THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

The Honorable J Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-000148

The State of South Carolina,...Appellant,

v.

Graham Franklin Douglas,...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in admitting the testimony of Officer Stair and Sergeant Drake concerning the decedent's prior attacks?

II. Whether the trial court properly assessed the intoxication level of the Respondent and the decedent?

III. Whether the trial court abused its discretion when it determined the Respondent reasonably believed his actions were necessary to prevent death or serious bodily injury from the decedent's attack?

IV. Whether the trial court erred in granting immunity pursuant to S.C. Code § 11-16-440(c) because the Respondent was attacked in his home?

STATEMENT OF THE CASE

On May 31, 2011, the Respondent Graham Franklin Douglas was arrested and charged with the murder of the decedent Eden Smith (hereinafter "decedent"). On April 23, 2012, counsel for the Respondent filed and served its Motion to Dismiss pursuant to the Protection of Person's and Property Act, S.C. Code § 16-11-410, et seq.

The Respondent's motion was heard from October 2-3, 2012, before the Honorable J. Michael Baxley in the Chesterfield County Court of General Sessions. Appellant was represented by S. Jahue Moore, M. Brooks Biediger, and M. W. Cockrell, III. Due to the recusal of the Fourth Circuit Solicitor's Office, the Appellant was represented by Third Circuit Solicitor Ernest A. Finney, III, and Asistant Solicitor Tyler B. Brown.

On January 4, 2013, Judge Baxley issued his order granting immunity and dismissing the Respondent's criminal charges. The present appeal followed shortly thereafter.

The Respondent now respectfully requests this Court affirm the trial court's Order Granting Immunity and Dismissing Criminal Charges.

STATEMENT OF FACTS

The Respondent Graham Douglas is a thirty-four year old man from Chesterfield, South Carolina. (R. p. 14). He lives in a small house located at 1311 Jackson Road West in Chesterfield (the "house" or "residence"). (R. p. 14). The residence is owned by his parents who live in a house next door. The residence is an old share-cropper's house. (R. p. 15). It is a small, two-bedroom house with very low ceilings. (R. p. 17). While his parents have owned the house for some time, the Respondent began living there in 2009. (R. p. 16).

The Respondent knew the decedent Eden Smith for approximately eighteen years prior to the incident. (R. p. 20). They met through the decedent's sister. The Respondent dated the decedent's sister on and off for approximately fifteen years before the incident. (R. p. 20). While they were acquaintances, the Respondent and decedent were not close friends. (R. p. 21).

The Respondent knew the decedent had a history of violence and run-ins with law enforcement. (R. p. 21). He knew the decedent had been previously charged with burglary, armed robbery, assaulting a woman, assaulting two police officers, and criminal sexual conduct. (R. p. 21).

In 2006, the decedent assaulted the Respondent. (R. p. 22). The attack happened in the decedent's parent's house. (R. p. 22). During the assault, the decedent threw the Respondent up against a pantry. (R. p. 22). The decedent then began strangling the Respondent and had to be pulled off by his sister and mother. (R. p. 23). The decedent had apparently been provoked by the Respondent's use of the words "God damn." (R. p. 23).

The Respondent is a law school graduate. (R. 17). He suffers from a severe form of dyslexia and attention deficit disorder. (R. 18). His learning disabilities give him a great deal of trouble. He has taken and failed the bar exam a number of times. (R. 34). He experiences difficulty speaking, reading, spelling, and has a difficult time communicating. (R. 18). The influence of a stressful situation tends to exacerbate these symptoms. The Respondent also suffers from anxiety, panic attacks, and chronic insomnia. (R. 19-20) He is prescribed anti-anxiety medication. (R. 18).

Day of the Incident

On the morning of May 31, 2011, the decedent picked up the Respondent from his house to play a round of golf at a nearby country club. (R. 28). While playing golf, the men drank heavily. (R. 29). They shared a medium sized bottle of vodka on the course. (R. 29).

After golf, the men returned to the Respondent's house and continued drinking. (R. 31). They picked up a second bottle of vodka on the drive home. (R. 30). The two continued drinking outside into the afternoon. (R. 31).

At approximately 5:00 p.m., the Respondent's father arrived at his home next door. (R. 40). The pair went back inside because he did not want his father to know he was drinking.

Once inside, the two continued drinking and talking in the dining area adjacent to the kitchen. (R. 40). SLED toxicology analysis would later determine the decedent was grossly intoxicated with a blood alcohol concentration of .240. (R. 371). At some point, the decedent left and went to the bathroom. (R. 41). The bathroom is located in the

Respondent's bedroom, which is adjacent to the kitchen area. (R. 41). The decedent closed the bedroom door and locked it when he went in. (R. 42).

Several moments passed and the decedent did not come back. (R. 42). The Respondent called out for the decedent, but to no response. (R. 42).

When the decedent finally came out, he was holding a bottle of Clonazepam and said "look what I found." (R. 43). The Respondent asked for the medication back, but the decedent refused. (R. 44). The Respondent attempted to take the bottle from the decedent, but the decedent kept it away and began taunting the Respondent. (R. 44).

The Respondent finally yelled, "God damn it, give me my medicine!" (R. 45). Upon hearing this, the decedent snapped. (R. 45). The decedent grabbed the Respondent by his upper arms and shoved the Respondent up against his refrigerator. (R. 45). The Respondent's legs buckled and he fell to the floor, striking his head. (R. 46).

The decedent continued the attack, kneeling over and punching the Respondent as he lay on the floor. (R. 48). The blow to the head stunned the Respondent, and he was not able to effectively fight back against the powerful attacker. (R. 47). At some point, the decedent bent over and bit the Respondent on the leg. (R. 48). It would later be determined the Respondent suffered traumatic injury to his eye, both arms, elbow, and legs. (R. 361). The Respondent was also experiencing the symptoms of a concussion, but no medical aid was rendered. (R. 365). According to the State's forensic pathologist Janice Ross, the Respondent suffered significant injury due to the decedent's attack. (R. 358).

The Respondent told the decedent to leave his house, but the decedent refused and continued attacking. (R. 49).

The Respondent crawled to his bedroom and sat on his bed to regain his senses after the attack. (R. 49). He grabbed a .38 caliber revolver from his dresser and ordered the decedent to leave his house. (R. 50). The decedent refused to leave and remained in the kitchen area. (R. 50).

The Respondent walked to the threshold between his bedroom and the kitchen and ordered the decedent to leave again. (R. 51). The decedent refused to leave again. (R. 51). Instead, the decedent aggressively charged towards the Respondent. (R. 51). The decedent crossed the small kitchen area in an instant. (R. 52).

The Respondent raised his pistol and fired in the general direction of the advancing decedent. (R. 51). By the time of the shot, the decedent was only a few feet from the Respondent. (R. 51). The forensic autopsy later confirmed the decedent was within an intermediate range when he was shot. (R. 349). The shot struck the decedent in the chest, killing him. (R. 53).

The Respondent ran to his parent's house next door and called 911. (R. 53). When the police arrived, the Respondent was arrested and charged with murder.

ARGUMENT

"A claim for immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." *State v. Curry*, Op. No. 27335 (Dec. 4, 2013), *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). If there is evidence to support the trial court's decision to grant the Respondent immunity under the Act, the court should affirm this decision. *Id.*

I. THE TESTIMONY OF OFFICER STAIR AND SGT. DRAKE WAS PROPERLY ADMITTED INTO EVIDENCE.

A. THE APPELLANT'S OBJECTION TO THE TESTIMONY OF OFFICER STAIR AND SERGEANT DRAKE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW.

i. Appellant Failed To Make a Proper Objection And Thus Is Precluded From Appellate Review.

"If the trial judge reserves a ruling on the admissibility of evidence until she hears the foundation for the evidence, the objecting party must raise the issue again by objection or motion to strike during the trial." 15 S.C. Jur. Appeal and Error § 79. In *Richland Cnty. v. Lowman*, 307 S.C. 422, 425, 415 S.E.2d 433, 435 (Ct. App. 1992), the plaintiff moved the strike testimony before it was taken. The court reserved its ruling until the testimony was heard. Since the plaintiff failed to object or strike the testimony later, the error was not preserved on appeal. *Id; Soaper v. Hope Industries, Inc.,* 306 S.C. 531, 413 S.E.2d 38, 41 (Ct.App.1992) (issue not presented at trial cannot be raised for first time on appeal). Because the State did not object to the admitted testimony of Officer Stair and Sgt. Drake after the court conditionally heard the testimony, the issue is not preserved for appellate review.

The State objected to the testimony of Officer Stair. (R. 133). The judge responded:

> I believe there is a sufficient connection that we would permit the evidence. However, if at the end of this, although it is hard to close the barn door once the horse is out, *we will hear from you at the end as to whether or not there is reason, based on the global evidence as we find it to be, that this evidence should be excluded once given.* For those reasons, I am going to overrule your objection.

(R. 135-36) (emphasis added). Although the state cross-examined Officer Stair subject to the same objection, no further action was taken to preserve the objection of the testimony. Before the testimony of Sgt. Drake, the State objected on the same grounds, acknowledging that it would need to be addressed later by stating:

> Your Honor, please let me interpose the same objection that we had with the Myrtle Beach police officer, and the same grounds. The fire incident, not something that this officer talked with Mr. Graham about. And therefore, it is *leading the horse again, as we proceed, Your Honor, with there being no real chance of curing it later.*

(R. 218)(emphasis added). Again, the state cross examined Sgt. Drake, though not subject to the same objection. No further action was taken to preserve the objection of the testimony once it was given. Therefore, because there was no objection to the evidence once it was given, the issue is not preserved for review.

ii. Appellant Objected At Trial On The Grounds Of Relevance, But Argues Objection Based On Other Grounds In Its Appellate Brief.

In *State v. Jarrell*, 350 S.C. 90, 105, 564 S.E.2d 362, 371 (Ct. App. 2002), a sex toy found in a room during a search was admitted into evidence. At trial, Jarrell objected to the admission of the sex toy into evidence on "relevance grounds." On appeal, however, Jarrell argued that the evidence was prejudicial and that it "impugned that

character and credibility" of a witness's testimony. The South Carolina Supreme Court held that because Jarrell failed to make these arguments at trial, this issue was not preserved for our review. *Id.; see also State v. Taylor,* 333 S.C. 159, 174, 508 S.E.2d 870, 877 (1998) (an objection which does not specify the particular ground on which the objection is based is insufficient to preserve the question for appellate review); *Holy Loch Distrib., Inc., v. Hitchcock,* 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000).

Likewise, in *State v. Stone*, 376 S.C. 32, 35-36, 655 S.E.2d 487, 488-89 (2007), Stone objected to testimony on causation grounds. However, Stone's appellate argument was based on different grounds. The court stated that since Stone "did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review." *Id., citing State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

The court went on to state:

> Appellant alleges that his argument on appeal is simply an augmentation of his objection at trial, but a thoughtful examination reveals that this is not so. Primarily, Appellant's objection at trial was based on relevance, and that issue has been abandoned here.... If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.

The State objected to the testimony of Officer Stair and Sgt. Drake on relevance grounds:

> I believe counsel is attempting to illicit information about character/conduct of the deceased form the period of 2007. *And I do not think it is relevant to this hearing.* We do not think it is probative of the issue of the Duncan (sic) case. And we would strongly object, especially because this court is sitting today as judge and jury, and therefore any indication of some prior act is going to have some impact

> on your ability to make a decision that needs to be made at the conclusion of Duncan hearing.

(R.133) (emphasis added). The judge then explained that the testimony may fit into an exception, that it was cumulative, and that it went to credibility and /or state of mind. (R. 135).

The Appellant argues in its brief that the evidence was inadmissible character evidence and that the evidence was prejudicial. Neither of these grounds were argued before the trial court, therefore the trial judge had no opportunity to review and rule upon these arguments. For that reason, the arguments made by Appellant in its brief are not preserved for review.

B. THE EVIDENCE WAS RELEVANT AND NON-PREJUDICIAL.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Adams,* 354 S.C. 361, 580 S.E.2d 785 (Ct.App.2003). A trial judge's evidentiary rulings will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Hamilton,* 344 S.C. 344, 543 S.E.2d 586 (Ct.App.2001); *State v. Mansfield,* 343 S.C. 66, 538 S.E.2d 257 (Ct.App.2000). In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Evidence is relevant if it tends to

establish or make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Schmidt,* 288 S.C. 301, 342 S.E.2d 401 (1986). South Carolina courts have a long history of admitting evidence of prior bad acts in order to ascertain the defendant's state of mind when acting in self defense:

> The great matter in every case of homicide is the motive which prompted the fatal act; and to ascertain this, in justice to the accused, all of the surrounding circumstances and facts calculated to influence motive and to prompt action, and relevant to the important issues involved, should be admitted. In our state the prominent case in which the question here was involved is the case of *State* v. *Smith*, 12 Rich. Law, 430. ... The evidence should be confined to a character and habits of violence, treachery, etc., such as might beget reasonable apprehensions of grievous bodily harm, and reduce the other party to the apparent necessity to slay in self-preservation.

State v. Turner, 29 S.C. 34, 6 S.E. 891, 892 (1888).

Evidence of other crimes is generally admissible when it is necessary to establish a *material fact* or element of the crime charged. *See Johnson,* 293 S.C. at 324, 360 S.E.2d at 319; *State v. Byers,* 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Cheatham,* 349 S.C. 101, 561 S.E.2d 618 (Ct.App.2002) (emphasis added). Such evidence is admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. *See* Rule 404(b), SCRE; *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). Under the res gestae theory, "evidence of other bad acts may be an integral part of the crime with which the defendant is charged *or may be needed to aid the fact finder in understanding the context in which the crime occurred.*"

State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005) (emphasis added). Our supreme court has adopted the reasoning set forth by the Fourth Circuit Court of Appeals:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context.... And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996), *citing United States v. Masters,* 622 F.2d 83, 86 (4th Cir.1980).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Aleksey,* 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and is examined on the facts of each case. *State v. Brooks,* 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist,* 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quotation marks and citations omitted). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403]." *State v. Lee,* 399 S.C. 521, at 529, 732

S.E.2d 225, at 229 (2012) (alteration and emphasis in original; quotation marks and citations omitted).

The trial judge determined, after an examination of the facts, that the testimonial evidence was relevant. He reasoned that since "here we are under a Castle Doctrine Hearing that would cause us to examine to some extent the actions of the deceased" and that "it would go to whether or not the defendant's alleged state of mind when this incident occurred was in fact a reasonable one" that the testimony was relevant. (R. 135). The State did not assert or argue that the evidence was prejudicial.

C. EVEN IF THE EVIDENCE WAS ADMITTED IN ERROR, THE ERROR WAS HARMLESS.

Error is harmless where it could not reasonably have affected the result of the trial. *In re Harvey,* 355 S.C. at 63, 584 S.E.2d at 897; *Mitchell,* 286 S.C. at 573, 336 S.E.2d at 151; *State v. Burton,* 326 S.C. 605, 610, 486 S.E.2d 762, 764 (Ct.App.1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. *State v. Sherard,* 303 S.C. 172, 399 S.E.2d 595 (1991); *State v. Adams,* 354 S.C. 361, 580 S.E.2d 785 (Ct.App.2003). An insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." *State v. Mizzell,* 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (internal quotations omitted). *See State v. Haselden,* 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (stating the erroneous admission of prior bad act evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record).

The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. *State v. Blackburn,* 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); *Weaverling,* 337 S.C. at 471, 523 S.E.2d at 793; *see also State v. Williams,* 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which is properly admitted); *State v. Schumpert,* 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of evidence cumulative to other unobjected-to evidence is harmless); *State v. South,* 285 S.C. 529, 535, 331 S.E.2d 775, 778 (1985) (stating court erred in admitting officer's notes because they were a prior consistent statement, but held "error was harmless beyond a reasonable doubt since [notes were] cumulative to the abundant amount of similar evidence admitted at trial"); *State v. Jarrell*, 350 S.C. 90, 101, 564 S.E.2d 362, 368 (S.C. Ct. App. 2002) (finding that since a statement was cumulative and substantially identical to other properly admitted evidence, any error caused by the admission of the evidence was harmless).

The trial judge stated that one of the reasons for allowing the testimony of Officer Stair was that the "evidence was somewhat cumulative in that it was referred to by Mr. Douglas on his direct examination." Even if the testimony had not been admitted, the impact of the testimony was minimal in the context of the record. Both officers testified to a history of assaultive behavior by the decedent. However, this history was also corroborated by the Respondent and by the decedent, the decedent's aunt, when she testified she knew the decedent was to be sentenced soon for charges of rape. (R. 238). The Respondent also "testified to a prior assault upon him by the decedent in the summer of 2006 that occurred at the decedent's home, was witnessed by others, and was forcibly

stopped by members of the decedent's family. This testimony was not disputed by those witnesses, who were present in the courtroom, but were not called to controvert this testimony during the State's case." (R. 444). Therefore, even if the testimony of the officers was admitted in error, the error was harmless.

II. THE COURT PROPERLY ASSESSED THE INTOXICATION LEVEL OF THE DECEDENT AND RESPONDENT.

A. THE COURT IS NOT REQUIRED TO ASSESS THE INTOXICATION LEVEL OF THE DEFENDANT IN A SELF DEFENSE DETERMINATION.

"A determination as to whether a defendant's belief concerning his exposure to danger is reasonable may not take into account his intoxication. Accordingly, because the defense was self defense, the degree of the defendant's intoxication was irrelevant." *Com. v. Ramirez,* 44 Mass. App. Ct. 799, 801, 694 N.E.2d 46, 48 (1998) (internal citations omitted). South Carolina courts do not have a history of measuring the level of intoxication of a defendant claiming self-defense. In *Battle v. State,* 305 S.C. 460, 409 S.E.2d 400 (1991) and in *State v. Bryant*, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2010) the courts acknowledged that both the decedent and the defendant had been drinking, but did not describe a comparison of drunkenness by the courts. A Westlaw search of South Carolina case law did not reveal any occasion in which a South Carolina court had done such a comparison.

The trial court, however, did note that it was aware that the Respondent had been drinking, although no blood alcohol level was obtained by law enforcement (R. 442). The court also stated that although the Respondent may have been intoxicated, there was no evidence of violent and aggressive behavior, and that he was generally "cooperative, passive, and remorseful throughout the aftermath of the incident." *Id.*

B. THE COURT HAD AMPLE EVIDENCE, SUPPORTED BY THE RECORD, TO DETERMINE THAT THE DECEDENT WAS AGGRESSIVE WHEN INXOTICATED.

The Appellant asserts that "the court's assessment of the decedent's level of intoxication as evidence supporting the reasonableness of Respondent's belief he was in

imminent fear of serious bodily harm is not supported by the record." Initial Brief of Appellant, p. 21.

There is evidence in the record that the decedent had a history of violent behavior, and that intoxication may have increased his pre-disposition to violence. The Respondent testified the decedent had a history of violence and was unpredictable and aggressive. (R. 21). Officer Stair testified that the decedent acted violently when arrested for public intoxication. (R. 137). Sgt. Drake testified that the decedent assaulted a woman while intoxicated. (R. 220). Ms. Shorrells, a forensic toxicologist, testified that an experienced drinker with the level of alcohol in the decedent's body was likely to be aggressive, violent, and experience severe mood swings.

In addition, the court did not rely solely on intoxication as evidence that the Respondent was acting in self defense. The court also reviewed the physical condition of the Respondent and the decedent, the injuries sustained by the men, the history of assaultive behavior by the decedent, and a prior assault by the decedent on the Respondent. (R. 441-44). Therefore, the court was not in error in assessing the level of intoxication of the decedent as part of its analysis.

III. THE RESPONDENT BELIEVED HE WAS IN IMMINENT DANGER OF DEATH OR SERIOUS BODILY HARM, THEREFORE HE WAS ENTITLED TO IMMUNITY FOR SELF DEFENSE PURSUANT TO THE "STAND YOUR GROUND" PROVISION OF THE ACT.

A. THE RESPONDENT ACTED REASONABLY IN SELF DEFENSE.

The Appellant asserts "[t]here was no evidence at the hearing" to support the trial court's conclusion that the Respondent had a reasonable fear of great bodily injury when he was attacked by the decedent. Appellant's Initial Brief, p. 24.

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

S.C. Code Ann. § 16-11-440(c). As a threshold matter, the Respondent was not engaged in an unlawful activity at the time of the incident and that the Respondent has a right to be in his own home at the time of the shooting. These facts are not disputed by the Appellant. However, the Appellant asserts the Respondent did not reasonably believe his use of force was necessary to prevent death or great bodily injury or prevent the commission of a violent crime. This assertion is not supported by the evidence.

A person has the right to act on appearances, even if the person's belief is ultimately mistaken. *State v. Fuller,* 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). "A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a

reasonable prudent man of ordinary firmness and courage would have entertained the same belief." *State v. Fuller,* 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989), *citing State v. Jackson,* 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955).

In *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011), reh'g denied (Oct. 18, 2011), the court found that a person would have the right to immunity for self defense against someone who was "highly intoxicated, acted aggressively over the course of the conflict, ... began advancing toward Petitioner quickly with the purpose of assaulting him, ... and [with] great disparity in the physical stature and capabilities of [the decedent] and Petitioner." The court went on to state that it was reasonable for the Petitioner to make the assumption that he was in "actual danger of death or serious bodily harm." *Id.* "[A] person of Petitioner's stature and limited agility would entertain the same fear when faced with an attack by a belligerent, intoxicated, more agile, and younger male, who appeared to be reaching for a weapon. *Id.*

In its order granting immunity, the trial court went into great detail in outlining the evidence that the Respondent was in fear of great bodily injury and that fear was reasonable under the circumstances.

The court stated that the decedent was has "superior physical conditioning" as compared to the Respondent. (R. 441). The decedent was significantly stronger and more athletic than the Respondent. During the attack, the decedent grabbed the Respondents arms with such force that "massive bruises [were left] on the upper arms of [the Respondent}." *Id.*

The court next addressed the decedent's level of intoxication. According to SLED toxicologist Shana Sorrells, the decedent had a blood alcohol concentration of .240. In his

heavily intoxicated state, the decedent was irrational and prone to violent behavior. This level of intoxication contributed to the decedent's aggressive mood swing and violent attack. *Id.*, p. 8.

Multiple injuries were sustained by the Respondent. Along with massive bruising to both upper arms, the Respondent suffered bruising of his right eye and a blow to the head. *Id.* He was unmistakably the victim of a violent attack. On the other hand, the decedent had nearly no signs of injury except for the fatal gunshot. The court concluded "the [Respondent's] claimed belief that serious additional injury was about to be inflicted upon him is he did not act to protect himself was reasonable, and supported by the evidence in this case." *Id.,* p. 9.

The court also cited to previous assaults committed by the decedent. The decedent had assaulted the Respondent previously in a manner similar to the attack on May 31. The attack was so violent that members of the decedent's family had to pull him off of the Respondent and restrain him. (R. 22-23). On another occasion, two male police officers were required to subdue the decedent after he had attacked another person. Officer Drake testified a tazer was required to subdue the decedent in another attack. These previous attacks show the power of the decedent to inflict serious injury. The previous attacks also corroborate the unusual injury to the Respondent, the bite mark on his leg. In at least one attack, the decedent attempted to bite one of the police officers in the leg. In the incident involving Officer Drake, the decedent bit a female bar patron, which led to the police call. (R. 219-21).

The law does not require a person to have already suffered great bodily injury before his right to defend himself takes hold. "Once the right to fire in self-defense

arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *State v. Starnes,* 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*citing State v. Hendrix,* 270 S.C. 653, 244 S.E.2d 503 (1978)).

The law requires a person have a reasonable fear that he will suffer great bodily injury if he does not defend himself. Based on the evidence presented in court, the Respondent had this fear and his actions were necessary to prevent great bodily injury or death.

B. THE RESPONDENT SATISFIED ALL ELEMENTS OF SELF-DEFENSE.

The recent decision in *State v. Curry* also clarifies the requirement of acting in self defense. The Court held that immunity under the Act is "predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *State v. Curry*, Opinion No. 27335 (Dec. 4, 2013). While the trial court did not have the benefit of *State v. Curry* during the *Duncan* hearing, the elements of self-defense are satisfied nonetheless.

The elements of self-defense which the Respondent must prove are:

> First, the defendant must be without fault in bringing on the difficulty. Second, 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. Third, 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 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. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. If,

> however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505-06 (1978). Pursuant to the Act and the common law castle doctrine, the Respondent does not need to prove the fourth element of self-defense: the duty of retreat. *Curry, supra.*

The Respondent was attacked without provocation. In the moments leading up to the incident, the decedent took a bottle of prescription medication from the Respondent's room. The Respondent attempted to get the bottle back, but the decedent refused to give it back. The Respondent made no assaultive action against the decedent. What would have been a somewhat playful - if mean spirited – encounter turned into a life threatening situation when the decedent began viciously beating the Respondent. Therefore, the Respondent was attacked without provocation and the first element of self-defense is satisfied.

The final elements of self-defense are satisfied because the Respondent was in actual imminent danger of attack, and the circumstances of the attack were such that his use of force was reasonable and necessary to save himself. *See argument supra.* The second and third elements of self-defense are analogous to the reasonable belief requirement in S.C. Code Section 16-11-440(c). There is a significant amount of evidence to prove the Respondent's actions were reasonable given the circumstances. The trial court went into great detail in analyzing this evidence in support of its decision to grant immunity. Therefore, this Court should affirm the trial court's decision because the Respondent acted in self-defense.

IV. THE COURT PROPERLY GRANTED IMMUNITY UNDER THE STAND YOUR GROUND PROVISION BECAUSE S.C. CODE § 16-11-440(c) DOES NOT EXCLUDE A PERSON'S HOME FROM PROTECTION.

The applicable portions of S.C. Code Section 16-11-440 reads:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
> (B) The presumption provided in subsection (A) does not apply if the person:
> (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or
> ...
> (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440 (2013).

The trial court found that although the Respondent was not entitled to the protection of subsection (A) since there was no unlawful entry, he was entitled to the protection of subsection (C), "even though the incident in question occurred within the Defendant's residence." (R. 436). Appellant asserts that because the shooting occurred

inside the Respondent's house, and not "in another place," the Respondent is not entitled to the "stand your ground" protection of subsection (C).

The cardinal rule of statutory construction is to determine the intent of the legislature. *Bass v. Isochem,* 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005). The best evidence of legislative intent is the text of the statute. *Wade v. State,* 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n,* 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.,* 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008); *Kiriakides v. United Artists Communications, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (when construing a statute, the Court will reject meaning that would lead to an absurd result not intended by the legislature).

When "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." *Kennedy v. S.C. Ret. Sys.,* 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). In some cases, legislative history may be probative in determining the legislature's intent. *Eagle*

Container Co. v. Cnty. of Newberry, 366 S.C. 611, 630, 622 S.E.2d 733, 743 (Ct.App.2005), *rev'd on other grounds,* 379 S.C. 564, 666 S.E.2d 892 (2008).

In 2006, the S.C. Legislature codifed the common law Castle Doctrine. In doing so, it stated that the codification was:

> An act to amend the code of laws of south carolina, 1976, by adding article 6 to chapter 11, title 16 so as to enact the "protection of persons and property act", to define the terms "dwelling", "great bodily injury", "residence", and "vehicle", to authorize the lawful use of deadly force against an intruder *or attacker in a person's dwelling, residence,* or occupied vehicle under certain circumstances, to provide exceptions, *to provide that there is no duty to retreat if the person is in a place where he has a right to be*, including the person's place of business, and the use of deadly force is necessary to prevent death, great bodily injury, or the commission of a violent crime, and to provide that a person who lawfully uses deadly force is immune from criminal prosecution and civil action and may not be arrested unless probable cause exists that the deadly force used was unlawful;

CRIMES, 2006 South Carolina Laws Act 379 (H.B. 4301) (emphasis added). In addition, the General Assembly included its intent in S.C. Code Section 16-11-420:

> (A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.
> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain

> unmolested and safe within their homes, businesses, and vehicles.
> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

S.C. Code Ann. § 16-11-420. The intent of the legislature was to give South Carolina citizens the right to protect themselves from attack, without fear of prosecution, wherever they were attacked. The purpose of the codification of common law is to *extend* the areas of protection, not to limit them.

Appellants assert that the language of subsection (A)(2) limits the locations of protection of subsection (C). They reason that because subsections (B), (D), and (E) refer to a dwelling, residence, or occupied vehicle and that (C) does not, that (C) cannot apply to a dwelling, residence, or occupied vehicle. By this reasoning, as long as someone has been invited into the home, he can attack any of occupants, who cannot act in self-defense and be protected from prosecution because is it not "another place." If a citizen gives an acquaintance a ride home and is attacked, she cannot act in self-defense because she was not in "another place." This is contrary to the purpose of the legislation and would lead to an absurd result. In addition, subsections (B), (D), and (E) are descriptors of presumptions that apply to subsection (A). They are not limitations to the statute.

The Respondent was attacked in his home. The sole reason that he was not entitled to the protection of 16-11-440(A) was because his attacker did not unlawfully enter his home. However, the legislature intended that citizens should be able to protect themselves, no matter where they are attacked. For this reason, the Respondent was entitled to protection from immunity under S.C. Code Ann. §16-11-420(C) and the decision of the court should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the trial court's order granting immunity and dismissing criminal charges pursuant to the Protection of Persons and Property Act.

Respectfully submitted,

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February 26, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

The Honorable J. Michael Baxley, Circuit Court Judge

Case No. 2013-000148

The State of South Carolina,..Appellant,

v.

Graham Franklin Douglas,...Respondent.

PROOF OF SERVICE

I certify that I have served the filed Final Brief of the Respondent on the parties listed below by depositing a copy in the United State Mail, postage prepaid, on February 28, 2014, addressed as indicated below:

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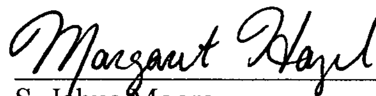
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent contains all material proposed to be included by any of the parties and not other material.



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