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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

Appellate Case No. 2024-001870

THE STATE, ...RESPONDENT

v.

CALVIN D. FORD, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Appellant's Statement of Issues on Appeal iv

Respondent's Counterstatement of Issues on Appeal v

Statement of the Case 1

Statement of Facts 3

Argument

I. The court did not err when it limited Appellant from calling his co-defendant as a witness at his immunity hearing after the co-defendant's counsel informed the court that he advised the co-defendant to invoke his Fifth Amendment rights.. 8

II. The court did not err in refusing to permit Appellant to call his private investigator to introduce co-defendant Aliga Campbell's written statement because, although Campbell was rendered an unavailable witness, the written statement was not against his penal interest.. 11

III. The circuit court did not err in denying immunity from prosecution where the evidence revealed that the Appellant was not claiming self-defense in the killing of Damian Alston; therefore, not being allowed immunity, and by failing to prove by a preponderance of the evidence that the killing of Jamal Burgess was in self-defense; thereby denying immunity.. 13

Conclusion 23

TABLE OF AUTHORITIES

CASES

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968)…………………………………...12

Semken v. Semken, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008)………………………………18

State v. Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019)…………………………………………..18

State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014)……………………………………………18

State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019)………………………10,14,17

State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013)……………………………………...18,21

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)……………………………………………..18

State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992)…………………………………........11

State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)………………………………………….18

State v. Ford, 439 S.C. 261, 886 S.E.2d 710 (2023)……………………………………………...2,14

State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996)……………………………………….11

State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019)……………………………………...14,18

State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997) 9, 10

State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987)…………………………………………13

State v. Marshall, 428 S.C. 11, 832 S.E.2d 618 (Ct. App. 2019)……………………………..19

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000)………………………………………11

State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012)……………………………..9

State v. Nelson, 380 S.C. 226, 669 S.E.2d 595 (Ct. App. 2008)...8, 9

State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983)………………………………………………..9

CONSTITUTION

U.S. Const. amend. V…………………………………………………………………………...8

STATUTE

S.C. Code Ann. §16-11-440(C) 17, 18

RULES

Rule 613, SCRE……………………………………………………………………………10

Rule 804(a), SCRE…………………………………………………………………………11

Rule 804(b)(3)…………………………………………………………………………11, 12,13

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err 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?

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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the court err in not permitting Appellant to call his co-defendant, Aliga Campbell, as a witness during his immunity hearing after Campbell's counsel informed the court that he advised Campbell to invoke his Fifth Amendment right against self-incrimination?

II. Did the court err in not allowing the Appellant to call his private investigator to the stand to testify during the immunity hearing in order to introduce co-defendant Aliga Campbell's written statement because, although Campbell was rendered an unavailable witness, the written statement was not against his penal interest, so, Rule 804(b)(3) did not apply?

III. Did the court err in the denial of immunity for the Appellant under the Protection of Persons and Property Act?

STATEMENT OF THE CASE

In June 2017, the Horry County Grand Jury indicted Appellant Calvin D. Ford, for the murder of Jamal Burgess and Dameion Alston, and for possession of a weapon during the commission of a violent crime (PWDCVC), and for the unlawful possession of a firearm by a person convicted of a violent offense. (R. pp. 327-332). Jonny McCoy, Esquire represented Appellant on these charges. The State of South Carolina was represented by Senior Assistant Solicitors, Joshua Holford and Mary-Ellen Walter both of the Fifteenth Circuit Solicitor's Office.

By and through his counsel, Appellant filed a motion for immunity from prosecution pursuant to S.C. Code Ann. § 16-11-450. The Honorable Benjamin Culbertson conducted an immunity hearing on March 5, 2019. Judge Culbertson denied Appellant's motion through a Form 4 Order filed the following day. (R. pp. 224-226).

On November 4, 2019, this case was called for trial before the Honorable Paul M. Burch. The State jointly tried Appellant along with his co-defendant, Aliga Campbell. After five days of testimony, a jury of his peers found Appellant guilty of the murder of Jamal Burgess as well as of both weapon offenses. (R. p. 325 l. 12-23). The jury found Appellant not guilty of the murder of Dameion Alston. (R. p. 325 l. 9-11).[1] After the verdict was read, the Appellant appeared before the trial judge for sentencing. The trial judge sentenced Appellant to a period of incarceration for the remainder of his natural life for the offense of murder; five years' incarceration for PWDCVC, and another five years for the unlawful possession of a firearm by a person convicted of a violent offense. The trial judge ordered that the sentences were to be served concurrently. (R. p. 326 l. 17-23).

Appellant timely filed a notice of appeal of his convictions and sentences on November 13,

[1] Appellant's co-defendant Aliga Campbell was found not guilty on each offense.

2019. On December 7, 2022, this Court heard arguments raised by the Appellant regarding the decision of the trial judge regarding immunity pursuant to Section 16-11-450 of the South Carolina Code of Laws. On April 5, 2023, this Court issued an opinion, affirming the trial courts' admission of eyewitness Sherika Gore's prior statement, vacating the Appellant's sentence for possession of a weapon during the commission of a violent crime, and remanding this case back to the circuit court for specific findings of fact in support of whether or not the Appellant is entitled to immunity. *State v. Ford,* 439 S.C. 261, 886 S.E.2d 710 (2023).

On October 24, 2024, the Honorable Benjamin H. Culbertson issued an order denying immunity for the Appellant. As ordered by this Court in the *Ford* opinion, the circuit court made specific findings of fact supporting the finding that Appellant was not entitled to immunity pursuant to South Carolina law. After this order was issued, Appellant filed a timely notice of appeal on November 1, 2024. The initial brief of the Respondent supporting their arguments follows.

STATEMENT OF FACTS

Appellant's convictions arise from a shooting that interrupted a birthday party held on the night of July 23, 2016, in a residential area adjacent to Mr. Joe White Avenue in Myrtle Beach. (R. p. 239, lines 19-21; R. p. 241, lines 11 – p. 242 line 24; R. p. 306, lines 19-24). The shooting occurred on Warren Street, known to the local residents as Dudley Row. (R. p. 236, lines 11 – 20). Officers were dispatched and arrived at the area right at 9:00 p.m. (R. p. 245, line 1 – p. 246, line 3). They found a large crowd and two victims each suffering from gunshot wounds, lying in a driveway on Warren Street. (R. p. 243, line 2 – p. 244, line 17). Officers were unable to locate a weapon anywhere on the scene. (R. p. 253, line 4 – p. 254, line 10). Law enforcement did, however, locate five 380 cartridge casings, a single nine-millimeter cartridge casing, and one bloodied projectile. (R. p. 255, line 19 – p. 256, line 1). The nine-millimeter casing lay separate from the 380 casings. (R. p. 257, lines 4-9). The 380 casings appeared "in close quarters to each other, almost in a line. It appeared someone was either walking towards or retreating back from that scene while they were being fired." (R. p. 258, line 22 – p. 259, line 11). Four of the five 380 casings were determined to have been fired by the same firearm; the fifth casing contained "some markings" that made the firearms analyst "think it could have been fired by the same firearm" as the other four, but the results were technically inconclusive. (R. p. 271, lines 12-18). The fired projectile was "most consistent with a 380 auto caliber bullet." (R. p. 272, lines 15-25). The same analyst opined that there were at least two guns involved in the shooting, "but there could have been four." (R. p. 272, lines 15-25).

Some partygoers were willing to speak with investigators. (R. p. 273, lines 4-25). Darlene Young testified she hugged the two victims when she arrived at Warren Street and did not feel a gun on either one of them during the hug. (R. p. 260, line 9 – p. 261, line 6). She did not see Appellant and his co-defendant Aliga Campbell arrive, but noticed Appellant walk up and stand

with other partygoers. (R. p. 263, lines 1-25). She could not say whether Appellant approached the victim, Jamal Burgess, or whether Burgess approached Appellant, but she did see Burgess "put his arm around [Appellant's] neck" and watched them walk from the porch together, talking. She believed they were solving an issue between them. (R. p. 264, lines 1-20). Once they reached the street, she heard Appellant say, to Burgess, "If I want something done to you I could have been had it done to you." (R. p. 264, line 23 – p. 265, line 8). The second victim, Dameion Alston, stood nearby. (R. p. 265, lines 23-25). Alston "was trying to eliminate the problem" between Appellant and Burgess, who were "having words." (R. p. 266, lines 2-11). Burgess was "moving his hands" as he spoke with Appellant. (R. p. 267, lines 14-19). Then, she saw "fire come out of a gun and hit" Burgess. (R. p. 267, lines 23-24). She testified that Appellant pulled a gun "out of one of his pockets" and she saw the fire from the gunshot. (R. p. 268, lines 3-5). Burgess had his hands in the air as this happened. (R. p. 268, lines 23-25). She did not see either victim with a gun. (R. p. 268, lines 19-22). After the witness saw Burgess get hit with a bullet in his right side, she ran. (R. p. 269, lines 12-24). She heard more shots as she ran to get out of the way. (R. p. 270, lines 10-18).

Another eyewitness, Sherika Gore, testified that she was talking to people at the party when she noticed Appellant walk up from across Mr. Joe White Avenue and approach Burgess. (R. p. 281, lines 16-25). He and Burgess "kind of walked off and they started talking." (R. p. 281, lines 18-20). She could not hear their conversation. (R. p. 282, lines 22-25). "From the outside looking in it seemed like whatever issues that they had[,] that they were trying to resolve them." (R. p. 286, line 25- p. 287, line 1). Eventually, however, they raised their voices. (R. p. 283, lines 3-12). When she "looked next, the only thing [she saw] was [Appellant] take out a gun and fire it." (R. p. 284, lines 15-17). She saw "fire come from the barrel." (R. p. 284, line 19). It appeared that Appellant pulled the gun from his waist; she did not see Appellant bend down to the ground. (R. p. 291, lines

1-6). She heard multiple shots as she turned away to find her children. (R. p. 285, lines 2-9). After the shooting, she did not see a gun, did not see anyone pick up a gun, nor did she hear anyone talk about a gun. (R. p. 288, lines 21-25). She also did not see a gun on Burgess that day. (R. p. 280, lines 1-2). She allowed Burgess to hold her three-month-old daughter earlier that evening, which she would not have allowed had she seen a gun in Burgess' waistband. (R. p. 280, lines 1-6; R. p. 292, line 17 – p. 293, line 6).

A third eyewitness, Felicia Williams, testified she was at the party and saw Appellant and the two victims standing in the street talking. (R. p. 289, lines 2-4). She heard a bottle break on the ground and looked over to see Burgess move Alston "out of the way" and then saw Appellant "take the gun up off his side and pull it out and shoot." (R. p. 290, lines 1–17). She did not see anyone else with a gun, and she never saw Appellant bend to the ground to retrieve a gun. (R. p. 291, lines 4-12). She witnessed Appellant fire a shot at Burgess, and she "took off running." (R. p. 291, lines 13-17). She heard "maybe three or four" shots fired. (R. p. 292, lines 10-11).

The State also presented testimony at trial recounting what Appellant offered at his pre-trial immunity hearing. At that hearing, Appellant testified that he was there when Alston dropped a gun. Appellant testified that he picked up that gun, fired it at Burgess and dropped it in a pond as he fled from the scene. (R. p. 275, lines 12-20; p. 276, lines 6-7). Appellant testified that he saw Burgess with a gun, that Burgess fired at him, and Appellant fired back. (R. p. 276, lines 13-20). Appellant also testified that Burgess and Alston, the two victims, "were tussling over a gun" when Alston's gun dropped and Appellant "picked it up and fired." (R. p. 276, lines 20-23). Officers were unable to corroborate that testimony. (R. p. 275, lines 19-23).

Appellant countered the State's case with a series of witnesses at trial. Appellant's mother testified that she saw Burgess out in front of her house the day before the shooting, but neither she

nor Appellant thought anything of it. (R. p. 294, lines 1-17). Patrick "PJ" Brave testified that Burgess called him early on the day of the shooting to tell him he was going to "talk to that boy about the situation we had about his teeth being knocked down" for the purpose of resolving it. (R. p. 295, line 12 – p. 296, line 21). During that call, Brave warned Burgess not to go to the party by himself. (R. p. 296, lines 2-5). The officer who interviewed Brave next testified that Brave told her he heard Burgess had a gun. (R. p. 299, lines 6-14). To further corroborate Appellant's self-defense claim, Appellant had the officer reiterate that Appellant testified at his earlier immunity hearing that he saw Burgess reach for a gun in his waistband. (R. p. 299, line 15 – p. 300, line 1). The officer believed that Appellant testified at that hearing that he was afraid that Burgess was going to shoot him. (R. p. 301, lines 3-8).

Appellant also presented testimony from his first cousin, Everett Ford. (R. p. 302, lines 5-7). Ford was at the incident and testified that when he saw Burgess at the party that night, he appeared "aggressive" and that "[s]omething was wrong with him." (R. p. 307, lines 1-17). Ford watched Burgess "flag" Appellant over to him at the party. (R. p. 308, lines 1-6). He testified that Burgess "grabbed" Appellant, "aggressively" placing his arm around him, and they had words. (R. p. 308, lines 10-25; R. p. 310, lines 7-15). As Alston tried to break them apart, Burgess "came up with his gun and pulled, and he fired" at Appellant. (R. p. 311, lines 1-14). Ford thought Burgess shot Appellant because Appellant "went down a little bit." (R. p. 312, lines 16-24). Ford began to run away as he heard gunshots from multiple guns. (R. p. 313, lines 15-23). Ford believed Appellant retrieved a gun "off the ground or something" when Alston was trying "to diffuse the situation," because he did see Appellant with a gun after hearing the initial shot. (R. p. 314, lines 1-17).

Ford also testified that four years prior, Burgess hit Appellant in the face with a gun and "knocked his teeth out." (R. p. 303, lines 8-19). He testified that after that incident, he and Appellant "stayed away from" Burgess, who was "known to have a gun." (R. p. 304, lines 6-15). Another one of Appellant's witnesses, Jerome Thompson, testified that he was in prison with Burgess, and Burgess told him that when he got out he was going to go home and kill Appellant. (R. p. 316, lines 2-6). Thompson clarified that the conversation happened ten years prior to the shooting, and he had never shared this information before. (R. p. 318, line 23 – p.319, line 5).

Yet another of Appellant's witnesses, Maurice Vereen, testified that he was at the party prior to the shooting, but could not recall being there during the shooting, nor could he say that he saw a gun on Burgess that day. (R. p. 322, lines 2-6). However, Maurice provided a statement to Appellant's private investigator stating, he saw Burgess "appear to pull at his waist, waistband where his handgun was located, then shots were fired[.]" (R. p. 322, lines 19-25).

Finally, another resident of Warren Street, Walter Stanley, testified on Appellant's behalf that he saw Appellant approach Burgess, who placed the Appellant in a headlock, and Appellant broke away (R. p. 323, lines 2-23). Stanley testified that Appellant ducked and then came up with his own gun and fired, striking Burgess. (R. p. 323, lines 23-25).

ARGUMENTS

I. The court did not err when it limited Appellant from calling his co-defendant as a witness at his immunity hearing after the co-defendant's counsel informed the court that he advised the co-defendant to invoke his Fifth Amendment rights.

Relevant Facts

Appellant called his co-defendant, Aliga Campbell, to testify at Appellant's pre-trial immunity hearing held pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et. seq*. (R. p. 135, lines 22-25). Campbell's attorney at that time informed the court that he had advised Campbell, and would continue to advise Campbell, "to invoke his rights under the Fifth Amendment not to give any testimony at all." (R. p. 136, lines 7-13). Campbell was indicted in this double homicide as a co-defendant and was tried jointly with Appellant. Appellant's counsel posited it would be "fine for record sake" if Campbell took the stand solely to invoke the Fifth Amendment. (R. p. 137, lines 13-15; p. 138, lines 4-10). The circuit court disagreed and found that he could not compel Campbell to testify at Appellant's immunity proceeding because he had "Campbell's rights to protect as well." (R. p. 136, lines 16-24; R. p. 139, lines 4-9; *see* p. 138, lines 15-18; p. 143, lines 11-12).

In part, the Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. Art. I, § 12. The circuit court adequately recognized co-defendant Campbell's right in this instance by not compelling him to testify, even just to invoke the Fifth Amendment.

Standard of Review

In criminal cases, this Court reviews errors of law only. To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. *State v. Nelson*, 380 S.C. 226, 228-29, 669 S.E.2d 595, 596 (Ct. App. 2008). The

admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012). Under this standard, the appellate court is bound by the trial court's findings unless they are clearly erroneous. *Nelson*, 380 S.C. at 229, 669 S.E.2d at 596. It is desirable that the jury not to know that a witness has invoked the privilege against self-incrimination, since neither party is entitled to draw any inference from such an invocation. *State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997). Most courts addressing this issue hold that it is improper for the prosecution to put an accomplice on the stand for the purpose of wringing from him a refusal to testify on the ground of privilege. *Id.* at 151, 493 S.E.2d at 823. Neither party may call a witness solely for the sake of having that witness invoke the Fifth Amendment privilege against self-incrimination in front of the jury. *Id.* at 153, 493 S.E.2d at 824.

<u>*Discussion*</u>

State v. Hughes modified the prior holding in *State v. Perry*, 279 S.C. 539, 309 S.E.2d 9 (1983), to the extent *Perry* "may be read to **require** the calling of a witness **solely** for the sake of invoking his or her Fifth Amendment privilege." *Hughes,* 328 S.C. at 154, 493 S.E.2d at 825 (emphasis modified from original). The *Hughes* court reasoned:

> [M]any courts have found no abuse of discretion in a trial court's refusal to permit defense counsel to call a codefendant to the stand solely to require them to assert the privilege in the presence of the jury. Finally, **it has been recognized that when a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand**.

Id. at 152, 493 S.E.2d at 824 (collecting cases) (emphasis added).

The circuit court did not abuse its discretion in refusing to allow Campbell to take the stand in this instance. The court sat as the factfinder at the pre-trial immunity hearing and was not permitted to draw any negative inference from Campbell's invocation of the privilege against self-

incrimination. *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Moreover, as the circuit court accurately noted, Campbell faced a joint trial with Appellant. Any testimony delivered by Campbell at the immunity hearing would create a prior testimonial statement which could then be used against his interest at his later jury trial, and which could affect his later decision to testify. *See generally*, Rule 613, SCRE.

In any event, any error in the circuit court's refusal to require Campbell to personally invoke the Fifth Amendment was harmless beyond a reasonable doubt because it "would have been cumulative to other testimony admitted" at the immunity hearing. *State v. Hughes*, 328 S.C. at 153, 493 S.E.2d at 824, *citing, State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985). The crux of Campbell's statement was that the victim, Burgess, began talking to Appellant as soon as Appellant arrived at the party. At some point, their discussion escalated and someone tried to intervene. Campbell stated Burgess shot first, and Appellant fired back in self-defense, only after picking up the intervener's gun which had fallen to the ground. (R. p. 2). Assuming *arguendo*, as Appellant has done, that Campbell's testimony aligned with the statement Appellant provided, this testimony was cumulative to that delivered by both Appellant and, Appellant's cousin Everett Ford. Campbell's testimony would have continued to contradict that of the State's eyewitnesses who did not see a gun on Burgess. Thus, Campbell's testimony could not have affected the outcome of the immunity hearing. Either he would have invoked the Fifth Amendment, or his proposed testimony would continue to facilitate a jury question.

II. The court did not err in refusing to permit Appellant to call his private investigator to introduce co-defendant Aliga Campbell's written statement because, although Campbell was rendered an unavailable witness, the written statement was not against his penal interest.

Relevant Facts

After consenting to Campbell's invocation of the Fifth Amendment, Appellant's counsel informed the court that he intended to call his private investigator to the stand for the purpose of introducing a sworn statement Campbell provided to the private investigator two weeks after the shooting. (R. p. 137, lines 4-25). Counsel argued that the statement was admissible through his private investigator as an exception to the rule against hearsay because Campbell, the declarant, became unavailable after invoking the Fifth Amendment, and because Campbell's statement was a statement against interest. (R. p. 137, lines 22-25; p. 139, line 11 – p. 141, line 12). The circuit court disagreed that Appellant's cited exceptions to the rule against hearsay. Though Campbell was unavailable because he asserted his Fifth Amendment privilege, the statement Campbell made was not against his own interest as required by Rule 804(b)(3), SCRE.

Standard of Review

A witness is unavailable where the declarant witness is exempted by ruling of the court on the ground of privilege from testifying. Rule 804(a), SCRE. The statement introduced must be incriminating to the declarant. *State v. McDonald*, 343 S.C. 319, 324-25, 540 S.E.2d 464, 466-67 (2000) (admissions of out-of-court declarant, McPhail, who invoked the Fifth Amendment, were admissible statements against interest because they were sufficiently corroborated by three other witnesses, Jackson, Mungo and Hawkins, who each on separate occasions heard McPhail admit to the offense); *State v. Forney*, 321 S.C. 353, 358-59, 468 S.E.2d 641, 644-45 (1996) (co-defendant's self-incriminating statements inadmissible absent sufficient corroboration); *State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) (self-incriminating statements made by minors who

invoked Fifth Amendment privilege admissible as statements against interest); A non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt. *Bruton v. United States*, 391 U.S. 123, 126-137, 88 S.Ct. 1620, 1622-28 (1968).

<u>*Discussion*</u>

The trial court did not err in declining to allow the private investigator to testify for the purpose of bringing in the sworn statement Campbell made. Given co-defendant Campbell's unavailability as a witness, Campbell's statement would have to be "at the time of its making so far contrary to [his] pecuniary or proprietary interest, or 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.

Campbell's statement, however, was not adverse to his own interests. (R. p. 3). The statement describes that Burgess, one of the victims, told Campbell to call Appellant "and tell him to come the party." (R. p. 3). Campbell "tried to call [Appellant] but he didn't answer," and then Appellant walked up to the party a few minutes later. (R. p. 22). Then, Campbell told Appellant that Burgess wanted to talk to him. (R. p. 22). Campbell then described what he witnessed between Appellant, Burgess, and the second victim Alston. (R. p. 23). The statement can be construed as including incriminating information about Burgess, who Campbell described as "angry talking about [Appellant]" and as one of the shooters. (R. p. 23). The statement can also be construed as including incriminating information about Appellant, who Campbell described as the other shooter. (R. p. 22). But the statement cannot fairly be construed as "so far tend[ing] 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. The statement described Campbell as merely present at the scene. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) ("Mere presence at the scene is not sufficient to establish guilt as an aider or abettor

Because Campbell's statement was not sufficiently adverse to his penal interest, the statement was not admissible via the hearsay exception for statements against interest made by an unavailable witness. Further, because the statement did not "tend[ ] to expose the declarant to criminal liability," the circuit court did not need to consider whether "corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3).

III. The circuit court did not err in denying immunity from prosecution where the evidence revealed that the Appellant was not claiming self-defense in the killing of Damian Alston; therefore, not being allowed immunity, and by failing to prove by a preponderance of the evidence that the killing of Jamal Burgess was in self-defense; thereby denying immunity.

Relevant Facts

On March 5, 2019, the court conducted an immunity hearing in response to Appellant's motion for immunity from prosecution pursuant to S.C. Code Ann. § 16–11–450. After a full hearing with arguments by counsel, the court found Appellant had not demonstrated by a preponderance of the evidence that he was entitled to immunity under the Act, and that the case would proceed to a jury trial where the State would have to disprove the elements of self-defense beyond a reasonable doubt. (R. p. 222, lines 7-20). The court issued a Form 4 Order the following day memorializing its decision. (R. p. 224) This Court later decided that the trial judge failed to follow South Carolina law as it pertains to decisions regarding the Protection of Persons and Property Act. This Court decided to remand the case back to the circuit court in order for the court

to create a new order with specific findings of fact in support of whether the Appellant was or was not entitled to immunity. *Ford,* 439 S.C. at 272, 886 S.E.2d at 716.

On October 24, 2024, the Honorable Benjamin H. Culbertson issued a second order denying immunity. Within this order the trial court followed the decision of this Court in *Ford* by making specific findings of facts. Within this order the trial court determined:

> "In the case at hand, the defendant alleges that he is entitled to immunity from prosecution under the Act because he acted in self-defense. However, the defendant asserts that he did not shoot or kill one of the victims, Damian Alston. He asserts that someone else did. Therefore, his defense to that alleged murder is not self-defense but, rather, that someone else committed the crime. The Act does not provide immunity from prosecution when a defendant claims that he did not commit the crime. Whether or not the defendant shot and killed Damian Alston (not whether or not the defendant acted in self-defense) is a question of fact to be determined by a jury at trial. Therefore, as a matter of law, the defendant is not entitled to immunity from prosecution under the Act for the alleged murder of Damian Alston."
>
> "As to 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, the 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."

(R. pp. 230-231).

<u>*Standard of Review*</u>

The circuit court "must sit as the fact-finder at [the immunity] hearing, weigh the evidence presented, and reach a conclusion under the Act. *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. The circuit court must necessarily consider the elements of self-defense" and "in announcing its ruling, should at least make specific findings on the elements on the record." *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019)

Discussion

During the immunity hearing, the State presented testimony from Elizabeth Holoman, who lived at the house where the party was taking place. She testified that she came home to find partygoers in her yard, and Burgess helped her carry some packages from her car to her home. (R. p. 153, line 12 – p. 154, line 12). She did not see a gun on Burgess. (R. p. 154, lines 18-19). She was inside when the shots rang out. (R. p. 155, lines 5-12).

Next, the State presented eyewitnesses Felicia Williams and Sherika Gore. Felicia testified that while she was at the party conversing with others:

> I heard a glass drop and it caught my attention. So, you know, I stood back from the car to see what was going on. I seen [Appellant] pull out a gun and him and [Burgess] --- well, actually I seen --- let me go back, I'm sorry. . . . when I pulled on the road, [Appellant] and [Burgess] were already talking to each other. And [Alston] was in the middle of them. And I seen [Burgess'] hand go like this [sweeping motion], because after the glass bottle dropped, I seen [Burgess'] hand go like this to move [Alston]. That's when I seen [Appellant] pull out the gun and once the first shot went off I took off running into [the] house.

(R. p. 159, lines 6-17).

Felicia did not know if it was an argument or not, she "could hear the conversation, but it wasn't any loud talking or aggression or anything like that to say it was an argument." (R. p. 174, lines 17-24). Felicia testified that she remembered Appellant saying he would fight. (R. p. 171, lines 6-13). Felicia clarified that she saw Burgess' hands in the air moving Alston away from the discussion, then saw the Appellant pull out a gun up from "off of his body." (R. p. 159, line 18; p. 162, line 1-3). Felicia did not see Appellant bend down to pick up a gun, nor did she see a gun on Alston or Burgess. (R. p. 162, lines 6-12; p. 173, lines 10-14). Felicia did not see any guns on the ground near the victims after the shooting. (R. p. 165, line 1–7).

Furthermore, Felicia testified that Everett Ford was not at the party that night. (R. p. 163, lines 1-9). Everett Ford had, however, contacted her the Friday prior to the immunity hearing to

tell her not to allow anyone to coerce her into stating something that was not true. (R. p. 163, lines 18-25). Felicia was a reluctant witness who did not want to testify against Appellant. (R. p. 163 lines 23-24). Felicia admitted she previously sent a message to Appellant about the incident stating "it could have gone either way out there." (R. p. 176, lines 6-22). Felicia pointed out, however, that Appellant "said he shot first" in his return message, and that she did not see Burgess with a gun. (R. p. 179, line 2-5).

The next eyewitness was Sherika Gore. She testified that Burgess wore sagging pants at the party that night, and she did not see a gun on him. (R. p. 181, line 18 – p. 182, line 13). Sherika testified that she let Burgess hold her young daughter, which she would not have allowed if she had seen a gun in his waistband. (R. p. 182, lines 9-10). Sherika recalled seeing Appellant and Burgess talking "off in the road" and when she looked up again, she saw "Appellant with a gun" she ran. (R. p. 183, lines 8-11). Sherika testified the conversation "wasn't loud because if they were arguing then it would have gotten the attention of everyone." (R. p. 184, lines 12-15). Though Sherika testified she did not recall it, she told law enforcement in an earlier recorded statement that the conversation between Appellant and Burgess became heated. (R. p. 188, line 15 – p. 190, line 25). Sherika did not know where Appellant got the gun from, and she did not see anyone else with a gun. (R. p. 184, lines 16-25). Like Felicia, Sherika did not see Everett Ford at the party. (R. p. 186, lines 4-10).

The State also presented testimony from officers who responded to the scene. They did not locate a gun or shell casings near either victim. (R. p. 198, lines 12-25; R. p. 202, lines 16-25). They did, however, locate five 380 caliber shell casings arranged in a linear fashion along the edge of the road. (R. p. 206, line 8 – p. 207, line 16). They also located just one nine-millimeter shell casing "approximately in the center of the roadway right in front of the driveway where the

shooting incident took place." (R. p. 209, lines 12-20). Burgess sustained one fatal gunshot wound, while Alston sustained three. (R. p. 211, lines 7-8)

At the conclusion of the testimony, the State argued that the court should deny Appellant's motion because witnesses described Appellant as the person who fired the first shot, because witnesses did not see Burgess with a gun, and because Appellant testified he fired a nine-millimeter handgun as he was running away, but the evidence showed five 380-caliber shell casings situated in a linear fashion along the roadway where Appellant escaped. The State further argued that the case was ripe for a jury's decision due to the conflicting evidence delivered by each party's witnesses. (R. p. 214, line 10 – p. 215, line 17).

The court did not err when it found that Appellant had not shown, by a preponderance of the evidence, that he was immune from prosecution, and that the State would be required to disprove the elements of self-defense beyond a reasonable doubt at trial. (R. p. 222, lines 7-20). As the court implicitly found, the evidence and the arguments by the State established a proper jury question as to whether Appellant was entitled to act in self-defense, and had no duty to retreat, when he was attacked in a place where he had the right to be.

Because Appellant was attending a party at the time of the shooting, his immunity claim derived from S.C. Code Ann. § 16-11-440(C), which applies to persons not engaged in an unlawful activity and who are attacked in another place where they have a right to be. Accordingly, Appellant had "the right to stand his ground and meet force with force, including deadly force, **if** he reasonably believe[d] it [wa]s necessary to prevent death or great bodily injury to himself or another person[.]" *Id.* (emphasis added). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. For the Act to apply, "a valid case of self-defense must exist,

and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013); *Glenn*, 429 S.C. at 119, 838 S.E.2d at 497 (2019) (when § 16-11-440(C) applies, "it replaces the duty to retreat element required to establish self-defense").

The standard of review for this pre-trial determination is by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). "[T]he relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "A preponderance of the evidence stated simply is that evidence which convinces as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). Thus, a motion for immunity from prosecution should be denied where testimony from the accused "varied 'substantially'" from that given by the State's witnesses. *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (2014), *quoting, Curry* at 369, 752 S.E.2d at 265). "When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." *State v. Butler*, 407 S.C. 376, 382, 755 S.E.2d 457 460 (2014).

Appellant bore the burden of convincing the circuit court that (1) he, was without fault in bringing on the difficulty, (2) he, actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger, and, (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (discussing elements of self-defense). As to the third prong, if Appellant "actually was in imminent danger, the circumstances [must have been] 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." *Id.*

Appellant's case for self-defense was not convincing of its truth due to substantial variances between Appellant's testimony and that delivered by the State's eyewitnesses, and because the location and caliber of the shell casings at the scene also conflicted with Appellant's testimony. These inconsistencies created cause to question Appellant's credibility and support the court's finding that Appellant's self-defense claim presented a question of fact for the jury. *See State v. Marshall*, 428 S.C. 11, 19, 832 S.E.2d 618, 622-23 (Ct. App. 2019).

For the reasons the State set forth before the circuit court, the factfinder could conclude from the evidence presented that Appellant was at fault in bringing about the difficulty. According to the State's eyewitnesses, Appellant was the only one with a gun. (R. p. 159, lines 13-23; p. 162, lines 6-13; p. 184, lines 16-25). Felicia Williams saw Burgess with his hands in the air when Appellant presented a gun. (R. p. 159, lines 13-23; p. 159, line 18 – p. 162, line 5). Further, neither Sherika Gore nor Elizabeth Holoman saw a gun on Burgess when they interacted with him prior to the shooting. (R. p. 154, lines 18-19; R. p. 182, lines 1-10). He was wearing his pants in a manner that revealed his waistband. (R. p. 182, lines 11-13).

Appellant's testimony failed to carry his immunity claim for other reasons. As the State pointed out, the physical evidence pointedly contradicted Appellant's testimony that Burgess "was still standing shooting" as Appellant ran away. (R. p. 128, lines 14-16). Appellant testified that once Burgess fired at him Appellant "fired back" as he ran away. (R. p. 98, lines 11-13). Appellant stated, "But I run like firing." (R. p. 98, line 12). Appellant also maintained he picked up and shot a nine-millimeter. (R. p. 122, line 13 – p. 123, line 14). However, officers found only one nine-millimeter shell casing on the scene, and it was found "approximately in the center of the roadway right in front of the driveway where the shooting incident took place." (R. p. 209, lines 12-20).

This placement is highly distinguishable from the series of five 380-caliber shell casings lined up down the roadway. (R. p. 206, line 8 – p. 207, line 16; p. 209, lines 12-20) The linear pattern of the multiple 380 shell casings indicates a person shooting while running, rather than shooting while standing still, and offers a plain contradiction to Appellant's immunity claim.

The second and third elements necessary to establish an immunity claim regard whether Appellant reasonably and actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. While Appellant relied on his past experience with Burgess to show he reasonably feared Burgess at all times, his own testimony lessened the veracity of this claim. Appellant twice testified during his immunity hearing that he was not afraid when Burgess approached him at the party. (R. p. 130, line 7 – p. 131, line 13; p. 134, lines 10-14). Appellant also testified that, at the time, he did not know that he believed the rumors he heard about Burgess planning to kill him. (R. p. 92, lines 4-7). Appellant also testified that he responded to Burgess' assertions at the party by telling him, "you know I'll beat you up." (R. p. 98, lines 3-6). This testimony indicates Appellant willingly sparred with Burgess and suggested they physically fight. According to Appellant, this was the comment that spurred Burgess to reach for a gun. (R. p. 97, line 22 – p. 98, line 6). When coupled with the fact that the State's eyewitnesses only saw Appellant with a gun, this evidence does not support the finding that Appellant reasonably and actually believed he was imminent danger during this interaction.

The whole testimony describing the degree of heat between Burgess and Appellant also varied. Felicia Williams testified the conversation she witnessed between Burgess and Appellant was neither "loud" nor an "argument" nor "aggression or anything like that." (R. p. 174, lines 17-24). Sherika Gore testified the conversation "wasn't loud because if they were arguing then it would have gotten the attention of everyone." (R. p. 184, lines 12-15). Appellant's cousin Everett

Ford initially told police that Burgess put his arm around Appellant at the party in a friendly manner. (R. p. 66, line 9 – p. 67, line 14). Ford testified at the immunity hearing that "they were kind to each other" when they first met up at the party. (R. p. 54, lines 1-2). Ford's testimony at other times mirrored that of Appellant who described Burgess' gesturing as aggressive. (R. p. 50, lines 6-11; R. p. 97, line – p. 98, line 1). Ford's testimony was otherwise circumspect, as the State's eyewitnesses did not see him at the party. (R. p. 163, lines 1-9; p. 186, lines 4-10). More, Ford also testified he never witnessed any of the prior incidents which led to Burgess allegedly being known for putting "his arm around you and hi[tting] you with a gun." (R. p. 51, line 7 – p. 52, line 23). Again, the record would support a factfinder's conclusion that Appellant was at fault in bringing about the difficulty and was not reasonably in fear of imminent death or serious bodily injury, but rather that he pulled a gun during a verbal jousting match.

Given the multiple interpretations flowing from the evidence presented, the trial court accurately found that Appellant did not meet the preponderance of the evidence standard and appropriately submitted the case to the jury. The eyewitness and physical evidence presented by the State at the immunity hearing undermined Appellant's own presentation and left his immunity claim unconvincing as to its truth. Accordingly, "Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *State v. Curry*, 406 S.C. at 372, 752 S.E.2d at 267. This Court should affirm the decision of the trial court as it applied the proper standard of review and reached the correct result.

CONCLUSION

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

Respectfully submitted,

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