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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

XZARIERA OKEVIS GRAY,

APPELLANT

APPELLATE CASE NO. 2024-000993

FINAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

On May 4, 2018, a Greenwood County grand jury indicted Xzariera Gray for murder (2018-GS-24-829) and possession of a weapon during the commission of a violent crime (2018-GS-24-830). R. 192-193; 195-196.

Prior to trial, Mr. Gray filed a motion to dismiss pursuant to the Protection for Persons and Property Act. Motion. The state, represented by Joshua Thomas and Carson Penney, called the case to trial before the Honorable Frank R. Addy and a jury on May 6-9, 2019. R. 1. Janna Nelson and Shane Goranson represented Mr. Gray. R. 1. After the jury was selected, the judge presided over a hearing on Mr. Gray's motion to dismiss. R. 4-80. After hearing the evidence, the judge denied Gray's request. R. 77, l. 23—80, l. 8.

The jury found Mr. Gray guilty as charged. R. 146, l. 19--147, l. 2. Due to the late hour, Judge Addy deferred sentencing until May 14, 2019. R. 148, l. 7-11; 149, l. 11—150, l. 5. On that date, Judge Addy sentenced Mr. Gray to thirty years imprisonment for murder and five years' imprisonment for the weapon. R. 158, ll. 14-25; R. 194; R. 197. He ordered the sentences be served consecutively. R. 158 ll. 14-25; R. 194; R. 197.

On May 23, 2019, Mr. Gray filed a motion for new trial. R. 159-162. In the motion, he requested a new trial based upon the jury deliberating for over ten hours during which they received only one meal and the judge's failure to clarify that the jury need not reach a verdict, and more importantly, that the jury need not reach a verdict that night. R. 159-162. Mr. Gray requested a hearing on the motion and individual voir dire of the jurors on the matter. R. 159-162. On June 21, 2019, Judge Addy issued an order denying the motion and refusing to hold a hearing on the motion for a new trial. R. 163-164.

On July 2, 2019, Mr. Gray served his notice of appeal. After briefing and oral argument,

this Court remanded his case to the circuit court to make specific findings regarding the Protection of Persons and Property Act.[1] *State v. Gray*, Op. No. 5951 (S.C. Ct. App. filed Nov. 23, 2022) (Howard Adv. Sh. No. 41 at 34); R. 166-177. This Court also affirmed (1) the trial court's admission of a surveillance video and (2) the denial of Mr. Gray's motion for a new trial without a hearing. *Id.* Pursuant to Rule 221(a), SCACR, Mr. Gray filed a petition for rehearing. Supp. R. 1-9. The state filed a return on December 19, 2022. Supp. R. 10-18. Subsequently, on January 23, 2023, this Court denied the petition for rehearing. Supp. R. 19-20.

On March 6, 2023, Mr. Gray filed a petition for a writ of certiorari with the South Carolina Supreme Court requesting it review this Court's affirmance of (1) the trial court's admission of a surveillance video and (2) the denial of Gray's motion for a new trial without a hearing. Supp. R. 21-46. On April 20, 2023, the state filed its return. Supp. R. 47-67. On October 3, 2023, the Court denied the petition for a writ of certiorari. Supp. R. 68.

On May 24, 2024, Judge Addy, by written, order denied Mr. Gray's motion for immunity without a hearing. On June 3, 2024, counsel for Mr. Gray made a motion to reconsider requesting the judge reconsider the ruling and grant Mr. Gray a new immunity hearing. R. 184. Judge Addy denied the motion on June 4, 2024. R. 191.

This appeal follows.

[1] *See* S.C. Code Ann. §§ 16-11-410 to -450 (2015).

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jones*, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

ARGUMENT

Mr. Gray is entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act based on the evidence presented.

Immunity hearing

In August 2017, Mr. Gray and the brother of Demetrious "Meatball" Fuller got into an altercation. R. 16, ll. 10-13. The brother was armed and chased Mr. Gray. R. 16, ll. 10-16; 21, ll. 21-25. After the chase ended, Meatball arrived with a gun. R. 16, ll. 17-19; 22, ll. 1-3. Although Meatball refused to put his gun down, he did not harm Gray that day. R. 16, ll. 17-22. After these two heated confrontations, Gray heard from others in the neighborhood that Meatball was armed and threatening to kill him. R. 16, l. 23—17, l. 3; 22, ll. 13-16.

Weeks later, on Friday, August 25, 2017, Mr. Gray was visiting with his friend, Ricky Grant, in Grant's home on Gray Street, in Greenwood. R. 6, l. 3—7, l. 8; 58, ll. 5-7. Around midnight, Gray and Grant decided to go to a neighborhood nightclub. R. 7, ll. 9-13; 57, l. 19—58, l. 4. While leaving, Meatball approached Grant's car and knocked on the window. R. 7, 19-22. Meatball learned they were going to a nightclub and asked to ride with them. R. 8, ll. 1-6; 67, l. 25—68, l. 1.

Aware of the prior altercations between Mr. Gray and Meatball, Grant asked if Gray would be agreeable to Meatball riding with them. R. 8, ll. 1-6; R. 9, ll. 7-14. Mr. Gray agreed. R. 8, ll. 5-6. The three rode to the nightclub together. R. 8, ll. 7-8; R. 57, ll. 22-23. When they arrived, only Grant and Meatball entered the nightclub. R. 8, ll. 7-12. Gray stayed in the parking lot where he talked to people he knew. R. 8, ll. 13-16. According to Grant, Meatball placed his

gun in some bushes outside the nightclub before entering. R. 59, ll. 11-15; R. 64, ll. 14-20.[2]

Between 3:30 and 4:00 a.m., Grant exited the club and indicated he was ready to return home. R. 8, ll. 17-23. Gray got into the car with him. R. 8, ll. 17-23; 58, ll. 12-14. Meatball did not leave with them. R. 9, l. 25—10, l. 2; 58, ll. 15-16; 68, ll. 10-12.

Grant and Gray continued to socialize at Grant's home. R. 10, ll. 4-10; 58, l. 22—59, l. 1. Suddenly, Meatball appeared in the doorway. R. 10, ll. 10-13; 59, ll. 5-7. Meatball was angry with Gray over the physical altercation between Gray and Meatball's brother that occurred two weeks earlier. R. 10, ll. 14-16. As Gray and Meatball began a heated verbal exchange, Grant told them to take their disagreement outside. R. 10, ll. 16-18; 13, ll. 1-8; 60, l. 6—61, l. 8. Gray and Meatball walked outside. R. 10, ll. 18-24; 13, ll. 11-12. Gray re-entered Grant's house, but Meatball followed him and continued to berate him. R. 10, ll. 19-24; 13, ll. 19-21. Grant again instructed the two men to go outside. R. 10, l. 25; 13, ll. 22-23; 64, ll. 5-6; 69, ll. 10-11.

As they walked onto the front porch, Meatball swung his fist at Gray. R. 11, ll. 4-6; 14, ll. 3-6. The two began to tussle. R. 11, ll. 5-6; 14, ll. 7-8; 26, ll. 21-24. Gray saw Meatball reach for a gun in his waistband. R. 11, l. 7; 14, ll. 12-13; 26, ll. 14-17. In fear, Gray grabbed for the gun. R. 11, l. 8; 14, ll. 15-16; 27, ll. 1-5. The two struggled over the gun. R. 11, l. 9. Gray got control of the gun, and as he stumbled back from Meatball, the gun fired. R. 11, ll. 10-12; 14, l. 17; 18, ll. 3-11; 27, ll. 11-13. When Gray stumbled backward, the two men were about twenty feet apart. R. 28, ll. 4-10. However, Meatball was charging him at the time he fired the single shot. R. 18, ll. 12-15; 19, ll. 8-10; 28, ll. 11-14; 31, ll. 8-9. After being shot, Meatball ran away. R. 19, ll. 11-12.

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[2] Ricky Grant did not tell the police he saw Meatball hide the gun in the bushes at the club. R. 70, l. 17 – R. 71, l. 13.

Aware that Meatball's family lived in the area, Gray, in shock, ran to Grant's door, but Grant would not let him in. R. 61, l. 14—62, l. 3. Gray then went to the house next door. R. 62, ll. 1-3.

Gray maintained that he feared death during the encounter with Meatball. R. 17, ll. 16-24. Gray was scared Meatball would shoot him and fulfill his promise to kill him. R. 17, ll. 20-24. Gray was "really scared." R. 19, ll. 15-19; 28, ll. 16-18.

Jeovani Vacquec lived near Grant. R. 32, ll. 3-6. He had multiple cameras around his house. R. 32, ll. 13-20. All of the cameras feedback to one central monitor. R. 32, ll. 21-23. Vacquec was certain the cameras were working on August 26, 2017, because he checked the cameras every two days. R. 33, ll. 8-15. Vacquec personally installed and maintained the cameras. R. 38, ll. 7-11. He noted the cameras recorded "on the recording machine" and were saved for "probably like two, three months" and then "erase[d] everything." R. 38, ll. 12-25. When police arrived at his house on August 26, 2017, he watched video footage with the officer. R. 33, ll. 16-24. The video footage recorded from Vacquec's equipment was admitted into evidence during the hearing over defense counsel's objection. R. 33, l. 25 – R. 37, l. 23; State's Exhibit 2.[3]

Raymond Kennedy claimed he was hanging out at Rick Grant's house on the night of August 25, 2017. R. 40, ll. 13-25. He saw Grant, Meatball, and Gray leave to go to the club. R. 41, ll. 8-14. However, Grant, Gray, and Gray's brother returned together. Meatball was not with them. R. 41, ll. 15-22. Later, Meatball arrived at Grant's home. R. 41, l. 23—42, l. 2. Meatball was angry and he claimed his gun was missing. R. 42, ll. 5-17; 59, ll. 8-10. When Meatball repeatedly accused Gray of having his gun, Gray denied the false accusations. R. 42, ll. 13-21.

[3] Mr. Gray challenged the admissibility of the video during the pre-trial hearing, the trial, and on direct appeal.

Kennedy claimed Meatball left, but returned approximately thirty minutes later and resumed his interrogation of Gray regarding his missing gun. R. 43, ll. 10-13. Based upon the altercation, Grant told Meatball and Gray to go outside. R.43, ll. 14-16.

According to Kennedy, Gray stood in the yard while Meatball continued his barrage of accusations. R. 43, ll. 14-17. Despite Gray's continued denials, the two men "got to scuffling and then gunshot went off." R. 43, ll. 17-19. Kennedy admitted the two were "tussling on the steps at first," and then the scuffle moved to the yard. R. 43, l. 23—44, l. 5.

Kennedy did not see who fired the gunshot, but he did hear it. R. 44, ll. 9-10. He observed that after the gunshot, Meatball "got up" and said, "That MF shot me for real." R. 44, ll. 10-12. Meatball then "ran down the street." R. 46, ll. 6-8.

Defense counsel argued Mr. Gray was entitled to immunity because he was in a place where he had a right to be as an invited guest at the home of Ricky Grant. R. 72, l. 25—73, l. 5. Additionally, Gray satisfied the requirements of self-defense because he feared losing his life at the hands of Meatball, who was armed. R. 73, ll. 6-13. The state conceded Gray was in a place where he had a right to be, but argued it was "a jury question as to the elements of self-defense." R. 73, ll. 15-19. Specifically, the state argued:

> There's some testimony from the witnesses that the defendant was armed with a handgun, got in sort of a tussle and he retrieved it, but that the victim came in, had no handgun on him, was asking about the gun and then the victim pulled a gun out after a tussle and shot him. I guess my position is that, in my mind, is a jury question.

R. 73, ll. 20-25.

When ruling on the motion, the judge explained the question before him was whether Gray had "demonstrated by the preponderance of the evidence" that he was entitled to immunity. R. 78, ll. 2-4. However, the judge failed to apply this burden of proof when reviewing the

evidence. The judge found Gray and Meatball were "invited guests." Therefore, Gray had a right to be there as required by the Act. R. 78, ll. 6-7. After noting the witnesses gave "different version[s] of events," the judge explained the descriptions were nuanced. R. 78, ll. 11-14. Thereafter, the judge explained his reasoning for denying immunity:

> If it [were] a clear open and shut case where all witnesses testified as to what [Gray]'s version of the events were, it might be a different matter entirely. The Court might be inclined to grant the defendant's motion.
>
> But based upon the varying evidence and the open question of whether the [Gray]'s entitled to a self-defense instruction, the Court's - - and passing upon the credibility of the witnesses who have testified, the Court finds that [Gray] has not met his burden of proving by the preponderance of the evidence that he is entitled to protection under the Act.

R. 78, ll. 15-25.

When defense counsel noted it was the judge's responsibility to weigh the evidence and resolve conflicts in the testimony in order to make a determination as to immunity, the judge was unrelenting in his view. R. 79, ll. 21. He emphasized that if he "had a hundred percent or very firm belief in the version of events put forward by [Gray] and argued by [defense counsel], then perhaps, ... it would be a different outcome, obviously." R. 79, ll. 17-21. He noted that "to the extent that [Gray]'s testimony would have been corroborated by others who were present at the scene, the court might be more inclined to say that the defense has met the burden of proving it by a preponderance of the evidence." R. 79, l. 22—80, l. 2. "In light of the conflicting evidence, though, and the open question of whether this is, in fact, a case of self-defense," the judge denied the motion. He thought "such matters [were] best left, in this case, since there is so much conflicting evidence, these matters [were] best left to the finders of fact, namely the trial jury." R. 80, ll. 3-8.

Order denying immunity

Judge Addy's May 2024, order denying immunity states "the court's recollection of this case and the testimony is crystal clear; accordingly, further hearing is unnecessary, and the court issues this order based upon the record, the court's notes, and the court's recollection." Order p. 1. In the order the judge found Mr. Gray did not prove he was entitled to immunity under the Act by the preponderance of the evidence. The judge found the testimonies of Mr. Grant and Mr. Kennedy were "more reliable and credible" than Mr. Gray's testimony where Grant and Kennedy were neutral witnesses with no stake in the outcome of trial and where Mr. Gray's version "[made] little sense." The judge found "most importantly" "all of this was clearly over a gun" and concluded "the most likely scenario was that Mr. Gray "appropriated the decedent's gun" and Mr. Gray was not entitled to immunity because he was at fault in bringing on the difficulty. Order p. 4.

In a footnote the judge suggests this Court "modify[] the procedural rule as promulgated in *Andrews*[4] and *McCarty*[5]" reasoning that appealing the denial of immunity after a guilty verdict is pointless because it requires the "appellate court to reject the jury's finding of guilt beyond a reasonable doubt." The order goes on to state "if a jury rejects a claim of self-defense and finds a defendant guilty, any insufficiently factually articulated denial of the defendant's [claim of immunity] by the court is of no import because the jury has found against the defendant beyond a reasonable doubt." The judge reasons that here, Gray "gave essentially the same testimony to the jury in his case in chief as he gave to the court at his immunity hearing . . . the jury rejected [Gray's] version of events." The order states this remand constitutes "little more than busy work" where the jury has reached a verdict of guilt. Order p. 5-6, fn i.

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4 *State v. Andrews*, 427 S.C. 178, 830 S.E.2d 12 (2019).

5 *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022).

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). "The General Assembly [found] that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A).

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

S.C. Code Ann. § 16-11-440(C).

More recently, the Supreme Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. *State v. Glenn*, 429 S.C.108, 117, 838 S.E.2d 491, 496 (2019) (citing *State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" *Id.* (quoting *Curry*, 406 S.C. at 372, 752 S.E.2d at 267). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Court explained that "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." *Glenn*, at 118, 838 at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." *Id.* Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." *Id.* "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." *Id.*

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. *Id.* "[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." *Id.* Additionally, "a proximate cause

analysis must also be applied to the unlawful activity element of subsection (C)." *Id.*

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

It appears from both the record of the 2019 immunity hearing and 2024 order reaffirming the denial of immunity, the judge erred in requiring Mr. Gray to satisfy a burden of proof higher than by a preponderance of the evidence. Additionally, while the judge made findings of fact—as required by this Court's remand—the facts are not applied to the Act. Instead, the judge focused on one "fact," his belief Mr. Gray took Meatball's gun, to the exclusion of all other facts. The judge determined that fact alone rendered Mr. Gray "not entitled to immunity as he [was] at fault in bringing on the difficulty." The judge erred in denying immunity to Mr. Gray where he satisfied the elements of self-defense save the duty to retreat and section 16-11-440(C) of the South Carolina Code.

In a footnote, the judge asked this Court to modify its procedural rule going forward. The order seems to suggest that because the jury as the finder of fact in this case found Mr. Gray guilty beyond a reasonable doubt this Court cannot or should not review the judge's decision to deny immunity. While the denial of immunity was based on the judge's findings of fact the judge's determination of immunity is a *matter of law* and is properly before this Court on appeal.

Burden of proof

As previously mentioned, "[a] claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." *State v. Curry*, 406 S.C. 364,

370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *Id.* at 371, 752 S.E.2d at 266.

"A 'preponderance of the evidence' stated in simple language, is that evidence which convinces as to its truth." *Frazier v. Frazier*, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955); *see also Gorecki v. Gorecki*, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010); *DuBose v. DuBose*, 259 S.C. 418, 424, 192 S.E.2d 329, 331 (1972). In fact, the Children's Code provides that "[p]reponderance of evidence means evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition." S.C. Code Ann. § 63-7-20 (21). Often understanding the burden of proof is explained in comparison to other burdens of proof: "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a *firm belief* as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less that is require for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *In re Dickey*, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (emphasis added).

Examining jury instructions provides useful guidance in defining the preponderance of the evidence. A suggested jury instruction in civil cases to inform juries regarding how to arrive at a verdict provides that the preponderance of the evidence is the equivalent to the greater weight of evidence. Ralph King Anderson, Jr., *Requests to Charge – Civil*, General Instructions – Burden §§1-3. According to the instruction, this means a party must prove the proposition by evidence that is more convincing on that party's side than the other side. *Id.* Further, the instruction explains:

> What is meant by the greater weight or preponderance of the evidence may be illustrated by an ordinary set of merchant scales used in a place of business. When the case begins, the scales are evenly balanced. When the case ends after all the evidence has been presented and as you deliberate, if those scales remain evenly balanced or if those scales tip ever so slightly in the defendant's favor, then the plaintiff has not met the required burden of proof and your verdict would be for the defendant. If, on the other hand, those scales tip ever so slightly in the plaintiff's favor, then the plaintiff has met the required burden of proof in this matter and your verdict would be for the plaintiff.

Id. Stated somewhat differently, but maintain the same meaning, Judge Anderson also proposed the following jury instruction:

> The scales of justice are in perfect equipoise as the case begins. The preponderance of the evidence moves the scales of justice from the position of perfect equipoise in favor of the party producing the preponderance of the evidence. As you evaluate the evidence and testimony, the scales of justice may tip ever so slightly in the party's favor on that factual issue and, if so, that party has met the burden of the preponderance of evidence on this factual issue. On the other hand, if the scales of justice remain in perfect equipoise on the factual issue, or if the scales tip ever so slightly in the other party's favor, then the party having the burden of proof has failed to meet the required burden.

Id.

The trial judge's ruling showed that he placed a very heavy burden upon Mr. Gray to show his entitlement to immunity rather than the proper burden of by a preponderance of evidence. The judge admittedly used the correct language when he stated the question before him was whether Gray had "demonstrated by the preponderance of the evidence" that he was entitled to immunity. R. 78, ll. 2-4. However, the judge's ruling showed he placed a burden *at least* as high as beyond a reasonable doubt, if not higher, upon Gray. The judge declared that if "*all* witnesses testified as to what [Gray]'s version of the events were," then he "*might* be inclined to grant" the request for immunity. R. 78, ll. 15-25 (emphasis added). Similarly, he

noted that "to the extent that [Gray]'s testimony would have been corroborated by others who were present at the scene, the court might be more inclined to say that the defense has met the burden of proving it by a preponderance of the evidence." R. 79, l. 22 – R. 80, l. 2. Thus, the judge required that all of the witnesses who testified to have corroborated Gray in order for him to grant immunity. Requiring the testimony of all witnesses to support Gray's version of events placed the burden of proof on Gray in excess of by a preponderance. Further, requiring Gray to present corroborative evidence placed a greater burden of proof on Gray than permitted under the law.

Finally, and most revealing, the trial judge made clear that only if he "had a *hundred percent* or *very firm* belief in the version of events put forward by [Gray] and argued by [defense counsel], then perhaps, ... it would be a different outcome, obviously." R. 79, ll. 17-21 (emphasis added). "In light of the conflicting evidence, though, and the open question of whether this is, in fact, a case of self-defense," the judge denied the motion. The judge's ruling made clear that he placed upon Mr. Gray a burden of proof in excess of "by a preponderance of the evidence." This was error.

In the order the judge reaffirms his 2019 ruling finding Mr. Gray did not prove his entitlement to immunity by the preponderance of the evidence. However, it appears again the judge held Mr. Gray to a burden of proof above by a preponderance. The judge found the testimony of Grant and Kennedy more reliable and credible than that of Mr. Gray. The judge found Mr. Gray's version of the incident made "little sense." Interestingly, the judge takes umbrage with Mr. Gray's assertion that the ride to the club with Meatball was without argument and Meatball returned to Grant's to start a fight without provocation. However, those facts were not disputed by either Grant or Kennedy. In fact, both men testified Gray and Grant left the club

without Meatball. And neither Grant nor Kennedy saw Gray with Meatball's gun. Neither testified they believed Gray had taken Meatball's gun. The testimony at the 2019 hearing was simply that Meatball *believed* Gray had his gun and Meatball came to Grant's house and started a fight with Gray.

Act as fact-finder

The Supreme Court made clear, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity." *Id.* In *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), the South Carolina Supreme Court held that because immunity under the Act was a bar to prosecution, it "must be decided prior to trial." The Court also held "that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *Id.* at 411, 709 S.E.2d at 665. In doing so, the Court established that the circuit court must resolve the conflict in the evidence to arrive at findings of fact in order to determine if the defendant proved entitlement to immunity by a preponderance of the evidence. *Id.* at 410, 709 S.E.2d at 665. To rule that conflicting evidence "created a question for the jury," ignores the standard of proof the circuit court was obligated to apply. When faced with conflicting evidence, the circuit court must make credibility findings, not simply conclude at conflict creates "a jury question," and therefore rule the defendant had not carried his burden of proof.

The order consists primarily of summary of the testimony given at the 2019 hearing with less than one page of the judge's findings of fact. While the judge made additional findings of

fact and ruled on credibility in the order it is apparent the judge reaffirmed his prior ruling on the same basis as the hearing.

Self-defense

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. *State v. Hendrix*, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); *see also State v. Davis*, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Id.*

In *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011), the South Carolina Supreme Court analyzed Dickey's claim that he was entitled to a directed verdict because the evidence showed he was exercising his right to self-defense as a matter of law. Dickey was a security guard at Cornell Arms apartments. *Dickey*, 394 S.C. at 495, 716 S.E.2d at 98. Two men were

guests of residents of the apartment complex. *Id.* When the men refused to leave, Dickey, in his role as security guard, intervened. *Id.* at 495, 716 S.E.2d at 99. Dickey contacted the police, and the men decided to leave. *Id.* at 496, 716 S.E.2d at 99. When the men walked outside, Dickey walked behind them so that he could tell the police where the men had gone. *Id.* The men turned toward Dickey, made threats, and advanced toward Dickey. *Id.* at 496-497, 716 S.E.2d at 99. Dickey pulled his gun, but one of the men continued to advance. *Id.* at 497, 716 S.E.2d at 100. When the man reached under his shirt, Dickey feared the man had a weapon. *Id.* In response, Dickey fired his gun, killing one of the men. *Id.*

Analyzing the first element of self-defense, the Court held Dickey was not at fault in bringing about the harm. *Id.* at 499, 716 S.E.2d at 101. The Court recognized "a business proprietor's right to eject a trespasser from his premises." *Id.* The Court explained that "[i]f the proprietor is engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty, and would not be bound to retreat." *Id.* at 499-500, 716 S.E.2d at 101. The Court concluded that Dickey was exercising his right to eject trespassers in good faith, as the agent of the apartment complex and, as a matter of law, he was not at fault for bringing on the difficulty because he had not brandished his gun, had followed the men outside only to alert the police to their whereabouts, and had not used threatening or words or posture. *Id.* at 500-501, 716 S.E.2d at 101-102.

In *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim

had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." *Id.*

Also, in *Hendrix*, 270 S.C. at 659-660, 244 S.E.2d at 506, the Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." *Id.* at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. *Id.* Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." *Id.*

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." *Id.* (citing *State v. Rash,* 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." *Rash*, 182 S.C. at 42, 188 S.E. at 438.

Furthermore, an individual has the right to act on appearances. *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000); *see also State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681 (1955). The Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on

appearances concerning one of the shootings. *Starnes*, 340 S.C. at 320, 531 S.E.2d at 912. In *Starnes*, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. *Id.* The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. *Id.* However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. *Id.* at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." *Id.* The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. *Id.*; see *also State v. Scott*, 424 S.C. 463, 472-473, 819 S.E.2d 116, 120 (2018) (explaining that what the defendant "knew in the heat of the moment" controlled whether the defendant was in actual imminent danger or reasonably believed he was).

Additionally, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *Hendrix*, 270 S.C. at 661, 244 S.E.2d at 507. In *Douglas v. State*, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

The South Carolina Supreme Court affirmed a grant of immunity in *State v. Jones*, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. *Id.* at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. *Id.* Jones left the residence and returned when she had "cooled down." *Id.* at 288, 786

S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. *Id.* at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. *Id.* Lee grabbed Jones, shook her, and told her it was over. *Id.* Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. *Id.* Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. *Id.* However, Lee later died at the hospital. *Id.*

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" where she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. *Id.* at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." *Id.* at 302, 786 S.E.2d at 142. In *Jones*, 416 S.C. at 288, 786 S.E.2d at, 135, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. *Id.*

This Court affirmed a grant of immunity in *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. *Id.* at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. *Id.* at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. *Id.* When Douglas grew angry, Smith "snapped" and "went crazy." *Id.* Smith grabbed Douglas by his arms and threw him against the refrigerator. *Id.* When Douglas fell to the floor, Smith got on top of him and struck him in the eye. *Id.* at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into

another room. *Id.* Douglas crawled to his bed and got a pistol from the nightstand. *Id.* Douglas, returning to the kitchen, again told Smith to leave. *Id.* Instead, Smith advanced toward Douglas. *Id.* Douglas lifted the pistol to scare Smith. *Id.* When Smith was two feet away, Douglas fired the pistol. *Id.* A bullet hit Smith, and he died within minutes. *Id.*

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. *Id.* at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. *Id.* at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. *Id.* at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. *Id.* Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." *Id.*

Contrary to order, Mr. Gray was not at fault in bringing on the difficulty. Regardless of Meatball's *belief* there was no testimony that anyone saw Mr. Gray with a gun that evening. It is undisputed, Gray was a guest in Ricky Grant's home. While socializing with his friend, Meatball arrived acting aggressively toward Gray. Although Gray claimed Meatball was threatening him due to an earlier confrontation between Gray and his brother, another witness alleged Meatball was asking Gray about the location of his gun. Regardless of the substance of the confrontation, it was undisputed that Meatball was the aggressor as he approached Gray and argued with him. Further,

Gray testified he was in actual fear of losing his life when he saw Meatball reach for his gun. Even if this Court were to determine that Gray was not in actual danger, then the evidence supports a finding Gray actually believed he was in such danger. This belief was reasonable as it was undisputed by the witnesses that Meatball often carried a gun and no witness claimed to have ever seen Gray with a gun. Finally, the danger was such that a man of ordinary courage would have fought for control of the gun and fired the fatal shot to protect himself from Meatball who was armed and acting aggressively. Gray explained he had no way to retreat because he feared Meatball would harm him or Meatball's family, who lived in the area would harm him. *See State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (explaining that an individual has no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury). Thus, Mr. Gray was entitled to immunity because he satisfied each element of self-defense.

Protection of Persons and Property Act

Even if this Court were to determine that Mr. Gray is not entitled to immunity under the Act pursuant to his satisfaction of the elements of the self-defense, specifically, the duty to retreat element, Mr. Gray was entitled to immunity under the Act because he satisfied the elements section 16-11-440(C). The trial judge erred in finding otherwise. The judge properly found that Gray was in a place where he had a right to be as he was an invited guest at the home of Ricky Grant. Although Grant asked that he and Meatball go outside due to the argument, Grant never evicted Gray or Meatball from his premises. Thus, the trial judge properly concluded Mr. Gray was in a place where he had a right to be as required under the statute.

Next, Mr. Gray was not engaged in unlawful activity. While the witnesses claimed Meatball accused Gray of stealing his gun, there was no evidence whatsoever to support the allegation. By all accounts, Gray was simply sitting at the home of his friend Ricky Grant when the

confrontation began. Thereafter, he was simply walking into the yard of his friend when Meatball continued his barrage of false accusations and physically attacked him.

Further, Mr. Gray was attacked by Meatball. Gray testified that Meatball swung at him with his fist. Additionally, as discussed *supra*, Meatball was the aggressor because he approached Gray repeatedly and engaged him in a verbal altercation which turned physical. Pursuant to the Act, Gray was under no duty to retreat and could meet Meatball's force with force, including deadly force, as long as he reasonable believed it was necessary to prevent death or great bodily injury to himself. Gray testified as to his fear of being killed by Meatball when he saw Meatball's gun. Others testified that Meatball was known to carry a gun. Even the state's theory of the case was that Meatball regularly carried a gun. The evidence presented showed that Gray's act of shooting Meatball was necessary to prevent Meatball from shooting him. Therefore, Mr. Gray satisfied each of the elements of the immunity statute as well. The trial judge erred in denying immunity to him.

CONCLUSION

Mr. Gray respectfully requests this Court grant him immunity from prosecution based upon the Protection of Persons and Property Act.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of August, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 18, 2025.

Sarah E. Shipe
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

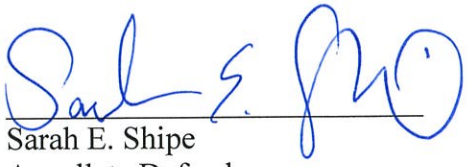
XZARIERA OKEVIS GRAY,

APPELLANT

APPELLATE CASE NO. 2024-000993

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 18th day of August, 2025.



Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT