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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County

The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

MELSHAUN ANTWAN ROBINSON,

Appellant.

Appellate Case No. 2024-001124

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Did the Circuit Court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act when the Court abused its discretion in finding Appellant did not establish by a preponderance of the evidence the requisite elements of self-defense?

STATEMENT OF THE CASE

In June 2024, the Charleston County Grand Jury returned indictments against Melshaun Robinson (hereinafter "Appellant") for murder (2024-GS-10-3064), attempted murder (2024-GS-10-3065), and possession of weapon during the commission of a violent crime (2024-GS-10-3066). (R. pp. 1058-1059; 1062-1063; 1066-1067). Subsequent to his arrest and prior to presentment to the Charleston County Grand Jury, Appellant, represented by Blair Jennings, Esq., filed a Motion to Dismiss Pursuant to Section 16-11-450 S.C. Code of Laws (Protection of Persons and Property Act) on January 26, 2023. (R. p. 1). Appellant subsequently filed a Memorandum in Support of Immunity on June 20, 2024, requesting that he be granted immunity from prosecution. (R. p. 286).

On June 20, 2024, a full hearing on the motion was held before the Honorable Deadra L. Jefferson. (R. p. 13). Appellant was represented by Counsel Jennings. Attorneys Benjamin Simpson and Sara Bozarth represented the State. (R. p. 13). At the conclusion of the hearing, Judge Jefferson recited the applicable case law and applied the facts ascertained at the hearing, ruling that Appellant failed to establish the elements of self-defense. (R. pp. 241-250). Judge Jefferson indicated that the final written order would be issued at a later date.[1] [2](R. pp. 249-250).

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[1] The Order Denying Defendant's Motion for Immunity from Prosecution was signed by Judge Jefferson on September 30, 2024, and filed on October 8, 2024, after Appellant was convicted at trial.

[2] Appellant argues that this Court should not consider the Order Denying Immunity because it was issued and filed after Appellant's trial. First, a written order is not required upon an immunity determination, and the trial court in this case made specific findings on the record and notified the parties that a written order would be submitted at a later date. *See State v. Cervantes-Pavon*, 426 S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n.4 (2019) ("While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve.").

Second, the only available remedy would be for this Court to remand to the circuit court to make specific findings that Appellant could appeal. *See State v. Gray*, 438 S.C. 130, 882 S.E.2d 469 (Ct. App. 2022). Such is unnecessary considering the circuit court did in fact submit a written order with specific findings -

Appellant's case proceeded to a jury trial on June 24-27, 2024, with Judge Jefferson presiding. (R. p. 13). At the conclusion of trial, the jury found Appellant guilty of murder, the weapons charge, and the lesser included offense of assault and battery, first degree. (R. p. 992). Appellant was sentenced to 33 years for murder, 10 years for assault and battery, and 5 years for the weapons conviction, to be served concurrently with credit for time served. (R. p. 992). Appellant subsequently initiated this appeal.

Appellant simply takes issue with the timing of when the order was submitted, which is irrelevant considering an appeal from the denial of immunity is interlocutory. *See State v. Isaac*, 405 S.C. 177, 181-182 747 S.E.2d 677, 679 (2013) (An order denying a request for immunity is not a final order and does not fall within any category of orders which are immediately appealable under section 14–3–330).

STANDARD OF REVIEW

Pretrial Immunity Hearing

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

STATEMENT OF FACTS

Summary of Facts Adduced at the Immunity Hearing

At the hearing, Appellant presented testimony from the following witnesses: Dr. Hannah Catherine Perlitz, Steven Christopher Laribo, Heather Diamond, and Appellant. The State presented testimony from Jaziel Armenta-Zavala and Detective Daniel Wilson.

On the afternoon of April 25, 2021, Zabdiel Tinoco-Hernandez (hereinafter "the Deceased")[3] and Jaziel Armenta-Zavala (hereinafter "Armenta")[4] visited the King Street Cabaret, an adult entertainment business, located at 1337 King Street Extension. Armenta and the Deceased were brothers-in-law – Armenta married the Deceased's sister. (R. p. 142).

While at the club, Armenta sought a private dance from Hannah Perlitz, (hereinafter "Perlitz"), who was employed at the club at that time. (R. p. 31-32; 146). Also at the club was a frequent patron by the name of Steven Laribo ("Laribo"), who agreed to participate in a joint private dance with Armenta and Perlitz. (R, pp. 146-147). Armenta suggested that they split the cost of the private dance and Laribo agreed. (R. p. 147). Armenta and Laribo did not know each other prior to this interaction. (R. p. 146).

Perlitz, Armenta, and Laribo have differing accounts of what occurred in the private room during the private dance. Perlitz testified that during the joint dance, Armenta "monopolized"' the dance, kept pulling her toward him, was "mimicking sex" with her while moving her around roughly and quickly. (R. p. 36). Perlitz testified that Armenta picked her up and dropped her, and

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[3] The Deceased was a 30 year-old man, who weighed approximately 230 pounds and measured 66 inches in length. Charleston County Coroner's Office (2021). Autopsy Examination Report Case #2021-1442 (R. p. 1042).

[4] At the conclusion of the presentation of evidence, the trial court inquired into the height and weight of the involved parties. Armenta testified that he is approxima1ely 197 pounds and measures 68 inches in length. Appellant testified that he is approximately 270 pounds and measures 72 inches in length. At the time of the incident Armenta was 30-years.old and Appellant was 38-years old.

was pushing her up against the wall, despite her requests for him to stop. (R. pp. 37-38). At some point during the dance, Perlitz testified that Laribo got up and left the private room, leaving her and Armenta alone. (R. pp. 37-38). She testified that she concluded the dance when Armenta exposed his penis to her. (R., pp. 38-39). She testified that Armenta did not pay the full amount he had agreed to pay, and after he expressed that he was not going to pay, Perlitz informed him that she would notify the manager. (R. pp. 39-40). At that time, the Deceased, Armenta's brother-in-law, overheard the argument and attempted to pay for Armenta's portion of the dance. (R. p. 40). She testified that she cannot recall specifics, but that she accepted whatever portion was offered to her and ultimately reported the incident to Appellant, who was the manager at the time. (R. p. 41).

Laribo testified to a similar version of events during the private dance. He testified that Perlitz was mainly dancing with Armenta, and when the song concluded, he paid Perlitz the portion that he owed and left the room. (R. p. 58). He was not present in the room when Armenta exposed himself. Laribo testified that after Perlitz and Armenta concluded their portion of the dance, Perlitz relayed to Laribo that she was upset with Armenta's behavior in the private room, and Laribo encouraged her to talk to the bouncer. (R. p. 59-60). Laribo testified that he knew some of the staff at the club, including Appellant because he frequented the club about every two or three months. (R. pp. 54-55). Perlitz then went and spoke with Appellant about the situation, and Appellant went to speak with Armenta and the Deceased. (R. p. 42). The video surveillance reflects that there was a significant delay between the conclusion of the dance and Perlitz going to the bouncer/manager to report her concerns about the private dance.

Armenta testified that he "spoke to a female at the bar with another guy." The female was identified as Perlitz and the other guy was identified as Laribo. (R. p. 146). Armenta testified that he and Laribo agreed to purchase a private dance together, each of them paying half. (R. p. 147).

Armenta testified that while in the private dance room Perlitz danced with him and Laribo, and then when she went back to him, Laribo decided to leave. (R. pp. 147-148). He testified that he may have grabbed Perlitz during the dance but after she told him to stop, he did not do it again. (R. pp. 148-149). He denied that he exposed his penis during the private dance and denied that he prevented Perlitz from leaving the private room. (R. pp. 150-151). He contradicted Perlitz and testified that he and Laribo agreed to $400 dollars for the cost of the dance to be split equally between the two of them, but Perlitz attempted to make him pay the full amount. He testified that he gave her $250. (R. pp. 149-150). Subsequently, he testified that he met back up with the Deceased at the bar, went to the restroom, and the two proceeded to leave the club. (R. pp. 151-152).

Surveillance footage showed the Deceased and Armenta exit the doorway of the club at 8:17:39 PM. At 8:17:45 PM Appellant entered the doorway and made comments and called the Deceased and Armenta back toward the doorway. As a result, Armenta and Appellant exchange words until 8:18:14 PM at which point Appellant exited the doorway, returns inside the club and the Deceased and Armenta proceed away from the building to their vehicle. (State's Exhibit 12; See also Defense Exhibit 16)

Armenta testified that he and the Deceased left the club on their own accord and when they exited the club, Appellant yelled behind them, "If you guys leaving, don't f*** come back here. You guys just go and don't come back." (R. p. 154). Armenta testified that he relayed to Appellant that they were not planning on returning to the club. (R. p. 154). Armenta testified that they stepped away and continued to walk to their vehicle and Appellant returned inside the club. (R. p. 155). Contrarily, Appellant testified that he approached Armenta in the club and told him that he was going to escort him out. (R. p. 94). Appellant confirmed that he told Armenta to leave and not

come back when they were standing outside of the doorway to the club, and that Armenta responded, "F*** you," and then proceeded on to say, " You don't want to f*** with me, I'll kill you, I'll kill everybody, I'll kill that snitching b****." (R. p. 94). Appellant testified that the Deceased grabbed Armenta to pull him away from the interaction. (R. p. 94).

Appellant was then seen on surveillance video making his way to his office inside the club to retrieve a firearm at 8:18:31 PM. Appellant placed the firearm in his back waistband and then proceeded to the parking lot of the club. (State's Exhibit 12; See also Defense Exhibit 16). Appellant testified that when Armenta made the above-mentioned threats, he thought that he should get their license plate number because he was worried Armenta would come back and shoot the club up. (R. p. 95). He testified that his concern was the reason that he went back into the club to retrieve his firearm and started looking for vehicles that were leaving the parking lot. (R. p. 95). He testified that he thought Armenta may have a gun in the bag that he was wearing. (R. p. 96).

Appellant was seen exiting the club at 8:18:52 PM.[5] Appellant stopped in the parking lot at 8:18:58 PM and looked around. From 8:19:03 PM to 8:19:11 PM, Appellant made his way towards the edge of the parking lot near King Street Extension. At 8:19:30 PM the Deceased's vehicle pulled onto Courtland Avenue near King Street Extension. The Deceased and Armenta were in the vehicle leaving the club. The vehicle was approximately 45 feet away from Appellant. Another verbal exchange occurred between Armenta and Appellant from 8:19:30 PM to 8:20:07 PM. During this verbal exchange Armenta can be seen hanging out of the window. At 8:20:07 PM Appellant was seen on surveillance video throwing an object at the Deceased's vehicle causing damage to the side panel of the vehicle. At this point the Deceased and Armenta exited the vehicle

[5] It is uncontested that at the time of the incident Defendant was recuperating from a work-related injury and was utilizing a scooter to navigate. He testified that while working his foot was injured and crushed by a large food can from the business' kitchen requiring surgery on his foot. (R. p. 85-86).

and began to approach Appellant. At 8:20:26 PM Appellant pointed his firearm at the Deceased and Armenta. When Appellant brandished the gun, Armenta began to retreat while the Deceased shielded himself with a car. At 8:20:31 PM, as Armenta was retreating away from Appellant, Appellant pursued Armenta. Appellant reached Armenta at 8:20:38 PM. When Appellant reached Armenta, a physical altercation ensued. At 8:20:45 PM the Deceased engaged in the physical altercation. At the time of the incident Appellant was suffering from a broken foot and utilized a scooter to navigate. During the physical altercation Appellant was dislodged from his scooter. It is clear from the video that Appellant is larger and of a significantly taller stature than the Deceased and Armenta. At 8:20:48 PM, Appellant threw the Deceased to the ground and broke free from the altercation. Appellant held the Deceased down by the back of his neck after which Armenta faced the street and fled away from Appellant. While the Deceased was on the ground on his hands and knees, Appellant fired multiple shots at the Deceased, striking him in his back. After the initial shot was fired, the Deceased and Armenta resumed their retreat. As they retreated, Appellant fired 5 additional shots. Appellant began to hobble away from the incident location at 8:21:17 PM. (State's Exhibit 12; See also Defense Exhibit 16).

Armenta testified that as he and the Deceased attempted to exit the parking lot in their vehicle, Appellant was near the stop sign yelling at them to stop. (R. p. 156-157). Armenta testified he lowered his window to hear what Appellant was saying. (R. p. 157). Armenta denied that he threatened, cussed, or threw anything at Appellant. (R. p. 158). Armenta testified that when the Deceased stopped the truck, Appellant threw a rock at the vehicle. (R. p. 158-159). The Deceased became upset because the rock damaged his car. (R. p. 159). They exited the vehicle
and began to approach Appellant. (R. p. 159). He then testified that it was his perception that Appellant wanted to fight. (R. p. 159). When the Deceased and Armenta stepped out of the vehicle,

Appellant pointed a firearm at them, and they attempted to walk back to the vehicle. (R. p. 160). Armenta testified that Appellant told him not to move and began to chase him. (R. p. 161). Armenta testified that he tried to grab Appellant's arm to keep his hand that held the gun away from him. (R. p. 162). Appellant then shot Armenta, and Armenta then turned and ran to the vehicle, and heard 4 to 5 more shots. (R. p. 162). Armenta then saw the Deceased run to the driver's door of the vehicle and then he fainted to the ground. (R. p. 163). Armenta testified that he used his bag to hold money and camera accessories. (R. p. 163). He further testified that he never had a gun on the night of the incident, nor was there one in the vehicle. (R. pp. 163-164).

Contrarily, Appellant testified that when he exited the club to get the license plate number, he heard screaming and yelling but could not tell where it was coming from until the Deceased's vehicle pulled up to the stop sign. Appellant testified that when the Deceased's vehicle pulled up to the stop sign at King Street Extension, Appellant was 45 to 50 feet away from the Deceased's vehicle. Appellant testified that he did not tell the Deceased and Armenta to stop. When the truck pulled up to the stop sign, Appellant testified Armenta was hanging out of the window ... saying he was going to f*** Appellant up and kill Appellant. (R. p. 118). Appellant testified that he told them to "get y'all a** on." (R. p. 118). Appellant testified that while the vehicle was at the stop sign, Armenta threw an object out of the vehicle's window and Appellant picked up the object and threw it back towards the vehicle. (R. p. 119).

At that point the Deceased and Armenta exited the vehicle and began approaching Appellant. Appellant testified that he observed Armenta reach into his crossbody bag. Appellant testified that he did not take the threats seriously until Armenta unzipped his satchel and placed his hand inside. (R. p. 120). Appellant then grabbed Armenta and pulled him from the door. At that point, Appellant pulled out his firearm. (R. p. 104). Appellant testified that he did not pull out

his firearm until the Deceased and Armenta tried to trap him between two cars. (R. p. 104). Appellant further testified that after he pulled his firearm out, he proceeded to Armenta as quickly as he could to ensure that he kept his hand in his bag. (R. p. 120-121). Appellant testified that he pulled out his gun to scare the Deceased and Armenta. (R p. 122).

Detective Daniel Wilson was a responding officer to the incident and took the Appellant's initial statement. (R. p. 185-186). He testified that he thought Appellant's version of events given in his statement to law enforcement was inconsistent with what the surveillance videos from the club portrayed. (R. p. 189). He testified that the video showed the Deceased and Armenta backing away when Appellant pulled out his firearm and proceeded to pursue them. (R. p. 190-192). He noted that Appellant was the only person who had a firearm and no other firearms were found on the scene. (R. p. 190). Additionally, Detective Wilson noted that all gunshot wounds that the Deceased sustained entered from his back. (R. p. 193). He acknowledged that there were a few discrepancies in what exactly was said but found Armenta's statements to be more accurate than Appellant's. (R. p. 205).

At the conclusion of the hearing the trial court requested the record be supplemented with the Coroner's Office Autopsy Examination Report. (R. pp. 238-239). Neither party objected to this request and the autopsy of Zabdiel Tinoco Hernandez was provided to the court. The autopsy report concluded that the Deceased suffered from three (3) gunshot wounds: one located on the Deceased's parascapular back; one located on the Deceased's paramedian spine; and one located on the Deceased's right forearm. (R. p. 1040).

The trial court indicated that a written order would be issued at a later date and made the following findings of fact and conclusions of law on the record:

> [I] think we all are clear on the law as in regards to the request for immunity and a motion to be immune, based on what we commonly

refer to as the stand-your-ground statute. And the case law is really quite clear. To prevail on an immunity claim under the Protection of Persons and Property Act, the defendant must meet by a preponderance of the evidence the elements of self-defense, save the duty to retreat. And we know a preponderance of the evidence is the more likely than not standard, which we commonly refer to as the greater weight of the evidence.

First, the defendant must be without fault in bringing on the difficulty. Second of the third elements is that he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. 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.
If he 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.

So in order to establish a credible case of, based on the stand-your-ground statute, the defendant would have to establish, and it is his burden to establish by a preponderance of the evidence, the satisfaction of the three elements of self-defense. Again, that would be that he was without fault in bringing about the difficulty.

Of course, if the defendant's conduct was of the type which was reasonably calculated to provoke a deadly assault, then the defendant would be at fault in bringing on the difficulty and would not be entitled to the stand-your-ground defense. In addition, he would have to prove by a preponderance or a greater weight of the evidence that he was, in fact, in imminent danger, which I've already articulated for the record.

And, finally, he would have to prove that there was no other way to avoid the danger, which is the final element. In other words, that there was -- the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as he did in this particular instance, of course acknowledging that if he was on his own premises or on a place where he legally has a right to be, he has no duty to retreat before acting in self-defense.

The Court finds by a preponderance of the evidence that the defendant has failed to establish the three elements of self-defense. And, again, in the interest of time, I will issue a very detailed written order. That order may be finished before we begin trial on Monday,

it may not. But, in any event, it will be filed prior to the conclusion of the trial because I need to go back and review the record and make sure it correlates with my notes and make those specific findings of facts and conclusions of law that are consistent with the record.

As in regards to the first element, which is to be without fault in bringing on the difficulty, the Court is hard pressed to find it credible that Mr. Robinson had no other way to have -- not be at fault in bringing on this difficulty in light of the fact that he was in a place of safety, left that place of safety, and pursued these individuals in the parking lot. And, again, without going into a great amount of detail, which will be reserved for purposes of the written order and in the interest of time.

Our case law is very clear that contemptuous language has to be -- it's not available if contemptuous language is also being utilized by the person who acted in self-defense, and such was calculated to bring about the difficulty. In other words, being some interaction, violent interaction between the individuals. And if his behavior was such that would -- that was reasonably calculated to provoke an assault. I think the fact of him placing the gun in his waistband, leaving a place of safety and going out into the parking lot, fails to establish by a preponderance of the evidence that he was without fault in bringing on the difficulty.

And no matter how -- in his own testimony he said he used contemptuous language. He dealt with it every day. And the Court is not persuaded that the language used would have brought about a physical encounter or did contribute to a physical encounter.

The second element is whether he was actually in imminent danger of death or serious bodily injury, or that he actually believed he was in imminent danger of death or serious bodily injury. Again, the Court is required to look at Mr. Robinson's objective observations and to rely on what he perceived as regarding this incident as to whether he was actually in imminent danger, or whether he believed he was in imminent danger of death or serious bodily injury. And based on my review -- again, I have to review these other videos, but based on my review of the initial video that was provided to the Court, the Court is hard pressed to find credible that testimony.

And of course when considering that, that's why I asked for the additional information. The Court has to look at all of surrounding facts and circumstances, including the physical condition and characteristics of the defendant and the victims, or the victim in this case. There's only one person, or he's asking for immunity from

both acts, that being the attempted murder of one individual and the actual murder of the other. And the Court must look to whether a reasonably prudent person of ordinary firmness and courage would have held the same belief, and would have been felt by an ordinary person in the same situation.

And, again, the Court must look to the size and age comparatively of the individuals involved, whether there are any threats by the victim, whether intoxication was involved. And the -- I think what is really dispositive in this analysis, and what I found most troubling regarding the presentation, which is no other way to avoid the danger, and that is the final element of self-defense, which is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as he did.
Of course, again, he does not have the duty to retreat where he has the legal right to be on the premises. But what I find most troubling is that he would leave a place of safety and engage in an altercation with individuals where -- and I don't find credible somehow this thought process that he was going to come in and shoot up the place. This place is covered with cameras. Nobody could have gotten a drop on him. They had the ability to see the parking lot. They had the ability to observe them. Even more important, they the ability to call the police if he thought the situation was that exigent before he left a place of safety.

He went out into a parking lot where he knew his health was compromised to confront these individuals. And I do not find it credible that he simply went to look for their license tag numbers. It's clear that this situation had gotten heated. The purpose of him going out in the parking lot amounted to a confrontation.

And the degree of force. Of course, when we're looking at that, where these individuals were unarmed. Of course, in self-defense, you're not limited to the degree or amount of force used by the victim. But in this instance, there is no evidence that the victims in this case acted initially such that it would have justified the use of deadly force. And there's no evidence in the record that, at the time Mr. Robinson was in the parking lot, he was acting in the defense of someone else.

And there has been reference made to the Dickey case, which actually is not similar to this case. It could be argued that it is, but it really is quite dissimilar. In the Dickey case, the defendant in that case called the police. He only went outside because he believed the police had arrived on the scene. And it was more of a simultaneous

> situation where the defendant was accompanying the individuals he was ejecting.
>
> And the courts found that when you have a situation of that type where the defendant is accompanying the ejection, where there's threatening words of posture, than a jury question has arisen. And the only similarity given in that case is where the defendant in that case had the right to eject trespassers from the premises. Other than that, those are the only two similarities. But it's not -- case law, of course, is accurate, but the facts are not similar. They're slightly similar but they're not the same. They cannot be characterized in the same vein.
>
> So, as such, the Court is denying the motion. I will do a very specific written order, which will contain the appropriate findings of fact and conclusions of law consistent with the record. Everybody will be provided a copy of that order. I am hopeful that I will have it done tomorrow sometime, but I'm not making any promises. I may not be able to get it done and we may be well into the middle of trial before I actually am done with it. It looks like the order probably will be in excess of 15 pages, so it will probably take me a little while to get it done.

(R. pp. 241-250).

ARGUMENT

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

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

To put it plainly, to obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance, to the trial court's satisfaction, or three of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance "stated simply is that evidence which convinces us as to its truth."

Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the following elements in determining whether a movant has met his burden:

> (1) he was without fault in bringing on the difficulty;
>
> (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and
>
> (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If a defendant only meets the first two elements, then he must also prove he meets the applicable section(s) of the Act that replace elements **(3)** reasonable fear; and **(4)** the duty to retreat. If the trial court finds a defendant has failed to satisfy one of the first two elements, immunity may be denied, and the case will proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("It is an axiomatic principle of law that the defense has not been established if any one element is disproven.")

Section (A): The presumption of reasonable fear applies (replacing element 3) if:

(1) The victim was in the process of unlawfully and forcefully entering or had entered an occupied vehicle or attempted to remove another person against his will from the vehicle; and

(2) Knows or has reason to believe that unlawful and forcible entry is or has occurred.

Section (B): Section A does not apply, however, if:

(1) The victim had the right to be in the residence or vehicle; or

(3)[6] The defendant was engaged in an unlawful activity at the time or used an occupied vehicle to further such unlawful activity.

Section (C): A person who:

- Is not engaged in unlawful activity; and
- Who is attacked in a place he had the right to be . . .
- Has no duty to retreat (replacing element 4) and has the right to meet force with force to prevent death or great bodily injury to himself or others.

Section (D): A person who attempts to enter a person's occupied vehicle is presumed to be doing so with the intent to commit an unlawful act or violent crime.

If the defendant proves all the above elements, the trial court must conclude the defendant had no duty to retreat and had the right to meet force with force, including deadly force. S.C. Code § 16-11-440(C) (2015); *State v. Jones*, 416 S.C. 283, 294-297, 301, 786 S.E.2d 132, 138-39, 142 (2016). The standard for determining whether the belief was reasonable is objective. *State v. Douglas*, 411 S.C. 307, 320, 768 S.E.2d 232, 239 (Ct. App. 2014).

Here, the trial judge was appropriately guided by this legal structure in considering the individual facts before her in finding immunity was not warranted. Moreover, the trial judge carefully set out the facts from the hearing in her order, including credibility determinations and the reasons for those determinations. In the present appeal, Appellant does little more than complain that the trial judge should have believed him rather than the remaining evidence. That is insufficient to show an error either in law or fact that would undermine the trial judge's ruling. Stated differently, Appellant fails to show an abuse of discretion. The order denying immunity should be affirmed.

[6] Items 2 and 4 of Section B are omitted as they are irrelevant to the facts of this case.

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

The trial judge correctly articulated the burden of proof at the immunity hearing (R. p. 242), as well as in the written order. (R. p. 314**)**. While Appellant argues that the trial judge erred in finding Appellant's version of events not credible despite corroborating witnesses and inconsistencies in Armenta's testimony (*See* Brief of Appellant, p. 30), the trial judge was able to review evidence, notably surveillance footage, and compare Appellant and Armenta's actions with their testimony. Rather, the judge was not *convinced* by a preponderance of the evidence that Appellant's version of the events was true in light of the evidence and testimony presented.

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

Simply put, the law in this state reflects a commonsense approach to resolving these fact-intensive disputes. As applied here, the circuit court's ruling aligns with this approach and should be upheld. *See State v. Andrews*, 427 S.C. 178, 182, 830 S.E.2d 12, 14 (2019)("[T]he circuit court

applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent.").

B. The trial judge appropriately exercised her duty to act as the factfinder for purposes of determining immunity.

In addition to arguing that the trial judge rendered a faulty credibility analysis, Appellant essentially asserts that the trial judge erred in her application of the elements of self-defense in consideration of Appellant's version of events. The trial judge considered Appellant's testimony, along with the other witness testimony, and was able to view the surveillance footage depicting the shooting.

"In determining a defendant's entitlement to immunity under the Act, the circuit court must necessarily consider the elements of self-defense." *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019). Those elements are: (1) "the defendant must be without fault in bringing on the difficulty," (2) "the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger," (3) "if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" or where "the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life," and (4) "the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." *Id.*, at 116, 838 S.E.2d at 495. "[A] valid claim of self-defense must exist, and the trial court must necessarily consider the elements of self-defense" in considering a claim of immunity. *Id*., at 118, 838 S.E.2d at 496 (quoting *Curry*, 406 S.C. at 371, 752 S.E.2d at 266). The Act where applicable, supplies a presumption of reasonable fear (unless there is an equal right to

be in the place at issue), or excuses the duty to retreat. *Id.*, citing S.C. Code §§ 16-11-440 (A) and (C).

Without Fault of Bringing on the Difficulty

Appellant contends the trial court erred by finding that Appellant was not without fault for bringing on the difficulty for three reasons: 1) Appellant had the right to exist [sic] the club to confirm that Decedent and Armenta were leaving and to obtain the license plate number of their vehicle; 2) the trial court did not address whether Armenta or Appellant caused Decedent to stop the vehicle instead of driving away; and 3) the trial court ignored Appellant's testimony that he rushed Armenta because he believed he was attempting to gain access to his weapon. (*See* Brief of Appellant, pp. 26-27).

Specifically, the trial court noted in the written order that the video surveillance showed the initial verbal altercation between Appellant and Armenta in the front doorway of King Street Cabaret. (R. p. 315). The surveillance video then showed that the verbal altercation concluded, the front door closed, and the Deceased and Armenta proceeded to their vehicle while Appellant re-entered the club. (R. p. 315). Surveillance video showed that Appellant retrieved his firearm from an office inside the club, exited the club, and made his way to the corner of Courtland Avenue and King Street Extension toward Armenta and the Deceased. (R. p. 315). The trial court determined that Appellant's testimony that he merely exited to obtain the license plate number is contradictory to his location on the Corner of Courtland and King Street Extension. (R. p. 315). The trial court noted that the probability Appellant would have been able to see the license plate number was unlikely. (R p. 315).

The trial court acknowledged the dispute and the verbal remarks which led to the Deceased and Armenta stopping at the corner of Courtland Avenue and King Street Extension and declined

to further address the issue noting that there was ample evidence supporting that Appellant was not without fault in bringing on the difficulty. (R. p. 316). The trial court noted that both Appellant and Armenta testified that Appellant threw a rock at the Deceased's vehicle, which caused Armenta and the Deceased to approach Appellant. (R. p. 316).

Leading into Appellant's third point, the trial court acknowledged that Appellant stated that he was in fear when Armenta appeared to reach for his firearm, however, did not find Appellant's testimony credible that the reason he chased Armenta was because he believed Armenta had a firearm. (R, pp. 317-318). The trial court also noted that upon review of the video surveillance, it appeared that Armenta and the Deceased retreated after Appellant brandished his firearm. Appellant then chased down Armenta and a physical altercation between the two ensued. The Deceased and Armenta then began to engage in a mutual assault with Appellant, which was when Appellant fired a shot causing Armenta and the Deceased to retreat. Appellant then held the Deceased by the neck, forced him to the ground and fired 5 more shots at the Deceased and Armenta. (R. p. 316).

Appellant cites to *State v. Dickey*, 394 S.C. 491, 500, 716 S.E.2d 97, 101-102 (2011) for support in which our Supreme Court determined that the accused, who was a security guard at an apartment complex, "had the right to eject the trespassers from the premises, his decision to exit the building and stand on the doormat to ensure their departure cannot, in and of itself, be construed as acting in bad faith." In the same vein, the Court in *Dickey* also reasoned that "[h]ad [the accused] accompanied the ejection with threatening words or posture, a jury question may have arisen." *Id*., 394 S.C. at 500, 716 S.E.2d at 102; *See State v. Wiggins*, 330 S.C. at 547, 500 S.E.2d at 494 ("testimony that appellant threatened to 'kick both [victim's and sister's] a—es' raised a jury question as to whether appellant was exercising good faith in ejecting victim"). Further, in *Dickey*,

there was no evidence to contradict Dickey's testimony that he routinely carried a concealed weapon and did not deliberately arm himself in anticipation of a conflict. *Id*., 394 S.C. at 500, 716 S.E.2d at 102. Additionally, Dickey called 911 before ejecting the trespassers and immediately called 911 after firing the shots. *Id*., 394 S.C. at 500, 716 S.E.2d at 102.

Contrary to *Dickey*, Appellant did far more than ensure the Deceased and Armenta's departure at the entrance of the club. Appellant intentionally armed himself and exited the club looking for Armenta and the Deceased, allegedly to retrieve the license plate number. While it was unclear who caused the Deceased to stop the vehicle, Appellant provoked Armenta and the Deceased by throwing a rock at their vehicle, which ultimately resulted in the subsequent altercation. The trial court considered the *Dickey* case in its analysis and found that *Dicke*y was not instructive under these circumstances. (R. pp. 556-557).

Reasonable Fear

The trial court addressed elements 2 & 3 together, noting that "the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injuries," and that "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[.]" (R. pp. 316-317).

Appellant contends that the trial court did not properly consider Appellant's testimony regarding his reasonable belief for why he was afraid that Armenta may have had a gun in his shoulder bag when addressing this element. (Brief of Appellant, p. 28). Appellant argues that the trial court instead focused on Appellant's conduct prior to Armenta and the Deceased exiting the vehicle, advancing toward Appellant, and Armenta's unzipping of the bag after Appellant brandished his gun. (Brief of Appellant, p. 28). Appellant further asserts that the trial court simply

ignored Armenta and the Deceased's actions and erred in finding that Appellant was the aggressor. (Brief of Appellant, p. 29).

In objectively judging Appellant's belief that he was in imminent danger such that he could have only saved himself by acting in self-defense, the trial court heavily relied on the surveillance video that depicted Appellant's actions throughout the duration of the incident. The trial court determined that Appellant's testimony did not correlate with his actions as shown on the video. (R. p. 317). The trial court considered Appellant's assertion that he was concerned for his safety and the safety of everyone in club, however, found Appellant's assertion to be inconsistent with his actions. The Deceased and Armenta had exited the club and were on their way back to the vehicle when Appellant exited the club to instigate and engage in a verbal altercation with them. (R. p. 317). The trial court noted that Appellant left his place of safety at the club to pursue the supposed danger and did not take the opportunity to call law enforcement or warn patrons of any imminent danger. (R. p. 317).

Appellant argues that his reasonable fear should be judged at the moment he believed Armenta was reaching in his bag for a supposed weapon, however, the trial court did in fact pass judgment based on Appellant's actions from the surveillance video that showed the altercation. The trial court did not find Appellant's testimony that he chased Armenta and engaged in a physical altercation because he believed Armenta had a firearm to be credible. (R. p. 318). Notably, the Deceased and Armenta began to retreat when Appellant brandished his firearm. (R. pp. 317-318).[7] Thus, the trial court reasonably concluded that Appellant failed to prove by a preponderance of the evidence that he believed he was in imminent danger sufficient enough to justify using deadly force. (R p. 318).

[7] The trial court recognized that Appellant did not have a duty to retreat pursuant to Section C of the Act. (R. p. 318).

No Other Probable Means of Avoiding the Danger

The trial court concluded that Appellant did not show by a preponderance of the evidence that he had no other probable means of avoiding the danger of losing his life to act as he did in this particular instance. (R. p. 318). Appellant asserts that the trial court erred in not considering that Deceased and Armenta chose not to drive away, proceeded to exit their vehicle and approached Appellant in a threatening manner. Appellant contends that he was outnumbered, being approached by two men who allegedly threatened to kill him and believed Armenta to be reaching for a weapon. (Brief of Appellant, p. 29-30).

The trial court noted that Appellant left the club and approached the supposed danger. (R. p. 318). There was no indication that Appellant was concerned about his safety considering law enforcement was not called. (R. p. 318). The trial court recognized that Appellant did not have the duty to retreat pursuant to Section C, however, Appellant is not entitled to pursue the conflict. (R. p. 318). And considering that he left the club to follow the Deceased and Armenta, thereby instigating an altercation, and pursued them when they attempted to retreat, it can hardly be considered that there was no other probable means of avoiding the danger.

Given the facts as presented above, there is evidence to support the trial court's denial of immunity under the Act. Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution. Accordingly, the case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having the burden to disprove at least one element of self-defense beyond a reasonable doubt.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the lower court's rulings be affirmed.

Respectfully submitted,

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