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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.

FINAL BRIEF OF RESPONDENT

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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), SCRCP, 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:

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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 Property 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 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 Property 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, 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
October 11, 2021

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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

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.

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