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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN D. FORD,

APPELLANT

APPELLATE CASE NO. 2024-001870

FINAL BRIEF OF APPELLANT

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II.

In the alternative, if this Court determines that the witness's statement was self-incriminating, did the circuit court err by refusing to permit defense counsel to call his investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE, where the witness was unavailable due to the invocation by counsel of the witness's privilege against self-incrimination, the witness's statement was corroborated by other testimony, and the cumulative nature of the witness's statement enhanced its probative value to render its exclusion not harmless beyond a reasonable doubt?

III.

Did the circuit court err in denying immunity from prosecution where the evidence demonstrated Appellant satisfied the elements of common law self-defense and the Act by a preponderance of the evidence?

STATEMENT OF THE CASE

On June 22, 2017, an Horry County grand jury indicted Appellant for the murder of Jamal Burgess, the murder of Damien Alston, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime. R. 327-332. The charges arose from a shooting that occurred at a birthday party gathering for Rasheed McKnight and Damien Alston, Appellant's brother and cousin, respectively. R. 95, l. 13 – 96, l. 15. Appellant's counsel, Jonny McCoy, filed a motion to dismiss pursuant to section 16-11-450 of the South Carolina Code of Laws, the Protection of Persons and Property Act (the Act). R. 1-23. On March 5, 2019, the Honorable Benjamin Culbertson presided over a hearing on the motion. R. 24. McCoy represented Appellant, and Mary Ellen Walter and Joshua Holford represented the state. R. 24. At the conclusion of the hearing, Judge Culbertson denied Appellant's request for immunity. R. 222, ll. 7-20; R. 224-226.

On November 4-8, 2019, the State called Appellant to trial before the Honorable Paul M. Burch and a jury. R. 232. Additionally, the State called Aliga Campbell, who had been charged with the same offenses under an accomplice liability theory, to trial. R. 233-235. Holford and Walter continued to represent the state, McCoy continued to represent Appellant, and Eric Fox represented Campbell. R. 232.

The jury acquitted Campbell of all charges. R. 325, ll. 2-8. The jury acquitted Appellant of the murder of Alston. R. 325, ll. 9-11. However, the jury convicted Appellant of the murder of Burgess and the two weapons charges. R. 325, ll. 12-24. Judge Burch sentenced Appellant to life imprisonment without the possibility of parole for murder and to five years' imprisonment for each of the weapons convictions. R. 326, ll. 17-23; R. 333-335.

On November 13, 2019, Appellant timely filed a notice of appeal. Former Appellate Defender Susan Barber Hackett filed a seven-issue brief with this Court on June 9, 2021. The state filed its final brief on June 14, 2021. Oral argument was held in the case on December 7, 2022. This Court issued a decision on April 5, 2023, holding that the circuit court erred in determining that the Act did not apply to the weapons charges, and the order denying immunity was insufficient for appellate review. This Court remanded the case back to the circuit court "to make specific findings of fact that support whether Ford is, or is not, entitled to immunity for murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime." State v. Ford, 439 S.C. 261, 886 S.E.2d 710 (Ct. App. 2023).[1] Because this Court remanded the matter back to the circuit court for a new order on Appellant's immunity under the Act, this Court did not address the other evidentiary issues regarding the immunity hearing that Appellant raised. Id. at 270, 886 S.E.2d at 715.

Undersigned counsel petitioned this Court for rehearing[2] on April 21, 2023, requesting this Court rule on the other evidentiary issues raised regarding the immunity hearing prior to remanding for a new order. This Court denied the petition for rehearing on May 18, 2023. A petition for writ of certiorari was filed in our Supreme Court on June 19, 2023. The state filed a return to the petition on July 18, 2023. Our Supreme Court denied certiorari on March 5, 2024. The remittitur was issued on March 6, 2024. On October 24, 2024, the Honorable Benjamin H.

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1 This Court also ruled that the state was permitted to enter witness Gore's prior consistent statement under Rule 801(d)(1)B, SCRE and that Appellant's sentence on the possession of a weapon during the commission of a violent crime charge was improper and must be vacated because he was also sentenced to life without the possibility of parole on the murder charge. State v. Ford, 439 S.C. 261, 886 S.E.2d 710 (Ct. App. 2023)

2 The petition for rehearing also requested this Court reconsider its ruling on the admissibility of witness Gore's prior consistent statement.

Culbertson issued a new order denying Appellant immunity under the Act. R. 227-231. Appellant timely filed a notice of appeal of the new order or November 1, 2024. This brief follows.

ARGUMENT

I.

The circuit court erred in allowing the lawyer for a witness whom Appellant wanted to call during the hearing on his request for immunity pursuant to the Protection of Persons and Property Act to invoke the witness's privilege against self-incrimination pursuant to the Fifth Amendment where (1) the privilege is personal and must be invoked by the person to whom the privilege belongs, (2) there was no evidence that the witness would have invoked the privilege had he been asked, and (3) the evidence in the record showed the witness could not have invoked the privilege as the testimony sought was not self-incriminating.

Standard of review

"In criminal cases, [the appellate] Court only reviews errors of law." State v. Lawrence, 439 S.C. 611, 616, 889 S.E.2d 557, 560 (2023) citing State v. Gamble, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013). "[The appellate] Court reviews question of law de novo." Id. citing State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).

Relevant facts

During the hearing on Appellant's request for immunity pursuant to the Act, defense counsel called Aliga Campbell as a witness. R. 135, ll. 24-25. Attached to Appellant's motion for immunity was a sworn, notarized statement made by Campbell on August 10, 2016, eighteen days after the incident. R. 22-23. Campbell described how he and Jamal Burgess, the deceased, had a heated encounter prior to Appellant's arrival at his family members' birthday party where the fatal shooting later occurred. R. 22-23. Campbell stated that when he arrived at the party

with Rasheed McKnight,[3] Burgess walked up to them and tried to grab Campbell's "grill" [4] from behind his ear – this caused Campbell to flinch back and his "grill" fell to the ground. Burgess picked up the "grill" and told Campbell to walk with him. Burgess was aggressively questioning Campbell, asking if Campbell "f**k with" him because Campbell was close to Appellant. R.22-23. Burgess admitted to Campbell that he knocked out Appellant's teeth on a prior occasion. R. 22-23. Burgess requested Campbell called Appellant about his arrival at the party, but Appellant did not answer. R. 22-23 Minutes later, Appellant arrived, and Campbell told Appellant that Burgess wanted to talk to him. R. 22-23. Appellant, who did not trust Burgess, did not go talk to him. Instead, when Appellant did not walk to Burgess, Burgess approached him. R. 22-23.

Campbell observed the conversation between Appellant and Burgess. R. 22-23. Damien Alston stepped between the two men because it looked "like Burgess was trying to fight [Appellant]." R 22-23. Campbell stated that as Burgess pushed Damien Alston to the side he was "whipping his gun out." R. 22-23. Alston's gun fell to the ground when Burgess pushed him. As Burgess "whipped out his gun, turned and fired," Appellant picked up Alston's gun and "fired back at Burgess in self-defense." R. 22-23. Campbell stated Burgess was "waving the gun all around and shooting at everyone." He described Burgess as highly intoxicated that day stating "Burgess was not on the same planet with the rest of us" at the time of the incident. R.

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3 McKnight also provided a sworn, notarized affidavit detailing the events of the shooting that was attached to the motion for immunity. He explained how Burgess was the aggressor and persistently pursued Appellant prior to the shooting. He also stated that Burgess was armed and people in the crowd removed his weapon and bullets from Burgess after the incident but prior to police arriving. His statement mirrors the statements of Campbell, Everette, and Appellant. R. 12-13.

4 Grills, also called "grillz" or "fronts," are decorative covers often made of gold, silver, or jewel-encrusted precious metals that snap over one or more of a person's teeth. They generally are removable. see https://www.mouthhealthy.org/all-topics-a-z/grills

22-23. Campbell was clear, "Burgess fired first. It was self-defense." R. 22-23. Campbell believed Burgess was going to kill Appellant. R. 22-23.

Finally, Campbell explained that the day before the shooting Burgess rode by his house where he and Appellant were outside. R. 22-23. Burgess saw the two men and pulled up his shirt to show them his gun in his waistband. R. 22-23. Campbell "took this as a threat and a warning against [Appellant] and anyone with [Appellant]." R. 22-23.

While the parties were waiting for Campbell to arrive in the courtroom from lock-up, Campbell's attorney Eric Fox advised the presiding judge that although Campbell was not a defendant for purposes of the hearing on Appellant's immunity request, Campbell was a co-defendant in the case. R. 136, ll. 7-8. Counsel Fox "advised and would advise Mr. Campbell again to invoke his rights under the Fifth Amendment not to give any testimony at all" as Campbell was "still indicted in a double homicide that [was] still pending." R. 136, ll. 10-14. The judge questioned, "[w]ell I don't know that I can – I mean this isn't his trial. I can't compel him to testify. If his attorney objects to you calling him as a witness." R. 136, ll. 16-18. Defense counsel expressed that he did not think Counsel Fox objected to Campbell being called and that it was a "procedural matter." R. 136, ll. 19-20. Counsel Fox then informed the presiding judge that he objected to Campbell testifying in any way. R. 136, ll. 21-24.

Defense counsel explained that Campbell provided "a sworn statement and a written affidavit," two weeks after the shooting and over a year prior to his arrest. R. 137, ll. 1-13. Further, defense counsel indicated that he wanted to call Campbell as a witness "for record sake" even if he wished "to plead the Fifth Amendment." R. 137, ll. 14-15. The judge framed the question as whether defense counsel could call Campbell "as a witness over his attorney's objection." R. 138, ll. 1-3. Defense counsel explained that it was necessary for Campbell to be

called to the stand and assert his privilege if that is what he chose to do. R. 138, ll. 4-10. The judge questioned whether he would permit "Campbell take the stand to assert his Fifth Amendment right when his attorney says, no I'm invoking it now, he doesn't take the stand." R. 138, ll. 15-17. The judge noted defense counsel sought to call Campbell as a witness during "a motion hearing," not "a criminal trial." R. 138, ll. 17-18. The solicitor opined, "I actually don't think it's proper to call someone just to invoke their Fifth Amendment." R. 138, ll. 20-21. In light of Counsel Fox's invocation of the privilege for Campbell, the judge would not permit defense counsel to call Campbell as a witness. R. 137, ll. 17-21; 139, ll. 4-6; 143, ll. 11-20.

Discussion

The circuit court improperly allowed Counsel Fox to invoke Campbell's Fifth Amendment right without Campbell taking the stand. Not only was it error for the court to allow Counsel Fox to invoke a right that belonged solely to his client, but it was error for the circuit court to allow a blanket invocation of that right. Appellant was prejudiced, as the information Appellant sought to obtain from Campbell was not incriminating to Campbell and supported Appellant's immunity claim.

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[5] "The essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406

[5] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12. Our Supreme Court has concluded that "the South Carolina Constitution, in this instance, provides the same protections as the United States Constitution." State v. Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023).

U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty").

Personal right

"The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated" by the Supreme Court of the United States. Couch v. United States, 409 U.S. 322, 327 (1973). "By its very nature, the privilege is an intimate and personal one." Id. The Supreme Court held that it is an "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, *a personal one that can only be invoked by the individual whose testimony is being compelled.*" Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986) (rejecting the notion that an attorney can invoke an individual's privilege against self-incrimination) (emphasis added).

"[T]he privilege against self-incrimination is personal and may not be invoked by, or on behalf of, a third person." State v. Hughes, 328 S.C. 146, 150, 493 S.E.2d 821, 822 (1997). Our Supreme Court has explained that "[a] judge may not invoke a witness's Fifth Amendment privilege," State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104-105 (1979), nor may a trial judge permit a witness to claim his Fifth Amendment privilege *before taking the stand.* State v. Perry, 279 S.C. 539, 540, 309 S.E.2d 9, 10 (1983) (emphasis added). More recently, our Supreme Court "[r]eiterating that *a witness himself must assert the privilege*" again stated "it is well settled that a witness who is not also a defendant can invoke that privilege *only after the incriminating question has been put.*" State v. Lawrence, 439 S.C. 611, 619, 889 S.E.2d 557, 562 (2023) citing State v. McGuire 272 S.C. at 550-551, 253 S.E.2d at 105 (emphasis added).

"The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever

the answer might tend to subject to criminal responsibility him who gives it." State v. Hook, 348 S.C. 401, 415, 559 S.E.2d 856, 863 (Ct. App. 2001), aff'd as modified, 356 S.C. 421, 590 S.E.2d 25 (2003) citing McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). A prohibition exists on calling a witness *before a jury* solely for the sake of invoking his or her Fifth Amendment privilege. See Hughes, 328 S.C. at 150, 152, 493 S.E.2d at 823 (1997) ("It is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation...[Neither party] should be allowed to call witnesses who either side knows will invoke the Fifth Amendment in front of the jury and then be subject to inferences in a form not subject to cross-examination.").

Here, the presiding judge erred by allowing Counsel Fox to invoke the privilege against self-incrimination on Campbell's behalf. The privilege was personal to Campbell, and it could be invoked only by Campbell after he had taken the stand and been subjected to questioning. Additionally, the language used by Counsel Fox was illuminating and important for the analysis of this issue on appeal. Counsel Fox informed the judge that he "advised and would advise Mr. Campbell again to invoke his rights under the Fifth Amendment not to give any testimony at all." Hrg. 113, ll. 10-13. Simply, Counsel Fox related only what he had advised Campbell to do. He never informed the judge that Campbell wanted to invoke the privilege. Thus, even if the law were to permit Counsel Fox to invoke the privilege on Campbell's behalf based on some agency theory, there was no evidence in the record that Campbell, the person to whom the right belonged, actually wanted to invoke his right against self-incrimination.

Not self-incriminating

The record revealed that the testimony defense counsel sought to elicit from Campbell would not have been self-incriminating. Counsel Fox never indicated – or even suggested – that

Campbell would testify differently from the statement he provided to Appellant's private investigator just weeks after the shooting. Campbell did not admit to any illegal conduct in the statement he provided nor would his answers to questions about the statement furnish a link in the chain of evidence needed to prosecute him.

The privilege against self-incrimination is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to the South Carolina Supreme Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118. "[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119. Furthermore, "unless the witness is the defendant in the case on trial, the trial court should not allow a 'blanket' invocation of the Fifth Amendment." Lawrence, 439 S.C. at 619, 889 S.E.2d at 561.

Campbell's statement provided no self-incriminating information. Importantly, as will be discussed infra, the judge ultimately found the statement was not against Campbell's penal

interest when he determined defense counsel could not call the investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE. At most, Campbell's statement was an admission that Campbell was present at the scene of a shooting. Merely being present at the scene of a crime is not incriminating – even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)).

Critically, the eventual finding that the statement was not against Campbell's penal interest was in direct conflict with the judge's decision regarding Campbell's Fifth Amendment privilege. On one hand, the circuit court allowed Counsel Fox to invoke Campbell's Fifth Amendment privilege against self-incrimination which barred defense counsel from calling Campbell to testify to the statement he had given. However, the circuit court simultaneously ruled the statement that defense counsel sought to admit was not against Campbell's penal interest. Both rulings simply cannot be correct. If the statement was incriminating, as discussed infra, then Campbell himself, and not his counsel, could invoke his Fifth Amendment privilege against self-incrimination, making himself unavailable and making the statement admissible under Rule 804(b)(3), SCRE, as a statement against his penal interest. If the statement was not incriminating, then neither Campbell, nor his counsel, could invoke his Fifth Amendment privilege and defense counsel should have been able to call Campbell to testify about his statement during the immunity hearing.

It was improper for the judge to allow Counsel Fox to claim a blanket invocation of Campbell's Fifth Amendment privilege against self-incrimination. It was incumbent upon the

circuit court to first determine whether Campbell himself wanted to invoke the personal privilege against self-incrimination. If Campbell intended to invoke the privilege, the court was then required to determine on a question by question basis whether the testimony sought could reveal incriminating information about Campbell. The judge erred by failing to pursue this undertaking.

II.

In the alternative, if this Court determines that the witness's statement was self-incriminating, the circuit court erred by refusing to permit defense counsel to call his investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE, where the witness was unavailable due to the invocation by counsel of the witness's privilege against self-incrimination, the witness's statement was corroborated by other testimony, and the cumulative nature of the witness's statement enhanced its probative value to render its exclusion not harmless beyond a reasonable doubt.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

When the presiding judge indicated he would permit Counsel Fox to invoke the Fifth Amendment privilege against self-incrimination for Campbell, defense counsel expressed his desire to call his private investigator to testify to the contents of Campbell's statement. R. 137, ll. 4-16, ll. 22-25; R. 139, l. 23 – 140, l. 1. Specifically, defense counsel argued that his investigator should be permitted to testify to Campbell's prior statement pursuant to Rule 804(b)(3), SCACR. R. 140, ll. 8-13; 141, ll. 1-6. The judge agreed that Campbell was not available because of the assertion by Counsel Fox of Campbell's privilege against self-

incrimination; however, the judge determined the statement was not against Campbell's interest. R. 140, ll. 14-21, ll. 24-25; R. 141, ll. 8-9. The state objected to defense counsel's introduction of the statement through his investigator, and the judge sustained the objection. R. 142, l. 22 – 143, l. 7.

Appellant incorporates by reference the contents of the proposed statement as discussed in Issue I, supra.

Discussion

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible. Rule 802, SCRE. However, the South Carolina Rules of Evidence permit hearsay "if the declarant is unavailable as a witness" and the "statement which was at the time of its making ... so far tended to subject the declarant to civil or criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE.

"'Unavailability of a witness' includes situations in which the declarant ... is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 804(a)(5), SCRE. "To bring evidence within [the Rule 804(b)(3), SCRE] exception, Defendant must show that the proffered statements were made by an unavailable declarant, that the statements exposed

the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements." State v. McDonald, 343 S.C. 319, 323, 540 S.E.2d 464, 466 (2000).

Although our Supreme Court refused to adopt a specific test to determine whether a statement has been sufficiently corroborated, the Court made clear that "the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statements' contents, but rather to the making of the statement." State v. McDonald, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000). Further, the Court recognized that "[i]n many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration." Id.

In State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992), our Supreme Court examined this issue. At Doctor's trial, an individual testified that Doctor and two other boys approached him in a shopping mall parking lot and demanded his keys. State v. Doctor, 306 S.C. 527, 528, 413 S.E.2d 36, 37 (1992). When the individual refused, Doctor pointed a gun at his head. Id. The individual handed over his keys and the three young men drove away in the car. Id. At the trial, Doctor called a sixteen-year-old boy to testify. Id. He admitted that he and two other minors committed the theft, and denied that Doctor was involved. Id. According to the boy, he and two others found the keys on the floorboard and did not use a gun. Id. The boy had pled nolo contendere to the crime in Family Court. Id.

The defense also called two minors to testify, who were implicated by the sixteen-year old. Id. at 529, 413 S.E.2d at 37. Both asserted their Fifth Amendment privilege against self-incrimination. Id. The defense then proffered the testimony of his investigator, who stated that "both the nontestifying minors, separately and in the presence of family members, confessed to the theft." Id. According to the investigator, the confessions "were identical in detail to the in-

court confession of the testifying minor." Id. Nevertheless, the judge excluded the investigator's testimony as hearsay. Id.

Our Supreme Court held the two minors were made unavailable by their assertion of their privilege against self-incrimination. Id. at 530, 413 S.E.2d at 38. Further, the Court held the statements were sufficiently corroborated in that all three minors related identical versions of the crime. Id. Finally, the two out-of-court confessions were further corroborated by the testimony of the three witnesses who saw the three confessing minors in the car without Doctor prior to the removal of the stereo. Id.

Additionally, the Court rejected the state's argument that the exclusion of the testimony by the investigator was harmless error as it was merely cumulative of the testifying minor's confession. Id. The Court noted that it was the "redundancy of the details" that made the testimony so valuable to the defendant. Id. The testifying minor's testimony was contradicted by the alleged victim's testimony, and the testifying minor's credibility was attacked on cross-examination by the state. Id. "When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative." Id.

In another similar case, our Supreme Court reversed a trial judge's exclusion of statements by two witnesses that tended to exculpate the defendant in State v. McDonald, 343 S.C. 319, 324-325, 540 S.E.2d 464, 466-467 (2000). Hawkins and Thorson were in the driveway of a residence when a group of men approached them. Id. at 321, 540 S.E.2d at 464. Thorson claimed McDonald, "who was not wearing a mask, approached the car from the rear, brandished a sawed-off shotgun and placed it to Thorson's head, demanding money." Id. at 321, 540 S.E.2d at 465. Thorson claimed "the gun fired," killing Hawkins. Id. Thorson sped away. Id. Robert

Jackson also claimed that McDonald fired the fatal shot; however, he indicated McDonald was wearing a black mask and he was able to identify him by his clothing. Id. Robert Jackson and Thorson agreed that McPhail was present at the scene. Id.

Timmy Jackson testified that immediately after hearing a gunshot, he saw McPhail standing near the car with a sawed-off shotgun. Id. at 322, 540 S.E.2d at 465. Timmy Jackson also testified that McDonald was not at the scene immediately after the shooting. Id. When the defense called McPhail to testify, he asserted his Fifth Amendment privilege. Id. Thereafter, the defense proffered testimony from Timmy Jackson that McPhail told him that he shot Hawkins because he refused to hand over his money. Id. The trial judge excluded the testimony, finding it was inadmissible testimony. Id.

In addition to Timmy Jackson's testimony, the defense proffered the testimony of (1) an individual who claimed McPhail admitting shooting Hawkins because he refused to pay for drugs and (2) a fellow who was in jail at the same time as McPhail and overheard McPhail tell an unidentified person that he shot the deceased and that McDonald was not involved. The trial judge excluded the testimony of these individuals on the basis of hearsay as well. Id.

Our Supreme Court reversed the trial judge and held "the statements purportedly made by McPhail [were] clearly corroborated and should have been admitted at trial." Id. at 324, 540 S.E.2d at 466. The Court explained that Timmy Jackson and Gary Hawkins indicated the motive for the shooting was the failure of the deceased to provide McPhail with money, which was the substantially same as the testimony from Thorson and Robert Jackson. Id. "The content of the statements indicates that the speaker had extensive knowledge of details of the crime." Id. Further, even the state's witnesses placed McPhail at the scene of the crime and Timmy Jackson placed a sawed-off shotgun in McPhail's hand within seconds of the shooting. Id. Finally,

"three different witnesses claim[ed] to have heard McPhail make similar statements on three separate occasions." Id. at 325, 540 S.E.2d at 466-467. The Court held the statements were sufficiently corroborated; therefore, the trial court's suppression of the statements was an abuse of discretion as it was controlled by an error of law. Id. at 325, 540 S.E.2d at 467.

In contrast, our Supreme Court affirmed a trial judge's exclusion of a co-defendant's statements admitting to shooting a police officer where the statements lacked corroborating evidence of trustworthiness. State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 644-645 (1996). Three of the incriminating statements made by the co-defendant were to jailhouse informants. Id. The Court held these statements did "not clearly indicate they were trustworthy." Id. at 359, 468 S.E.2d at 645. Two other statements, one given to an investigating officer and one to a prison guard, did not exculpate Forney. Id. at 360, 468 S.E.2d at 645. Rather, these statements only inculpated the co-defendant. Id.

Campbell was an unavailable witness because the presiding judge permitted Counsel Fox to invoke Campbell's privilege against self-incrimination. See Rule 804(a)(1), SCRE; Doctor, 306 S.C. at 530, 413 S.E.2d at 38. While Appellant argued that Campbell's proposed testimony was not self-incriminating, see supra Issue I, the judge permitted Counsel Fox to invoke Campbell's privilege against self-incrimination presumably because the judge found Campbell's testimony would have incriminated Campbell. Otherwise, Campbell would not have been permitted to invoke the privilege. Appellant acknowledges the judge's ruling on the Fifth Amendment issue contradicts his ruling that Campbell's proposed testimony was not against his penal interest, thus he raises this issue in the alternative. In the event this Court determines Campbell's proposed testimony was self-incriminating because he admitted to being present at the time of the shooting or that he called Appellant immediately prior to Appellant arriving at the

party, then the proposed testimony was ipso facto against his penal interest, and the judge erred by not allowing Appellant to present Campbell's statement through his investigator.

Furthermore, Campbell's statement was corroborated sufficiently under Rule 803(b)(4), SCRE, to require admission. Campbell's statement was almost identical to the testimony of Appellant and Everette Ford. While there were too many similarities to list them all, the important corroborating details are as follows. Campbell described Appellant and Burgess having a conversation, which was also described by Everette and Appellant. R. 22-23; R. 50, ll. 4-23; R. 97, ll. 9-25. Campbell explained how Damien Alston tried to break up the confrontation, just as Everette and Appellant explained. R. 22-23; R. 55, ll. 6-9; R. 97, ll. 1-3. Next, Campbell told how Alston dropped his gun during the scuffle, which was exactly what Appellant and Everette said happened. R. 22-23; R. 55, ll. 18-23; R. 98, ll. 7-10. According to Campbell, Everette, and Appellant, Burgess fired first. R. 1-23; R. 55, l. 24 – 56, l. 4; R. 98, ll. 11-12. All three indicated Appellant picked up Alston's gun and returned fire. R. 1-23; R. 56, ll. 5-10; R. 98, ll. 10-12.

Just as in Doctor and McDonald, the excluded statement by Campbell was sufficiently corroborated by the evidence in the record at the time – the testimony of Everette and Appellant. Furthermore, the cumulative nature of Campbell's statement did not render the error harmless. As the Court explained in Doctor, it is the "redundancy" of the details that makes the testimony so valuable. The state called into question the credibility of Appellant and his cousin, Everette, which amplified the importance of Campbell's statement. The presiding judge erred by refusing to permit Appellant to present Campbell's statement through his investigator pursuant to Rule 804(b)(3), SCRE.

III.

The circuit court erred in denying immunity from prosecution where the evidence demonstrated Appellant satisfied the elements of common law self-defense and the Act by a preponderance of the evidence.

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).

Relevant facts [6]

In 2014, a mere two years prior to the shooting incident, Burgess walked up to Appellant, placed his arm around Appellant's shoulders, and without warning knocked out Appellant's teeth by hitting him in the mouth with a gun. R. 51, ll. 11-18; R. 53, ll. 3-6; R. 87, ll. 10-13, ll. 24-25. After being hit, Appellant fell to the ground, spitting out teeth and blood. R. 87, ll. 14-15. Burgess stood over Appellant threatening to shoot him. R. 87, ll. 15-16. Appellant managed to jump up and grab Burgess, with the assistance of another person, to prevent Burgess from shooting him. R. 87, ll. 16-20. Appellant then ran from Burgess. R. 87, ll. 19-20. Appellant

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6 Attached to the motion for immunity were sworn, notarized statements by Rasheed McKnight, Everette Ford, Emily Ford, Aliga Campbell, and Phyllis Campbell. These statements all supported Appellant's immunity claim by corroborating Appellant's assertions that Burgess was the aggressor, Burgess was known to be violent and carry a gun, Burgess was armed at the time of the shooting, Appellant had a reasonable fear of Burgess due to Burgess knocking out Appellant's teeth two years earlier, Appellant attempted to avoid Burgess at the party, and Burgess was at fault for bringing on the difficulty. R. 1-23.

had to go to the emergency room and was sent to a surgeon to have the remnants of his broken teeth removed from his gums. He also had to have his gums stitched together. R. 88, ll. 4-23. From that point forward, Appellant was afraid of Burgess and kept his distance. R. 88, l. 24 – 89, l. 4; R. 89, ll. 10-11; R. 90, ll. 14-25; R. 109, l. 25; R. 134, ll. 7-9. Appellant was also aware that Burgess was "always shooting people and shooting at people." R. 91, ll. 1-2.

During the middle of July 2016, Appellant learned that Burgess, who was incarcerated at the time, told Monique Brown that he planned to kill three people when he was released. Appellant was one of the three people Burgess intended to kill. R. 91, l. 22 – 92, l. 7; R. 111, ll. 3-24. Burgess was released from prison around July 21, 2016. R. 92, ll. 12-15. Following his release, on July 22, 2016, Appellant's mother Emily Ford saw Burgess sitting on a moped in front of the home she shared with her son. R. 35, ll. 9-19; R. 36, ll. 14-20. Appellant also learned that Burgess was riding his moped in front of Appellant's grandfather's house. R. 93, ll. 1-6.

The following day, Appellant's cousin Everette Ford also attended the birthday party on Warren Street (also called Dudley Street). R. 45, l. 1 – 46, l. 21. He arrived around the same time as Appellant. R. 49, ll. 4-7; R. 96, ll. 13-15. Burgess put his arm around Appellant in an aggressive way, just as he did in 2014. R. 50, ll. 4-11; R. 97, ll. 15-24; R. 98, l. 22 – 99, l. 2. Burgess, who was armed with a gun at his waist, then confronted Appellant about some rumors and gossip. R. 50, ll. 15-23; R. 99, ll. 22-25. Appellant "felt dread" and fear in that moment. R. 97, ll. 10-11. Appellant pulled out of Burgess' hold. R. 51, ll. 9-14.

Burgess told Appellant he "should shoot" him. R. 97, ll. 24-25. When the confrontation between Appellant and Burgess escalated, Damien Alston arrived and tried to defuse the situation. R. 55, ll. 6-9; R. 70, ll. 14-15; R. 98, ll. 1-3. While Alston was trying to calm Burgess,

who was reaching for his gun, Alston's gun dropped to the ground. R. 55, ll. 12-23, ll. 16-19; R. 93, ll. 6-10; R. 120, l. 24 – 121, l. 3. Burgess then fired his gun. R. 55, ll. 24-25; R. 98, ll. 10-12. In fear of losing his life, Appellant then picked up Alston's gun, which was a 9-millimeter, and returned fire while running away. R. 56, ll. 6-8; R. 98, ll. 10-12; R. 100, ll. 14-21; R. 102, ll. 1-2, ll. 12-13. Burgess continued firing as Appellant ran. R. 56, ll. 9-10; R. 98, ll. 12-13; R. 128, ll. 9-16; see R. 165, ll. 21-25 (a state's witness testifying that Burgess was still alive after being shot); R. 185, ll. 16-18 (same); R. 198, ll. 1-6 (police officer testifying that Burgess was alive when he arrived).

Everette and Appellant explained that Burgess "always had a gun." R. 48, l. 19; R. 63, l. 16; R. 93, l. 13. However, the state presented several witnesses who claimed to not see a gun on Burgess on the night of the party. See e.g., R. 154, ll. 18-19; R. 162, ll. 11-12; R. 182, ll. 6-8; R. 184, ll. 21-22.

Felicia Williams claimed she heard a glass bottle drop, which drew her attention to a confrontation between Appellant and Burgess. R. 159, ll. 6-8; R. 161, ll. 15-22; R. 169, ll. 10-12. She saw Alston in the middle of Appellant and Burgess. R. 159, ll. 12-13. Reluctantly, Williams admitted that she told police that there may have been a "beef" between Appellant and Burgess because Burgess knocked Appellant's teeth out. R. 170, ll. 10-17. Further, Williams admitted to hearing Appellant say, "I'll fight, I'll fight but I ain't gonna shoot." R. 170, ll. 21-24. Burgess pushed Alston to the side. R. 159, ll. 14-15, ll. 18-22; R. 171, ll. 14-17. Then, she claimed, Appellant pulled out a gun from off his body. R. 159, ll. 15-16; R. 162, ll. 2-5. "[O]nce the first shot went off [she] took off running into Dudley's house." R. 159, ll. 15-17.

Williams also admitted that she was "not sure" if Burgess fired a gun. R. 173, l. 21 – 174, l. 2. Williams even admitted that she was uncertain whether Burgess had a gun because she

was not "looking at him like that." R. 175, l. 22 – 176, l. 1. Importantly, Williams testified that "it could have went either way out there." R. 176, ll. 9-19. In fact, Williams told Appellant after the shooting that if he had not killed Burgess then Burgess would have killed him. R. 177, ll. 19-20. She surmised that "[s]omebody was going to get killed that night regardless." R. 177, ll. 20-21. She also revealed that while she did not see Burgess with a gun, the police informed her Burgess had tested positive for gunshot residue. R. 178, ll. 17-21.

Sherika Gore also attended the birthday party. R. 181, ll. 2-4. She saw Appellant and Burgess in the road talking. R. 183, ll. 8-9. She was not paying close attention to them. R. 183, ll. 9-10. However, when she "looked up," she saw Appellant "with a gun." R. 183, ll. 10-11. Upon seeing this, she ran. R. 183, l. 11; R. 185, ll. 3-4. Although she saw Appellant with a gun, she did not see where he got the gun. R. 184, ll. 16-18. Gore denied previously stating to police in a recorded statement that Appellant and Burgess were arguing, that it got heated, and that they were yelling when Burgess pushed Alston out of the way. R. 188, l. 8 – 190, l .25.

When the police arrived, they found "a huge crowd of people." R. 197, l. 1; R. 199, ll. 14-16; R. 201, l. 6. The police discovered six cartridge casings at the scene. R. 206, ll. 8-16. Five were 380 cartridge casings and one was a 9-millimeter cartridge casing. R. 206, ll. 19-20. "The 380's were on the east side of the roadway. Some of the cartridge casings [were] very, very close to the roadway. Some [were] in the dirt, some [were] on the roadway, but they were very close together in sort of like a line going up beside the road." R. 206, l. 23 – 207, l. 2. The 9-millimeter cartridge casing was in the center of the roadway. R. 209, ll. 11-20. There were no other casings around it. R. 209, ll. 17-20. An autopsy revealed Alston sustained three gunshot wounds, and Burgess sustained a single gunshot wound. R. 211, ll. 16-21. However, no projectiles were recovered from the bodies. R. 212, ll. 15-16.

The state argued Appellant failed to show that he was without fault in bringing on the difficulty. R. 148, ll. 20-22. Although conceding that Appellant had a legal right to be at the party, the state argued Appellant brought on the difficulty by attending the party. R. 149, ll. 1-18. According to the state, Appellant "was, in fact, the aggressor." R. 214, ll. 1-2. To support this argument, the state pointed to its witnesses who indicated Appellant "fired the first shot." R. 214, ll. 10-13.

Next, the state argued for immunity not to apply because Appellant was prohibited from carrying a handgun and was "engaged in a fight by his own words" prior to shooting Burgess. R. 149, l. 22 – 150, l. 7. Defense counsel countered that according to binding precedent, a person can be acting lawfully even if he is in unlawful possession of a weapon if he is entitled to arm himself in self-defense at the time of the shooting. R. 150, ll. 13-19. Here, Appellant "was entitled to arm himself once he saw [Burgess] reaching for a gun." R. 150, ll. 19-21.

Defense counsel countered that Appellant's conduct was not the type that would provoke a deadly assault. R. 216, ll. 11-13. Appellant was grabbed in the same manner by the same man who knocked his teeth out during a previous confrontation. R. 216, ll. 14-19. Further, Appellant was aware that Burgess had been in jail until just days before the encounter. R. 216, ll. 19-20. Due to their prior interactions and Burgess's reputation, Appellant knew he was dangerous. R. 216, ll. 21-22. Importantly, Appellant knew Burgess told at least one other person that he intended to kill Appellant when he was released from jail. R. 216, ll. 22-24. Appellant also testified that he saw a gun on Burgess waist, and a photograph submitted during the hearing showed "something" along the waistband. R. 217, l. 19 – 218, l. 5; Defendant's Exhibit #1 (on file with this Court); Defendant's Exhibit #2 (on file with this Court). Thus, Appellant was in actual fear of Burgess and his fear was reasonable. R. 221, ll. 1-25.

Defense counsel also questioned the credibility of the state's two lay witnesses, who "backtracked" on the stand. R. 218, ll. 12-13. One witness admitted that if Appellant had not shot Burgess then Burgess would have shot him. R. 218, ll. 14-17. Further, Appellant told Burgess not to shoot, but the two could fight. R. 220, ll. 19-20.

Judge Culbertson found "that the defense has failed to prove by preponderance of the evidence that they are in – or that he is entitled to immunity in this case." R. 222, ll. 7-12. On March 6, 2019, a Form 4 order was filed which again stated that the defense had failed to prove by a preponderance of the evidence that Appellant was entitled to immunity. R. 224-226. This Court remanded the case back to the circuit court for a new order setting forth specific findings of fact and conclusions of law that supported the grant or denial of immunity. State v. Ford, 439 S.C. 261, 886 S.E.2d 710 (Ct. App. 2023). Judge Culbertson[7] issued a new order denying immunity on October 24, 2024.[8] R. 227-231. After summarizing[9] the evidence presented during the hearing Judge Culbertson found,

> [T]he State presented evidence that the defendant was at fault in bringing on the difficulty. The State's evidence is in direct contrast to the evidence presented by the defendant and is equally compelling as the evidence presented by the defendant. Therefore, the defendant failed to prove that it is more likely true than not true that he was not at fault in bringing on the difficulty, thus failing to prove that element of self-defense by a preponderance of the evidence. The defendant failed to meet the burden of proof

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7 In the third footnote of the order, Judge Culbertson stated that he did not recall the actual hearing in this case and based his findings of fact on a review of the transcript. Therefore, the order contains no credibility findings. R. 227, fn. 3.

8 Appellant does not address the portion of the order regarding the death of Damian Alston, as he was acquitted of that murder.

9 In the Findings of Fact portion of the order, the court does not appear to affirmatively find the facts but merely summarizes the facts presented at the hearing. Notably, the summary of the defense evidence totaled two paragraphs while the summary of the "equally compelling" evidence presented by the state totaled a single sentence. R. 227-231.

> required for immunity from prosecution. Therefore, as a matter of law, the defendant is not entitled to immunity under the Act for the alleged murder of Jamal Burgess, possession of a weapon by a felon and possession of a weapon during the commission of a violent crime.

R. 230-231.

Discussion

During the immunity hearing, the only element of self-defense contested by the state was that Appellant was not without fault in bringing on the difficulty. The state never argued that Appellant failed to meet the other three elements of self-defense, thus the judge did not rule on those elements. The judge's finding that Appellant was not without fault in bringing on the difficulty is not supported by the record. Appellant proved all four elements of self-defense by a preponderance of the evidence. He also proved that he had a legal right to be at the incident location and that he was not engaged in an unlawful activity that was the proximate cause of the incident. Thus, Appellant was entitled to immunity and it was error for the circuit court to deny immunity.

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 it "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 this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). The Court explained that "another applicable provision of law" found within the Act "includes the common law of self-defense." State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019). Further, the Court held that "[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).

"This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Glenn, 429 S.C. at 18, 838 S.E.2d at 496 (internal quotation omitted). "Accordingly, a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id.

The Act provides:

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

> prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). Thus, "in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because the provision was enacted to extend the protections of the Castle Doctrine to other places where he has a right to be." Id. at 118-119, 838 S.E.2d at 496. "Where this section is applicable, it replaces the duty to retreat element required to establish self-defense." Id. at 119, 838 S.E.2d at 497. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

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 S.C. 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.

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). Our Supreme 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.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "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), our

Supreme 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.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[10] 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' belief 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

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10 The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

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. According to this Court, Douglas was not at fault in bringing on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

Appellant was not at fault in bringing on the difficulty. Appellant was a guest at his family members' birthday party. As soon as he arrived at the party, he was accosted by Burgess, despite his efforts to avoid Burgess. Appellant and others tried to calm Burgess, but he was relentless in his pursuit of Appellant. Contrary to the state's position that Appellant's possession of a gun meant he was at fault in bringing on the difficulty, all the evidence in the record showed either Appellant armed himself in self-defense or that his possession of the firearm illegally was not reasonably calculated to produce the occasion that resulted in the difficulty. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting"). At no point where Appellant's actions "in violation of the law *and* reasonably calculated to produce the occasion" which led to Burgess' death. See Bryant, 336 S.C. at 345, 520 S.E.2d at 322.

Furthermore, witnesses for the state and defense testified that Burgess knocked out Appellant's teeth. This evidence showed Burgess, who was an aggressor in the past, was the probable aggressor in this instance. See State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998) (explaining that evidence that the accused and the decedent had previous difficulty is

admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor).

Next, according to Appellant and his cousin, Appellant was in actual imminent danger because Burgess was armed, pulled his gun, and fired at Appellant. The state's own witness, Felicia Williams, agreed that either Burgess or Appellant would have died that night. See State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (explaining that a defendant's statement it was either "her or me" after the defendant disarmed the victim established the defendant believed he was in imminent danger). Further, Williams admitted to hearing Appellant beg Burgess not to shoot, but to fight instead. There would be no need for Appellant to ask Burgess not to shoot if Burgess were unarmed. The photograph of Burgess from that night, as authenticated by a state's witness, showed something black at his waistband. This object appeared to be a gun. See Starnes, 340 S.C. at 320, 531 S.E.2d at 912 (holding a person has the right to act on appearances). Yet, more evidence to support Appellant's position that Burgess was armed. Finally, the police discovered two different calibers of shell casings, which demonstrated there were two shooters. These circumstances, coupled with Appellant's knowledge of Burgess's prior conduct toward Appellant, toward others, and threats against Appellant, were the type of circumstances that would warrant a reasonable man to strike the fatal blow.

Even if this Court determines the evidence did not show Appellant was in actual danger, Appellant believed he was, and his belief was reasonable. Appellant testified unequivocally that he feared for his life when he fired the shot at Burgess. The totality of the evidence showed his fear was reasonable. In addition to the prior incident in which Burgess knocked out Appellant's teeth with a gun, Burgess was released recently from prison where he had told another person that he was

going to kill Appellant when he was released. See State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000) (addressing instances of violence on the part of the deceased)

Finally, Appellant had no other probable means of avoiding the danger. Appellant fired after being fired upon and ran as quickly as he could from the danger. He was not required to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989).

The Act

Turning to the Act, in deciding whether a defendant satisfies section 16-11-440(C), the court must ascertain whether, at the time of the incident, he was not engaged in an unlawful activity and was attacked in another place where he had a right to be. Previously, the Court "recognized ... the irrationality of foreclosing immunity based on the location of the incident provoking the use of self-defense." Glenn, 429 S.C. at 119, 838 S.E.2d at 497. Additionally, the Court required circuit courts to undertake a proximate cause analysis for the Act's requirement that a person be in a place where he had a right to be. Id. at 119-120, 838 S.E.2d at 497. Finally, the Court indicated that "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id. at 120, 838 S.E.2d at 497.

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

If this Court were to determine that Appellant failed to satisfy the duty to retreat element of self-defense, then Appellant respectfully requests this Court hold he satisfied the elements of section 16-11-440(C). As discussed supra, Appellant satisfied the first three elements of self-defense; therefore, if he were not engaged in an unlawful activity and was attacked in another place where he had a right to be, then he is entitled to immunity under the Act.

First, Appellant was attacked in a place where he had a right to be. The state conceded this point during the hearing, and the judge found that Appellant had a legal right to be there. R. 149, ll. 7-11. If the state were to argue differently on appeal, the state could not demonstrate that Appellant's attendance at the birthday party for his brother proximately caused Burgess's death.

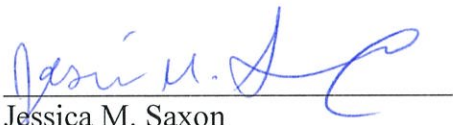
Second, Appellant was not engaged in an unlawful activity. At the hearing, the state recognized case law providing that "unlawful carrying of a pistol in and of itself is not an unlawful

act that would preclude someone from relying on stand your ground." R. 149, l. 22 – 150, l. 1. However, the state argued that Appellant "is prohibited from carrying a handgun so he's not just unlawful carrying but he's a prohibited person engaged in a fight by his own words." R. 150, ll. 2-7. To the contrary, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Burriss, 334 S.C. at 262, 513 S.E.2d at 108. Furthermore, the state could not show Appellant's carrying of a firearm was the proximate cause of Burgess's death.

Appellant was entitled to immunity from prosecution because he satisfied the elements of self-defense and the Act. The presiding judge erred in ruling otherwise. Admittedly, the judge's revised ruling does not contemplate all four elements of self-defense, nor does it undertake the proximate cause analysis set out in State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019). However, the state at no point argued that Appellant had not met the other three elements of self-defense. Thus, were this Court to find Appellant had met all four elements of self-defense, this Court could rule that Appellant was entitled to immunity as a matter of law. However, if this Court were to determine that Appellant had not met the duty to retreat element of self-defense, then Appellant would reluctantly request a second remand to the circuit court for a new order addressing the proximate cause analysis required by Glenn, supra.

CONCLUSION

As to Issues I and II, Appellant respectfully requests a new immunity hearing related to the murder of Jamal Burgess, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime. As to Issue III, Appellant respectfully requests this Court hold he is entitled to immunity from prosecution concerning the murder of Jamal Burgess, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of October, 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."

This 27th day of October, 2025.

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