STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State, ...Respondent

v.

Jabari Linnen,.....Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly denied Appellant's request to give the jury a charge under the Protection of Persons and Property Act where Appellant never sought a pretrial determination from the trial court regarding immunity under the Act and where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act?

STATEMENT OF THE CASE

Jabari Linnen (Appellant) was indicted at the May 19, 2011 term of the grand jury for Beaufort County for attempted murder (2011-GS-07-946) and possession of a weapon during the commission of a violent crime (PWDCVC) (2011-GS-07-947). He was represented by Jim Brown, Esquire, of the Beaufort County Bar. The State was represented by Deputy Solicitor Sean P. Thornton of the Fourteenth Judicial Circuit Solicitor's Office. (R.p.7). On September 17, 2012, jury qualification and selection were held before the Honorable Stephanie McDonald and on September 18-21, 2012, Appellant proceeded to trial by jury before the Honorable Diane S. Goodstein. The jury found Appellant guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of PWDCVC. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for PWDCVC. (R.p.1-6; R.p.374, line 16-p.375, line 5). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

On April 21, 2011, King David Williams was driving Appellant's car down Luther Warren Drive on St. Helena Island in Beaufort County, with Appellant in the passenger seat. When they stopped at the corner of Seaside Road and Luther Warren, they encountered the victim, Trey Nichols, standing next to an oak tree and cursing at Appellant. Nichols threw an empty Coke can at the car. Appellant then retrieved a pistol from the glove compartment, exited the passenger's side of the car, walked around to the driver's side and fired multiple shots at the victim. Nichols was struck at least six times in the arms, legs and chest, and suffered at least three life-threatening wounds; however, he survived the attack. (R.p.50, line 11-SROA.p.2-3, line 13; p.52, line 12-p.53, line 14; p.54, line 4-p.57, line 15; p.60, line 23-p.61, line 3; R.p.121, line 6-SROA.p.7; p.133, line 21; p.167, line 17-p.182, line 9; p.208, line 21-p.210, line 6; p.238, line 18-SROA.p.20; SROA.p.21; p.294, line 25).[1]

Prior to the jury being sworn, Appellant sought a pretrial ruling on the admissibility of evidence of specific instances of violence on the part of Nichols. Appellant wanted to introduce this evidence in support of his theory of justifiable homicide by showing he had a reasonable apprehension of fear from Nichols at the time of the shooting. The trial court ruled it would allow testimony about three specific prior instances of violence committed by Nichols within three months of the shooting but would exclude evidence of two other prior instances which were significantly older in time. The court also ruled Appellant would be allowed to elicit opinion or reputation

[1] Although the accounts given by Nichols, Williams, and Appellant differ in some details about what happened immediately prior to the shooting, it is undisputed that Appellant was outside his vehicle when he pulled a pistol from behind his back and shot Nichols multiple times. Thus, Nichols had not unlawfully and forcibly entered Appellant's vehicle, was not in the process of unlawfully and forcefully entering Appellant's vehicle, and was not removing or attempting to remove another person against his will from Appellant's vehicle.

evidence about Nichols if Appellant laid the proper foundation. (R.p.14, line 20-p.28, line 17). Appellant did not make a pretrial motion for immunity from prosecution under the "Protection of Persons and Property Act" (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007).[2]

After the jury was sworn, the trial judge made preliminary remarks to the jury and the parties made opening statements briefly outlining the forthcoming evidence and their respective theories of the case. (SROA.p.1, line 20-R.p.49, line 24). Appellant's counsel stated in part:

> April 21st, 2011. Mr. Nichols attacked Jabari Linnen using hostile words and harsh facts at the corner of Luther Warren Drive and Seaside Road. Jabari was without fault in bringing on that difficulty. Jabari stood his ground, because he reasonably believed that force was necessary to prevent great bodily injury or death.
>
> Now, you'll find out that Mr. Nichols has a reputation for violence. Mr. Nichols has earned this reputation. What are you going to find out about Mr. Nichols? We know that he has physically attacked his mother, grandmother, and grandfather within two-and-a-half months of April 21st, including one incident with his mother the very morning that this happened.
>
> Now, why is Mr. Nichols' reputation for violence or instances of violence important? Because a person in South Carolina has the right to expect to remain free from molestation and attack. We know that a person in South Carolina has a right to stand their ground. As a person in this State that has not engaged in any unlawful activity and who is in a place where he has a right to be, has the right to stand his ground and has no duty to retreat as long as he reasonably believes that the force used is necessary to prevent harm, death, great bodily injury, or death to himself or others or to prevent the commission of a violent crime.
>
> So it is important to understand that while Jabari Linnen tried to raise a family, Mr. Nichols was raising hell on Seaside Road.

(R.p.47, line 25-p.49, line 2) (emphasis added). In cross-examining the State's second witness, Brandon Beaton, Appellant's counsel asked Beaton if he had any information to

[2] "Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (emphasis added).

present to the jury indicating Appellant was not justified in standing his ground that day; however, the State's objection to the question was sustained. (R.p.51, lines 18-25).

Later, while cross-examining Investigator Jeremiah Fraser of the Beaufort County Sheriff's Office, Appellant asked if there had been any investigation into whether the shooting was lawful or unlawful. Fraser explained the police simply investigate the facts and present those facts to the solicitor's office in regard to whether a shooting might have been lawful. He acknowledged he was familiar with the term "justified shooting." (R.p.58, line 8-p.59, line 8; p.62, line 7-p.63, line 5; p.64, lines 18-25). Appellant was then allowed to cross-examine Investigator Fraser about the three previously admitted specific instances of violence committed by Nichols prior to the shooting. (R.p.65, line 13-SROA.p.4; SROA.p.5; p.93, line 7). On re-direct, Fraser noted that none of the three incidents had anything to do with Appellant. (R.p.94, line 10-SROAp.6, line 1). On re-cross, Appellant attempted to elicit reputation or opinion testimony about Nichols as a result of Fraser's knowledge of police investigations of prior incidents, but Fraser said he had not formed any opinion about Nichols' reputation for violence. Appellant's counsel then advised the trial court he had a matter of law. The judge excused the jury to allow the proffer of testimony and arguments regarding whether Appellant would be allowed to impeach Fraser's claim with extrinsic evidence not previously admitted. This evidence consisted of a DVD recording of the police interview of King David Williams, arrest warrants of Trey Nichols, and a Sheriff's Department summary of Trey Nichols. Appellant appeared to want to introduce this evidence to support his contention that Fraser actually does or should have an opinion about Nichols being a violent person. Appellant argued in part that he believed the questions were admissible to prove his

defense of "justification" and argued self-defense was merely a subset of justification. He claimed "justification" would include self-defense, "the right to stand your ground, statutorily," and the defense of others. Ultimately, the trial court allowed Appellant to ask whether the incident reports from the previously admitted specific acts of violence led Fraser to form an opinion about Nichols but prohibited any attempts to ask Fraser about the other three pieces of extrinsic evidence. (SROA.p.6, line 6-p.121, line 2).

During his subsequent cross-examination of Williams, Appellant tried to show Nichols was a violent person who had an ongoing "beef" with Appellant. He also tried to establish that Appellant was in a place he had a right to be when he fired on Nichols in self-defense. (R.p.182, line 14-SROA.p.8; p.207, line 18). After the State rested, Appellant moved for a directed verdict on the attempted murder charge, arguing there was no evidence in the record of malice aforethought. He also noted the defense theory that his shooting of Nichols was justified, but he did not seek to invoke immunity under the terms of the Act. (R.p.213, lines 1-21).[3]

Appellant then presented evidence in his own defense. He further developed his theme that Nichols was a violent person by calling witnesses Regina Blanding, Paul Mitchell, Robert Blanding, and Desiree Blanding on his behalf. (R.p.214, line 11-p.233, line 22; p.234, line 3-SROA.p.9-16; p.235, line 25; p.236, line 1-SROA.p.17-19; p.237, line 21; R.p.300, line 12-p.308, line 10). Appellant also testified in his own defense,

[3] In State v. Curry, our supreme court treated a challenge to the denial of immunity under the Act as preserved for review even though Curry improperly moved for immunity at the directed verdict stage rather than prior to trial, because the required pretrial procedure had not been established by the court at the time of Curry's trial. 406 S.C. 364, 370 n.3, 752 S.E.2d 263, 266 n.3 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)). Here, Appellant's trial was held in September of 2012, more than a year after the published opinion in Duncan. Thus, any attempt by Appellant to invoke immunity under the Act at the directed verdict stage or any other time after the trial commenced would have been untimely.

claiming he was scared of Nichols and got out of the car only because he wanted to talk to Nichols about his behavior. (R.p.238, line 18-SROA.p.20; p.294, line 25).

After the defense rested, the State called Investigator Fraser in rebuttal. (R.p.308, line 11-p.312, line 19). Prior to closing arguments, the trial court held an informal charge conference in chambers, after which Appellant submitted a set of seventeen requests to charge as Court's Exhibit Two. (R.p.289, line 1-p.317, line 17). Appellant's fourth request to charge states:

> The Castle Doctrine, which recognizes that a person's home is his castle, has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is engaged in an unlawful activity and who is attacked in another place where he has a right to be 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 crime.

(Court's Exhibit Two). In his closing argument, Appellant focused on the theory that he was justified in shooting Nichols in self-defense. He argued he was without fault in bringing on the difficulty, that he believed he was in imminent danger of great bodily danger or death, that he was in fact in imminent danger of great bodily injury or death, and that even though he had a duty to retreat, he did not reasonably believe retreat was possible. Appellant also focused on Nichols' violent nature and his allegedly aggressive approach towards Appellant once Appellant was outside the car. (R.p.318, line 19-p.329, line 1).

Next, the State made its closing argument and the trial court charged the jury on the law, including a detailed charge on the law of self-defense. The trial court did not charge the common law Castle Doctrine or any provisions from the Act. (R.p.329, line 8-

p.364, line 19). Following the jury charge, the trial judge asked if there were any additions or exceptions from either the State or Appellant. Appellant referenced Court's Exhibit Two and specifically asked that the trial judge charge the jury on "the right to stand your ground." He noted there were three particular sentences listed as the defendant's request for instructions number four, all or any part of which he wanted the trial court to charge. (R.p.364, line 20-p.365, line 10). The trial court ruled as follows:

> Thank you so much, it is appropriate to put those on the record right now; so thank you so much for doing that. And thank you Mr. Brown for having filed this as a Court's Exhibit, that way it's very clear for our record of what those are. We addressed those yesterday and let me just say that I do not believe that the Castle doctrine, with regards to the vehicle, applies to those facts. Given the dictates of the Castle doctrine, given the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that that is what is contemplated by the Castle doctrine. We will know one day, because it is a developing theory, so we will know.

(R.p.365, line 20-p.366, line 9). The jury ultimately found Appellant guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of possession of a weapon during the commission of a violent crime. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for the weapon charge. (R.p.1-6; R.p.374, line 16-p.375, line 5).

ARGUMENT

The trial court properly denied Appellant's request to give the jury a charge under the Protection of Persons and Property Act where Appellant never sought a pretrial determination from the trial court regarding immunity under the Act and where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act.

Appellant argues the trial judge erred by refusing to charge the jury on the "Protection of Persons and Property Act" (the Act), S.C. Code §§ 16-11-410 to -450, because his request to charge was a correct statement of law and was supported by facts in evidence. He maintains the Act was intended to extend the common law Castle Doctrine to occupied vehicles and thus provide citizens with the ability to protect themselves with deadly force and avoid the need for retreat when attacked in their vehicles. Appellant argues that since he was attacked inside his vehicle and confronted the threat "in a protectable area outside his vehicle" he was entitled to the presumption of reasonable fear of imminent danger absolving him of the duty to retreat and therefore was entitled to the requested jury charge. The State disagrees and submits Appellant was not entitled to a jury charge under the Act where he never sought immunity pursuant to the Act and where, as a matter of law, the evidence presented at trial could not establish immunity under any specific terms of the Act. Accordingly, the trial judge committed no error in refusing Appellant's request to instruct the jury on the Act, and Appellant's convictions should be affirmed.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The conduct of a

criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

Law / Analysis

The trial judge committed no error in refusing to charge the jury on provisions of the Act where Appellant did not claim immunity under the Act and did not seek a pretrial determination from the trial court regarding immunity. In Curry, the trial court charged the jury with subsection 16-11-440(C) of the Act. State v. Curry, 406 S.C. 364, 372-73, 752 S.E.2d 263, 267 (2013). On appeal, Curry argued the trial court erred by charging the jury both on the provisions of the Act and on self-defense. Id. Our supreme court held that because the trial court denied Curry immunity under the Act, the Act "should have not been charged." Id. at 373, 752 S.E.2d at 267 (emphasis added). In a partial concurrence, Justice Pleicones explained:

> I agree with the majority that [the Act] creates a statutory immunity but leaves intact the common law defenses of habitation, of others, and of self-defense. While a criminal defendant is entitled to have the issue of statutory immunity decided prior to trial by a judge, once the case goes to trial a defendant's right to a jury charge on these defenses is determined under common law principles.

Id. at 375, 752 S.E.2d at 268 (Pleicones, J., concurring in part and dissenting in part). Here, Appellant was likewise "entitled to have the issue of statutory immunity decided prior to the trial by a judge," but he never sought that determination. The State submits this constituted a waiver of the right to seek immunity under the Act and is equivalent to denial of immunity by the trial court for purposes of reviewing the propriety of a jury

charge. Thus, the Act "should not have been charged" to the jury in Appellant's case, and the trial court properly denied Appellant's request.

To the extent this Court concludes Curry is not controlling and that Appellant's failure to seek a pretrial ruling on immunity under the Act does not amount to a denial of immunity, the trial court nevertheless properly denied Appellant's request to charge because, as a matter of law, the evidence presented at trial simply could not have established immunity under the Act. "The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence." State v. Gibson, 390 S.C. 347, 355-56, 701 S.E.2d 766, 770 (Ct. App. 2010). "When reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial." State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (citation omitted). Absent an abuse of discretion, the appellate court will not reverse a trial court's decision regarding a jury charge. Id. at 479, 697 S.E.2d at 584.

Presumably relying on subsection 16-11-440(A), Appellant argues he presented evidence that he was attacked inside his vehicle and used force in self-defense in a "protectable area" immediately outside the vehicle. (Brief of App.p.8). He acknowledges the statute effectively "modifies the common law of self-defense by absolving a defendant from the duty to retreat before using force when attacked in an occupied vehicle," but seeks protection under the statute for actions taken after he left

the vehicle. (Brief of App.p.9) (emphasis added). Appellant argues Nichols "forcefully entered" the vehicle by throwing the Coke can in the window and that Appellant "peaceably exited his vehicle in order to repel the attack by Nichols." He goes on to argue that like a place of business, an occupied vehicle has a "protectable curtilage" where there is no duty to retreat. (Brief of App.p.9-p.10). The State submits the plain terms of the Act do not support Appellant's expansive interpretation.

In the context of a vehicle, subsection 16-11-440(A) narrowly limits using force against a person who either: (1) unlawfully and forcibly entered an occupied vehicle, (2) is unlawfully and forcibly entering an occupied vehicle, or (3) is attempting to remove a person against his will from the occupied vehicle. S.C. Code Ann. § 16-11-440(A)(1) (2007). A plain reading of the statute establishes that by using the words "entered" and "entering," the Legislature intended for an unlawful and forcible entry to be a requirement of subsection 16-11-440(A), unless a person is being forcibly removed against his will from his occupied vehicle. Even though Appellant testified he was scared of Nichols and got out of the car only because he wanted to talk to Nichols, these facts do not concern whether Nichols had unlawfully and forcibly entered or was in the process of unlawfully and forcibly entering Appellant's occupied vehicle. Absent evidence Nichols himself unlawfully and forcibly entered Appellant's vehicle or Nichols was attempting to remove Appellant from his vehicle, Appellant's argument that he acted within the scope of the law is without merit for purposes of determining immunity under subsection 16-11-440(A). Therefore, subsection 16-11-440(A) is inapplicable, and the trial court properly declined Appellant's request to instruct the jury on the provisions of the Act.

There is no basis to reverse Appellant's convictions based on the trial judge's jury instructions because the trial court did not fail to give a requested charge on an issue raised by the evidence. Gibson, 390 S.C. at 355-56, 701 S.E.2d at 770. Indeed, because the instructions given afforded the proper test for determining the issues, there was no abuse of discretion. Mattison, 388 S.C. at 479, 697 S.E.2d at 583-84.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated August 1, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 4th day of August, 2014.

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