. When the jury was on a break, the investigators measured the difference between the demonstrative and the model of the Appellant's original vehicle and testified that it would be "off less than one sixteenth of one inch to the benefit of the defense." Aug. 2019 R. 2380, lines 19-24.

The Court then said to the defense, "I understand your argument. I think it's a piece of demonstrative evidence. It doesn't go back to the jury. The jury can't play with it. Y'all can manipulate it in here to your heart's content and you're welcome to use that cross examination questions of the inconsistencies there. You're welcome to do that." Aug. 2019 R. 2387, lines 15-22. The State then asked questions of Investigator Sullivan while the jury was present about how he built it and for what purpose, Aug. 2019 R. 2388, line 15 to R. 2397, line 6, and the defense then thoroughly cross-examined him on the measurements. Aug. 2019 R. 2397, line 8 to R. 2411, line 11.

Relevant Law and Analysis

The Trial Handbook for South Carolina Lawyers summarizes the definition and requirements for using demonstrative evidence during a criminal jury trial. Alex Sanders and John S. Nichols, § 19.1 *Real and Demonstrative Evidence, Generally*, Trial Handbook for South Carolina Lawyers (4th ed. Sept. 2020).

Courts have tended to divide demonstrative evidence into two categories: original or real evidence – evidence directly related to the occurrence at issue; and prepared or illustrative evidence – evidence which is prepared for litigation solely to aid the comprehension of the jury. Original evidence includes items such as an alleged murder weapon the defective product, and photographs taken at the scene of an accident. Prepared evidence includes such items as charts, maps, skeletal sections, and working demonstrative models.

The difference between real and illustrative demonstrative evidence is significant for two reasons. First, that which is proved to be original is always relevant and will go to the

jury unless the court excludes it for a specific, reviewable reason On the other hand, purely illustrative demonstrative evidence is admitted only as a tool to help the jury understand the relevant facts of the case and, therefore, is subject to much broader discretionary exclusion. In other words, real demonstrative evidence is evidence; illustrative demonstrative evidence is an advocate's educational tool

§ 19.1, Real and Demonstrative Evidence, Generally.

Before introducing a demonstrative, the party seeking to introduce it must properly lay the foundation and establish a link between the item and the matter in issue. *State v. Hart*, 306 S.C. 344, 412 S.E.2d 380 (1991) (all evidence is subject to challenge on the ground that a proper foundation has not been laid.) Then, the introducing party must show its relevance. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). "Any evidence that assists in arriving at the truth is relevant and admissible unless rendered incompetent by some legal rule." *State v. Petit*, 14 S.C. 452, 142 S.E. 725 (1928). Evidence is considered relevant and admissible if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. *South Carolina Dept. of Social Services v. Bacot*, 280 S.C. 485, 313 S.E.2d 45 (Ct. App. 1984). Finally, the Court must conduct a Rule 403, SCORE, analysis and determine if the item's probative value is outweighed by the danger of unfair prejudice. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). Unfair prejudice is defined as an undue tendency to suggest a decision on an improper basis. *State v. Brown*, 306 S.C. 448, 412 S.E.2d 440 (Ct. App. 1991).

If the party seeking to introduce the demonstrative has done all of the above, and the court concludes the item is relevant and has probative value, "[I]t is for the jury to determine the weight, if any, [it] is to be given." *Benton & Rhodes, Inc. v. Boden*, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993). The determination of relevancy and the ultimate admission of demonstratives is a matter largely within the trial court's discretion and his discretion will not be

disturbed on appeal in the absence of an abuse of such discretion amounting to a manifest error of law. *Ward*, 290 S.C. at 557, 351 S.E.2d at 873; *Grand Strand Const. Co., Inc. v. Graves*, 269 S.C. 594, 595, 239 S.E.2d 81, 81 (1977). Wide latitude and freedom is allowed to the parties seeking to introduce demonstratives. *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962).

In *Holmes v. Black River Elec. Co-Op, Inc.*, the Court held the trial judge did not abuse his discretion in admitting in evidence of the plaintiff's injured and amputated arm, even though the picture did not accurately reflect the plaintiff and his injuries at the time. *Holmes*, 274 S.C. 252, 258, 262, S.E.2d 875, 878 (1980). The Court found that the demonstrative evidence aided the jury in its evaluation of the injuries and pain suffered by the appellant and that they were not introduced with the sole purpose of inflaming the jury. "They served the proper purpose of bringing vividly to the jurors the details of tremendous injuries. The pictures were certainly admissible as a matter of discretion of the trial judge, if not as a matter of right. We find no error." *Holmes*, 274 S.C. at 258, 262 S.E.2d at 878.

Here, the Solicitor properly laid the foundation for the demonstrative by questioning the Investigator on how it was made and why it was important to the current matter at issue. The Investigator testified that the Ford Explorer door model was substantially similar to that of the Appellant's the night of the stabbing and that it would help the trier of fact understand and visualize where the Appellant was standing and whether he could have stabbed the victim outside or inside the vehicle. The Solicitor showed it was relevant by demonstrating it made the ultimate question of whether the victim had reached his hand into the Appellant's occupied vehicle that night more or less probable. The Solicitor then argued with the defense about why the item had more probative value than prejudicial risk of unfair prejudice. The trial court properly allowed the Solicitor's Office to admit the door as demonstrative evidence, placing on

the record that the jury would not have access to it in the jury room and that the defense could argue the inconsistencies and thoroughly cross-examine the Investigator. The trial court properly concluded the inconsistencies of the model went to the weight of the evidence, and not the admissibility. The defense has not shown how the trial court has manifestly abused its discretion with an error of law and this Court should affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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October 11, 2021

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

Respondent,

v.

KIERIN MARCELLUS DENNIS,

Appellant

Appellate Case No. 2019-001486

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

This 11th day of October 2021.

s/Julianna E. Battenfield
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August 14, 2024

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Re: The State v. Kierin M. Dennis
Appellate Case No. 2019-001486

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in blue ink that reads "Catherine Hannison, deputy". The signature is written in a cursive style with a large initial 'C'.

CLERK

cc: Alan McCrory Wilson, Esquire
The Honorable Eugene C. Griffith, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kierin Marcellus Dennis, Appellant.

Appellate Case No. 2019-001486

Appeal From Lexington County
 Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 6082
 Heard November 16, 2023 – Filed August 14, 2024

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek,
 Appellate Defender Lara Mary Caudy, and Appellate
 Defender Adam Sinclair Ruffin, all of Columbia, for
 Appellant.

Attorney General Alan McCrory Wilson, Deputy
 Attorney General Donald J. Zelenka, Senior Assistant
 Deputy Attorney General Melody Jane Brown, and
 Assistant Attorney General Julianna E. Battenfield, all of
 Columbia, and Solicitor Samuel R. Hubbard III, of Lexington,
 for Respondent.

THOMAS, J.: Kierin Marcellus Dennis appeals his conviction for murder, arguing the trial court erred in (1) relying on evidence from a prior immunity

hearing and mistrial; (2) denying him immunity under the Protection of Persons and Property Act (the Act)¹; (3) finding he had a duty to retreat under the Act; (4) finding self-defense was a jury issue; (5) finding he had a duty to avoid going to a place he had the right to be; (6) admitting an aerial photograph; and (7) admitting a model car door that was misleading. We reverse and remand.

FACTS

Dennis, at the time a recent graduate of Lexington High School (LHS), was indicted for murder based on the stabbing of a student from the rival school, Dutch Fork High School (DFHS), after a basketball game on February 17, 2014. The stabbing occurred in the parking lot of a Cook-Out restaurant while Dennis was in his vehicle. A pre-trial hearing on Dennis's entitlement to immunity under the Act was held in November of 2014 before the Honorable Thomas Russo (the first immunity hearing). Dennis and numerous LHS students testified, generally supporting Dennis's claim of immunity. Numerous DFHS students testified, generally not supporting the claim.

By order filed February 10, 2015, the court denied Dennis's request for immunity under the Act, finding Dennis had not met his burden of proving the victim was in the process of entering, or had entered, Dennis's vehicle. In addition, the court found Dennis's allegation of such an entry or attempt to enter was not credible. The court also concluded Dennis failed to establish the elements of self-defense. Thus, the court denied Dennis immunity under the Act.

Dennis was tried in October of 2016. The jury deadlocked, was given an *Allen*² charge, and remained deadlocked after more than ten hours of deliberation. The Honorable Eugene C. Griffith Jr. declared a mistrial.

¹ The Act is informally known as the "Stand Your Ground Law" and was enacted by the South Carolina General Assembly in 2006 to provide a person "is immune from criminal prosecution and civil action for the use of deadly force" in circumstances that are permitted by the Act or by another provision of law. See S.C. Code Ann. § 16-11-450(A) (2015); *State v. McCarty*, 437 S.C. 355, 366, 878 S.E.2d 902, 908 (2022).

² *Allen v. United States*, 164 U.S. 492, 501 (1896) (defining the jury charge used to encourage a deadlocked jury to reach a verdict).

In June of 2017, Dennis again filed a motion for immunity under the Act. Dennis argued there was new evidence by Elizabeth Bettini and a manager at Cook-Out, neither of whom were related to either school and both of whom witnessed the events. Dennis also alleged there was new evidence from the pathologist, which was introduced at trial, and new evidence of a 911 recording never produced at trial and evidence from Ervin Meggett, a friend of the victim, who told investigators in August of 2016 that the victim was the aggressor. At a hearing on the motion held in August of 2017 before the Honorable Robert E. Hood (the second immunity hearing), Dennis argued he was entitled to a new hearing based on the new witnesses and evidence. He also argued the previous trial was a mistrial, final, and "we start all over again."

The court refused to allow Dennis a new immunity hearing; however, it ruled Dennis could proffer the new testimony. Dennis called new witnesses to support his claim of immunity. Officer Caitlin Voravudhi, of the Lexington County Police Department, testified she responded to a call at the Cook-Out the night in question and there were approximately forty students there. With her vehicle camera recording and audio being recorded from a microphone she wore, she began interviewing people. She identified Bettini as one of the people and took a statement. Bettini stated she was in the drive-through, saw about thirty teenagers in the parking lot, heard cussing and screaming, and witnessed Dennis's vehicle stop. She stated she then heard him yell, saw a guy ran to his vehicle and throw a drink at him, and then saw about ten male teenagers run toward the vehicle, which then pulled out. A small car then followed it. She called 911 and saw a third car leave. Voravudhi never verified the 911 call, stating she passed the statements on to an investigator. On her recording, a voice can be heard stating, "I saw everything that happened" and "Somebody threw a drink." An employee of Cook-Out can be heard saying he came out for a break and saw someone throw a cup at and lean into Dennis's vehicle. Voravudhi also got a statement from the Cook-Out employee, Zachary Lynch, in which he stated he saw a guy in a white shirt walk to Dennis's car, "reach[] in the car as if to stab somebody." Lynch then saw another guy walk up to the vehicle and throw a cup, followed by two guys getting in the vehicle and the vehicle then leaving.

Janice Edwards Ross was qualified as an expert in forensic pathology. Based on the direction of the knife wound, she testified the victim could have been leaning over at the time he was stabbed. She opined the victim would have had to have been bent over, almost parallel to the ground. She also opined there were many scenarios that would have fit the wound, including if the victim had been standing, the knife would have had to come up and down and if the victim had been stooped

over, it would have had to "go kind of straight parallel to the ground." Ross testified it depended on how much the window was down and how tall the victim was as to whether someone leaning in the window was consistent with the autopsy findings.

Bettini testified she turned into Cook-Out and saw three kids in the road, describing "they did not have happy faces." She looked to her right and saw between thirty and forty teenagers, "hollering, cussing, [and] acting crazy." She saw Dennis's SUV drive up, but kids blocked the road and called the driver names, saying "I'm gonna f***ing kick your ass." They were running at his car and throwing drinks at it. Bettini testified she called 911 and told the dispatcher there was about to be a fight and when the car got stopped, the kid looked scared to death. Bettini was afraid the students would hurt Dennis. She denied seeing a knife, and told the dispatcher, "I just told you that I saw Cook[-]Out trays and a drink being thrown" She next told the dispatcher she heard sirens, which she assumed was why the kids backed away from Dennis's vehicle and he took off. She testified she heard Dennis say either, "Y'all leave me the f*** alone," or "get the f*** away from me." She described the kids as constantly moving around his car and the scene as complete chaos. She assumed the reason Dennis did not leave was because he would have run students over. She also testified that once the police were on the scene, some of the students still in the parking lot were "cussing [her] out and telling [her] that [she was] trying to get their friend in trouble" She concluded, "All I remember is I looked at [Dennis's] face. He was stopped and there [were] kids and they would not let him leave the parking lot." Bettini wrote her statement as requested and never heard from anyone again until two years later when the first trial was about to begin. At that time, the police called her and asked her not to speak to the media if she was contacted. She next met with the solicitor and was told the 911 tape had been lost.

Lynch testified he was working at Cook-Out that night and gave a statement similar to Bettini's statement. When he heard people yelling, "He just got stabbed," Lynch thought it was Dennis who got stabbed by the victim because the victim leaned in the car window, hand forward. Lynch gave a second statement the following morning. He described the victim leaning in with his right hand, not his whole body but from his stomach up. He testified the window was "quite low" but up a little bit. Lynch testified Dennis could have left, but he probably would have run somebody over.

The first 911 call was from the restaurant manager. A 911 Computer Aided Dispatch (CAD) event was created. The second 911 call was from Bettini;

however, no CAD event was created. Nikki Rodgers, of Lexington County 911, testified her office received the calls the night of the incident. She explained some calls were left off the relevant CAD report because the calls were associated with different addresses. Years later, her office received a request for information on calls that night and used a management information system that found eight relevant calls. Several of the eight calls, including Bettini's, were not recorded.

The State recalled Alexis Brunson and Devon Chatman, of DFHS. Dennis objected, arguing if the court was going to rely on the transcript of the first immunity hearing for Dennis's witnesses, the State should not have the opportunity to present its witnesses in person for the second immunity hearing. The court allowed the State to continue.

The court then heard arguments on the merits of Dennis's motion, which it described as "a motion to essentially have a second stand your ground hearing" By order filed October 16, 2017, the court denied the motion for immunity, finding Dennis was not without fault in bringing on the difficulty because he sought out the DFHS students, chose the situation, and chose not to leave via the other exits available to him. The court also found the testimony of Dennis's fear was in direct contradiction to the testimony of the DFHS students, and if he was in fear, it was not a belief a reasonably prudent person would have entertained. The court next found Dennis did not prove he had no other means to avoid the danger. The court concluded,

Under the facts before this Court, [Dennis's] claim of self-defense presents a quintessential jury question. . . . The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because [Dennis] has not proven[,] beyond a preponderance of evidence standard[,] . . . self-defense. The Court finds that [Dennis] has not established the elements of self-defense by the greater weight of the evidence.

Accordingly, the court found Dennis was not entitled to immunity under the Act. Based on that finding, the court declined to rule as to whether Dennis was entitled to a second immunity hearing. After a second trial, Dennis was convicted and sentenced to thirty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"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. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). An appellate court "reviews an immunity determination for an abuse of discretion." *McCarty*, 437 S.C. at 365, 878 S.E.2d at 908. "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." *Id.* (quoting *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (alteration in original)).

LAW/ANALYSIS

A. Immunity Hearing After a Mistrial

Dennis argues the court erred in denying him a second immunity hearing after the first trial ended in a mistrial. We agree.

We first find no merit to the State's argument that Dennis was precluded from receiving a new immunity hearing because he failed to appeal the denial of immunity after the first immunity hearing. In *State v. Isaac*, our supreme court "clarif[ied] that an order granting a request for immunity under the Act is immediately appealable because it is a final order in the case. However, an order **denying** a request for immunity is not a final order in the case." 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013) (footnote omitted).

We next hold the court erred in denying Dennis's motion for a new, full immunity hearing. "A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court." *State v. Woods*, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009). When a case ends in a mistrial, it is considered a nullity and begins "anew when called again for trial." *Id.*; *State v. Mills*, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984), *cert. denied*, 469 U.S. 930 (1984) ("When a mistrial occurs because of the inability of a jury to agree on a verdict, it is the same as if no trial took place."); *Grooms v. Zander*, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (finding that rulings of a trial judge in a proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). After a mistrial, "rulings made with reference to the admissibility and competency of the testimony result[] in no binding adjudication of the rights of the parties." *Keels v. Powell*, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948). Although a ruling on immunity under the Act is not a ruling on the admissibility of evidence, we find

the situations analogous. Like evidentiary rulings, the decision on immunity is left to the sound discretion of the trial court. *See State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019) ("This Court reviews an immunity determination for abuse of discretion. A trial court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support." (internal citation omitted)); *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001))); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011))). In some instances, a lengthy pretrial hearing may have been held on the evidentiary matter in dispute. The fact that such issue may have been ruled upon in the first trial does not preclude the defendant from making the same, different, or additional arguments to the trial court on retrial regarding admission or exclusion and does not preclude a different ruling. *See Woods*, 382 S.C. at 158, 676 S.E.2d at 131 ("A mistrial is the equivalent of no trial and leaves the cause pending in the [trial] court."); *State v. Smith*, 336 S.C. 39, 43–44, 518 S.E.2d 294, 296 (Ct. App. 1999) ("Because a mistrial is the equivalent of no trial, the trial [court] could not rely on any evidentiary rulings from the nugatory proceeding."). While evidentiary rulings may not hold the inherent power to completely end a prosecution, in many cases, they can have a similar effect when the controverted evidence, such as a confession or blood test, is the key evidence offered by the State.

Furthermore, jurisprudence from our sister state of Georgia suggests the grant of a new trial restarts the entire prosecutorial process including an immunity hearing. In *State v. Hamilton*, 839 S.E.2d 560, 564 (Ga. 2020), the trial court granted Hamilton a new trial after her conviction of felony murder based on "general grounds" and because "trial counsel rendered constitutionally ineffective assistance by, among other things, failing to move for a pretrial determination on the issue of immunity from criminal prosecution." The Georgia Supreme court affirmed, and Hamilton filed a motion for immunity from prosecution under Georgia's "Stand Your Ground" Act. *Id.* at 565. The court stated,

the trial court granted Hamilton a new trial And
 '[w]hen a new trial has been granted by the court, the
 case shall be placed on the docket for trial *as though no*

trial had been had' OCGA § 5-5-48 (emphasis supplied). . . . When the trial court granted Hamilton's new trial, the jury verdict against her was set aside. As a result, when the State elected to retry Hamilton, she was free to seek immunity from prosecution under OCGA § 16-3-24.2 before any new trial was conducted.

Id. at 565–66; see *State v. Remy*, 840 S.E.2d 385, 388–89 (Ga. 2020) (reiterating that a defendant may file a motion for immunity after a mistrial is declared because a mistrial is the equivalent of no trial at all). Although the defendants in both *Hamilton* and *Remy* had not previously had immunity hearings, the court in each found the mistrial restarted the clock on the defendant's ability to request immunity.

The issue of the use of prior trial transcripts also arose in *Hamilton*. The State argued the trial court erred in admitting the transcript from Hamilton's jury trial and the transcript from the motion for a new trial hearing in the hearing on her motion for immunity. *Id.* at 566. The court considered the admissibility of the transcripts under its Rules of Evidence governing hearsay and its exclusions and affirmed the trial court's admission of the transcripts. *Id.* at 571. However, the court qualified its decision as follows:

A number of factors lead us to that conclusion. First, there is no dispute that Hamilton's criminal case was fully litigated over the course of an eight-day trial, and that the same judge who presided over that—and who observed the demeanor of witnesses being examined and cross-examined—also presided over Hamilton's motion for new trial and immunity hearings. *Cf.* [*United States v. Mathis*, 559 F.2d 294, 298–99 (5th Cir. 1977)] (reasoning that live testimony is generally favored and considered more probative, at least in part, because the factfinder is able to observe a witness's demeanor, including during cross-examination). Second, the witnesses' prior testimony would have been considered one way or the other at the immunity hearing if they were called to testify, whether that was because a witness was re-subpoenaed and testified in a way that was materially similar to his or her prior testimony, or because a witness was re-subpoenaed and contradicted his or her prior

testimony, thus allowing the prior testimony's admission as a prior inconsistent statement. . . . Third, the trial court accounted for the potential for additional or inconsistent testimony by giving both Hamilton and the State an opportunity to 'hear testimony from any additional witnesses and from witnesses that did testify at trial if the witnesses had any additional newly discovered evidence,' yet the State declined to present any such witnesses or evidence. Finally, and perhaps most importantly, Hamilton's 2011 trial—where many witnesses recounted the events of the many years leading up to [the victim's] death, as well as the events on the day of his death less than a year before the witnesses testified—was conducted more than *eight years* before the hearing on her motion for immunity was held in 2019. . . . Given this unusual procedural posture, and considering the totality of the circumstances, we cannot say that the trial court abused its discretion by admitting the transcripts from Hamilton's trial and the hearing on her motion for new trial into evidence.

Id. (internal footnote omitted).

In this case, the second immunity hearing was not held before the judge who conducted the first trial nor the judge who heard the first immunity hearing. In addition, there were less than three years between the first immunity hearing and the second immunity hearing and less than a year between the first trial and the second immunity hearing. We find the unusual circumstances relied upon by the Georgia Supreme Court are absent here, and the court erred in relying on transcripts rather than making its own credibility findings and weighing the evidence. *See McCarty*, 437 S.C. at 372, 878 S.E.2d at 911 ("[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity."); *State v. Chhith-Berry*, 437 S.C. 527, 542–43, 878 S.E.2d 352, 360 (Ct. App. 2022), *reh'g denied*, (Oct. 20, 2022), *cert. denied*, (May 24, 2023) ("[T]he [trial] court's [immunity] ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." (quoting *Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569)).

We hold the court erred in failing to conduct a new immunity hearing and by relying on transcripts to rule on Dennis's entitlement to immunity. Accordingly, we remand for a new immunity hearing. If immunity is granted, the conviction is set aside. If immunity is denied, the conviction stands and Dennis is entitled to appeal the denial of immunity and the trial issues. The trial court on remand is to consider only the evidence at the new hearing. See *McCarty*, 437 S.C. at 375, 878 S.E.2d at 913 (remanding for an immunity hearing "because the circuit court is in the best position to assess witness credibility and make the necessary findings of fact"); *Glenn*, 429 S.C. at 123, 838 S.E.2d at 499 (remanding where the circuit court did not address the elements of self-defense in denying immunity); *Cervantes-Pavon*, 426 S.C. at 452–53, 827 S.E.2d at 569 (remanding where the circuit court erred by, *inter alia*, finding that the immunity issue presented a jury question, while making it "clear[] we are not ordering a new trial, only a new hearing to determine whether Cervantes-Pavon is entitled to immunity under the Act," and rejecting the State's contention that there was evidence from the immunity hearing to support the court's ruling); *id.* (directing the trial court on remand "to rely only upon evidence presented at the new hearing on remand"). We acknowledge that almost ten years have passed since the initial immunity hearing. 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.

B. Merits of Dennis's Claim of Immunity

Dennis argues he was entitled to immunity under the Act. As noted above, we find the proper course is to remand "because the circuit court is in the best position to assess witness credibility and make the necessary findings of fact." *McCarty*, 437 S.C. at 375, 878 S.E.2d at 913. However, we review Dennis's remaining issues regarding his claim of immunity.

1. Conflicting Evidence

Dennis first argues the court erred in finding that because there was conflicting evidence as to Dennis's entitlement to immunity, self-defense was a jury issue. We agree.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate] court[s] review[] under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786

S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [trial] court to deny immunity; the [trial] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Gray*, 438 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022), *reh'g denied* (Jan. 23, 2023), *cert. denied* (Oct. 3, 2023) (alterations in original) (quoting *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569). "[T]he [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record." *Id.* (alterations in original) (quoting *Glenn*, 429 S.C. at 123, 838 S.E.2d at 499). See *State v. Ford*, 439 S.C. 261, 271, 886 S.E.2d 710, 715 (Ct. App. 2023), *cert. denied* (Mar. 5, 2024) ("[T]he circuit court, sitting as fact-finder, must make specific findings that support its immunity decision."); *Gray*, 426 S.C. at 142, 882 S.E.2d at 475 (reversing the trial court's denial of Gray's motion for immunity under the Act because the court "impermissibly abdicated its role as the fact-finder at Gray's immunity hearing").

The court here likewise deferred to the jury, stating the following:

Under the facts before this Court, [Dennis's] claim of self-defense presents a quintessential jury question. . . . The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because [Dennis] has not proven[,] beyond a preponderance of evidence standard[,] . . . self-defense. The Court finds that [Dennis] has not established the elements of self-defense by the greater weight of the evidence.

We find the court erred in deferring to the jury because there were conflicts in the evidence. We acknowledge the State's argument that the court made findings as to the elements of self-defense and its use of the phrases regarding deference to the jury did not affect his analysis. However, we conclude the findings were interspersed with deference to the jury and in violation of the law requiring the court to be the fact-finder at an immunity hearing.

2. Duty to Retreat/Avoid the Danger

Dennis next argues both circuit court judges erred by denying him immunity based upon the legally erroneous reason that he had the duty to retreat and that his

allegation of fear was neither credible nor reasonable. We address these elements of self-defense in the context of the Act for the trial court's edification on remand.

The Act provides immunity from prosecution for a person who has used deadly force after a trial court determines the person was justified in using such force. The general four elements a defendant must meet to justify the use of deadly force under the common law of self-defense are the following:

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.

The Act provides immunity as follows:

(A) 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 (2015) (emphasis added). "[A]nother applicable provision of law' includes the common law of self-defense." *Glenn*, 429 S.C. at 117, 838 S.E.2d at 496.

Dennis argues the court erred in denying immunity based on Dennis's failure to retreat and because he went to Cook-Out. In its order, the court found Dennis sought out the DFHS students and chose the situation, which is in contradiction to Dennis's right to be there. In addition, the court found Dennis chose not to leave using other exits available to him, indicating the application of the duty to retreat element of self-defense.

Dennis claimed immunity under both sections 16-11-440(A) and (C) of the Act. "[A] trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." *Id.*

Section 16-11-440(A) provides the following:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, *or occupied vehicle*, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred

S.C. Code Ann. § 16-11-440(A) (2015) (emphasis added). "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. Here, Dennis was in his vehicle at the time of the incident, which is included in the presumption of reasonable fear in the Act. As to findings regarding fear, Dennis argues, "Oddly, [the court] found [he] failed to prove this second element, that he actually was in imminent danger . . . or he believed he was . . . because [he] did not avoid the situation at the Cook[-]Out." The court also found "the testimony as to the 'fear in his eyes,' given by [Bettini] and [Dennis, is] in direct contradiction with the testimony of the" DFHS students. Dennis maintains he met the third element of self-defense—a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger—and that he was in fact in such imminent danger. The court found Dennis did not meet this element because there was "inconsistent testimony." However, the court did not elaborate, and as we previously discussed, we find the court's deferral of factfinding to the jury on contradictory evidence was erroneous.

"The presumption of subsection (A) does not apply, however, 'if the victim has an equal right to be in the dwelling or residence.'" *Id.* (quoting *State v. Jones*, 416 S.C. 283, 292, 786 S.E.2d 132, 137 (2016)). We find the same analysis applies to one's vehicle. Thus, although the victim also had the right to be at Cook-Out, he did not have the right to be in Dennis's occupied vehicle, as Dennis did, during the confrontation. Therefore, the presumption that Dennis's fear was reasonable applied to the extent he met his burden of showing the victim was unlawfully in or entering his vehicle.

"[I]n 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" *Id.* at 118–19, 838 S.E.2d at 496. Section 16-11-440(C) 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

S.C. Code Ann. § 16-11-440(C) (2015) (emphasis added). "Where the section is applicable, it replaces the duty to retreat element required to establish self-defense." *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496.

On remand, the trial court must make specific findings of fact in compliance with any applicable presumptions afforded to Dennis in the Act.

C. Evidentiary Issues at Trial

We decline to reach the evidentiary issues raised by Dennis. *See State v. Mekler*, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue concerning the admission of evidence decided by this court, noting whether the issue would arise on retrial and its resolution would depend upon the evidence and testimony presented, and would be for the trial judge's consideration); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

CONCLUSION

We reverse Dennis's conviction and remand for a new immunity hearing in accordance with this opinion.

REVERSED AND REMANDED.

KONDUROS and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT

Appellate Case No. 2019-001486

MOTION TO STRIKE

Pursuant to Rule 240, SCACR, Appellant Kierin Marcellus Dennis respectfully moves this Court to strike respondent's petition for rehearing and rehearing *en banc* as well as respondent's memorandum in support of petition for rehearing and rehearing *en banc*. In support of this motion, undersigned counsel would respectfully show the Court the following:

1. In a published opinion filed August 14, 2024, this Court held appellant was entitled to a new immunity hearing. State v. Dennis, Op. No. 6082 (S.C. Ct. App. Filed August 14, 2024) (Howard Adv. Sh. No. 31 at 31). On August 28, 2024, respondent requested a fifteen day extension of time to file a petition for rehearing. By order filed August 28, 2024, this Court granted respondent's request.

2. On September 13, 2024, respondent filed an eighteen-page petition for rehearing and rehearing *en banc* accompanied by a forty-one page memorandum in support of the petition for rehearing and rehearing *en banc*. The two separate documents total fifty-nine pages.

3. In footnote one of respondent's petition for rehearing, the state cited to Rule 240, SCACR, which the state maintained "provides all petitions, including petitions for rehearing, shall include a memorandum with citation of authorities in support of the motion." Pet. at 1. Respondent indicated the "memorandum is attached to this Petition." Pet. at 1.

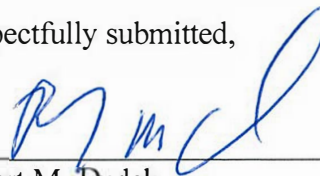
4. Appellant respectfully moves this Court to strike respondent's petition for rehearing and rehearing *en banc* because the state failed to comply with the fifteen page limit set forth in Rule 221(a), SCACR. Appellant also moves this Court to strike respondent's memorandum in support of petition for rehearing and rehearing an *en banc* for failure to comply with the fifteen page limit set forth in Rule 221(a), SCACR.

5. Additionally, appellant moves to strike respondent's memorandum in support of petition for rehearing and rehearing an *en banc* because Rule 240(c)(2), SCACR, which the state cited in support of its filing of a separate memorandum, does not contemplate the filing of a separate memorandum. Rather, the rule merely requires a motion or petition be supported by citations to authorities as opposed to a form motion with no substance. The memorandum filed by respondent is essentially an additional brief in support of the state's position that appellant's conviction should be affirmed. "The purpose of a petition for rehearing is not to present points which lawyers for the losing party have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time." Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina, at p. 309 (1999) *citing* Arnold v. Carolina Power & Light Co., 168 S.C.

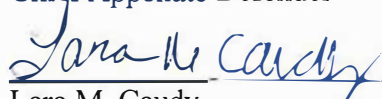
163, 167 S.E.2d 234 (1933). In short, the state is not permitted a “do over” in respect to its brief filed before this Court.

WHEREFORE, undersigned counsel respectfully requests that this Court strike respondent’s petition for rehearing and rehearing *en banc* as well as the memorandum in support of the petition for rehearing and rehearing *en banc* based on the foregoing reasons. Additionally, if a return to the state’s petition for rehearing is requested by this Court pursuant to Rule 221(a), SCACR, appellant respectfully requests the time limit for filing that return to the petition for rehearing and rehearing *en banc*, be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender



Lara M. Caudy
Senior Appellate Defender

ATTORNEYS FOR APPELLANT

This 16th day of September, 2024

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

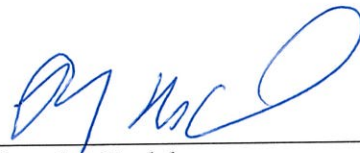
KIERIN MARCELLUS DENNIS,

APPELLANT

APPELLATE CASE NO. 2019-001486

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Motion to Strike in the above referenced case has been served upon Anthony Mabry, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 16th day of September, 2024.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: [Warren, Kaylynn](#)
To: amabry@scag.gov
Cc: [Dudek, Robert](#); [Caudy, Lara](#); DDALESSIO@SCAG.GOV
Subject: 2019-001486 The State v. Kierin Marcellus Dennis
Date: Monday, September 16, 2024 8:39:00 AM
Attachments: [2019-001486 The State v. Kierin Marcellus Dennis Motion to Strike.pdf](#)

Good Morning,

Attached for service in the above-referenced case is the Motion to Strike which will be filed today, September 16, 2024, with the Court of Appeals via email filing.

Respectfully,

Kaylynn

Kaylynn Warren

Administrative Assistant

South Carolina Commission on Indigent Defense

Division of Appellate Defense

(803) 734-1330

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

RESPONSE IN OPPOSITION TO MOTION TO STRIKE

Respondent hereby makes a Response to Appellant's Motion to Strike Respondent's Petition for Rehearing and Rehearing *En Banc* and Appellant's Motion to Strike Respondent's Memorandum Supporting the Petition for Rehearing and Rehearing *En Banc*.

On Friday, September 13, 2024, pursuant to Rule 221, 240, & 267, SCACR, Respondent previously filed its Petition for Rehearing and Rehearing *En Banc* along with its' Memorandum in Support of the Petition for Rehearing and Rehearing *En Banc* as required by Rule 240 (c)(2), SCACR in the above case. Petitioner subsequently filed a Motion to Strike both the Petition and the Supporting Memorandum of Law.

I.

Petitioner moves to strike Respondent's Petition for Rehearing and Rehearing *En Banc* because it is 18 pages in length. Respondent would note that the fact that the Petition exceeded 15 pages was inadvertent. Respondent was relying on the most current *South Carolina Rules of Court, Volume I-State, 2024* in filing the Petition for Rehearing and Rehearing *En Banc* which contains no page limit for the length of a Petition for Rehearing. Rule 221, SCACR, was amended April 30, 2024, by Order published in the Advance Sheets which now limits a Petition for Rehearing to 15 pages. This Order is not contained in the latest volume of the *South Carolina Rules of Court, Volume I-State, 2024*, on which Respondent was relying. Because Respondent's exceeding the page limit was inadvertent, Respondent is conditionally filing its Amended Petition for Rehearing and Rehearing *En Banc*, which is in compliance with the Amended Rule 221, SCACR, and is 15 pages in length with this Response to the Motion to Strike. Respondent moves and asks this Court to accept the Amended Petition for Rehearing and Rehearing *En Banc* for filing and substitute it for the original Petition. Thus, the motion to strike Petition may be denied as moot.

II.

As to Appellant's Motion to Strike Respondent's Memorandum in Support of the Petition for Rehearing and Rehearing *En Banc*, Respondent opposes the Motion to Strike. Rule 240 (a), SCACR, states that Rule 240, SCACR, is applicable to all motions and petitions filed in the appellate courts of this state **including petitions for rehearing**. *Id.* Rule 240 (c), SCACR, also states as follows:

Each motion or petition shall include the following:

- (1) A certificate or affidavit of service reflecting the date of service upon

all parties. The original certificate or affidavit of service must be filed with the original motion or petition.

- (2) A memorandum with citation of authorities in support of the motion.
- (3) Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.

Rule 240(c), (1), (2) & (3). SCACR. Respondent included its Memorandum with citation of authorities pursuant to this Rule when it filed its original Petition for Rehearing and Rehearing *En Banc*. Rule 221, SCACR, does not state a page limit for the memorandum pursuant to Rule 240(c)(2). Respondent relied on Rule 221's express incorporation of Rule 240, SCACR in filing the memorandum with the Petition. *See* Rule 221 (referencing Rule 240, SCACR).

Appellant is also wrong in his motion to strike that Respondent is trying to re-brief the case. Respondent's Memorandum is in support of the Petition for Rehearing pursuant to Rule 240, SCACR, which one can see by simply reading the Memorandum itself. In the Memorandum, Respondent only addresses those matters raised and addressed in the Petition for Rehearing. (See Memorandum).

Respondent is refiling the Memorandum in Support of the Petition for Rehearing and Rehearing *En Banc* with the Amended Petition for Rehearing and Rehearing *En Banc* to fully comply with Rule 221 and 240(c)(2). Appellant's motion to strike Respondent's Memorandum is without merit and must be denied.¹

¹ To the extent this Court disagrees with Respondent on this point, the Memorandum is supportive of the Petition for Rehearing and Rehearing *En Banc*, and the Memorandum's removal in no way diminishes or affects the validity of the Petition itself which stands on its' own and is completely factually and legally sufficient.

For the above stated reasons, having made a Response to Petitioner's Motion to Strike, Respondent moves and asks this Court to accept its Amended Petition for Rehearing and Rehearing *En Banc* because initially exceeding the page limit by only 3 pages was inadvertent and Respondent has now brought the Petition into compliance with the new amended Rule 221, SCACR, effective April 30, 2024. And, Respondent moves this Court to deny Appellant's motion to strike the supporting memorandum as it is in compliance with Rule 221, 240, (c)(2), and 267, SCACR

Respectfully Submitted,

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Attorney General

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Deputy Attorney General

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By: s/ J. Anthony Mabry
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

September 16, 2024.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

PROOF OF SERVICE

I, **Donna D'Alessio**, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Response in Opposition to Motion to Strike; Amended Petition for Rehearing and Rehearing En Banc and Memorandum in support has been forwarded to Appellant's counsel, Robert M. Dudek, Esq. and Lara Caudy, Esq. via email today, September 16, 2024 to RDudek@sccid.sc.gov and to lcaudy@sccid.sc.gov as well to their assistants kwarren@sccid.sc.gov and to smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of September, 2024.

s/ Donna D'Alessio
Donna D'Alessio
Legal Assistant to J. Anthony Mabry
Senior Attorney General

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-001486

THE STATE, ... RESPONDENT,

v.

KIERIN MARCELLUS DENNIS, ... APPELLANT.

AMENDED¹ PETITION FOR REHEARING AND REHEARING *EN BANC*

Respondent hereby makes an Amended Petition for Rehearing and Re-hearing *En Banc* pursuant to SCACR Rules 221, 240², & 219. A rehearing *En Banc* is necessary to secure or

¹ This Amended Petition is being filed because the State inadvertently relied on Rule 221, SCACR, in the *South Carolina Rules of Court, 2024* when it filed its original Petition which had no page limit for Petitions for Rehearing. The Rule was amended April 30, 2024, and now contains a 15-page limit for a Petition for Rehearing. (See Order, S.C. Supreme Court, January 31, 2024).

² Rule 240, SCACR, provides all motions or petitions, including petitions for rehearing, shall include; (1) an affidavit of service with the date; (2) a memorandum with citation of authorities in support of the motion; (3) Affidavits or other documents in support of their positions where the Record or Appendix is not on file or the information relied upon in the motion is not contained in the Record or Appendix. Rule 240, SCACR (a) & (c)(1)(2)&(3). The memorandum is included with this Petition as required by the Rule. Rule 240, SCACR (a)&(c)(2).

maintain uniformity of this Court's decisions in this area, and/or the proceeding involves a question of exceptional importance.³

In its Opinion in this case, State v. Kierin Marcellus Dennis, Howard Advance Sheets, Opinion No. 6082 (Ct. App. Filed August 14, 2024), this Court overlooked and misapprehended several points of law and fact as set forth below:

1. This Court completely misapprehended and overlooked its recitation of the facts and procedural history of the case that Appellant brought on the difficulty in this case by **first challenging** Dutch Fork High School (DFHS) students and **to fight at *the Cookout*** restaurant while still at the high school just outside the basketball arena.⁴ This critical fact, which drove both the decision of Judge Russo and Judge Hood to deny immunity, after 2 immunity hearings, is completely left out of this Court's Opinion and is nowhere mentioned. Dennis, *supra*.

2. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that Appellant then drove to several restaurants looking for DFHS fans or students and eventually intentionally drove his car to *Cookout* looking for DFHS students or fans for the previously mentioned fight that he instigated while still at the high school while outside the basketball arena.⁵ While this Court mentioned Judges Russo and Hood found this fact, this Court nowhere sets forth that there was actual testimony that this occurred **supporting both**

³ In State v. Kierin Marcellus Dennis, Howard Advance Sheets, Opinion No. 6082 (Ct. App. Filed August 14, 2024), a 3-judge panel of this Court found in a published decision that the Appellant was entitled to a new immunity hearing on remand, after a complete denial of immunity by the first immunity court judge pretrial, a mistrial was granted because of a hung jury of 11 to 1 to convict, and after denial of immunity by another judge after an immunity hearing, after which appellant was convicted by the re-trial jury.

⁴ (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99).

⁵ (Nov. 2014 R. 14-15; 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2099; 2139, 2168-69 2182, 2442 2598-99).

Judge Russo's and Judge's Hood finding that Appellant brought on the difficulty. This is further aggravated by point 1 above, where there was no mention in this Court's Opinion that Appellant began the conflict at the High School after the game by challenging DFHS fans or students to fight or settle this at *Cookout*.

3. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that Appellant after arriving at the *Cookout*, parked his car near the car wash, entered the *Cook Out* restaurant where numerous DFHS students and alumni were eating, left the restaurant, re-entered his car, drove to the *Petco* parking lot and intentionally pointed his car directly toward a group of DFHS students and then drove his car from the area of the *Petco* aggressively into a group of DFHS students or fans near the *Cook Out* almost striking 2 of them which further instigated and aggravated the conflict with the DFHS students started at the high school that led to the fatal stabbing of the victim. And, Appellant then called 2 DFHS students over to his car and further instigated the conflict by taunting the group of DFHS students that they did not want what Appellant had in his car.⁶ These fact were also critical in both Judge Russo's and Judge Hood's determinations that Appellant was not without fault in bringing on the difficulty, did not act reasonably, had other means of avoiding the danger than to act as he did, was not in a place where he had a right to be, and had not proved he was entitled to immunity under the Act by a preponderance of the evidence. Yet, even though these facts drove the lower court's determinations of immunity, these facts are not mentioned anywhere in this Court's Opinion.

⁶ (Nov. 2014 R. 14, 16-18, 37, 45-46, 50-51, 62 80-85; 119, 126-27; 135, 151, 154, 250-51, 257-258, 262-63, 213, 285 316-319, 323-324, 327-28; 372; 375-77; 412-413, 428, 436-438, 448, 451-53, 463, 506, 516, 543-548, 569, ; Aug 2017 R. 270; 1729-31; 1893-94; 1907, 1931, 1925-33; 1953-54, 2040; Aug. 2019 R. 2218-28; 2230-34; 2100; 2486-88).

4. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that the evidence presented at the 2nd immunity hearing before Judge Hood was not “newly discovered evidence” but evidence that was available through the discovery provided to Appellant **before the 1st immunity hearing before Judge Russo** and could have been presented at the 1st immunity hearing that defense counsel chose not to present. *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999). The *so-called* new evidence was evidence that could have been discovered by simple investigation by defense counsel [of which Appellant had 3] using the discovery provided by the State and interviewing witnesses.

A. For example, Elizabeth Bettini, specifically discussed in the Court’s Opinion, **was called as a witness at the 1st trial by the defense.** (R. 1621-1649). Bettini was available to be called as a witness at the 1st immunity hearing. Bettini gave multiple statements to police shortly after the crime. These were **turned over to the defense before the 1st immunity hearing.** Her police body cam statements referenced by this Court in its Opinion were provided to defense counsel before the 1st immunity hearing as well. Yet, Appellant chose not to call Bettini at the 1st immunity hearing. Appellant either made a strategic decision not to call Bettini at the 1st immunity hearing or Appellant failed to interview Bettini before the 1st hearing. Regardless, the State did not prevent Appellant from interviewing Bettini and as noted in this Court’s Opinion, police only told Bettini shortly before trial not to talk *to the media*. (R. 1783, ll. 21-25). They did not tell Bettini at any time not to talk to defense counsel. (R. 1783, ll. 21-25). Bettini’s testimony was not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

B. The same is true of Zachary Lynch, the employee of *Cookout* discussed in this Court’s Opinion. He was also **available as a witness at the 1st immunity hearing before Judge Russo.** In fact, Lynch was called as a witness at trial before Judge Griffith by Appellant. (Tr. 1448-1475).

Police took a statement from Lynch shortly after the crime, and it was turned over to Appellant **before the 1st immunity hearing before Judge Russo**. Lynch can also be heard on Officer Caitlin Voravudhi's body cam footage the night of the crime which was also provided to defense counsel **prior to the 1st immunity hearing**. The State did not hide Lynch's purported testimony from Appellant. Despite having all this information available about Lynch prior to the 1st immunity hearing, Appellant chose not to call Lynch as a witness at the 1st immunity hearing. Appellant either strategically chose not to call Lynch at the 1st hearing or Appellant failed to interview Lynch before the 1st immunity hearing. Either way, this is not newly or after-discovered evidence as recognized by the law. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

C. Further, Bettini's 911 call mentioned in the Court's Opinion was never recorded, as the Court mentioned briefly. Importantly, the 911 call was not hidden from Appellant by the State or any government agency, it was simply never recorded by the 911 agency involved. The 911 tape was not played at the 2nd immunity hearing either, because it did not exist. (R. 1702-1866). It was not suppressed by the State. Bettini's testimony about her 911 call recited by the Court in its Opinion was available to Appellant before and at the 1st immunity hearing as **her previous statements were provided to Appellant in discovery before the 1st immunity hearing**. Appellant either made a strategic decision not to call her as a witness at the 1st immunity hearing or Appellant failed to interview Bettini before the 1st hearing. Either way, her testimony was not newly discovered or after discovered evidence. *Spann*.

D. Officer Caitlin Varavudhi, also mentioned in this Court's Opinion, was also available before and at the 1st immunity hearing. Appellant simply failed to call her as a witness even though he had been provided with the police and investigative file, her name is listed on the police report, and her body cam footage of Bettini and Lynch was turned over to Appellant before the 1st

immunity hearing. The State did not hide her existence or the substance of her testimony from Appellant. Appellant simply chose not to call her at the 1st immunity hearing. Both the State and Appellant chose to call her at the 1st trial (R. 630-31; 1439-44). Appellant either made a strategic decision not to call Varavudhi at the 1st immunity hearing or Appellant failed to interview her before the 1st hearing. Either way, her testimony was not newly discovered or after discovered evidence. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

E. Further, Dr. Janice Ross, mentioned in the Court's Opinion, was available before and at the 1st immunity hearing as well. She was the pathologist who performed the autopsy on the victim. She was called as a witness in the 1st trial itself. (R. 1270-81). The State did not hide her testimony or findings from Appellant. Appellant simply chose not to call her as a witness at the 1st immunity hearing. Appellant made a strategic decision not to call Dr. Ross at the 1st immunity hearing or Appellant failed to interview Dr. Ross before the 1st immunity hearing. Either way, Dr. Ross's testimony is not newly or after-discovered evidence as defined by the law. *Spann*.

F. Additionally, this Court mentions in its Opinion that one of Appellant's arguments for a new [2nd] immunity hearing was information Ervin Meggett told police [actually the Solicitor] in August of 2016.⁷ The Court mentions nowhere in the Opinion what Meggett actually testified to at the 2nd immunity hearing. Meggett could not remember stating what was contained in a Solicitor's Officer's summary of speaking with him in August of 2016, that *allegedly* the victim was in the wrong when he approached Appellant's vehicle when Appellant was leaving the *Cook Out*. (R. 2020-2032). Regardless, it would not change the outcome at trial. Meggett testified at the 2nd immunity hearing that the victim **did not lean or reach into Appellant's car and the victim**

⁷ Meggett was captured in a surveillance video from the time of the actual crime. He was with the victim when the victim was stabbed by Appellant. (R. 2023-2025).

was standing straight up or erect and outside Appellant's vehicle when Appellant reached outside of his vehicle and stabbed the victim and then drove off. (R. 2020-2032). At the 2nd immunity hearing, Meggett actually contradicted the 2 other witnesses mentioned by this Court in its Opinion, Bettini and Lynch. (R. 2020). The testimony from Meggett does not meet the definition of newly or after-discovered evidence either, because it would not have changed the result at trial. *Spann*. It would have further confirmed the State's case and contradicted Appellant's defense at trial. Appellant did not call Meggett at the 1st trial or at the 2nd trial.

In summary, the Court's Opinion is factually incorrect and misleading because it implies Appellant did not receive a fair 1st immunity hearing before Judge Russo because evidence was either hidden, not disclosed, or newly discovered before the 2nd immunity hearing before Judge Hood. This is incorrect as set forth in Respondent's brief. (FBOR). The information Appellant presented at the 2nd immunity hearing from Bettini and Lynch, Appellant could have discovered simply by interviewing Bettini or Lynch before the 1st hearing or calling Bettini or Lynch at the 1st hearing, or interviewing Officer Voravudhi or calling Officer Voravudhi at the 1st hearing. Appellant could have called Dr. Ross at the 1st immunity hearing as well. Appellant chose not to. These were decisions that Appellant and his defense counsel made before the 1st hearing. They were not the fault of the State, the police, some agency, or circumstance.

Omission of critical facts also leads to a misleading impression. Chauncey Meggett testified he did not remember telling the Solicitor's Office what was contained in a Solicitor's summary of an interview with him, but he did clearly remember the victim was outside Appellant's car and standing straight up when Appellant stabbed the victim by reaching out his car window and stabbing the victim. Appellant was not denied a fair 1st immunity hearing, he simply chose to call different witnesses or not present certain evidence. The Court's Opinion fails to acknowledge

or point this out. The Opinion implies Appellant was somehow deprived of this information and fails to acknowledge if this was not presented at the 1st immunity hearing it was Appellant's fault.

5. This Court also failed to apply the proper standard of review to Judge Russo's factfinding and legal conclusions. Judge Russo, after hearing evidence and argument, found Appellant failed to carry his burden. Further, this Court failed to apply the proper standard of review to Judge Hood's determination either. Regardless, neither this Court nor Judge Hood found Appellant had met the elements of newly or after-discovered evidence entitling him to a new immunity hearing. *Spann*. And, as discussed previously above, Appellant did not make that showing. *Id.*

6. This Court misapprehended or overlooked the State's argument as to appealability. The Court first stated that it rejected the State's argument that "...Dennis was precluded from receiving a new immunity hearing because he failed to appeal the denial of immunity after the first immunity hearing." (Opinion, p. 6). The Court addressed an argument the State did not make. The State submitted that the remedy was for Dennis **to appeal the 1st immunity hearing Order after judgment** (conviction by the second jury that found him guilty), precisely what State v. Isaac, 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013), provides. The State's argument is Appellant was only entitled to 1 immunity hearing, the hearing he had before Judge Russo, who denied him immunity under the Act by Order. He was not entitled to the 2nd immunity hearing before Judge Hood, which was gratuitous. The immunity hearing determination this Court should have reviewed on appeal from Appellant's conviction of murder, was the 1st immunity hearing denial of immunity by Judge Russo in his Order (R. 2905-2914), which was all Appellant was entitled to.

7. This Court also misapprehended the record finding a "new" hearing was not allowed by Judge Hood. The Court first says Judge Hood did not allow a 2nd immunity hearing when the record shows he actually did. In fact, the statement of facts and procedural history of the case in

the Court's Opinion, is a recitation of the evidence presented at the 2nd immunity hearing before Judge Hood. Judge Hood allowed Appellant to present any *so-called* new witnesses or evidence Appellant claimed he had discovered since the 1st immunity hearing even though it was not newly or after-discovered evidence as defined by the law. Judge Hood also considered any portions of the previous immunity hearing transcript that either side requested he review. Later in its Opinion, this Court then discusses Judge Hood held a 2nd immunity hearing and what occurred at that hearing. And, the Court discusses Judge Hood's Order finding that after the 2nd immunity hearing, Judge Hood denied immunity under the Act. This Court's Opinion contradicts itself and Appellant in fact had a 2nd immunity hearing before Judge Hood that was denied by Order (R. 2915-2921).

8. The Court misapprehends or overlooks the fact that this Court has now given Appellant a 3rd immunity hearing after only 1 conviction. Appellant was only entitled to 1 immunity hearing and Order, which he received from Judge Russo, (R. 2905-2914) which should have been reviewed on appeal. Further, as the record shows, Judge Russo appropriately denied immunity as appellant instigated the conflict, further aggravated the conflict, goaded DFHS students, sought out the conflict, was not without fault in bringing on the difficulty, did not act reasonably or as a reasonable man in the circumstances, had other means of avoiding the difficulty than employing deadly force, could have retreated and failed to prove he was entitled to immunity under the act by a preponderance of the evidence.

9. This Court misapprehended and overlooked the legal ramifications of a mistrial. A mistrial does not entitle a defendant to another, 2nd, or 3rd immunity hearing. An immunity hearing is a statutory right to seek immunity **from prosecution**. It goes neither to evidence or defense, nor is it renewed or reconsidered during the trial. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) ("we find that, by using the words 'immune from criminal prosecution,'

the legislature intended to create a true immunity, and not simply an affirmative defense.”). *See also State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 679 (2013) (“An order denying an immunity request is not an order involving the merits in that it does not finally determine a substantial cause of action or defense.”); *id.*, at 184, 747 S.E.2d at 680 (“denial of a request for immunity under the Act is analogous to the denial of a motion to dismiss a criminal case on the ground of double jeopardy”); *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (“the trial court had denied Appellant immunity, and section 16–11–440(C) should not have been charged to the jury”). *Compare State v. Blackwell*, 420 S.C. 127, 137, 801 S.E.2d 713, 718 n. 9 (2017)(Thus, like other pre-trial determinations, such as the denial of a defendant's claim of immunity under the South Carolina Protection of Persons and Property Act, we find the issue is proper for our review). *Cf. Curry*, 406 S.C. at 370, 752 S.E.2d at 266 (“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.”). The denial of immunity under the Act by Judge Russo, by Order (R. 2905-2914), after the 1st immunity hearing, was appealable after Appellant was convicted of murder as he was in this case. He was not entitled to a 2nd immunity hearing, a second bite at the apple, on the question of immunity because of a mistrial. The 2nd immunity hearing was gratuitous. The determination of immunity is not a determination of the admissibility of evidence such as drugs or a confession during the trial. *See Keels v. Powell*, 213 S.C. 570, 572–73, 50 S.E.2d 704, 705 (1948)(“The effect of the mistrial was to leave the parties in status quo ante, with the cause still *pending for trial* in the circuit court. The overruling of the motion for a directed verdict and the rulings made with reference to the admissibility and competency of the testimony resulted in no binding adjudication of the rights of the parties. Therefore the appeal is prematurely brought, and jurisdiction thereof cannot be retained.”). The Legislature did not intend for the defendant to

be granted a 2nd immunity hearing otherwise if the defendant received multiple mistrials, for whatever reasons, he would be entitled to two, three, four, five [innumerable] immunity hearings which would make no sense, would not serve judicial economy, and would be redundant. It could also result in the defendant being granted immunity after multiple mistrials, when multiple previous trial judges had denied immunity considering the same or similar evidence. The denial of immunity is a determination separate from the trial of the case. In fact, it is a determination whether the defendant has to go through a trial or not. As a result, this Court misapprehended the law in ruling Appellant was entitled to a 2nd immunity hearing, and now actually a 3rd hearing. Appellant was only entitled to 1 immunity hearing, the 1 he had before Judge Russo and was appropriately denied immunity.⁸

10. This Court misapprehended and overlooked that it essentially ruled the 1st immunity hearing was a nullity without any finding of error, much less reversible error. Judge Russo held a complete immunity hearing on November 17-19, 2014. The record shows that testimony was received from multiple witnesses [14 in all]. Judge Russo denied immunity in an Order filed on February 10, 2015. (R. 2905-2914). A jury trial was held in October 2016. The jury could not return a verdict (reporting that they were 11 to 1 in favor of conviction). The November 2014 immunity hearing transcript, the 1st immunity hearing, and the February 2015 Order denying immunity from that hearing, are not only available, but they are also in the record before this Court. (See ROA 1-586 and 2905-2914). This Court erred in determining that Appellant was entitled to “a new, full immunity hearing” simply because the first trial ended in a hung jury.

⁸ In order to be entitled to a new immunity hearing after a mistrial or reversal an appellant would have to show a previous *Brady* violation relevant to immunity before the last immunity hearing or newly or after discovered evidence as defined by the law. See Rule 29, SCRCrim.P. (motion for a new trial based on after-discovered evidence; S.C. Code Ann. Section 17-25-45(c)(2nd PCR action based on after-discovered evidence); *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

11. This Court also misapprehended or overlooked the fact that in both Georgia cases which this Court cited in its Opinion for the proposition that Appellant was entitled to a new immunity hearing after a mistrial, those cases are not controlling, instructive, or even persuasive, because in neither of those cases did the appellant receive an immunity hearing before trial and an order denying immunity as Appellant did in this case.⁹ See *State v. Hamilton*, 839 S.E.2d 560 (Ga. 2020); *State v. Remy*, 840 S.E.2d 385 Ga. 2020). Here, Appellant received an immunity hearing before Judge Russo, an Order denying immunity from Judge Russo, a 2nd immunity hearing before Judge Hood, and another order denying immunity from Judge Hood. Further, this Court cites *Hamilton* for one proposition but refuses to follow *Hamilton* for another. (See Opinion). The cases cited from Georgia are simply not authoritative in this setting. Appellant is not entitled to another, third, hearing and another, third, determination of immunity.

12. This Court also misapprehended the lower court's ruling on Appellant's immunity claim. The Circuit Court found Appellant's claim of immunity failed because Appellant's claim of immunity was not credible; therefore, Appellant failed to prove he was entitled to immunity under the Act by a preponderance of the evidence. The Circuit Court specifically addressed the elements of self-defense and the elements under the Act and found Appellant was not entitled to immunity. In stating the case presented a "quintessential jury question," the Circuit Court was not abdicating its' responsibility, but was stating that after it made its credibility determination, found specifically that the elements of self-defense were not met, and found that Appellant failed to meet his burden of proof he was entitled to immunity under the Act by a preponderance of the evidence, given all of the witnesses and testimony, the case was one for the jury to decide. See State v.

⁹ In neither Georgia case had the appellant ever received an immunity hearing much less an order denying immunity. Appellant here received 2 of each in this case.

Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019). And, the fact that the Circuit Court made this statement did not affect its' immunity analysis which was conducted as required by South Carolina law. Moreover, this statement was made regarding the 2nd hearing. As noted above, Appellant already had a full hearing before Judge Russo. A statement by Judge Hood could not undermine the finding of Judge Russo.

13. This Court misapprehended and overlooked that it cannot make evidentiary findings on appeal as if it is a Circuit Court and instruct a Circuit Court on whether it should find certain facts favorable to the Appellant on remand or grant Appellant certain inferences. (See "Duty to Retreat/Avoid the Danger" section of the Opinion, pp. 11-15). First, this portion of the Opinion is entirely *dicta* as it was unnecessary to the decision made in this case, and it should be struck for that reason. Second, and even more troubling, these evidentiary and legal findings of this Court and directions to the Circuit Court to follow them would require the Circuit Court, which is the sole determiner of the facts and elements at an immunity hearing, to follow the factual findings and legal conclusions of this Court which would abdicate the Circuit Court's statutory role in immunity proceedings to this Court. This would also violate this Court's role of appellate review.

Further, as demonstrated, this Court's findings and legal conclusions in this section of the Opinion are incorrect and are contradicted by other evidence presented at the first 2 immunity hearings.¹⁰ The fact that Appellant was in his car does not mean he was in a place where he had

¹⁰ Appellant began and instigated the difficulty between himself and DFHS students beginning at the high school where he challenged them to a fight at the *Cook-Out*. Appellant drove to the *Cook-Out* and further instigated the conflict by going inside the *Cook Out* in the presence of DFHS students after challenging them to a fight at the high school. He then walked to his car, parked near the car wash, and again sought out DFHS students or fans by driving to *Petco*, maneuvering his car to where it pointed at DHFS students, and drove his car directly into several DFHS students almost striking 2 near the *Cook Out*. This action escalated the conflict Appellant started even further. There was also evidence presented the victim did not lean into or touch Appellant's car. And Appellant signaled the DFHS students to come to his car and lured the victim to his car where

a right to be. This Court erred in giving the Circuit Court instructions on what it should find below and what inferences it must apply in Appellant's favor, as the credible record does not support that Appellant was without fault in bringing on the difficulty, that he acted reasonably after instigating the conflict, that he had no other means of avoiding the difficulty, or that he even was in a place he had a right to be. This portion of this Court's Opinion is erroneous and should be struck.

14. This Court misapprehended or overlooked it did not grant Appellant relief from his conviction but in the same instance refused to rule on his evidentiary issues since they might change *upon re-trial*. (Opinion, p. 15). Appellant was not granted a new trial, and his conviction was not vacated or reversed. Only a 3rd immunity hearing was granted. This Court must grant rehearing and rule on Appellant's 2 evidentiary issues raised on appeal **from his conviction**.

15. This Court also misapprehended and overlooked that at the conclusion of its Opinion, this Court erroneously stated, "We reverse Dennis's conviction...", when his conviction was not reversed, and only a 3rd immunity hearing was granted. (Opinion, p. 15, last sentence). The Petition for Rehearing and Rehearing En Banc must be granted, and the Opinion corrected.

16. *En Banc* review should be granted because consideration of the full Court is necessary to secure or maintain uniformity of this Court's decisions in this area, and/or because this proceeding involves a question of exceptional importance. Rule 219, SCACR. The 3-judge panel of this Court issued a published Opinion in this case, which has precedential value if it remains unaltered. The 3-judge panel held for the first time that a criminal defendant upon mistrial or new trial is entitled to an entirely new immunity hearing regardless of the reason for reversal, mistrial,

Appellant was armed with a deadly weapon, a knife. Appellant provoked the stabbing. The stabbing also occurred where cars were visible passing Appellant's parked car indicating the conflict that he started, he could have easily driven away from, i.e. he had other means of avoiding the difficulty. Appellant had already been inside the restaurant, and returned to his car before he drove into the group of DFHS students or fans. Appellant could have left long before the incident.

or grant of new trial. The holding has severe implications for the South Carolina criminal justice system, the administration of justice, and an already overly crowded criminal docket and does not serve judicial economy.¹¹ Our lower courts will be required to conduct new immunity hearings which may last several days up to a week or longer and render the first immunity hearing, which was entirely proper, a nullity and a complete waste of time and judicial resources.

CONCLUSION

For the above stated reasons, and the reasons set forth in the Memorandum in Support of the Petition for Rehearing and Rehearing *En Banc*, this Court should grant the Petition for Rehearing or Rehearing *En Banc*, vacate the Court's original Opinion, and affirm Judge Russo's denial of immunity to Appellant, and proceed with review of Appellant's evidentiary issues previously fully briefed and argued by both parties.

Respectfully submitted,

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¹¹ One can easily foresee lower courts being required to conduct a new immunity hearing when there has been no showing of newly or after-discovered evidence, **such as in this case**, or when the same evidence is to be presented again which was already presented once before and denied. In fact, one can foresee a trial judge being required to conduct a new immunity hearing when he heard the exact same evidence before and denied the same and the grant of a mistrial or reversal had absolutely nothing to do with the pre-trial immunity hearing or the denial of immunity.

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September 16, 2024

By: s/ J. Anthony Mabry
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

PROOF OF SERVICE

I, **Donna D'Alessio**, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Response in Opposition to Motion to Strike; Amended Petition for Rehearing and Rehearing En Banc and Memorandum in support has been forwarded to Appellant's counsel, Robert M. Dudek, Esq. and Lara Caudy, Esq. via email today, September 16, 2024 to RDudek@sccid.sc.gov and to lcaudy@sccid.sc.gov as well to their assistants kwarren@sccid.sc.gov and to smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of September, 2024.

s/ Donna D'Alessio
Donna D'Alessio
Legal Assistant to J. Anthony Mabry
Senior Attorney General

Sep 16 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-001486

THE STATE, ...RESPONDENT,

v.

KIERIN MARCELLUS DENNIS, ...APPELLANT.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING
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STATEMENT OF FACTS

Dutch Fork High School (DFHS) played its long-time rival Lexington High School (LHS) in basketball on the evening of February 17, 2014. (Nov. 2014 R. 8, 227, 246; Aug. 2019 R. 2121-22.). DFHS won the rowdy game. (Nov. 2014 R. 246, 443; Aug. 2019 R. 2125-27). Kierin Dennis (“Appellant”) left the game with his 4 friends: Keith Adams, Ketura “Lucky” Cook, Will Zander, and Morgan Zander, Will’s sister, all of whom were current or former students of LHS.¹ (Nov. 2014 R. 8-9, 161; Aug. 2019 R. 2127-28). Students from the 2 high schools had post-game altercations before, so extra security was on hand to separate students after the game. (Nov. 2014 R. 9-13, 160-161, 482-483). LHS students were directed to exit the gym out the front door, while DFHS students were directed out the back. (Nov. 2014 R. 9, 160; Aug. 2019 R. 2125, 2134-35). Students from DFHS were celebrating by dancing in a loosely-formed circle in the parking lot when Appellant approached them and interrupted their celebrations. (Nov. 2014 R. 161, 178, 252; Aug. 2019 R. 2181, 2598-99). Things got tense, and Appellant challenged them to meet up at the local *Cook-Out* restaurant later to settle things as police ordered everyone to leave the parking lot. (Nov. 2014 R. 247, 359-362; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69).

Appellant left the high school driving his gold Ford Explorer Sport followed by Keith in his White Nissan Armada, and Will, Morgan, and Ketura in Will’s Silver Infinity Crossover. (Nov. 2014 R. 14-15; Aug. 2019 R. 2099). They initially drove to a gas station, then to *Sonic*, then to *McDonald’s*, but finally ended up at the *Cook-Out*, even though it was noticeably full. (Nov. 2014 R. 14-15; Aug. 2019 R. 2442). Keith parked by a *Petco* while Will and Appellant parked their cars further down by a car wash. (Nov. 2014 R. 14, 119; Aug. 2017 R. 1931-33; Aug. 2019 R.

¹ Keith Adams, Will Zander, and Ketura Cook were LHS graduates. (Nov. 2014 R. 7, 74, 245). Morgan Zander was a current LHS student. (Nov. 2014 R. 159).

2218-28). One of Appellant's long-time friends, Austin Sanders, was leaving the *Cook-Out* when Appellant and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." (Nov. 2014 R. 250). Appellant and his friends chose to go into *Cook-Out* anyway. (Nov. 2014 R. 250). Inside were between 30 to 40 current and former DFHS students, including Devon Chatman, Alexis Brunson, Michael James, Lamar Butler, Kenneth Williams, and the 18-year-old victim, Da'Von Capers.² (Nov. 2014 R. 213, 592; Aug. 2019 R. 2100).

Once Appellant was inside the restaurant, Michael James, a current DFHS student, stood up and said, "Is that all y'all brought?" (Nov. 2014 R. 37, 428). Appellant replied, "We just came here to eat." (Nov. 2014 R. 251). Surveillance footage shows the students from the 2 high schools eating quietly inside *Cook-Out* for about 17 minutes before Appellant decided to go outside. (Nov. 2014 R. 316; Aug. 2017 R. 1953-54; Aug. 2019 R. 2486-88; State's Ex. 12; Defense Ex. 3). Appellant had previously texted his cousin, Tobias Davis, that DFHS students were "trying to fight [them] at Cook-Out" and stepped outside to take a phone call from him. (Nov. 2014 R. 16, 317-319). Appellant's 4 other friends followed him outside along with Michael James, who was seen on the surveillance footage dressed in a white, long-sleeved shirt. Michael James was walking to his car when Morgan Zander, Will's sister, said something to him, so he turned around and threw his hands up, and said, "Are y'all still salty?" (Nov. 2014 R. 16-18, 80; Aug. 2017 Tr. 270).

Surveillance video shows the DFHS students then immediately came out of the restaurant. (Nov. 2014 R. 81-85, 323-324; Aug. 2017 R. 1925-33). Appellant and his friends walked to their cars, but no one assaulted or attempted to assault them as they were on their way. (Nov. 2014 R.

² Devon Chatman, Alexis Brunson, and Kenneth Williams were DFHS graduates; Lamar Butler, Michael James, and Da'Von Capers were current DFHS students. (Nov. 2014 R. 442, 481, 502-503, 566; Aug. 2019 R. 2100).

448, 463). Once they were in their 3 cars, Appellant and his friends pulled up next to each other and discussed for about 5 minutes how they would exit the parking lot. (Nov. 2014 R. 126-127, 257-258). Keith left the parking lot first and turned right toward Main Street. (Nov. 2014 R. 45-46). Will Zander drove next to the DFHS crowd and stopped his car, rolled down the window, and threw money out of the car, saying, “Hey, this what y’all are worth.” (Nov. 2014 R. 544, 569). Appellant, in the *Petco* parking lot, maneuvered his vehicle to face the DFHS students while Will was doing this. (Nov. 2014 R. 51, 327-328). Appellant then pointed his car at the crowd of DFHS students and rapidly accelerated his vehicle into the wrong lane of traffic and almost hit 2 Dutch Fork students, Tyreke Farrow and Devon Chatman, before finally stopping his car by the opposite curb. (Nov. 2014 R. 451-452, 543-547). Xavier Holliday had to push Tyreke out of the way to prevent Appellant’s car from hitting him. (Nov. 2014 R. 547).

DFHS students then gathered around Appellant’s vehicle and heated words were exchanged because Appellant had almost hit two DFHS students. (Nov. 2014 R. 412-413, 506, 547; Aug. 2017 R. 2040). Will parked his car diagonally in front of the Appellant’s, exited his vehicle, and got a metal pipe out of his trunk. (Nov. 2014 R. 50, 62, 135, 151). After approximately a minute of this heated exchange, Appellant motioned in a “come here” fashion to 2 of the DFHS students, rolled his window down further, and told them, “You don’t want what I got. You don’t want what I got.”³ (Nov. 2014 R. 436-438, 516, 548). Appellant was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and abruptly stabbed Da’Von Capers, who was outside his driver’s side window, in the chest. (Nov. 2014 R. 262-263, 285, 375-377, 453; Aug.

³ Appellant’s window was already rolled down partially before he accelerated toward the Dutch Fork crowd. (Aug. 2019 R. 2235, 2252, 2322, 2346, 2552, 2757-58).

2019 R. 2230-34). Some witnesses testified that Da’Von Capers did not reach inside Appellant’s vehicle and others testified that he did, some saying it was only after Appellant stabbed Capers in the chest. (Aug. 2017 R. 1729-31, 1893-94). Appellant then sped out of the parking lot and the victim was pronounced dead at Lexington Medical Center shortly after. (Nov. 2014 R. 154, 372; Aug. 2017 R. 1907; Aug. 2019 R. 2230-31).

Appellant went home and changed his clothes then decided to bury the knife. (Nov. 2014 R. 269-271, 343-344; Aug. 2017 R. 1908-12). He did not call or talk to law enforcement until they picked him up from his house later and never told them he was afraid for his life or that he had to act in self-defense. (Nov. 2014 R. 270-271; State’s Exhibits 2 and 35). Appellant admitted he stabbed the victim but, at trial, claimed he did it in self-defense because the DFHS students were reaching into his car to attack him. (Nov. 2014 R. 277-355; Aug. 2019 R. 2322, 2337-39, 2663-64; State’s Exhibits 2 and 35). However, no DNA or fingerprints from DFHS students were found on or in Appellant’s vehicle. (Nov. 2014 R. 293-294, 403; Aug. 2019 R. 2753-62). Appellant did tell law enforcement that his car was blocked, and he could not leave the parking lot, but surveillance footage shows 1 or 2 cars driving past Appellant’s vehicle while it was parked by the curb. (Nov. 2014 R. 204-208, 276-277; Aug. 2019 R. 2228-29). Law enforcement arrested the Appellant for Murder and Possession of a Weapon during the Commission of a Violent Crime. (Indictments).

RELEVANT PROCEDURAL HISTORY

Appellant was indicted for Murder and Possession of a Weapon during the Commission of a Violent Crime in 2014 by the Lexington County Grand Jury. The case was prosecuted by the current Solicitor Samuel “Rick” Hubbard, III, Deputy Solicitor Shawn Graham, and Assistant Solicitor Rhonda Patterson. Appellant was represented by Todd Rutherford, Simone Martin, and

Nicole Simpson, Esquires. (Nov. 2014 R. 1; Oct. 2016 R. 619; Aug. 2017 R. 1657; Sept. 2017 R. 2041; Aug. 2019 R. 2095).

The 1st Immunity Hearing

Prior to trial, Appellant made a motion for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450 (2006), and a hearing took place pursuant to the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), from **November 17 to 19, 2014** before **Circuit Court Judge Thomas Russo** (“the 1st immunity hearing”). (Nov. 2014 R. 1-618). Fourteen (14) witnesses were called at the hearing. On February 4, 2015, Judge Russo denied Appellant immunity by Order. (R. 2905-14). The case proceeded to trial by jury on October 3, 2016, which concluded in a mistrial due to an 11-1 hung jury on October 11, 2016. It was reported by the jury the alignment was 11-1 to convict. (Oct. 2016 R. 1001, 1656).

The 2nd Immunity Hearing

Appellant moved for a new immunity hearing in June of 2017, alleging newly discovered evidence, and a second immunity hearing (“the 2nd immunity hearing”) was held before Circuit Court Judge Robert E. Hood on August 22 and 24, 2017 and September 18, 2017. (June 2017 Motion, R. 1665; Aug. 2017 R. 1657; Sept. 2017 R. 2041). Seven (7) more witnesses were called at this hearing. Appellant was allowed to present his *so-called* newly discovered evidence. On October 11, 2017, Judge Hood issued a 2nd Order denying immunity. (Oct. 2017 Order; Aug. 2019 R. 2901-2902). The case proceeded to trial by jury from August 19 to 27, 2019, after which Appellant was found guilty of murder. He was sentenced by the trial judge, the Honorable Eugene C. Griffith, to 30 years’ imprisonment. (Aug. 2019 R. 2904)

The Direct Appeal/the Award of a 3rd Immunity Hearing

Appellant appealed his conviction and sentence and subsequently submitted a brief in support of his appeal. Respondent filed a responsive Brief. After oral argument, a three (3) judge panel of this Court issued an opinion granting Appellant a new immunity hearing (“a 3rd immunity hearing”) in the Circuit Court below. State v. Kieren Marcellus Dennis, Opinion No. 6082 (Ct. App. Filed August 14, 2024). The Court did not reverse Appellant’s conviction for murder, it only granted him a 3rd immunity hearing before another Circuit Judge. Id. It is unknown who that Circuit Judge will be. The Court did not reach Appellant’s 2 trial issues raised in his brief. In its Opinion, the Court inappropriately held that “after a mis-trial,” a criminal defendant is entitled to a new immunity hearing before his re-trial. The Opinion contains factual errors and wrong legal conclusions as well. In its Opinion, the three (3) judge panel of this Court misapprehend certain facts and law and overlooked certain facts and law. Appellant was not entitled to the 2nd immunity hearing he obtained before Judge Hood, because he had already had a full 1st immunity hearing before Judge Russo, and because the evidence presented at the 2nd immunity hearing was not “newly discovered evidence” but available through discovery before the 1st immunity hearing. The three (3) judge panel of this Court’s holding and the language used in the Opinion also has severe implications for the administration of criminal justice in this State and for judicial economy and will burden an already crowded and severely backlogged criminal justice system in this State and therefore a rehearing *En Banc* is appropriate.

WHY THE PETITION SHOULD BE GRANTED

I.

In its Opinion in this case, the three (3) judge panel of this Court misapprehended and overlooked the record in this case which led directly to an incorrect Opinion in this case. *See Dennis, supra*. In its recitation of the facts and procedural history of the case and in its discussion of the findings of both Judge Russo and Judge Hood below, the three (3) judge panel of this Court failed to recognize or mention that Appellant Keiren Marcellus Dennis brought on the difficulty in this case by first challenging DFHS students and fans to fight at the *Cook Out* restaurant while **still at the high school just outside the basketball arena in the parking lot**. (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99). This critical fact drove both the decision of Judge Russo and Judge Hood to deny immunity after the first two (2) immunity hearings. While this Court mentioned in its Opinion that the lower courts found Appellant sought out DFHS students and fans at the *Cook Out*, this Court left out of its Opinion why Judge Russo and Judge Hood made the finding above, i.e. the critical fact that Appellant started the difficulty while still at the high school. (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99). The Opinion is misleading that the lower courts had no basis to make their finding that Appellant sought out DFHS fans and students at *Cook Out*.

The 3-judge panel of this Court also misapprehended, overlooked, and left out of its Opinion that Appellant then drove from the high school to several other restaurants and then intentionally drove to the *Cook Out* looking for DFHS fans and students he had previously challenged to fight at the high school. (Nov. 2014 R. 14-15; 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2099; 2139, 2168-69 2182, 2442 2598-99). This fact also drove Judge

Russo's and Judge Hood's analysis of why Appellant was not entitled to immunity. Appellant was not without fault in bringing on the difficulty.

The 3 judge panel of this Court also misapprehended and overlooked in its Opinion that Appellant after arriving at the *Cook Out*, parked his car, entered the restaurant, spoke to DFHS fans and students, left the restaurant, reentered his car, moved his car in the *Petco* parking lot to where it was pointed toward DFHS fans and students, and then intentionally and aggressively drove his car into a group of students or fans from DFHS in the *Cook Out* parking lot, almost striking at least one (1) of them, and Appellant told two (2) DFHS students to come to his car and taunted them with what he had in his car, which further instigated and aggravated the conflict with the DFHS fans and students that Appellant started at the high school that led to the fatal stabbing of the victim. (Nov. 2014 R. 14, 16-18, 37, 45-46, 50-51, 62 80-85; 119, 126-27; 135, 151, 154, 250-51, 257-258, 262-63, 213, 285 316-319, 323-324, 327-28; 372; 375-77; 412-413, 428, 436-438, 448, 451-53, 463, 506, 516, 543-548, 569; Aug 2017 R. 270; 1729-31; 1893-94; 1907, 1931, 1925-33; 1953-54, 2040; Aug. 2019 R. 2218-28; 2230-34; 2100; 2486-88). These facts were also critical in both Judge Russo's and Judge Hood's determinations that Appellant was not without fault in bringing on the difficulty, did not act reasonably, had other means of avoiding the danger than to act as he did, was not in a place where he had a right to be, and had not proved he was entitled to immunity under the Act by a preponderance of the evidence. These facts were also critical in the jury's determination Appellant was guilty of murder and did not act in self-defense.

II.

The 3-judge panel of this Court misapprehended and overlooked in its Opinion that the evidence presented at the second (2nd) immunity hearing before Judge Hood was not newly or after-discovered evidence but evidence that was available to defense counsel through discovery

provided before the 1st immunity hearing before Judge Russo and could have been discovered by reviewing the discovery or interviewing the witnesses contained in the discovery.

What Occurred Below

A. November 17-19, 2014 Immunity Hearing and February 4, 2015 Order from the Honorable Thomas A. Russo

Upon the Appellant's motion for immunity under the Protection of Persons and Property Act, a hearing was held from **November 17-19, 2014** before **Judge Russo** pursuant to the procedure established in *State v. Duncan*. Nov. (2014 R. 1-10). Judge Russo heard testimony from 14 witnesses, including Appellant, and heard closing arguments from both the defense and the prosecution. (Nov. 2014 Tr.). The State argued Appellant had brought on the difficulty by inserting himself into the DFHS circle at the high school, inviting them to the *Cook-Out* to fight, and then driving his vehicle straight at DFHS students, nearly hitting 2 of them in the parking lot of *Cook-Out*. (Nov. 2014 R. 604-614). Appellant had gone first to *Sonic*, then *McDonald's*, then *Cook-Out* to look for DFHS students, and that as he had not met his burden of proving the elements of self-defense, he had a duty to retreat before using force. (Nov. 2014 R. 614-617). The defense argued Appellant was entitled to immunity because he and his friends were outnumbered 5 to 30 or 40, they were chased out of *Cook-Out* and pursued down the hill, and that Appellant had only pulled his vehicle up to the curb, nearly hitting Dutch Fork students, in order to make sure his friend, who pulled up first and threw money out the window, was okay. (Nov. 2014 R. 589-595). They argued Appellant should be granted immunity because he was in an occupied vehicle, "in his bubble," DFHS students "stuck their hands in his windows and tried his door handle," and that he reacted out of fear by sticking his knife out of the window in order to defend himself. (Nov. 2014 R. 596-604).

Judge Russo issued an **Order** denying immunity on **February 4, 2015**. (Feb. 2015 Order R. 2905-14). In it, after establishing findings of fact, Judge Russo laid out the burden of Appellant to prove he was entitled to immunity by a preponderance of the evidence, and systematically analyzed the elements of self-defense and of S.C. Code 16-11-440(A) and (C). (Feb. 2015 Order 2905-14). He concluded Appellant was not entitled to immunity because he had not proven the elements of self-defense by a preponderance of the evidence or the requirements of Section (A) or (C). (Feb. 2015 Order 2911-14):

The defendant claims immunity under both subsections A and C of the Act. Section A has two requirements: you are entitled to reasonable fear presumption if (1) the person against whom deadly force is used is in the process of unlawfully and forcefully entering or has unlawfully or forcefully entered an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Regarding the first requirement, the Court finds that the Defendant has not met his burden of proving by the greater weight of the evidence that Da'Von Capers was in the process of unlawfully and forcefully entering an occupied vehicle or that he had unlawfully and forcefully entered an occupied vehicle.

Although one witness testified that while he was standing a few dozen feet from the Defendant's vehicle, he saw what appeared to be several students reach inside the Defendant's vehicle, several other witnesses who were actually standing right next to the Defendant's vehicle testified that no one was touching the vehicle or reaching inside, but that they were simply standing next to the vehicle talking to the Defendant, albeit in a heated manner.

Further, no fingerprints other than that of the Defendant were found on or in the vehicle. Based on the testimony of witnesses and other evidence, including an iPad video tape, the Court finds that the Defendant has not established the first requirement of Subsection (A) by a preponderance of the evidence.

Regarding the second requirement, the Court finds that the Defendant has failed to prove by the greater weight of the evidence that the Defendant, the person who used deadly force, did not know and had no reason to believe that an unlawful and forcible entry or an unlawful and forcible act was occurring or was about to occur.

The Defendant alleges that he had reason to know or believe that Da'Von Capers was in the process of unlawfully and forcefully entering his occupied vehicle. However, the Court finds that based on the totality of the circumstances in this case,

that is not credible. Again, several witnesses in the immediate area of the Defendants' vehicle testified that no one was touching or placing their hands on or inside the Defendant's vehicle, and the only fingerprints found on or in the vehicle were that of the Defendant. Therefore, the Court finds that the Defendant has not established the second requirement of Subsection (A) by a preponderance of the evidence.

In addition to failing to establish the provisions of Subsection (A) of the Act by a preponderance of the evidence, the Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence. Regarding the first element, the Defendant has not shown by a preponderance of the evidence that he was without fault in bringing on the difficulty.

The Defendant approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side. Such an act was reasonably calculated to bring about the difficulty that arose. *See Slater*, 373 S.C. at 70, 644 S.E.2d at 52.⁴ Then, rather than attempting to leave, the Defendant kept his vehicle stationary.

While the Defendant testified that he was unable to leave, the Court finds that based on the totality of the circumstances in the case, that testimony is not credible. The iPad video showing the Defendant's vehicle stationed at the curb shows one or two vehicles driving past the Defendant's vehicle, indicating that he could have left, as these vehicles were clearly able to leave. Thus, the Court finds that he has not established that he was not without fault in bringing on the difficulty.

As to the third element, even if the Defendant established the second element, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, the Defendant has not established by a preponderance of the evidence that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. As noted above, the Dutch Fork students who testified indicated that no one had even touched the Defendant's vehicle, nor was anyone attempting to remove the Defendant from his vehicle. Also, fingerprint analysis and DNA testing did not reveal that anyone other than the Defendant had their hands on or in the vehicle. Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(A) is denied.

The Defendant also claims immunity from prosecution under Subsection (C) of the Act. Even if Subsection (C) applied, the Defendant would not be entitled to immunity under that subsection because he has not established the elements of self-

⁴ *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

defense by a preponderance of the evidence as noted above. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(C) is denied.

(Feb. 2015 Order 2911-14 (emphasis added)).

B. June 2017 – Defense's Motion for a New Hearing

After Appellant's first trial ended in a hung jury in October of 2016, the defense moved for a new immunity hearing in June of 2017. They alleged that Elizabeth "Beth" Bettini, **a witness who was available and who they were aware of before the 1st immunity hearing before Judge Russo**, had witnessed the attack and had called 911 while in the *Cook-Out* drive-thru, and that as neither the State nor the defense had obtained the 911 call recording prior to the 1st immunity hearing or trial, they should be allowed to present it at a new hearing.⁵ (June 2017 R. 2922, 2935). They also alleged that the manager of the *Cook-Out*, Zach Lynch, also a witness they were aware of and who was available before the 1st immunity hearing, had seen Da'Von Capers reach inside the Appellant's vehicle from across the parking lot, and that this was "newly discovered" evidence, even though the defense was aware he was **a witness prior to and at the first immunity hearing before Judge Russo and at the 1st trial**. Lynch also testified at trial but failed to tell the judge he had seen Capers' alleged hand movement. (June 2017 R. 2922-23).

C. August 22 and 24, 2017: 2nd Immunity hearing before Judge Robert E. Hood

Judge Hood heard arguments from both the State and the defense before the 2nd immunity hearing as to why or why not the defense should be allowed to proffer the so-called "new" evidence. (Aug. 2017 R. 1657).

Keep in mind I have never worked on this case before so I need a kind of a procedural history of what occurred and when it occurred so I can wrap my own mind about it . . . I need to understand the procedural history of the case before we start.

(Aug. 2017 R. 1662). The State, referencing the written motion the defense had previously filed:

⁵ Beth Bettini's 911 call was never obtained or presented in open court at any hearing or trial because it did not exist.

Your Honor, the motion that Mr. Rutherford filed is asking for an entirely new hearing and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence.

Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.

Seven talks about the manager of the Cook-Out Restaurant on duty the night in question. His name is Zachary Lynch . . . [and he] was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

(Aug. 2017 R. 1666-67).

The State then argued the defense had no rule, statute, or case law to stand on to prove they were authorized to have a 2nd "stand your ground" hearing. (Aug. 2017 R. 1667). The State argued the defense had chosen to call the 1st hearing when they did and that it was their burden to prove by a preponderance of the evidence Appellant was entitled to immunity. That it was Appellant's choice as to who to call as witnesses and Appellant's choice of what to present as evidence at that 1st hearing before Judge Russo. (Aug. 2017 R. 1667). The State argued that Beth Bettini was listed as the *complainant* in the police report, had given a written statement to law enforcement at the time of the crime, and had given her statement on two (2) dash camera videos that were all turned over to the defense prior to the 1st immunity hearing. (Aug. 2017 R. 1667). The State argued that Zachary Lynch had also written two (2) statements and had given a recorded interview at police headquarters **that were also turned over to the defense before the 1st immunity hearing and**

that their testimony in a 2nd hearing could not, in fact, be newly discovered. (Aug. 2017 R. 1668).

The State argued alternatively that the only rule that was close enough in comparison was Rule 29(b), SCRCP, that addressed the grounds for a new trial based on newly or after-discovered evidence. (Aug. 2017 R. 1668-69). The State argued that the evidence was not newly or after-discovered and that it could have been ascertained with the exercise of reasonable diligence prior to the 1st immunity hearing before Judge Russo. (Aug. 2017 R. 1669). The State cited *State v. Harris*, 381 S.C. 539 (Ct. App. 2011)⁶ to Judge Hood, where the Court held the denial of a new trial was not an abuse of discretion as the decision was well within the sound discretion of the trial judge. (Aug. 2017 R. 1671). The defense then argued why they should get a new hearing. (Aug. 2017 R. 1677-93).

Judge Hood then stated:

I think the only way to do this and this is what I've been thinking about this now for a while, I think the only way to do this is to let Mr. Rutherford proffer all of his testimony because let's play this out. Scenario number 1 is I say no, you're not entitled to another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered.

So I'm gonna skip that step all together. I'm going to let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?

⁶ The test for a new trial is the movant must show: (1) The evidence is such as will probably change the result if a new trial is granted; (2) The evidence has been discovered since the trial; (3) The evidence could not have been discovered before the trial by the exercise of due diligence; (4) The evidence is material to the issue of guilt; and (5) The evidence is not merely cumulative or impeaching. *State v. Harris*, 381 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion"); *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

I will review whatever anybody wants me to review. Now, we're talking, one, seven, ten plus pages of testimony, right? Eight, nine, 10 days of testimony if I'm considering them all together so I'm not gonna be able to review it today, you know, or maybe even this week, but I will – What I want to do is create a record on what Mr. Rutherford believes he should have presented at the original hearing and let's create that so it exists, so that that factor exists. So I don't want to put us in a situation where we're creating some kind of precedent where everybody and their mother can come back and ask for a stand your ground hearing upon stand your ground hearing upon stand your ground hearing.

I also don't want to create a situation where it just gets appealed for us to come back and have this, you know, quote, unquote, hearing to proffer this evidence. I think the safest way to do it is to allow the evidence to be proffered and then I can consider everything and then even at that point I can make the decision. I can make multiple decisions. I can make the decision that he's entitled to immunity. I can make the decision that he's not even entitled to a hearing and there's no rule that permits it. Or I can make the decision that he was entitled to another hearing and he's not entitled to immunity.

So I'm not foregoing any of those legal arguments by allowing him to present this evidence. Does that make sense? So I'm still gonna allow the State to argue he shouldn't even be allowed to do this, there is no rule, that line of thought process, but I think the safest way to do it is to create a full and complete record of everything, let me review everything and then maybe once I've reviewed everything, we can get everybody back together and y'all can put your thoughts together and organize them the way you want to and do a hearing where there's no testimony, where it's just legal arguments once I've had a chance to process everything, okay? So that's what we're gonna do and you ready to go forward with that?

(Aug. 2017 R. 1695-1700).

Appellant then called the following witnesses at the 2nd hearing to proffer the evidence they claimed was “newly discovered”: Caitlin Voravudhi, Janice Edwards Ross, M.D., Beth Bettini, Zachary Lynch, Nikki Rogers, Alexis Brunson, Devon Chatman, Marc Miramontes, Brent Carter, and Ervin Chauncy Meggett. It was not newly discovered evidence. *State v. Spann*, *supra*.

D. September 18, 2017 – Immunity Argument before Judge Hood

As promised, Judge Hood allowed the State and the defense to put their arguments for and against a new immunity hearing on the record a few weeks later on September 18, 2017. He began the hearing with a summary of what he had allowed on August 22 and 24, 2017 and why:

[You] were essentially allowed to proffer that testimony so that a record was created so that one day in the future, depending on whatever happens with this case, we don't need to be guessing as to what the defense would have shown or what these witnesses would have said

[T]o get them on the record, to get them cross-examined they called those witnesses along with Dr. Ross, and then I allowed the State to respond to that and then I was provided the transcripts from the original immunity hearing and the original trial I told the State that they would still be allowed to make the argument that the hearing itself isn't even proper and shouldn't even happen. I wasn't gonna preclude them from doing that and so let's start.

(Sept. 2017 R. 2043-44).

The defense then argued why their evidence was newly-discovered and the State argued why Appellant was not entitled to a new hearing. (Sept. 2017 R. 2046-79). The Solicitor first gave the judge a 15-page memorandum and then argued that S.C. Code Ann. § 16-11-450 and *State v. Duncan* laid out the procedure for a stand your ground hearing, and that neither said a defendant was entitled to multiple immunity hearings. The Solicitor told Judge Hood he had conducted research and had not been able to find a single state anywhere in the United States that allowed a second (2nd) stand your ground hearing.

[A]t what point would it ever end? Every time the defendant comes up with a new piece of evidence that they claim changes something, you would have to have another hearing. Every time that you schedule a trial date, if the defendant came up with something new that hasn't been considered, you would have to have another hearing. You would never be able to have any finality. I think that's why it's not – I think that's why it's not allowed. It may be silent on that, but I think that's why it's not allowed and why we haven't seen it.

It was their motion to seek immunity. They chose that date and time. They had their hearing on the information they chose to present. They knew about Beth Bettini and Zachary Lynch. They knew about Dr. Ross. They chose not to call them for

whatever reason. It's not new evidence . . . he's asking you to set new precedent with no supporting law to back it up.

(Aug. 2017 R. 2052-55).

The Solicitor then discussed the 5 factors the Court set forth in *State v. Spann*, 334 S.C. 618, 513 S.E2d 98, that a defendant would have to prove to be granted a new trial, as it was the only legal rule anywhere close to being relevant to the argument at hand.⁷

I can't imagine a scenario for a hearing where they would be allowed to say less and to have another hearing. [*Spann* discussed] a trial where someone has been convicted. It seems like that any benefit would go to the individual who has been convicted. The purpose of the immunity statute was to allow a defendant to convince the Court that they shouldn't have to face the publicity and the rigors of a trial, and he's had that opportunity.

(Aug. 2017 R. 2056-57).

The Solicitor informed the judge that neither side had obtained a copy of the 911 call and that it was no longer available for retrieval. However, Beth Bettini's dash camera statement and her written statement **had been produced prior to the 1st hearing**. (Aug. 2017 R. 2057-59). She did not report at that point that she had called 911, had seen the stabbing, or had seen fear in the Appellant's eyes. (Id.) The Solicitor argued that went to her credibility. (Aug. 2017 R. 2096). He then analyzed the five *Spann* factors and argued why the Appellant had not met them in order to be entitled to a new immunity hearing. (Aug. 2017 R. 2057-62). He did the same thing with the alleged "newly-discovered" testimony of Zachary Lynch and argued that the testimony presented on August 22 and 24, 2017 was cumulative at best. (Aug. 2017 R. 2062-69). He concluded by

⁷ Like *Harris*, *Spann* included the following factors: (1) The results would probably change if a new trial is granted; (2) The evidence was discovered since the trial; (3) It could not have been discovered through the exercise of due diligence; (4) Is material to the issue of guilt; and (5) Is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 620, 513 S.E.2d 98, 99 (1999).

making an argument as to why the Appellant had not established he was entitled to immunity by a preponderance of the evidence. (Aug. 2017 R. 1688-97).

There is no precedent for a second immunity hearing. [But if you have to, you could] adopt the five-factor test and agree that the defendant failed to establish proper testimony that entitles [him] to a new hearing. If you find [he] are entitled to a new hearing, find he has failed to prove his burden by a preponderance.

(Aug. 2017 R. 2080). The Court then stated, “No one can say anything anyone of us did was right or wrong without making a record of it. That’s why I did that and that’s why I did it that way. I did it that way so that we could be clear.” (Aug. 2017 R. 2091).

Analysis

After the first trial ended with an 11-1 hung jury in favor of conviction, Appellant moved for a 2nd immunity hearing based on “newly-discovered evidence,” even though the Solicitor later established that all of the evidence that Appellant argued was “new” had been turned over to Appellant prior to the first hearing and trial. Judge Hood, the 2nd immunity hearing judge, erred when he granted a 2nd immunity hearing because the *so-called* new evidence was not newly or after-discovered evidence at all, and could have been discovered or introduced at the 1st immunity hearing before Judge Russo. The 2nd hearing judge, Judge Hood, heard testimony from Appellant’s additional witnesses that purportedly had “new” evidence to bring forth in order to avoid a future post-conviction relief (PCR) issue and to preserve the record for appeal, and incorporated the transcript from Judge Russo’s hearing into his analysis of whether the Appellant was entitled to immunity. Even so, Judge Hood after considering the so-called new evidence and the prior hearing record, also denied Appellant immunity by Order.

The 3-judge panel of this Court inappropriately granted Appellant a 3rd immunity hearing. The Court found that Appellant was entitled to a 3rd immunity hearing at which the 3rd immunity hearing judge would have to hear all of the evidence again and judge its credibility. The problem

and error with the 3-judge panel's analysis is Appellant was not entitled to a 2nd immunity hearing to begin with. Appellant already had a full and fair immunity hearing before Judge Russo where he was denied immunity, and that determination was final. Further, Appellant did not show, and could not show, that the so-called new evidence he wanted admitted at a 2nd immunity hearing was newly or after discovered evidence under the law. It was evidence he could have discovered or presented at the 1st immunity hearing as it was contained in the discovery given to Appellant before the 1st immunity hearing. The 2nd hearing was gratuitous, and Appellant still failed to prove he was entitled to immunity **because he instigated and brought on the whole difficulty** and could have left *Cook-Out* before anything occurred. Instead, he remained and further instigated and brought about the whole conflict and murdered a human being.

Appellant cannot complain of an issue his own actions induced. Appellant failed to discover or elucidate the "new" testimony at the 1st hearing and was not entitled to a second (2nd) "bite at the apple" just because he failed to thoroughly review properly disclosed discovery or interview witnesses before his 1st immunity hearing or because he made a strategic decision not to present certain witnesses for whatever reason. No case law, statute, or regulation exists that would entitle Appellant to a new immunity hearing, whether a 2nd or a 3rd immunity hearing. Appellant himself moved for the 2nd hearing and Judge Hood's actions of allowing Appellant to proffer his "new" evidence cannot be shown to have prejudiced Appellant in any way, as he was allowed to present additional evidence that he claimed could have established the elements of self-defense by a preponderance of the evidence. He was given a *second* immunity analysis and Order by a Circuit Court judge: something no South Carolina defendant has ever been allowed to have.⁸ The 3-judge panel of this Court should have held that Judge Hood improperly, yet harmlessly, held

⁸ Pursuant to the thorough, yet open to correction, research of the State.

a 2nd immunity hearing and issued a 2nd immunity Order. And, this Court should have established a bright-line rule that defendants are not entitled to a “second bite” at the immunity apple. To date, no court, not Judge Hood, or the 3-judge panel of this Court has found that Appellant has made a sufficient showing of newly or after-discovered evidence as recognized by law to be entitled to a 2nd immunity hearing, much less a 3rd immunity hearing. This was error.

The *so-called* new evidence was presented at the 1st immunity hearing **or** could have been presented at the 1st immunity hearing before Judge Russo. The *so-called* new evidence could have been discovered by simple investigation by defense counsel, of which Appellant had 3 attorneys, using the discovery provided by the State. For example, this Court discusses the testimony of Elizabeth Bettini extensively in its Opinion in its discussion of the *so-called* new evidence when Ms. Bettini was known as a witness and available as a witness before the 1st immunity hearing before Judge Russo. Bettini gave multiple statements to law enforcement shortly after the crime which were **provided to defense counsel before the 1st immunity hearing**. Her body cam audio-recorded statements discussed by the Court in its Opinion were provided to defense counsel as well **before the 1st immunity hearing before Judge Russo** and were available for Appellant and his defense attorneys to listen to before the 1st hearing before Judge Russo. Bettini’s testimony is not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d 98.

Similar, Zachary Lynch, the employee of *Cook Out*, discussed in the Court’s Opinion, was also known as a witness to Appellant and available at the 1st immunity hearing before Judge Russo or could have been called. Police also *took a statement from Lynch* shortly after the crime, and *he can be heard on Officer Caitlin Voravvudhi’s voice recording* which were both also provided to defense counsel **prior to the 1st immunity hearing** and were available for defense

counsel to listen to. But, defense counsel chose not to call Lynch as a witness at the 1st immunity hearing. Again, this is not newly discovered evidence. *State v. Spann*.

Additionally, Bettini's 911 call mentioned in the Court's Opinion was never recorded, as the Court mentions, however, it was not withheld or hidden from Appellant because it was never recorded. Appellant could have questioned Bettini at the 1st immunity hearing before Judge Russo about her 911 call, but he chose not to call a witness he was aware of, and Appellant had been provided with her previous statements to law enforcement before the 1st immunity hearing. And Bettini, could have been questioned at the 1st immunity hearing before Judge Russo about what she can be heard saying on the officer body cam video recording as defense counsel received the same in discovery. Appellant made a strategic decision not to call Bettini, or Appellant failed to interview her before the 1st immunity hearing. But the substance of her 911 call is not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Further, Dr. Janice Ross, mentioned in the Court's Opinion **was available** at the 1st immunity hearing before Judge Russo. She performed the autopsy. Appellant and his defense counsel simply chose not to subpoena or call Dr. Ross at the first hearing or examine her. Again, this is not newly discovered or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Officer Caitlin Varavudhi, also mentioned in this Court's Opinion, was also available before and at the 1st immunity hearing. Appellant simply failed to call her as a witness even though he had been provided with the police and investigative file and her body cam footage of Bettini and Lynch before the 1st immunity hearing. The State did not hide her existence or the substance of her testimony from Appellant. Appellant simply chose not to call her at the 1st immunity hearing before Judge Russo. Both the State and Appellant chose to call her at the trial before Judge Griffith

(R. 630-31; 1439-44). Appellant either made a strategic decision not to call Varavudhi at the 1st immunity hearing or Appellant failed to interview her before the 1st immunity hearing. Either way, her testimony was not newly discovered or after discovered evidence. *State v. Spann*.

Additionally, this Court mentions in its Opinion that one of Appellant's arguments for a new [2nd] immunity hearing was information Ervin Meggett told police [actually the Solicitor's Office] in August of 2016.⁹ The Court mentions nowhere in the Opinion what Meggett actually testified to at the 2nd immunity hearing. (R. 2020-2032). Meggett testified he could not remember stating what was contained in a Solicitor's Officer's summary of speaking with him in August of 2016, that *allegedly* the victim was in the wrong when he approached Appellant's vehicle when Appellant was leaving the *Cook Out* parking lot. (R. 2020-2032). Regardless, it would not change the outcome at trial. Meggett testified at the 2nd immunity hearing that the victim **did not lean or reach into Appellant's car and the victim was standing straight up or erect and outside Appellant's vehicle** when Appellant **reached outside of his vehicle and stabbed the victim** and then drove off. (R. 2020-2032). At the 2nd immunity hearing, Meggett actually contradicted the 2 other witnesses mentioned by this Court in its Opinion, Bettini and Lynch. (R. 2020). The testimony from Meggett does not meet the definition of newly or after-discovered evidence either, because it would not have changed the result at trial. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99. It would have further confirmed the State's case and contradicted Appellant's defense at trial. Appellant did not call Meggett at the 1st trial or at the 2nd trial.

In summary, the three (3) judge panel's Opinion is misleading because it implies Appellant did not receive a fair 1st immunity hearing before Judge Russo because evidence was perhaps

⁹ Meggett was captured in a surveillance video from the time of the actual crime. He was with the victim when the victim was stabbed by Appellant. (R. 2023-2025).

withheld, hidden, not disclosed, or newly discovered before the 2nd hearing in front of Judge Hood. This is not true as set forth in Respondent's brief on direct appeal. (FBOR). The information Appellant presented at the 2nd hearing, Appellant could have discovered by simply interviewing Bettini or Lynch before the 1st immunity hearing and calling them at the 1st hearing, or by interviewing Officer Voravudhi or calling Voravudhi as a witness at the 1st hearing. Appellant could also have called Dr. Ross at the 1st hearing. Appellant and his multiple attorneys chose not to do any of these things. These were decisions Appellant and his defense counsel made before the 1st immunity hearing. They were not the fault of the State, the police, some agency, or circumstance. Appellant was not denied a fair 1st immunity hearing, he simply chose not to call certain witnesses for strategic reasons, or he chose not to present certain evidence. If Judge Russo was deprived of any evidence at the 1st immunity hearing, it was of Appellant's choosing and that of his defense attorneys. The Court's Opinion fails *to acknowledge or point this out*. The Opinion implies Appellant was somehow deprived of this information and fails to acknowledge that if this evidence was not presented at the 1st immunity hearing it was Appellant's fault. Appellant was given a gratuitous 2nd immunity hearing with no finding that the evidence he wished to present and did present at the 2nd immunity hearing was newly or after-discovered evidence as required by law. This Court also erred in finding Appellant was entitled to a new immunity hearing without a finding that Appellant met the standard of newly or after-discovered evidence. *Spann*. This Court should have reviewed on appeal from Appellant's conviction Judge Russo's Order denying immunity after the 1st hearing.

III.

In its Opinion, the Court misapprehended or overlooked the State's argument as to appealability. The State was not arguing that Appellant was precluded from receiving a new

immunity hearing because he failed to appeal the denial of immunity immediately after the first immunity hearing and Order. (Opinion at p. 6). The State submitted that the remedy was for Appellant Dennis to appeal the first immunity hearing determination after judgment (conviction by the second jury that found him guilty), precisely what State v. Isaac, 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013) provides. The State's argument is Appellant was entitled to only one (1) immunity hearing, the hearing he had before Judge Russo, who denied him immunity under the Act by Order. He was not entitled to the 2nd immunity hearing before Judge Hood, which was gratuitous to clean up what defense counsel did not present and could have presented at the 1st hearing. Appellant failed to show and there was no finding below of "after-discovered" or "newly-discovered evidence" which would entitle Appellant to a 2nd immunity hearing. Calling something new does not make it newly discovered or after-discovered evidence under the law. *Spann*. The immunity hearing this Court should have reviewed on appeal from Appellant's conviction of murder, was the 1st immunity hearing denial of immunity by Judge Russo in his Order, which was all Appellant was entitled to.

IV.

This Court also misapprehended or overlooked the record finding a "new" hearing was not allowed by Judge Hood. The Court early in its Opinion states that Judge Hood did not allow a 2nd immunity hearing when the record shows that he did. In fact, the statement of facts and procedural history of the case in this Court's Opinion is a recitation of the evidence presented at that 2nd immunity hearing before Judge Hood. Judge Hood allowed Appellant to present any so-called new witnesses or evidence Appellant claimed he discovered since the first immunity hearing even though it was not "newly discovered evidence" under the law. Judge Hood also considered any portions of the previous immunity hearing transcript that either side wished for him to review.

Later in its Opinion, this Court then discusses Judge Hood held a 2nd immunity hearing and what occurred at that hearing. And, the Court discusses Judge Hood's Order finding after the 2nd immunity hearing that Appellant had not proven by a preponderance of the evidence that he was entitled to immunity under the Act. The Court's Opinion contradicts itself and Appellant in fact had a 2nd immunity hearing before Judge Hood that was denied by Order of Judge Hood.

V.

The 3-judge panel of this Court misapprehended and overlooked the fact that this Court has now given Appellant a third (3rd) immunity hearing after only one (1) conviction. Dennis, *supra*. Appellant was only entitled to one (1) immunity hearing which he received from Judge Russo, and who denied immunity in an Order which should have been reviewed on appeal. First, the Appellant was not entitled to a 2nd immunity hearing under South Carolina law. There is no case law, statute, or regulation that would allow him one because the judicial system has a compelling interest in finality.

Finality in the criminal law is an end, which must always be kept in plain view At some point, the criminal process, if it is to function at all [or if it is] worth having and enforcing, it must at some time provide a definite answer to the question litigants present or else it never provides an answer at all. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment . . . [that is] tomorrow and every day thereafter . . . subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error

Anderson v. Leeke, 271 S.C. 425, 441-442, 248 S.E.2d 120, 123 (1978).

The proper remedy for a party who disagrees with the outcome of an immunity hearing is a direct appeal to this Court after conviction. The determination of whether a party may immediately appeal an order issued before or during trial is governed by statute. *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008).¹⁰ The Protection of Persons and Property statute does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial. S.C. Code §§ 16-11-410 to 450 (2006). *See Brown v. County of Berkely*, 366 S.C. 354, 358, 622 S.E.2d 533, 362 (2005) (The trial court's interlocutory order denying the Appellant's Motion to Dismiss based on a qualified immunity claim was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013) (Order denying the defendant's request for an immunity hearing on charges of murder under the Protection of Persons and Property Act was not a final determination and thus was not an immediately appealable interlocutory order.). As an immunity hearing ruling cannot be immediately appealed to this Court, the Appellant certainly was not entitled to a new 2nd hearing and ruling below before a final judgment had been rendered at all. Instead of waiting to exercise his legal remedy of a direct appeal after trial (if he had been found guilty at the 2nd trial), the Appellant instead attempted to and halfway successfully convinced Judge Hood to redo the immunity hearing altogether, making superfluous the court's expenditure of time and effort by hearing testimony that had already been presented for the record over the course of multiple days, wasting the witnesses' time, only prejudicing the State, and bypassing this Court's usual direct

¹⁰ S.C. Code Ann. § 14-5-440 (1976) sets forth the categories of interlocutory orders from which a party may immediately appeal: Those affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action; (b) grants or refuses a new trial; or (c) strikes out an answer or any part thereof or any pleading in any action.

appeal process. This confusion led directly to this Court's Opinion in this case. There was no and is no legal purpose to conduct a 2nd hearing and the Appellant was not entitled to a 2nd ruling on whether he was entitled to immunity. Judge Hood improperly, yet harmlessly, held a 2nd immunity hearing and issued a 2nd judgment regarding the Appellant's non-entitlement to immunity. To rule any other way would create mass chaos in the Courts of General Sessions.

Second, Appellant complains that the 2nd immunity judge, Judge Hood, improperly incorporated the testimony and findings of Judge Russo in his decision and argues he should have been entitled to an entirely new immunity hearing where he would present the testimony of the 14 witnesses who had already testified for the record, plus the additional 7 witnesses he called at the 2nd hearing. As has been argued, Appellant was not entitled to a new 2nd hearing at all. Instead, he only benefitted from the 2nd trial judge allowing him to proffer testimony from an additional 7 witnesses a 2nd time and only benefitted from the 2nd trial judge's second ruling on immunity entitlement, as the second holding very well could have gone a different way. He had nothing to lose. Now, the 3-judge panel of this Court has granted Appellant a 3rd immunity hearing when he was not entitled to a 2nd immunity hearing.

Appellant himself chose the witnesses for the 1st immunity hearing and complains he did not have the chance to call them all over again to proffer the exact same testimony. Appellant himself moved for the new 2nd hearing over the objection of the State and now complains it was conducted incorrectly. Appellant cannot complain of an error which his own conduct has induced. *State v. McCrary*, 242 S.C. 506, 508, 131 S.E.2d 687, 688 (1963). Appellant, also, cannot complain on appeal that he received the relief in the trial court for which he asked. *State v. Brown*, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant had received the relief requested from the trial court,

there is no issue for the appellate court to decide.). This Court should find Judge Hood improperly issued a second, albeit harmless, immunity ruling and affirm Judge Russo's denial of immunity as Appellant was only entitled to 1 immunity hearing, which he received. He is not now entitled to a 3rd immunity hearing.

VI.

This Court misapprehended and overlooked the legal ramifications of a mistrial. A mistrial does not entitle a defendant to another, 2nd, or 3rd immunity hearing. An immunity hearing is a statutory right to seek immunity **from prosecution**. It goes neither to evidence or defense, nor is it renewed or reconsidered during the trial. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (“we find that, by using the words ‘immune from criminal prosecution,’ the legislature intended to create a true immunity, and not simply an affirmative defense.”). *See also State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 679 (2013) (“An order denying an immunity request is not an order involving the merits in that it does not finally determine a substantial cause of action or defense.”); *Id.*, at 184, 747 S.E.2d at 680 (“denial of a request for immunity under the Act is analogous to the denial of a motion to dismiss a criminal case on the ground of double jeopardy”); *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (“the trial court had denied Appellant immunity, and section 16–11–440(C) should not have been charged to the jury”). *Compare State v. Blackwell*, 420 S.C. 127, 137, 801 S.E.2d 713, 718 n. 9 (2017) (Thus, like other pre-trial determinations, such as the denial of a defendant's claim of immunity under the South Carolina Protection of Persons and Property Act, we find the issue is proper for our review. *Cf. Curry*, 406 S.C. at 370, 752 S.E.2d at 266 (“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.”)).

The denial of immunity under the Act by Judge Russo, by Order, after the 1st immunity hearing was appealable **after Appellant was convicted of murder as he was in this case**. He was not entitled to a 2nd immunity hearing, a second bite at the apple, on the question of immunity because of a mistrial with his first jury. The 2nd immunity hearing was gratuitous.

The determination of immunity is not a determination of the admissibility of evidence such as drugs or a confession during the trial. *See Keels v. Powell*, 213 S.C. 570, 572–73, 50 S.E.2d 704, 705 (1948)(“The effect of the mistrial was to leave the parties in status quo ante, with the cause still *pending for trial* in the circuit court. The overruling of the motion for a directed verdict and the rulings made with reference to the admissibility and competency of the testimony resulted in no binding adjudication of the rights of the parties. Therefore the appeal is prematurely brought, and jurisdiction thereof cannot be retained.”). The Legislature did not intend for the defendant to be granted a second (2nd) immunity hearing otherwise if the defendant received multiple mistrials, for whatever reasons, he would be entitled to three, four, five innumerable immunity hearings, which would make no sense, would not serve judicial economy, and would be redundant. It could result in the defendant being granted immunity after multiple mistrials, when multiple previous trial judges had denied immunity considering the same or similar evidence. The denial of immunity is a determination separate from the trial of the case. In fact, it is a determination whether the defendant has to go through a trial or not. As a result, this Court misapprehended the law in ruling Appellant was entitled to a second (2nd) immunity hearing, and now actually a third (3rd) hearing. Appellant was only entitled to one (1) immunity hearing, the one he had before Judge Russo, the 1st immunity hearing, and was appropriately denied immunity. Appellant was entitled to appeal that ruling once he was convicted by a jury and sentenced by Judge Griffith.

VII.

This Court misapprehended and overlooked that it ruled the 1st immunity hearing was a nullity. Judge Russo held a complete immunity hearing on November 17-19, 2014. The record shows that testimony was received from multiple witnesses, 14 in all. Judge Russo ultimately denied immunity in an Order filed on February 10, 2015. A jury trial was held in October 2016. The jury could not return a verdict (reporting that they were 11 to 1 in favor of conviction). The November 2014 immunity hearing transcript, the first immunity hearing, and the February 2015 Order denying immunity from that hearing, are not only available; they are in the record before this Court. (*See* ROA 1-586 and 2905-2914). This Court erred in determining that Appellant was entitled to “a new, full immunity hearing” when the first trial ended in a hung jury. The Court erred in not reviewing Judge Russo’s Order Denying Immunity which was supported by the record and should have been affirmed as shown below.

Standard of Review

South Carolina law provides for a pretrial hearing to determine whether a defendant is entitled to immunity from prosecution under the Protection of Persons and Property Act (“the Act”). *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); S.C. Code Ann. §§ 16-11-410 to 450 (2006). The appellate court reviews an immunity determination for abuse of discretion. *Id.* at 45, 791 S.E.2d at 151. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). “[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court’s assessment of witness credibility.” *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

Relevant Law and Analysis

The Protection of Persons and Property Act (“The Act”) provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2006); *Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (setting forth the procedure, standard of review, and burden of proof for an immunity determination). To obtain immunity, a defendant must either satisfy all four (4) elements of self-defense by a preponderance of the evidence, to the trial court’s satisfaction, or three (3) of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance “stated simply is that evidence which convinces us as to its truth.” *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

(1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If the judge finds a defendant has failed to satisfy one (1) of the first two (2) elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”). However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it

accordingly. S.C. Code §§16-11-440(A) and (B) (2006). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2006); *Jones*, 416 S.C. at 294–97, 301, 786 S.E.2d at 138–39, 142. If he proves all of the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *Douglas*, 411 S.C. at 320, 768 S.E.2d at 239.

Judge Russo properly found Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. “Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element.” *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). Judge Russo correctly found Appellant had not proven by a preponderance of the evidence that the victim was unlawfully entering his vehicle at any time before or while Appellant stabbed him as no fingerprints or DNA from the victim or any DFHS student or former student was found on or in Appellant’s vehicle. Further, the testimony of whether the victim had put his hand inside Appellant’s window varied wildly. Judge Russo found Appellant’s testimony **was not credible** regarding his belief that unlawful or deadly force was about to or was occurring and that he had not proven by a preponderance of the evidence that he was not without fault without the difficulty. Specifically, Appellant challenged the DFHS students to a fight at the *Cook-Out* while they were all still at the

high school, he voluntarily went into the *Cook-Out* even though it was full of DFHS students, and he accelerated his vehicle directly at DFHS students, and he called DFHS students to his car and taunted them. Judge Russo found his actions were reasonably calculated to bring on the difficulty, that no reasonable man would have believed he was in danger, and, as a result, he had a duty to retreat before meeting force with force. And, the record showed he had numerous avenues of retreat and could have avoided the difficulty altogether by not going to *Cook Out* after instigating the conflict, by not going into the restaurant and antagonizing those he had challenged to fight at the high school, and by not driving his car into a group of DFHS students but simply left the parking lot where he parked, and by not calling DFHS students over to his car and taunting them and by pulling away before stabbing anyone. Judge Russo properly analyzed the elements of self-defense and Sections (A) and (C) of the Act and properly denied immunity. This Court should have affirmed Judge Russo's determination. And, Appellant was not entitled to another hearing.

Even though Appellant was not entitled to a 2nd immunity hearing, similarly, Judge Hood also appropriately denied Appellant immunity as Appellant had not proven elements one and two of self-defense by a preponderance of the evidence. Judge Hood properly found Appellant had not proven he was not without fault in bringing on the difficulty and he had a duty to retreat as a result but failed to. He properly found Appellant could have left the scene of *Cook-Out* by any number of available exits. This conclusion was proper under the law. This Court should have accorded both judges the deference they are due and affirm as both judges properly analyzed the elements of self-defense according to their discretion and properly and correctly found Appellant was not entitled to immunity because he failed to meet his burden by a preponderance of the evidence.

Neither Judge Russo nor Judge Hood erred in denying Appellant immunity. Both judges properly analyzed whether Appellant was entitled to immunity by individually analyzing whether Appellant had met the four (4) elements of self-defense and Sections A and C of the Protections of Persons and Property Act for the record and **in their published Orders**. Both circuit judges correctly found Appellant had not established he was without fault in bringing on the difficulty by a preponderance of the evidence. As a result, both judges properly found, Appellant, therefore, had a duty to retreat under the law before meeting force with force. Both circuit judges listed conflicting evidence as a reason for denying immunity, but both made it clear that they were denying Appellant immunity *because* Appellant did not meet his burden by a preponderance not because conflicting evidence simply existed. This Court should affirm Judge Russo's denial of immunity. The Court must grant the petition for rehearing and rehearing *en banc* and correct this error.

VIII.

This Court also misapprehended or overlooked the fact that in both Georgia cases which this Court cited for the proposition that Appellant was entitled to a new immunity hearing after a mistrial, those cases are not controlling, instructive, or even persuasive, because in neither of those cases did the appellant receive an immunity hearing before trial and an order denying immunity as Appellant did in this case.¹¹ See *State v. Hamilton*, 839 S.E.2d 560 (Ga. 2020); *State v. Remy*, 840 S.E.2d 385 Ga. 2020). Here, Appellant received an immunity hearing before Judge Russo, an Order denying immunity from Judge Russo, a 2nd immunity hearing before Judge Hood, and another Order denying immunity from Judge Hood. Further, this Court cites *Hamilton* for one

¹¹ The Appellant in this case actually received 2 immunity hearings and 2 orders denying immunity. In neither Georgia case had the appellant ever received an immunity hearing much less an order denying immunity.

proposition in its Opinion but refuses to follow *Hamilton* for another proposition in the same Opinion. (See *Dennis*, supra). The cases cited from Georgia are simply not authoritative in this setting. Appellant is not entitled to another, third (3rd), hearing and another, third (3rd), determination of immunity.

IX.

This Court also misapprehended or overlooked the lower court's ruling on Appellant's immunity claim. The Circuit Court found Appellant's claim of immunity failed because Appellant's claim of immunity was not credible; therefore, Appellant failed to prove he was entitled to immunity under the Act by a preponderance of the evidence. The Circuit Court specifically addressed the elements of self-defense and the elements under the Act and found Appellant was not entitled to immunity. In stating the case presented a "quintessential jury question," or issue the Circuit Court was not abdicating its' responsibility, but was stating that after it made its credibility determination, found specifically that the elements of self-defense were not met, and found that Appellant failed to meet his burden of proof he was entitled to immunity under the Act by a preponderance of the evidence, given all of the witnesses and testimony, the case was one for the jury to decide. And, the fact that the Circuit Court made used the language quintessential jury question, did not affect its' immunity analysis which was conducted as required by South Carolina law.

X.

This Court misapprehended and overlooked that it cannot make evidentiary findings on appeal as if it is a Circuit Court in an immunity hearing and instruct a Circuit Court on whether it should find certain facts favorable to the Appellant on remand or grant Appellant certain inferences on remand. (See "Duty to Retreat/Avoid the Danger" section of the Opinion, pp. 11-15).

First, this portion of the Opinion is entirely *dicta* as it was unnecessary to the decision made in this case. See *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining “dictum ‘is a statement on a matter not necessarily involved in the case, ... is not binding as authority ..., [and] is not the court's decision.’ ” (quoting 21 C.J.S. *Courts* § 227 (2006))). Dictum is not the law. *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018)(Few, J. concurring). This portion of the Court’s Opinion should be struck for this reason.

Second, and even more troubling, these evidentiary and legal findings of this Court in this section of the Opinion and directions to the Circuit Court to follow them, pp. 11-15, would require the Circuit Court, which is the sole determiner of the facts and elements at an immunity hearing, to follow the factual findings and legal conclusions of this Court which would abdicate the Circuit Court’s statutory role in immunity proceedings to this Court. *S.C. Code Ann.* Sections 16-11-410 to 450 (2006); *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013); *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011); *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022). This Court and our Supreme Court have repeatedly held a Circuit Court may not abdicate its fact finding and legal conclusion determinations in an immunity hearing to another body. *State v. McCarty*, 437 S.C. 355, 372, 366, 878 S.E.2d 902, 911 (2022)(“[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity”); *State v. Chhith-Berry*, 437 S.C. 527, 542-43, 878 S.E.2d 352, 360 (Ct. App. 22)(“[T]he [trial court’s] [immunity ruling must be based solely on the evidence presented at the pretrial hearing[.]”); *State v. Cervantes-Pavon*, 426 S.C. 442, 452-27 S.E.2d 564, 569 (2019); *State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019); *McCarty*, 437 S.Ct. at 375, 878 S.E.2d at 913 (“the circuit court is in the best position to assess witness credibility and make the necessary findings of fact”); *State v. Gray*,

488 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022)(“[T]he trial court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act.” And, it must not abdicate its role); *State v. Ford*, 439 S.C. 261, 886 S.E.2d 710 (“[T]he circuit court, sitting as fact-finder, must make specific fact findings that support its immunity decision.”).

This Court’s duty is to conduct appellate review of the Circuit Court’s immunity determination not to dictate to the Circuit Court what to find or what inference to grant to appellant on remand. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate courts review [] under an abuse of discretion standard of review.”), quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). Respectfully, this Court exceeded its appellate review and authority in this section of the Opinion. (pp. 11-15).

Further, this Court’s findings and legal conclusions in this section of the Opinion, pages 11-15, are incorrect and are contradicted by other evidence presented at the first 2 immunity hearings. As stated previously, Appellant began and instigated the difficulty between himself and students and fans of DFHS beginning outside the basketball arena in the parking lot **at the high school**. There, Appellant challenged students and fans of DFHS to a fight [to settle it] at the *Cook-Out* restaurant. Appellant then eventually drove to the *Cook-Out* and further instigated the conflict. Appellant first went inside in the presence of DFHS students after first challenging them to a fight at the high school. After going inside in the presence of DFHS students, Appellant then walked to his vehicle, while in the Petco parking lot maneuvered his vehicle to where it was pointed in the direction of DFHS students, and again sought out Dutch Fork High School students or fans by driving his car aggressively and directly into several DFHS students at the *Cook Out* almost striking at least one student or fan. This escalated the conflict Appellant started even further,

resulting in the stabbing. Appellant also yelled out to Dutch Fork High School fans and students that they did not want something he had for them in his car, and in essence invited and goaded them to or into his vehicle. There was evidence at the hearing that Appellant signaled at least 2 DFHS fans or students to his car. There is evidence Appellant instigated the conflict and difficulty and lured DFHS fans and students to just outside his car or into his car whereupon he stabbed the victim. There was testimony and evidence the victim did not touch Appellant's car *or* lean into it. The crime also occurred where cars were visible passing Appellant's parked car indicating the conflict that Appellant started, Appellant could have easily driven away from, i.e. he had other means of avoiding the difficulty. It must be remembered Appellant had been in and left the interior of *Cook Out* and gone to his vehicle and maneuvered it in the *Petco* parking lot. And, Appellant could have left the parking lot before he drove into the DFHS students. Appellant's friend had left the *Cook-Out* parking lot in his car. Two (2) different Circuit Courts hearing the same or similar evidence denied immunity under the Act. This Court erred in giving the Circuit Court instructions on what it should find below on remand and what inferences it must apply in Appellant's favor on remand, as the credible record does not support that Appellant was without fault in bringing on the difficulty, that he acted reasonably after instigating the conflict, that he had no other means of avoiding the difficulty, or that he even was in a place he had a right to be. The fact that Appellant was in his car **does not mean he was in a place where he had a right to be**. Appellant had already been in the restaurant and walked to his parked car. He then drove his car aggressively into a crowd of DFHS fans or students at *Cook Out*. This portion of this Court's Opinion, pp. 11-15, is erroneous and should be stricken for all of the reasons set forth above.

X1.

This Court also misapprehended or overlooked that it did not grant Appellant relief from his conviction [a new trial] but in the same instance refused to rule on his evidentiary issues since they might change upon re-trial. (Opinion, p. 15 citing State v. Mekler, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008)(affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue concerning admission of evidence decided by this court, noting whether the issue would arise on retrial and its resolution would depend upon evidence and testimony presented, and would be for the trial judge's consideration) and Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)(holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive). Appellant was not granted a new trial, and his conviction was not vacated or reversed. Only a third (3rd) immunity hearing was granted to Appellant. This Court must grant rehearing and rule on Appellant's 2 evidentiary issues raised on appeal from his conviction for murder which is final.

XII.

This Court also misapprehended and overlooked that at the conclusion of its Opinion, this Court erroneously stated, "We reverse Dennis's conviction...", when his conviction was not reversed, and only a third (3rd) immunity hearing was granted. (Opinion, p. 15, last sentence). The Petition for Rehearing and Rehearing En Banc must be granted, and the Opinion corrected.

XIII.

Respondent submits that *En Banc* review is necessary because consideration of the full Court is necessary to secure or maintain uniformity of the Court's decisions in this area, and the proceeding involves a question of exceptional importance. Rule 219, SCACR. The 3-judge panel of this Court issued the Opinion in this case which was published. The Opinion holds that upon

mistrial or new trial the parties start all over and a criminal defendant is entitled to an entirely new immunity hearing, even when the evidence does not change or does change, and even in the absence of a showing of true newly or after-discovered evidence under the law. The Opinion has grave implications for the administration of criminal justice in this State and an already backlogged criminal docket in this State, and for numerous frivolous and unnecessary hearings that the Legislature did not intend. Respondent can foresee numerous instances where this Opinion could be used to justify another immunity hearing simply because the defendant is granted a mistrial or a new trial for some trial or evidentiary related reason, or even after reversal on appeal where reversal was granted for some trial or evidentiary reason which had nothing to do with the immunity determination. Respondent can for foresee our trial court's being forced to grant a new immunity hearing where the evidence is exactly the same as at the first hearing. For this reason, Respondent moves for Rehearing *En Banc*. Rule 219, SCACR.

CONCLUSION

For the above stated reasons, this Court must grant the Petition for Rehearing and Rehearing *En Banc*, vacate the prior Opinion, affirm Judge Russo's denial of immunity to Appellant and address Appellant's evidentiary issues raised in his brief and argued at the oral argument.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 16, 2024.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

PROOF OF SERVICE

I, **Donna D'Alessio**, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Response in Opposition to Motion to Strike; Amended Petition for Rehearing and Rehearing En Banc and Memorandum in support has been forwarded to Appellant's counsel, Robert M. Dudek, Esq. and Lara Caudy, Esq. via email today, September 16, 2024 to RDudek@sccid.sc.gov and to lcaudy@sccid.sc.gov as well to their assistants kwarren@sccid.sc.gov and to smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of September, 2024.

s/ Donna D'Alessio
Donna D'Alessio
Legal Assistant to J. Anthony Mabry
Senior Attorney General

The South Carolina Court of Appeals

The State, Respondent,

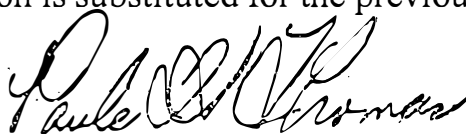
v.

Kierin Marcellus Dennis, Appellant.

Appellate Case No. 2019-001486

ORDER

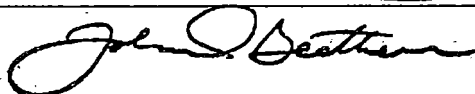
The State filed a petition for rehearing. Dennis filed a motion to strike the petition, arguing it violated the page restriction in Rule 221 of the South Carolina Appellate Court Rules. The State thereafter filed an amended petition for rehearing in compliance with the rule. Because the State's amended petition complies with the rule, we decline to act on the motion to strike because it is now moot. After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. The attached opinion is substituted for the previous opinion, which is withdrawn.



J.



J.



J.

Columbia, South Carolina

FILED
Oct 30 2024

cc:

Alan McCrory Wilson, Esquire
Samuel R. Hubbard, III, Esquire
Robert Michael Dudek, Esquire
Melody Jane Brown, Esquire
Lara Mary Caudy, Esquire
Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
The Honorable Eugene C. Griffith, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kierin Marcellus Dennis, Appellant.

Appellate Case No. 2019-001486

Appeal From Lexington County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 6082
Heard November 26, 2023 – Filed August 14, 2024
Withdrawn, Substituted, and Refiled October 30, 2024

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek,
Appellate Defender Lara Mary Caudy, and Appellate
Defender Adam Sinclair Ruffin, all of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, and
Assistant Attorney General Julianna E. Battenfield, all of
Columbia, and Solicitor Samuel R. Hubbard III, of Lexington,
for Respondent.

THOMAS, J.: Kierin Marcellus Dennis appeals his conviction for murder, arguing the trial court erred in (1) relying on evidence from a prior immunity

hearing and mistrial; (2) denying him immunity under the Protection of Persons and Property Act (the Act)¹; (3) finding he had a duty to retreat under the Act; (4) finding self-defense was a jury issue; (5) finding he had a duty to avoid going to a place he had the right to be; (6) admitting an aerial photograph; and (7) admitting a model car door that was misleading. We reverse and remand.

FACTS

Dennis, at the time a recent graduate of Lexington High School (LHS), was indicted for murder based on the stabbing of a student from the rival school, Dutch Fork High School (DFHS), after a basketball game on February 17, 2014. The stabbing occurred in the parking lot of a Cook-Out restaurant while Dennis was in his vehicle. A pre-trial hearing on Dennis's entitlement to immunity under the Act was held in November of 2014 before the Honorable Thomas Russo (the first immunity hearing). Dennis and numerous LHS students testified, generally supporting Dennis's claim of immunity. Numerous DFHS students testified, generally not supporting the claim.

By order filed February 10, 2015, the court denied Dennis's request for immunity under the Act, finding Dennis had not met his burden of proving the victim was in the process of entering, or had entered, Dennis's vehicle. In addition, the court found Dennis's allegation of such an entry or attempt to enter was not credible. The court also concluded Dennis failed to establish the elements of self-defense. Thus, the court denied Dennis immunity under the Act.

Dennis was tried in October of 2016. The jury deadlocked, was given an *Allen*² charge, and remained deadlocked after more than ten hours of deliberation. The Honorable Eugene C. Griffith Jr. declared a mistrial.

¹ The Act is informally known as the "Stand Your Ground Law" and was enacted by the South Carolina General Assembly in 2006 to provide a person "is immune from criminal prosecution and civil action for the use of deadly force" in circumstances that are permitted by the Act or by another provision of law. *See* S.C. Code Ann. § 16-11-450(A) (2015); *State v. McCarty*, 437 S.C. 355, 366, 878 S.E.2d 902, 908 (2022).

² *Allen v. United States*, 164 U.S. 492, 501 (1896) (defining the jury charge used to encourage a deadlocked jury to reach a verdict).

In June of 2017, Dennis again filed a motion for immunity under the Act. Dennis argued there was new evidence by Elizabeth Bettini and a manager at Cook-Out, neither of whom were related to either school and both of whom witnessed the events. Dennis also alleged there was new evidence from the pathologist, which was introduced at trial, and new evidence of a 911 recording never produced at trial and evidence from Ervin Meggett, a friend of the victim, who told investigators in August of 2016 that the victim was the aggressor. At a hearing on the motion held in August of 2017 before the Honorable Robert E. Hood (the second immunity hearing), Dennis argued he was entitled to a new hearing based on the new witnesses and evidence. He also argued the previous trial was a mistrial, final, and "we start all over again."

The court refused to allow Dennis a new immunity hearing; however, it ruled Dennis could proffer the new testimony. Dennis called new witnesses to support his claim of immunity. Officer Caitlin Voravudhi, of the Lexington County Police Department, testified she responded to a call at the Cook-Out the night in question and there were approximately forty students there. With her vehicle camera recording and audio being recorded from a microphone she wore, she began interviewing people. She identified Bettini as one of the people and took a statement. Bettini stated she was in the drive-through, saw about thirty teenagers in the parking lot, heard cussing and screaming, and witnessed Dennis's vehicle stop. She stated she then heard him yell, saw a guy ran to his vehicle and throw a drink at him, and then saw about ten male teenagers run toward the vehicle, which then pulled out. A small car then followed it. She called 911 and saw a third car leave. Voravudhi never verified the 911 call, stating she passed the statements on to an investigator. On her recording, a voice can be heard stating, "I saw everything that happened" and "Somebody threw a drink." An employee of Cook-Out can be heard saying he came out for a break and saw someone throw a cup at and lean into Dennis's vehicle. Voravudhi also got a statement from the Cook-Out employee, Zachary Lynch, in which he stated he saw a guy in a white shirt walk to Dennis's car, "reach[] in the car as if to stab somebody." Lynch then saw another guy walk up to the vehicle and throw a cup, followed by two guys getting in the vehicle and the vehicle then leaving.

Janice Edwards Ross was qualified as an expert in forensic pathology. Based on the direction of the knife wound, she testified the victim could have been leaning over at the time he was stabbed. She opined the victim would have had to have been bent over, almost parallel to the ground. She also opined there were many scenarios that would have fit the wound, including if the victim had been standing, the knife would have had to come up and down and if the victim had been stooped

over, it would have had to "go kind of straight parallel to the ground." Ross testified it depended on how much the window was down and how tall the victim was as to whether someone leaning in the window was consistent with the autopsy findings.

Bettini testified she turned into Cook-Out and saw three kids in the road, describing "they did not have happy faces." She looked to her right and saw between thirty and forty teenagers, "hollering, cussing, [and] acting crazy." She saw Dennis's SUV drive up, but kids blocked the road and called the driver names, saying "I'm gonna f***ing kick your ass." They were running at his car and throwing drinks at it. Bettini testified she called 911 and told the dispatcher there was about to be a fight and when the car got stopped, the kid looked scared to death. Bettini was afraid the students would hurt Dennis. She denied seeing a knife, and told the dispatcher, "I just told you that I saw Cook[-]Out trays and a drink being thrown" She next told the dispatcher she heard sirens, which she assumed was why the kids backed away from Dennis's vehicle and he took off. She testified she heard Dennis say either, "Y'all leave me the f*** alone," or "get the f*** away from me." She described the kids as constantly moving around his car and the scene as complete chaos. She assumed the reason Dennis did not leave was because he would have run students over. She also testified that once the police were on the scene, some of the students still in the parking lot were "cussing [her] out and telling [her] that [she was] trying to get their friend in trouble" She concluded, "All I remember is I looked at [Dennis's] face. He was stopped and there [were] kids and they would not let him leave the parking lot." Bettini wrote her statement as requested and never heard from anyone again until two years later when the first trial was about to begin. At that time, the police called her and asked her not to speak to the media if she was contacted. She next met with the solicitor and was told the 911 tape had been lost.

Lynch testified he was working at Cook-Out that night and gave a statement similar to Bettini's statement. When he heard people yelling, "He just got stabbed," Lynch thought it was Dennis who got stabbed by the victim because the victim leaned in the car window, hand forward. Lynch gave a second statement the following morning. He described the victim leaning in with his right hand, not his whole body but from his stomach up. He testified the window was "quite low" but up a little bit. Lynch testified Dennis could have left, but he probably would have run somebody over.

The first 911 call was from the restaurant manager. A 911 Computer Aided Dispatch (CAD) event was created. The second 911 call was from Bettini;

however, no CAD event was created. Nikki Rodgers, of Lexington County 911, testified her office received the calls the night of the incident. She explained some calls were left off the relevant CAD report because the calls were associated with different addresses. Years later, her office received a request for information on calls that night and used a management information system that found eight relevant calls. Several of the eight calls, including Bettini's, were not recorded.

The State recalled Alexis Brunson and Devon Chatman, of DFHS. Dennis objected, arguing if the court was going to rely on the transcript of the first immunity hearing for Dennis's witnesses, the State should not have the opportunity to present its witnesses in person for the second immunity hearing. The court allowed the State to continue.

The court then heard arguments on the merits of Dennis's motion, which it described as "a motion to essentially have a second stand your ground hearing" By order filed October 16, 2017, the court denied the motion for immunity, finding Dennis was not without fault in bringing on the difficulty because he sought out the DFHS students, chose the situation, and chose not to leave via the other exits available to him. The court also found the testimony of Dennis's fear was in direct contradiction to the testimony of the DFHS students, and if he was in fear, it was not a belief a reasonably prudent person would have entertained. The court next found Dennis did not prove he had no other means to avoid the danger. The court concluded,

Under the facts before this Court, [Dennis's] claim of self-defense presents a quintessential jury question. . . . The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because [Dennis] has not proven[,] beyond a preponderance of evidence standard[,] . . . self-defense. The Court finds that [Dennis] has not established the elements of self-defense by the greater weight of the evidence.

Accordingly, the court found Dennis was not entitled to immunity under the Act. Based on that finding, the court declined to rule as to whether Dennis was entitled to a second immunity hearing. After a second trial, Dennis was convicted and sentenced to thirty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"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. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). An appellate court "reviews an immunity determination for an abuse of discretion." *McCarty*, 437 S.C. at 365, 878 S.E.2d at 908. "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." *Id.* (quoting *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (alteration in original)).

LAW/ANALYSIS

A. Immunity Hearing After a Mistrial

Dennis argues the court erred in denying him a second immunity hearing after the first trial ended in a mistrial. We agree.

We first find no merit to the State's argument that Dennis was precluded from receiving a new immunity hearing because he failed to appeal the denial of immunity after the first immunity hearing. In *State v. Isaac*, our supreme court "clarif[ied] that an order granting a request for immunity under the Act is immediately appealable because it is a final order in the case. However, an order **denying** a request for immunity is not a final order in the case." 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013) (footnote omitted).

We next hold the court erred in denying Dennis's motion for a new, full immunity hearing. "A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court." *State v. Woods*, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009). When a case ends in a mistrial, it is considered a nullity and begins "anew when called again for trial." *Id.*; *State v. Mills*, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984), *cert. denied*, 469 U.S. 930 (1984) ("When a mistrial occurs because of the inability of a jury to agree on a verdict, it is the same as if no trial took place."); *Grooms v. Zander*, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (finding that rulings of a trial judge in a proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). After a mistrial, "rulings made with reference to the admissibility and competency of the testimony result[] in no binding adjudication of the rights of the parties." *Keels v. Powell*, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948). Although a ruling on immunity under the Act is not a ruling on the admissibility of evidence, we find

the situations analogous. Like evidentiary rulings, the decision on immunity is left to the sound discretion of the trial court. *See State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019) ("This Court reviews an immunity determination for abuse of discretion. A trial court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support." (internal citation omitted)); *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001))); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011))). In some instances, a lengthy pretrial hearing may have been held on the evidentiary matter in dispute. The fact that such issue may have been ruled upon in the first trial does not preclude the defendant from making the same, different, or additional arguments to the trial court on retrial regarding admission or exclusion and does not preclude a different ruling. *See Woods*, 382 S.C. at 158, 676 S.E.2d at 131 ("A mistrial is the equivalent of no trial and leaves the cause pending in the [trial] court."); *State v. Smith*, 336 S.C. 39, 43–44, 518 S.E.2d 294, 296 (Ct. App. 1999) ("Because a mistrial is the equivalent of no trial, the trial [court] could not rely on any evidentiary rulings from the nugatory proceeding."). While evidentiary rulings may not hold the inherent power to completely end a prosecution, in many cases, they can have a similar effect when the controverted evidence, such as a confession or blood test, is the key evidence offered by the State.

Furthermore, jurisprudence from our sister state of Georgia suggests the grant of a new trial restarts the entire prosecutorial process including an immunity hearing. In *State v. Hamilton*, 839 S.E.2d 560, 564 (Ga. 2020), the trial court granted Hamilton a new trial after her conviction of felony murder based on "general grounds" and because "trial counsel rendered constitutionally ineffective assistance by, among other things, failing to move for a pretrial determination on the issue of immunity from criminal prosecution." The Georgia Supreme court affirmed, and Hamilton filed a motion for immunity from prosecution under Georgia's "Stand Your Ground" Act. *Id.* at 565. The court stated,

the trial court granted Hamilton a new trial And
 '[w]hen a new trial has been granted by the court, the
 case shall be placed on the docket for trial *as though no*

trial had been had' OCGA § 5-5-48 (emphasis supplied). . . . When the trial court granted Hamilton's new trial, the jury verdict against her was set aside. As a result, when the State elected to retry Hamilton, she was free to seek immunity from prosecution under OCGA § 16-3-24.2 before any new trial was conducted.

Id. at 565–66; *see State v. Remy*, 840 S.E.2d 385, 388–89 (Ga. 2020) (reiterating that a defendant may file a motion for immunity after a mistrial is declared because a mistrial is the equivalent of no trial at all). Although the defendants in both *Hamilton* and *Remy* had not previously had immunity hearings, the court in each found the mistrial restarted the clock on the defendant's ability to request immunity.

The issue of the use of prior trial transcripts also arose in *Hamilton*. The State argued the trial court erred in admitting the transcript from Hamilton's jury trial and the transcript from the motion for a new trial hearing in the hearing on her motion for immunity. *Id.* at 566. The court considered the admissibility of the transcripts under its Rules of Evidence governing hearsay and its exclusions and affirmed the trial court's admission of the transcripts. *Id.* at 571. However, the court qualified its decision as follows:

A number of factors lead us to that conclusion. First, there is no dispute that Hamilton's criminal case was fully litigated over the course of an eight-day trial, and that the same judge who presided over that—and who observed the demeanor of witnesses being examined and cross-examined—also presided over Hamilton's motion for new trial and immunity hearings. *Cf.* [*United States v. Mathis*, 559 F.2d 294, 298–99 (5th Cir. 1977)] (reasoning that live testimony is generally favored and considered more probative, at least in part, because the factfinder is able to observe a witness's demeanor, including during cross-examination). Second, the witnesses' prior testimony would have been considered one way or the other at the immunity hearing if they were called to testify, whether that was because a witness was re-subpoenaed and testified in a way that was materially similar to his or her prior testimony, or because a witness was re-subpoenaed and contradicted his or her prior

testimony, thus allowing the prior testimony's admission as a prior inconsistent statement. . . . Third, the trial court accounted for the potential for additional or inconsistent testimony by giving both Hamilton and the State an opportunity to 'hear testimony from any additional witnesses and from witnesses that did testify at trial if the witnesses had any additional newly discovered evidence,' yet the State declined to present any such witnesses or evidence. Finally, and perhaps most importantly, Hamilton's 2011 trial—where many witnesses recounted the events of the many years leading up to [the victim's] death, as well as the events on the day of his death less than a year before the witnesses testified—was conducted more than *eight years* before the hearing on her motion for immunity was held in 2019. . . . Given this unusual procedural posture, and considering the totality of the circumstances, we cannot say that the trial court abused its discretion by admitting the transcripts from Hamilton's trial and the hearing on her motion for new trial into evidence.

Id. (internal footnote omitted).

In this case, the second immunity hearing was not held before the judge who conducted the first trial nor the judge who heard the first immunity hearing. In addition, there were less than three years between the first immunity hearing and the second immunity hearing and less than a year between the first trial and the second immunity hearing. We find the unusual circumstances relied upon by the Georgia Supreme Court are absent here, and the court erred in relying on transcripts rather than making its own credibility findings and weighing the evidence. *See McCarty*, 437 S.C. at 372, 878 S.E.2d at 911 ("[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity."); *State v. Chhith-Berry*, 437 S.C. 527, 542–43, 878 S.E.2d 352, 360 (Ct. App. 2022), *reh'g denied*, (Oct. 20, 2022), *cert. denied*, (May 24, 2023) ("[T]he [trial] court's [immunity] ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." (quoting *Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569)).

We hold the court erred in failing to conduct a new immunity hearing and by relying on transcripts to rule on Dennis's entitlement to immunity. Accordingly, we remand for a new immunity hearing. If immunity is granted, the conviction is set aside. If immunity is denied, the conviction stands and Dennis is entitled to appeal the denial of immunity and the trial issues. The trial court on remand is to consider only the evidence at the new hearing. *See McCarty*, 437 S.C. at 375, 878 S.E.2d at 913 (remanding for an immunity hearing "because the circuit court is in the best position to assess witness credibility and make the necessary findings of fact"); *Glenn*, 429 S.C. at 123, 838 S.E.2d at 499 (remanding where the circuit court did not address the elements of self-defense in denying immunity); *Cervantes-Pavon*, 426 S.C. at 452–53, 827 S.E.2d at 569 (remanding where the circuit court erred by, *inter alia*, finding that the immunity issue presented a jury question, while making it "clear[] we are not ordering a new trial, only a new hearing to determine whether Cervantes-Pavon is entitled to immunity under the Act," and rejecting the State's contention that there was evidence from the immunity hearing to support the court's ruling); *id.* (directing the trial court on remand "to rely only upon evidence presented at the new hearing on remand"). We acknowledge that almost ten years have passed since the initial immunity hearing. 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.

B. Merits of Dennis's Claim of Immunity

Dennis argues he was entitled to immunity under the Act. As noted above, we find the proper course is to remand "because the circuit court is in the best position to assess witness credibility and make the necessary findings of fact." *McCarty*, 437 S.C. at 375, 878 S.E.2d at 913. However, we review Dennis's remaining issues regarding his claim of immunity.

1. Conflicting Evidence

Dennis first argues the court erred in finding that because there was conflicting evidence as to Dennis's entitlement to immunity, self-defense was a jury issue. We agree.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate] court[s] review[] under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786

S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [trial] court to deny immunity; the [trial] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Gray*, 438 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022), *reh'g denied* (Jan. 23, 2023), *cert. denied* (Oct. 3, 2023) (alterations in original) (quoting *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569). "[T]he [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record." *Id.* (alterations in original) (quoting *Glenn*, 429 S.C. at 123, 838 S.E.2d at 499). See *State v. Ford*, 439 S.C. 261, 271, 886 S.E.2d 710, 715 (Ct. App. 2023), *cert. denied* (Mar. 5, 2024) ("[T]he circuit court, sitting as fact-finder, must make specific findings that support its immunity decision."); *Gray*, 426 S.C. at 142, 882 S.E.2d at 475 (reversing the trial court's denial of Gray's motion for immunity under the Act because the court "impermissibly abdicated its role as the fact-finder at Gray's immunity hearing").

The court here likewise deferred to the jury, stating the following:

Under the facts before this Court, [Dennis's] claim of self-defense presents a quintessential jury question. . . . The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because [Dennis] has not proven[,] beyond a preponderance of evidence standard[,] . . . self-defense. The Court finds that [Dennis] has not established the elements of self-defense by the greater weight of the evidence.

We find the court erred in deferring to the jury because there were conflicts in the evidence. We acknowledge the State's argument that the court made findings as to the elements of self-defense and its use of the phrases regarding deference to the jury did not affect his analysis. However, we conclude the findings were interspersed with deference to the jury and in violation of the law requiring the court to be the fact-finder at an immunity hearing.

2. Duty to Retreat/Avoid the Danger

Dennis next argues both circuit court judges erred by denying him immunity based upon the legally erroneous reason that he had the duty to retreat and that his

allegation of fear was neither credible nor reasonable. We address these elements of self-defense in the context of the Act for the trial court's edification on remand.

The Act provides immunity from prosecution for a person who has used deadly force after a trial court determines the person was justified in using such force. The general four elements a defendant must meet to justify the use of deadly force under the common law of self-defense are the following:

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.

The Act provides immunity as follows:

(A) 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 (2015) (emphasis added). "[A]nother applicable provision of law' includes the common law of self-defense." *Glenn*, 429 S.C. at 117, 838 S.E.2d at 496.

Dennis argues the court erred in denying immunity based on Dennis's failure to retreat and because he went to Cook-Out. In its order, the court found Dennis sought out the DFHS students and chose the situation, which is in contradiction to Dennis's right to be there. In addition, the court found Dennis chose not to leave using other exits available to him, indicating the application of the duty to retreat element of self-defense.

Dennis claimed immunity under both sections 16-11-440(A) and (C) of the Act. "[A] trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." *Id.*

Section 16-11-440(A) provides the following:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, *or occupied vehicle*, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred

S.C. Code Ann. § 16-11-440(A) (2015) (emphasis added). "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. Here, Dennis was in his vehicle at the time of the incident, which is included in the presumption of reasonable fear in the Act. As to findings regarding fear, Dennis argues, "Oddly, [the court] found [he] failed to prove this second element, that he actually was in imminent danger . . . or he believed he was . . . because [he] did not avoid the situation at the Cook[-]Out." The court also found "the testimony as to the 'fear in his eyes,' given by [Bettini] and [Dennis, is] in direct contradiction with the testimony of the" DFHS students. Dennis maintains he met the third element of self-defense—a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger—and that he was in fact in such imminent danger. The court found Dennis did not meet this element because there was "inconsistent testimony." However, the court did not elaborate, and as we previously discussed, we find the court's deferral of factfinding to the jury on contradictory evidence was erroneous.

"The presumption of subsection (A) does not apply, however, 'if the victim has an equal right to be in the dwelling or residence.'" *Id.* (quoting *State v. Jones*, 416 S.C. 283, 292, 786 S.E.2d 132, 137 (2016)). We find the same analysis applies to one's vehicle. Thus, although the victim also had the right to be at Cook-Out, he did not have the right to be in Dennis's occupied vehicle, as Dennis did, during the confrontation. Therefore, the presumption that Dennis's fear was reasonable applied to the extent he met his burden of showing the victim was unlawfully in or entering his vehicle.

"[I]n 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" *Id.* at 118–19, 838 S.E.2d at 496. Section 16-11-440(C) 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

S.C. Code Ann. § 16-11-440(C) (2015) (emphasis added). "Where the section is applicable, it replaces the duty to retreat element required to establish self-defense." *Glenn*, 429 S.C. at 118, 838 S.E.2d at 496.

On remand, the trial court must make specific findings of fact in compliance with any applicable presumptions afforded to Dennis in the Act.

C. Evidentiary Issues at Trial

We decline to reach the evidentiary issues raised by Dennis. *See State v. Mekler*, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue concerning the admission of evidence decided by this court, noting whether the issue would arise on retrial and its resolution would depend upon the evidence and testimony presented, and would be for the trial judge's consideration); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive). However, we note that if the circuit court on remand denies Dennis immunity and he appeals, he may raise these evidentiary issues.

CONCLUSION

We reverse and remand for a new immunity hearing in accordance with this opinion.

REVERSED AND REMANDED.

KONDUROS and GEATHERS, JJ., concur.