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Jun 26 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County

The Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

Respondent,

v.

XZARIERA OKEVIS GRAY,

Appellant.

Appellate Case No. 2024-000993

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Did the lower court err in denying Mr. Gray's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act without further hearing?

STATEMENT OF THE CASE

In May 2018, the Greenwood County Grand Jury returned indictments against Xzareira Okevis Gray (appellant) for murder and possession of a weapon during the commission of a violent crime. (R. *, indictments). The State alleged that appellant shot and killed Demetrius "Meatball" Fuller (victim). *Id.* The case was called to trial in May 2019, before the Honorable Frank R. Addy. Attorneys Janna Nelson and Shane Goranson represented appellant at trial. Prior to the jury trial, appellant sought immunity from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et. seq.* (Tr. 43). After a full hearing on the issue, the circuit court denied the motion from the bench. (Tr. 119). The jury ultimately found appellant guilty as charged on both counts. (Tr. 603-604). On May 14, 2019, Judge Addy sentenced appellant to thirty-five years for murder and five years, consecutive, for possession of a weapon during the commission of a violent crime. (May 14, 2019 Tr. 15; R. sentencing sheets). Appellant's motion for a new trial based on a jury related argument was denied. Appellant subsequently appealed.

Appellant raised three issues in his original appeal to this Court:

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

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

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

(Appellate Case No. 2019-001109, IBOA, at 1).

After full briefing and argument, this Court affirmed in part and remanded for additional proceedings in a published opinion issued on November 23, 2022 opinion. (Appellate Case No. 2019-001109, Opinion).[1] Finding the trial court did not make adequate findings for appellate review, this Court "remand[ed] for the trial court to make specific findings that support its determination of whether Gray is, or is not, entitled to immunity under the Act." *Id.*, at p. 10. This Court also affirmed on the remaining issues, finding no abuse of discretion. *Id.*, at 11-12.[2]

Appellant's counsel sought rehearing on the two issues affirmed in the November 2022 opinion and, after denial of the petition, filed a petition for writ of certiorari with our Supreme Court on March 6, 2023, presenting questions regarding those same two issues. The petition was denied on October 3, 2023, and this Court issued the remittitur on October 4, 2023. (Appellate Case No. 2019-001109).

On remand, by order dated May 24, 2024, Judge Addy issued a written order denying immunity. (R. p. * Order). On June 4, 2024, Judge Addy also denied appellant's motion to reconsider the ruling. (R. p. * Order).

This appeal follows.

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1 Published at *State v. Gray*, 438 S.C. 130, 882 S.E.2d 469 (Ct. App. 2022).

2 On December 9, 2022, Judge Addy wrote to a member of the panel with an offer to issue a written order indicating that he had both his notes and those of his clerk, and also "a good recollection of the testimony pertaining to Mr. Gray's motion for immunity." (Dec. 9, 2022 Letter addressed to Judge Konduros).

STATEMENT OF FACTS

While the below facts give context to the case in general, Respondent expressly notes that it does not rely on these facts for resolution of the precise issue presented in this appeal as the precise issue involves only the ruling denying appellant's motion for immunity. *See State v. Cervantes-Pavon*, 426 S.C. 442, 452–53, 827 S.E.2d 564, 569 (2019) (on questions of immunity, '"the court's ruling must be based solely on the evidence presented at a pretrial hearing'") (quoting *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013)).

Murder of Demetrius "Meatball" Fuller

Officer Kirby Claphan of the Greenwood Police Department was on patrol during the early morning hours of August 26, 2017, along with Officer Satterfield. (Tr. 162). Near the end of his shift, Officer Claphan pulled into the city maintenance shop to put gas in his patrol car, and while there, heard a gunshot from the general direction of nearby Gray Street. (Tr. 162-63). The officers immediately drove towards the sound of gunfire. (Tr. 163). While driving down Gray Street, Officer Claphan saw several men standing outside a house. (Tr. 163). As he passed by the house, a woman flagged him down for assistance. (Tr. 163). As he drew near the woman, Officer Claphan found Demetrius "Meatball" Fuller (victim) lying on the ground. (Tr. 164). The victim had a gunshot wound to the stomach. (Tr. 165). He was also wearing a paper wristband indicating he had been to the Getaway Bar and Grill. (Tr. 210). Another responding officer noted that the victim was asking for water and mumbling something unintelligible. (Tr. 194).

Paramedics arrived on scene and realized that the victim was fighting for his life. (Tr. 216). As they rushed him to the hospital, he went into cardiac arrest. (Tr. 217). The victim died in the emergency room. (Tr. 323). The autopsy confirmed that the cause of death was a single gunshot wound to the abdomen. (Tr. 342). The bullet pierced a major artery leading to the victim's lower

body, causing him to bleed to death. (Tr. 338, 342). There was no bruising on the victim's hands, indicating that he had not thrown a punch or been restrained such as if "[some]one had tight control over his hands[.]" (Tr. 341). Additionally, testing for alcohol levels determined the victim was not intoxicated at the time he died. (Tr. 414).

Investigator William Kay learned that Raymond Kennedy, who was at the hospital where the victim was taken, saw what happened. (Tr. 348). Kennedy informed him the shooting occurred on Gray Street. (Tr. 348).

Kennedy explained in his trial testimony that on the night of the murder he was hanging out at Ricky Grant's house, which is on Gray Street. (Tr. 219). Appellant, appellant's brother, and the victim were also there. (Tr. 219). Later that evening, appellant, the victim, and Grant decided to go to a club. (Tr. 219). While all three men left in the same car, appellant and Grant subsequently returned to the house without the victim. (Tr. 220). About an hour after they returned, Kennedy saw the victim walking down Gray Street towards the house. (Tr. 220). The victim was upset that his gun was missing and went inside the house. (Tr. 222-223). When he entered Grant's house, the victim repeatedly asked appellant if he had the victim's gun. (Tr. 222). Appellant denied having the victim's gun, and the two men began to argue. (Tr. 222). Grant told them to take the argument outside, so they did. (Tr. 223). Once outside, appellant pushed the victim off the porch and yelled, "I ain't got your gun." (Tr. 226). The victim "kept asking about the gun," and the victim and appellant started "tussling" in front of the house. (Tr. 226). The two men briefly "locked up" in the front yard before the victim fell to the ground. (Tr. 226-227). Kennedy saw the victim on the ground, heard a gunshot and looked up at appellant. (Tr. 227). Appellant was holding a gun and subsequently ran behind the house. (Tr. 227-228). The victim was able to get up and said, "the MF shot me for real." (Tr. 227-228). The victim turned and ran but quickly collapsed nearby. (Tr. 228).

After speaking with Kennedy, the detective traveled to Ricky Grant's house to further investigate where he found a shell casing in the front yard. (Tr. 348). Additionally, an individual later reported that a gun was discovered in some bushes behind the house. (Tr. 291, 353). SLED compared the gun to the shell casing recovered from the front yard and the bullet removed during the autopsy and determined that they were fired by that gun. (Tr. 422-423).

While collecting evidence in Grant's yard, the detective noticed that the neighbor across the street had several surveillance cameras. (Tr. 351). The neighbor allowed the detective to review the footage from the time of the murder, which included, though dark, the cars around the area and the shooting. (Tr. 146, 351-352; State's Exhibit 2). In addition to obtaining surveillance footage, the detective interviewed Ricky Grant. (Tr. 356).

Grant confirmed that he, appellant, and the victim rode over to The Getaway Bar and Grill. (Tr. 260). Grant testified that when the three got to the club, the victim hid a firearm in some bushes across the street, as, according to Grant, guns are not allowed inside the bar. (Tr. 261). Grant and the victim then went inside the club, but appellant stayed in the parking lot. (Tr. 261). About an hour later, Grant and appellant went back to the house, leaving the victim. (Tr. 262). The victim subsequently returned to Grant's house and said he could not find his gun. (Tr. 264). When he asked appellant about the missing gun, the two got into an argument. (Tr. 264). As the argument intensified, Grant told them to take it outside. (Tr. 264). Appellant and the victim went outside, but Grant stayed inside. (Tr. 264). About a minute later, Grant heard a gunshot and ran to the front door and opened it. (Tr. 265). Grant saw the victim running down the street holding his stomach. (Tr. 265). Appellant appeared, to Grant, to be in shock and tried to come inside the house, but Grant refused entry. (Tr. 265).

Appellant was later arrested at a family member's apartment in Columbia. (Tr. 355).

STANDARD OF REVIEW

Pretrial Immunity Hearing

The standard of review for a pretrial determination of immunity is abuse of discretion. *State v. Jones,* 416 S.C. 283, 786 S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support." *Id*., at 316, 768 S.E.2d at 237 (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)). In applying this standard, appellate courts do not "reweigh the evidence or second-guess the trial court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014).

ARGUMENT

The order denying immunity should be affirmed where the trial judge clearly set out and applied the appropriate legal standards that guided his decision and also set out the controlling findings of facts which are amply supported by the evidence presented in the pre-trial hearing.

The Protection of Persons and Property Act (the Act) provides that an individual who is justified in the use of deadly force can seek immunity from civil and criminal liability at a pre-trial hearing. S.C. Code Ann. § 16-11-450; *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). To obtain immunity, the accused must establish by a preponderance of the evidence that he was justified in his use of deadly force. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). The trial judge hearing the request for immunity "should at the least make specific findings on the elements" sufficient for appellate review. *State v. McCarty*, 437 S.C. 355, 374, 878 S.E.2d 902, 912 (2022) ("a circuit court, as the designated fact-finder in this matter, must provide adequate findings to support its decision so an appellate court can perform its role of reviewing the ruling under an abuse of discretion standard"); *see also State v. Andrews*, 427 S.C. 178, 182, 830 S.E.2d 12, 14 (2019) ("while the circuit court may not have set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent").

Here, the trial judge was appropriately guided by this legal structure in considering the individual facts before him in finding immunity was not warranted. (May 24, 2024 Order, at 1, 4). Moreover, the trial judge carefully set out the facts from the hearing in his order, including his credibility determinations and the reasons for those determinations. (May 24, 2024 Order, at 2-4).

In the present appeal, appellant does little more than complain that the trial judge should have believed him rather than the remaining evidence. That is insufficient to show an error either in law or fact that would undermine the trial judge's ruling. Stated differently, appellant fails to show an abuse of discretion. The order denying immunity should be affirmed.

Prior Appeal and Remand

This Court did not set aside the immunity hearing, and did not order that any additional testimony be taken; rather, this Court remanded specifically: "we remand for the trial court to make specific findings that support its determination of whether Gray is, or is not, entitled to immunity under the Act." Opinion, p. 9; *see also Gray,* 438 S.C. at 142, 882 S.E.2d at 475.

On May 24, 2024, the trial judge issued an order memorializing the specific reasons for denying immunity. Though the judge had the transcript from the prior trial, and had presided over that trial, he correctly limited review for the immunity question to the immunity hearing. (May 24, 2024 Order, at 1) ("reviewed the trial transcript of the Castle Doctrine hearing" and his "notes and those of [his] law clerk"). Further, he asserted his "recollection of this case and the testimony [was] crystal clear" such that additional proceedings were not necessary. (May 24, 2024 Order at 1).[3] *See generally McCarty,* 437 S.C. at 375, 878 S.E.2d at 913 (resting decision "whether to issue a new order based on the record of the hearing it has already conducted, or whether to conduct a new immunity hearing before issuing a ruling" in trial judge's discretion).

In the order, the trial judge reviewed appellant's testimony, and that of State witnesses Kennedy and Grant, along with the video evidence. (May 24, 2024 Order at 2-4). The trial judge then "reaffirm[ed]" his prior ruling that appellant had failed in his burden of proof. (May 24, 2024

[3] The trial judge also noted that "[n]either the State nor the Public Defender requested a hearing." (May 24, 2024 Order, at 1 n. 1).

Order at 4). Notably, the trial judge particularly did not credit appellant's testimony that the victim "reached for a gun in decedent's waist …grabb[ed] the gun, stumble[d] back, and fire[d]." (May 24, 2024 Order at 2). The trial judge considered: "If the decedent was armed when he returned to the house as the Defendant maintained, why would he be confronting the Defendant about stealing the very gun with which he was armed?" (May 24, 2024 Order at 4). In contrast, the "reliable and credible" testimony by the "neutral witnesses" such as Grant, convinced the judge "that the decedent left his gun outside the club and [appellant] likely took the gun." (May 24, 2024 Order at 4). The trial judge "concluded that the most likely scenario is that [appellant] appropriated the decedent's gun while waiting outside the club" and was "not entitled to immunity as he is at fault in bringing on the difficulty." (May 24, 2024 Order, at 4). Thus, appellant failed in his burden of proof. (May 24, 2024 Order, at 4). The record fully and fairly supports the trial judge's ruling.

Immunity Hearing

Appellant testified that two weeks before the murder, he and the victim's brother got into a fight at Grant's house. (Tr. 48, 55). He asserted that the victim's brother had a gun and chased appellant around a car which appellant ran into a nearby home. (Tr. 55). Twenty minutes later, the victim arrived and took the gun from his brother. (R. 55, 22). After he recounted that interaction, appellant recounted the night of the murder.

Appellant testified that as he and Grant were about to drive to the club, the victim knocked on the car window and asked to come along. (Tr. 46-47). Grant looked at appellant to see if it was okay, and appellant left it to Grant to decide. (Tr. 47). The victim went with them and when they got to the club, Grant and the victim went inside, but appellant remained in the parking lot and drank a few beers with some friends. (Tr. 47). Grant eventually returned to the car and the two left. (Tr. 47). Appellant could hear the victim walking toward the Gray Street house because

the victim was "talking loud," and he could also hear him come up the steps. (Tr. 49). Appellant testified victim stated "I ain't forget about you hitting my brother in the mouth or something," and then Grant said to "take that outside." (Tr. 49). Appellant testified that he went outside and started to walk home, but he turned around because Grant had promised to give him a ride. (Tr. 49-50). When appellant went back inside the house the victim followed him. (Tr. 49). The argument continued, and Grant again asked them to leave because they were being too loud. (Tr. 49-50).

Appellant testified that when he went back outside a second time, the victim "swung and hit me. When he hit me, we got to tussling." (Tr. 50). [4] Appellant testified that during the scuffle, he saw the victim reach for a gun in his waistband. (Tr. 50). Appellant let go of the victim, grabbed the gun, and stumbled backwards. (Tr. 50). As appellant fell back, he could see the victim rushing towards him in a "rage." (Tr. 57). Appellant shot the victim as appellant was falling backwards.[5] (Tr. 53). On cross-examination, appellant denied that the argument arose over the victim's missing gun; rather, he maintained that the victim was still upset about the previous altercation. (Tr. 63). Appellant even asserted that prior to the scuffle, he never saw the victim with a gun that night. (Tr. 69).

However, Raymond Kennedy and Ricky Grant each testified that the argument arose over the victim's missing gun. (Tr. 81, 99). Kennedy explained that "when [the victim] came back he

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[4] Appellant's pre-trial testimony was not consistent on the fight. On direct exam, he testified that when he went outside, the victim "swung and hit me." (Tr. 50). Later during direct, he stated that the victim "*tried to hit me* or whatnot." (Tr. 53) (emphasis added). Appellant also indicated, while looking at a photograph, that "he *hit me* right here. And we started tussling right here." (Tr. 64) (emphasis added).

[5] Appellant was inconsistent on this point, too. At first, he testified that "I stumbled back and the gun fired, fired the gun." (Tr. 50). He later testified that "when I was falling back, I shot." (Tr. 57). When asked on cross-exam whether the gun fired on accident, appellant responded, "It was a [sic] accident because I was scared at the time. Like I didn't mean to do it. Like I'm just being real. It was a [sic] accident to me." (Tr. 68).

asked about a gun…he was angry about his gun – about his gun being missing." (Tr. 81). According to Kennedy, the victim "kept asking about his gun," and appellant "kept telling him he didn't have the gun." (Tr. 82, 92). Ultimately, "they got to scuffling and the gunshot went off." (Tr. 82).

Grant corroborated that account. He testified that before entering the club, the victim hid his gun in some bushes across the street. (Tr. 98). When the victim returned to Grant's house, Grant understood from the victim's "interactions" that appellant had his gun and the victim wanted it back. (Tr. 99). While the two were arguing, Grant even told appellant, "if you got his gun, give it to him." (Tr. 108). When they both became "loud," Grant testified that he "put everybody outside of the house." (Tr. 100). Grant later heard gunfire when the two went outside. (Tr. 100).

In addition to offering Kennedy and Grant's testimony, the State also introduced the neighbor's surveillance footage, and argued that appellant's version of events did not match the surveillance footage, noting that the video appeared to show the two were "a good five or six feet apart" when appellant fired. (Tr. 113).

A. The trial judge appropriately recognized and applied the correct preponderance of the evidence burden in making his findings of facts.

The trial judge correctly articulated the burden of proof at the immunity hearing, (R. 78, 80), and on remand again embraced that correct standard, (May 24, 2024 Order, at 1, 4). While appellant argues (again) that an incorrect, higher burden of proof was applied, (BOA at 13), the order leaves no doubt that the argument must be rejected. Further, the trial judge did not "require" full corroboration as appellant contends, (*see* BOA at 16), rather, the judge was not *convinced* by a preponderance of the evidence that appellant's version of the events was true in light of testimony from "neutral witnesses who have no stake in the outcome of the trial." (May 24, 2024 Order, at

4). The credibility ruling in no way enhanced the burden of proof – appellant's story simply was not credible.

Moreover, the trial judge's comparing the different versions of the story is precisely what is required. In assessing the merits of an immunity claim, appellate courts have consistently considered whether an accused's story is corroborated by other evidence. For example, in *State v. Curry*, our Supreme Court affirmed the denial of immunity underscoring that "immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." 406 S.C. at 372, 752 S.E.2d at 267. The Court rejected the appellant's suggestion that "the Act should be construed to require a trial court to accept the accused's version of the underlying facts." *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. Similarly, this Court upheld a denial of immunity when the record supported the trial judge's determination that the number of wounds on the victim was inconsistent with the appellant's explanation of the event. *State v. Chhith-Berry*, 437 S.C. 527, 544, 878 S.E.2d 352, 361 (Ct. App. 2022).

Simply put, the law in this state reflects a commonsense approach to resolving these fact-intensive disputes. As applied here, the circuit court's ruling aligns with this approach and should be upheld. *See State v. Andrews*, 427 S.C. 178, 182, 830 S.E.2d 12, 14 (2019)("[T]he circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent.").

B. The trial judge appropriately exercised his duty to act as the fact-finder for purposes of determining immunity.

In addition to arguing that the trial judge failed to apply the correct burden of proof, appellant also asserts that trial judge only focused on one fact – that appellant took the victim's gun – when, according to appellant, he satisfied the elements of self-defense apart from the duty

to retreated, and for that he could rely on the Act. (BOA at 13). Appellant is wrong in two distinct ways.

First, he is wrong because precedent dictates that the elements of self-defense be considered. *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019) ("In determining a defendant's entitlement to immunity under the Act, the circuit court must necessarily consider the elements of self-defense."). Those elements are: (1) "the defendant must be without fault in bringing on the difficulty," (2) "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," (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 where "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," 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 this particular instance." *Id.*, at 116, 838 S.E.2d at 495. "[A] valid claim of self-defense must exist, and the trial court must necessarily consider the elements of self-defense" in considering a claim of immunity. *Id.,* at 118, 838 S.E.2d at 496 (quoting *Curry*, 406 S.C. at 371, 752 S.E.2d at 266). The Act where applicable, supplies a presumption of reasonable fear (unless there is an equal right to be in the place at issue), or excuses the duty to retreat. *Id.*, citing S.C. Code §§ 16-11-440 (A) and (C). Contrary to appellant's position, an accused is not relieved of showing the very first element, *i.e.,* being without fault in bringing about the event. The Act, at its heart, is about protection. That should logically not shield a bad actor who creates a situation in which force is used.

Second, he is wrong that section 16-11-440 (C) works to avoid the element of being without fault in bringing on the difficulty. "Where the section is applicable, it replaces the duty to retreat element required to establish self-defense." *Glenn*, 429 S.C. at 119, 838 S.E.2d at 497. The trial judge here did not incorrectly apply precedent or the statutory provisions.

In addition to applying the correct legal standard, the record below reveals the circuit court acted as the fact finder, weighed the evidence presented, and reached a conclusion well-supported by the record. For example, after the presentation of evidence, the trial judge asked the State whether its investigation definitively linked ownership of the weapon to either the victim or appellant. (Tr. 115). When the solicitor replied there was no forensic evidence linking the weapon to either party, the trial judge followed up by confirming the State's theory was that the argument "was about a gun." (Tr. 115). The court's questioning provides insight into its rationale for denying immunity. If the argument arose over the victim's missing gun, as the two other witnesses testified, then appellant cannot credibly claim either a reasonable fear of bodily harm or no fault at bringing upon the difficulty. *See Glenn, supra; see also State v. Marshall*, 428 S.C. 11, 18-19, 832 S.E.2d 618, 622 (Ct. App. 2019) (citing the elements of self-defense that the accused must show at the pre-trial immunity hearing).

Notably, appellant relied exclusively on self-serving testimony and asserted that the victim started the altercation because of the prior difficulty with appellant's brother, not over a gun. (Tr. 63). However, Raymond Kennedy and Ricky Grant each testified that the dispute arose because the victim could not find his gun and assumed appellant had taken it. (Tr. 82, 92, 99 and 108). This detail went to the heart of the matter: if the victim cannot find his gun at the start of the fight, he most likely does not have it tucked in his waistband during the ensuing scuffle.

Appellant's self-defense claim unravels at that point.[6] *See generally Curry*, 406 S.C. at 371, 752 S.E.2d at 266 (rejecting argument that an accused version of the events must be accepted as true). The trial judge has provided even greater insight into his thought process in the subsequent order.

The trial judge also found inconsistent the assertion that everyone road peacefully together to the club, while a two-weeks old prior feud caused the later aggression without any intervening event. (May 24, 2024 Order, at 4). The trial judge was well-within his discretion to find that story "quite unbelievable." (May 24, 2024 Order, at 4). And, again in crediting the "neutral witnesses" testimony about the reason for the fight, the trial judge logically posited: "If the decedent was armed when he returned to the house as [appellant] maintained, why should he be confronting [appellant] about stealing the very gun with which he was armed?." (May 24, 2024 Order at 4). The trial judge credited testimony from Grant (again a "neutral witness[]") that the victim left his gun outside to go into the club and reasoned that appellant "very likely took the gun." (May 24, 2024 Order at 4). The trial judge concluded:

> In short, [appellant's] version of events is illogical and not credible in light of the other testimony and evidence presented at the Castle Doctrine hearing. Having concluded that the most likely scenario is that [appellant] appropriated the decedent's gun while waiting outside the club, [appellant] is not entitled to immunity as he is at

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[6] The lack of credibility is supported by other inherent inconsistencies in appellant's testimony. For example, appellant was also adamant that his brother was not there that night. (Tr. 62). However, Raymond Kennedy testified that appellant's brother was standing right beside appellant when he fired the fatal shot. (Tr. 90-91). Further, appellant first testified inconclusively that he "stumbled back and the gun fired, fired the gun," (Tr. 50), then later, he shot while falling back as the victim was rushing him in a "rage." (Tr. 57). When asked on cross-exam whether the gun fired on accident, appellant responded, "It was a [sic] accident because I was scared at the time. Like I didn't mean to do it. Like I'm just being real. It was a [sic] accident to me." (Tr. 68). Further still, appellant gave inconsistent testimony about whether the victim actually punched him. On direct exam, he testified that when he went outside, the victim "swung and hit me." (Tr. 50). Later in direct he stated that the victim "*tried to hit me* or whatnot." (Tr. 53) (emphasis added). Appellant also indicated, while looking at a photograph, that "he *hit me* right here. And we started tussling right here." (Tr. 64) (emphasis added). The record is replete with support for the trial judge finding appellant's testimony was not credible.

> fault in bringing on the difficulty. Therefore, he failed to meet his burden of proof by the preponderance of the evidence….

(May 24, 2024 Order, at 4) (*See also* Tr. 117, finding appellant failed to meet his burden in light of the court's credibility analysis).

To sum up, the record reveals that the trial judge did not abuse his discretion in rejecting appellant's story as not credible based on detailed and careful fact-finding which is supported by the testimony at the immunity hearing or in concluding that appellant failed to carry the required burden of proof. As a result, this Court should affirm the lower court's ruling. *Chhith-Berry*, 437 S.C. at 544, 878 S.E.2d at 361 (affirming lower court where "the record contains evidence the trial court applied the correct burden of proof and made findings that supported its denial of immunity").

CONCLUSION

Based on the foregoing, this Court should affirm.

Respectfully submitted,

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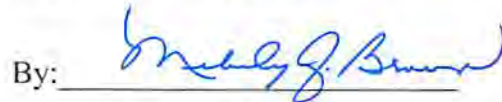
By: 

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June 26, 2025