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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-000204

The State, Respondent/Petitioner,

v.

Theodore Manning, Petitioner/Respondent.

Opinion No. 2014-UP-411 (S.C. Ct. App. refiled November 19, 2014)

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Theodore Manning, Appellant.

Appellate Case No. 2010-176707

Appeal From Richland County
G. Thomas Cooper Jr., Circuit Court Judge

Opinion No. 5228
Heard December 10, 2013 – Filed May 7, 2014

AFFIRMED

Luke A. Shealey, of The Shealey Law Firm, LLC, and Chief Public Defender E. Fielding Pringle, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch Jr., both of Columbia, for Respondent.

PIEPER, J.: This appeal arises from Theodore Manning's voluntary manslaughter conviction. On appeal, Manning argues the trial court erred by: (1) refusing to exclude a photograph of the victim; (2) refusing to suppress a search warrant; (3) refusing to hold an evidentiary hearing on whether Manning was entitled to immunity under section 16-11-410 of the South Carolina Code (Supp. 2013), the

"Protection of Persons and Property Act" (the Act); and (4) refusing to give a jury charge on the Castle Doctrine. We affirm.

FACTS

Manning was charged with the murder of Nikki McPhatter. Manning admitted to killing McPhatter in his residence on May 6, 2009; however, Manning maintained throughout trial McPhatter pulled a gun on him and tried to attack him. Prior to trial, the trial court heard Manning's motion regarding immunity under the Act. Manning requested an evidentiary hearing and argued he was entitled to immunity from prosecution under the Act. Manning attached his second statement to the police to his written motion. In the statement, Manning explained that he and McPhatter were in a heated argument about their relationship at Manning's residence. According to the statement, McPhatter wanted a serious relationship and Manning did not. Manning reported McPhatter pointed the gun at him; he took the gun from her; and then he pointed the gun at her. The statement provides McPhatter took a step towards Manning and he "pulled the trigger to show her to stop playing." Manning explained that after he shot, he thought McPhatter fainted until he realized she had no pulse. The trial court read Manning's statement and asked both parties questions about the facts of the case and whether the facts triggered immunity under the Act. In support of immunity, Manning argued even though McPhatter was an invited social guest, she "transformed" to a trespasser when she acted unlawfully. The trial court denied Manning's motion for immunity, finding the Act inapplicable to Manning's case. At the close of Manning's case, he renewed his request for an immunity hearing on the basis he was "not given the opportunity to argue the Castle Doctrine."

At trial, Manning testified that on May 6, 2009, McPhatter drove from Charlotte to visit him in Columbia. According to Manning, McPhatter began walking around the house, and when Manning found McPhatter in his daughter's room, they started to argue about their relationship. Manning testified he left his daughter's room to get a shirt, and when he returned, McPhatter was standing in the doorway with her hands behind her back. Manning stated he and McPhatter continued to argue and McPhatter "pulled a gun out from behind her back and pointed it at me." Manning testified he was scared for his life and McPhatter "just pointed the gun at me. I could see the gun . . . going up and down." According to Manning, he grabbed the gun and wrestled it away from McPhatter. Manning explained he pointed the gun at McPhatter, told her to leave, and "screamed at her to get out." Manning testified that when he pulled the trigger, McPhatter was coming towards him and he thought

she was reaching for the gun. After he shot the gun, Manning explained he did not see any blood or where the bullet went. Manning realized McPhatter had no pulse when he tried to wake her up. Kelly Fite testified after Manning as an expert in crime scene reconstruction, firearms, and ballistics and corroborated Manning's testimony.

At the jury instruction conference, Manning requested a Castle Doctrine charge. Manning also submitted written jury instructions requesting a defense of habitation charge. The trial court charged the jury with murder, voluntary manslaughter, self-defense, and the common law Castle Doctrine. The jury found Manning guilty of voluntary manslaughter. Manning was sentenced to thirty years' imprisonment. This appeal followed.

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). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

Manning argues the trial court committed reversible error by refusing to hold an evidentiary hearing on whether he was entitled to immunity under the Act. We find no reversible error.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal quotation marks and citation omitted). This court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (internal quotation marks and citation omitted).

"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." S.C. Code Ann. § 16-11-420(A) (Supp. 2013). "[I]t 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." S.C. Code Ann. § 16-11-420(B) (Supp. 2013). The immunity provision of the Act provides: "A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . ." S.C. Code Ann. § 16-11-450(A) (Supp. 2013).

The Act further provides the following:

> (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 . . .
>
> . . . .
>
> (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(A) to (C) (Supp. 2013). The legislature's use of the words "immune from criminal prosecution" evidences an intent "to create a true immunity, and not simply an affirmative defense." *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). The legislature "intended defendants be shielded from trial if they use deadly force as outlined under the Act." *Id.* "Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." *Id.* "A claim of 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*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013).

In *Duncan*, our supreme court reviewed the immunity provision of the Act. 392 S.C. at 408-11, 709 S.E.2d at 663-65. In deciding whether the trial court properly found Duncan was immune, our supreme court found evidence in the record supported the trial court's finding Duncan was entitled to immunity. *Id.* at 411, 709 S.E.2d at 665. Specifically, the *Duncan* court noted testimony and statements showed a third party was between the victim and Duncan trying to remove the victim from the dwelling, but the victim continued to force his way onto the porch. *Id.* Based on this evidence, our supreme court found Duncan "showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering [Duncan's] home in accordance with [the Act]." *Id.* Thus, our supreme court determined the trial court properly found Duncan was entitled to immunity under the Act. *Id.*

In *Curry*, our supreme court again reviewed whether the Act entitled a defendant to immunity. 406 S.C. at 370-72, 752 S.E.2d at 265-67. Curry and the victim were socializing at Curry's mother's house when an argument and fight ensued. *Id.* at 369, 752 S.E.2d at 265. Curry shot the victim upon the belief that the victim was lunging towards him. *Id.* At the close of the State's case, Curry moved for a directed verdict pursuant to the Act. *Id.* The trial court denied Curry's motion, finding he failed to establish entitlement to immunity under the Act. *Id.* Our

supreme court found evidence supported the trial court's denial of immunity.[1] *Id.* at 370, 752 S.E.2d at 266. Relying on subsection 16-11-440(B), the *Curry* court determined Curry failed to establish he was entitled to immunity pursuant to subsection 16-11-440(A) because the victim was a social guest and rightfully in the apartment. *Id.* Regarding whether Curry established by a preponderance of the evidence he was immune pursuant to subsection 16-11-440(C), our supreme court affirmed the trial court's denial of immunity. *Id.* at 371, 752 S.E.2d at 266-67. Specifically, the court found Curry's "claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *Id.* at 372, 752 S.E.2d at 267.

We agree with Manning the trial court erred by refusing to hold an evidentiary hearing. As noted by *Duncan*, "the Act does not explicitly provide a procedure for determining immunity." 392 S.C. at 409, 709 S.E.2d at 664. Nonetheless, the trial court in *Duncan* provided Duncan with a pretrial hearing in which Duncan and the State were provided the opportunity to submit evidence. *Id.* at 406, 709 S.E.2d at 663. Similarly, the trial court in *State v. Isaac* provided Isaac with a full hearing, in which Isaac testified, before deciding the Act did not apply. 405 S.C. 177, 181, 747 S.E.2d 677, 679 (2013). Further, *Curry* cites *Duncan* for the proposition a claim of immunity "requires a pretrial determination using the preponderance of the evidence standard." 406 S.C. at 370, 752 S.E.2d at 266. By holding the trial court must determine immunity by the "preponderance of the evidence," we find a defendant is entitled to an evidentiary hearing to present evidence, not mere arguments, in support of immunity.[2] Even though the trial court provided Manning a hearing to present oral arguments in support of immunity, the trial court erred by refusing to provide Manning an evidentiary hearing.

Next, we must determine whether we should remand this case for the trial court's refusal to conduct an evidentiary hearing or whether we can determine as a matter

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[1] Even though Curry requested an immunity determination at the close of the State's case, rather than prior to trial, our supreme court found "because [Curry] and the trial court did not have the benefit of *Duncan*, we elect to treat the matter as preserved through the directed verdict motion." *Curry*, 406 S.C. at 371 n.3, 752 S.E.2d at 266 n.3.

[2] We recognize the trial was held before our supreme court's decisions in *Duncan*, *Curry*, and *Isaac*, and thus the parties and the trial court had little guidance in arguing and deciding issues related to the Act.

of law the record establishes the court's refusal to hold an evidentiary hearing did not prejudice Manning. Manning argues he is entitled to immunity under subsections 16-11-440(A) and (C) because even though McPhatter was a social guest, she was "transformed" to a trespasser when she acted unlawfully and refused to leave at Manning's request. Manning contends that had he been provided an evidentiary hearing, he would have submitted his trial testimony and the testimony of Kelly Fite, a firearms and ballistics expert. Thus, we have before us the evidence Manning would have presented at an evidentiary hearing. Manning argues his trial testimony was more specific than the statement the trial court reviewed, and he draws attention to his testimony that he yelled at McPhatter to "get out." Manning also argues Fite's testimony corroborates Manning's version of events. After a thorough review of Manning and Fite's testimonies at trial, and for the reasons set forth below, we find that had Manning been able to present the recited evidence in support of immunity, he would not have established immunity as a matter of law under either subsection 16-11-440(A) or (C).

Subsection 16-11-440(A) narrowly limits using force against a person who either (1) unlawfully and forcibly *entered* a residence, (2) is unlawfully and forcibly *entering* a residence, or (3) is attempting to remove a person against his will from the residence. § 16-11-440(A)(1). 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 dwelling, residence, or occupied vehicle. Even though Manning testified he yelled at McPhatter to "get out" and McPhatter acted unlawfully, these facts do not concern whether McPhatter had unlawfully and forcibly entered or was in the process of unlawfully and forcibly entering Manning's residence. We find absent evidence McPhatter unlawfully and forcibly entered Manning's residence or McPhatter was attempting to remove Manning from his residence, Manning's argument that McPhatter's status was "transformed" from a social guest to a trespasser is without merit for purposes of determining *immunity* under subsection 16-11-440(A). Rather than being a trespasser, McPhatter, like the victim in *Curry*, was a social guest; therefore, subsection 16-11-440(A) is inapplicable. *See* § 16-11-440(B); *Curry*, 406 S.C. at 369-70, 752 S.E.2d at 265-66 (finding the victim, whom Curry invited to his mother's apartment, was a social guest; thus, despite Curry's allegation the victim lunged towards him while Curry was in the possession of a gun, he was not entitled to the presumption of subsection 16-11-440(A)). For the foregoing reasons, even if Manning had the benefit of an evidentiary hearing, he would not have been able to establish immunity under subsection 16-11-440(A).

Further, we also disagree with Manning's argument he is entitled to immunity pursuant to subsection 16-11-440(C) because McPhatter's status "transformed" from a social guest to a trespasser. Subsection 16-11-440(C) provides immunity for a person who is "attacked in *another* place where he has a right to be." § 16-11-440(C) (emphasis added). Based upon a plain reading of the statute, we find the language "in another place" refers to a place other than one's dwelling, residence, or occupied vehicle, as subsection 16-11-440(A) governs unlawful acts in one's dwelling, residence, or occupied vehicle. *See* § 16-11-440(A)(1). Thus, subsection 16-11-440(C) allows a person to stand his ground against attacks that occur at a location other than one's dwelling, residence, or occupied vehicle. Even though the record contains evidence McPhatter attacked Manning, because Manning shot McPhatter in his residence, not "in another place," subsection 16-11-440(C) is inapplicable to Manning's case. Accordingly, even if Manning had the benefit of an evidentiary hearing, he would not be able to establish immunity under subsection 16-11-440(C).

Having failed to present evidence or arguments at trial or on appeal that the trial court *could* have found immunity pursuant to the Act, we find no reversible error in either the trial court's refusal to hold an evidentiary hearing or its ultimate legal conclusion the Act is inapplicable to Manning's case. *See State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005) ("In order for an error to warrant reversal, the error must result in prejudice to the appellant."); *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990) ("Whether an error is harmless depends on the particular circumstances of the case. No definite rule of law governs this finding; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.").

Finally, Manning argues the trial court erred by refusing to give a Castle Doctrine jury charge, contending the trial court should have charged subsection 16-11-440(A) of 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) (internal quotation marks and citation omitted). Absent an abuse of discretion, this court will not reverse a trial court's decision regarding a jury charge. *Id.* at 479, 697 S.E.2d at 584.

The common law Castle Doctrine provides: "'[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.'" *Curry*, 406 S.C. at 372, 752 S.E.2d at 267 (emphasis omitted) (quoting *State v. Gordon,* 128 S.C. 422, 425, 122 S.E. 501, 502 (1924)). Further, the defense of habitation, which is separate from the common law Castle Doctrine, provides:

> For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances. Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious injury or damage. Instead, the defense of habitation provides that [when] one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser.

State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007) (citation omitted).

In *Curry*, the trial court charged the jury with subsection 16-11-440(C) of the Act. 406 S.C. at 372-73, 752 S.E.2d at 267. On appeal, Curry argued the trial court erred by charging the jury on the provisions of the Act and 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. The court also determined Curry did not meet the requirements of the common law Castle Doctrine. *Id.* at 373-74, 752 S.E.2d at 267-68. Concerning the use of the Act in jury instructions, Justice Pleicones' partial concurrence in *Curry* is instructive:

> 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). Based upon *Curry*, the trial court did not err by refusing to charge the provisions of the Act cited in Manning's appellate brief. Furthermore, we note that based upon the evidence in the record that Manning was attacked in his home by no fault of his own, Manning was entitled to a common law Castle Doctrine charge, and the trial court properly charged the doctrine.

Regarding the defense of habitation, Manning does not assert in his issues on appeal the trial court also erred by refusing to charge the common law defense of habitation, which is a separate doctrine from the Castle Doctrine. Rather, Manning's sole issue on appeal concerning jury instructions is whether "[t]he trial court erred in failing to give a Castle Doctrine jury charge." Accordingly, we decline to address whether the trial court erred by refusing to charge the common law defense of habitation. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Johnson v. Lloyd*, Op. No. 27383 (S.C. Sup. Ct. filed Apr. 23, 2014) (Shearouse Adv. Sh. No. 16 at 22) (finding the Court of Appeals erred by addressing the merits of an issue that was not preserved for review). For the foregoing reasons, we find the trial court did not abuse its discretion in charging the jury.[3]

---

[3] Regarding Manning's remaining issues on appeal, we affirm pursuant to Rule 220(b), SCACR. As to whether the trial court abused its discretion by refusing to exclude a photograph of McPhatter's skeletal remains: *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 399 (Ct. App. 2010) ("[R]ulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion."). As to whether the trial court erred by refusing to suppress the search warrant: *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (providing that in South Carolina, "[w]hen reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling"); *State v. Sullivan*, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623-624

CONCLUSION

Because we find the trial court's refusal to provide Manning a full evidentiary hearing was harmless error, and because the trial court did not abuse its discretion in charging the jury, the decision of the trial court is hereby

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

(1976) (explaining that "it is not unusual for an affidavit of a law enforcement officer to contain hearsay information" gathered by another officer, and that the magistrate is called to evaluate the information in the affidavit to determine whether the affiant gained it in a reliable way); *State v. Dunbar*, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004) ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched." (quotation marks omitted)); *id.* at 246, 603 S.E.2d at 618-19 (noting this court should give great deference to the magistrate's determination of probable cause).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

PETITION FOR REHEARING

On May 7, 2014, this Court affirmed Appellant's convictions but found the trial court erred in failing to give Appellant a full evidentiary hearing. This Court misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find an evidentiary hearing is not required, affirm the trial court's ruling, and affirm Appellant's conviction and sentence.

This Court found the trial court erred in failing to provide Appellant with a full evidentiary hearing pre-trial in order to determine whether he is entitled to immunity under the Protection of Persons and Property Act, Sections 16-11-410 through -450 of the South Carolina Code (the Act). The trial court allowed argument by both counsel including allowing Appellant's counsel to argue what evidence indicated Appellant was entitled to immunity under the Act. As a result, Appellant received all the consideration pre-trial that is required under State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (2011).

Finally, Appellant received a ruling from the trial court that he was not entitled to immunity, which he was able to appeal.

In Duncan, the Supreme Court concluded: "We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." Id. at 410, 709 S.E.2d at 665 (emphasis added). Nothing in the Act, or in Duncan, requires a specific type of hearing or a specific procedure for the hearing. It only requires the trial court make the determination upon motion of either party prior to trial.

The trial court in this case heard all that was necessary to know the facts as presented by Appellant's counsel did not and would never rise to the standard necessary to provide for immunity under the Act. The court did not need to hold an evidentiary hearing with testimony from witnesses in order to reach the conclusion it reached and requiring such a hearing places an unnecessary burden on the trial court when the issue is straightforward as this Court even found in its opinion.

In this case, the issue was decided pre-trial as is required by Duncan. While witnesses were not called, Appellant never asked to call any witnesses in support of his position, and never objected to the trial court's hearing the motion without witnesses being called. (T.462-471; R. 462-471). He never asked to proffer additional testimony or indicate to the trial court the additional testimony he would have presented had he been entitled to a full testimonial evidentiary hearing. The trial court in this case heard the evidence provided and argument provided by counsel and made a ruling prior to trial as

required by Duncan. As a result, Appellant received a determination prior to trial as he was entitled to under Duncan.

Finally, the fact an evidentiary hearing may be necessary in some cases in which evidence is contradicted or to be provided by a variety of witnesses does not justify a requirement that an evidentiary hearing be held in every case. The trial judge should be entitled to use his or her discretion in determining whether a hearing is necessary to make a decision based on the facts and circumstances of the particular case. In this case, it was clear the trial court did not need additional testimony or evidence to be admitted to make the determination immunity did not apply, and as a result, should not have been required to hold a full evidentiary hearing to satisfy an artificial requirement not within the Act.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly considered Appellant's request for immunity, and affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 22, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing one copy of the same in the United States mail, postage prepaid, addressed to:

E. Fielding Pringle, Chief Public Defender
Richland County Public Defender's Office
1701 Main Street
Columbia, South Carolina 29201

Luke A. Shealey, Esquire
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2008 Lincoln Street
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.
This 22nd day of May, 2014.

Sally Ellison

SALLY ELLISON
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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

THEODORE MANNING,

APPELLANT

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5228

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Theodore Manning petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the clear legislative intent contained within the Protection of Persons and Property Act in its narrow construction of 16-11-440(A) and (C). In the present case, the trial judge committed reversible error in denying Manning a pretrial evidentiary hearing regarding whether he was entitled to immunity under the Act. The trial judge additionally refused to provide a Castle Doctrine Jury charge under the Act. These errors cannot be harmless when they deprive Manning immunity and an entire defense respectively. Additionally, counsel respectfully submits that the Court misapprehended the trial court's error of

allowing into evidence the non-material and highly prejudicial photo of the victim's charred skeletal remains and by not suppressing the flawed search warrant of Manning's home.

I. Protection of Persons and Property Act

Set forth in Section 16-11-420(A) of the Act, South Carolina's legislature made it clear that it was their intent 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." Section 16-11-420(D) finds that persons have the right to "remain unmolested and safe within their homes, business, and vehicles" and Section (E) provides that "no person or victim of crime should be required to surrender his personal safety to a criminal, not should a person or victim be required to needlessly retreat in the face of intrusion or ***attack*** (emphasis added). The legislature clearly enacted this statue to codify long standing common law giving citizens the right to protect themselves in their homes, but also to extend those same protections to other places. Section 16-11-450 contains the immunity provision of the Act where Section (A) states "A person who uses deadly force as permitted by the provisions of this article or ***another applicable provision of law*** is justified in using deadly force and is immune from criminal prosecution..."(emphasis added). The plain meaning of this language of the Act shows the legislature's intent for the Act to work in conjunction with established self-defense and defense of habitation law, not for the Act to replace or supersede the common law.

The Court's narrow construction of Section 16-11-440(A) to only allow for immunity when using force against someone who is unlawfully and forcefully "entering" or who has "entered" overlooks the clear legislative intent of the Act. Such narrow construction bars the door to immunity for long standing justifiable use of force in defending one's home, which is specifically meant to be protected by the "another applicable provision of law" language referenced above. Under the

Court's reading, if a would be attacker is invited into a citizen's home because he is a particularly clever brand of criminal, and he uses some ploy or trick to mask his true purpose and only begins to attack once inside, it stands to reason that our legislature intended for the Act to provide immunity for a citizen's use of deadly force against that type of attacker. It is clear from the language contained within 16-11-420 of the Act that our legislature did not intend to leave citizens only immune from action against an intruder who breaks down his door but not against one who attacks only once he's already inside. The purpose of the Act was to expand and codify the common law, providing immunity under the Act and other applicable provisions of law; the Court's interpretation diminishes long established self-defense and defense of habitation law. Nikki McPhatter was a social guest of Mr. Manning's at his home until there was a heated argument where she picked up his loaded gun and brandished it at him. He was able to disarm her after a brief struggle and screamed for her to leave his home. She refused and charged him, ultimately being shot in the head during the struggle. The actions Manning took in defending himself against an attacker in his own home have long been deemed justified through the common law, which was explicitly intended to be included within the immunity provision of the Act. Cases such as State v. Bradley, 126 S.C. 528 (1923), State v. Sparks, 179 S.C. 135 (1936), State v. Rye, 375 S.C. 119(2007) and State v. Bryant, 391 S.C. 225 (2010) articulate the law of defense of habitation which makes Manning's actions against McPhatter justified. The Court indicates it is not persuaded by Manning's argument that although McPhatter was a social guest she was "transformed" into a trespasser when she refuses to leave after brandishing a gun. The Court's narrow application of 16-11-440(A) to apply only when using force against one "entering" or who has "entered" unlawfully and forcibly overlooks the cases *supra*, which the clear language of the Act would include as "other applicable provisions of law."

For over ninety years our common law has protected the actions taken by Manning, as the Supreme Court in Bradley stated:

> A man who attempts to force himself into another's dwelling, or who, ***being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.***

Id. at 533 (emphasis added). Respectfully, the Court's misapprehension and narrow construction of 16-11-440(A) is not in harmony with long established common law which was meant to be expanded upon by the Act, not diminished.

The Court relies on State v. Curry, 406 S.C. 364 (2013) in determining, that in addition to the previously discussed narrow construction of 16-11-440(A), Manning is not entitled to immunity per Curry because McPhatter was a "social guest." In Curry both the appellant and the victim were social guests in Curry's mother house; therefore, they both had an equal right to be there in relation to each other. Neither party had a superior right; accordingly, it made sense that Curry would seek immunity under 16-11-440(C) of the Act regarding being "attacked in another place where he has a right to be..." The Court in Curry performed an analysis of Curry's potential immunity claim under 16-11-440(A) of the Act, although it appears Curry only raised immunity under 16-11-440(C) in his appeal. The Court reasoned that because Curry had only an "equal right" to be in the residence or dwelling as the victim that his potential immunity claim would fail under 16-11-440(B) of the Act. Section (B) is an exclusion provision of the Act listing circumstances when the presumption of reasonable fear of imminent peril when using deadly force would not apply. The pertinent part of that list includes someone that "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." The plain intention of that provision is to prevent immunity in situations where one spouse kills the other

in the marital home, or where one roommate kills another roommate and both are on the lease...etc. The Court in Curry goes on to say that because immunity under 16-11-440(A) is inapplicable then the immunity analysis "defaults" to 16-11-440(C). The Court went on to analyze Curry's immunity claim under Section (C), holding that Curry's immunity claim failed under that provision after performing an analysis that included application of self-defense common law elements but for the duty to retreat, claiming that Curry's claim for immunity presented a "quintessential jury question...not warranting immunity from prosecution" Curry at 372.

The factual situation in Curry is highly distinguishable from what's at hand in Manning's case, and the Court overlooks this distinction in ruling that immunity under 16-11-440(C) does not apply because McPhatter, just like the victim in Curry, was a social guest. Curry's immunity claim ultimately failed because Curry needed to prove that he was "attacked in another place where he had a right to be..." The Supreme Court ruled that the victim had just as much right to be there as Curry, both guests in another's house, and that coupled with the application of common law self-defense elements (but for the duty to retreat) left a quintessential jury question. In the case at hand, no person has a superior or even equal right to be in Mr. Manning's home. He was the title holder and McPhatter was a social guest up until she pulled his gun on him during the heated argument and refused to leave. At that point, per the common law defense of habitation cases *supra*, which were specifically incorporated into the Act's immunity provision through the language "or another applicable provision of law," McPhatter was not a social guest and Manning should be immune for the force he was compelled to take to end her obtrusion into his home.

The Court's strict and narrow construction of the Act under 16-11-440(C) also overlooks the intent of the General Assembly discussed above when it reasons Section (C) is inapplicable. This reasoning hinges on the interpretation of the word "another" under Section (C), with the Court

construing the section to describe immunity only in places not provided for in Section (A), i.e., "dwelling, residence, or occupied vehicle." Although the statute is silent on what it means by "another place," when read in conjunction with the clear legislative intent it seems most likely that Section (C) is a "catch-all" section meant to provide immunity to a number of places and scenarios as long as the citizen was acting lawfully and in a place where he had a right to be prior to the attack. It names "his place of business" specifically as an example of a place where one has a right to be, "but not limited to" just that one place. It stands to reason that if the language of Section (C) purposefully refuses to make a finite list of where it applies that it would also include one's home, particularly if a citizen was "attacked" there while acting lawfully. Additionally, rules of statutory construction require that any ambiguity in the statute is always construed to favor the Defendant and against the drafter; however, the Court's narrow interpretation of both section (A) and (C) of 16-11-440 disfavors the Defendant and bars the door to countless claims of immunity by citizens of South Carolina.

II. Castle Doctrine Jury Charge

The Court again relies heavily upon the Supreme Court's decision in Curry in affirming the denial of Manning's request for a jury instruction based on 16-11-440(A) of the Act. The Court overlooks the fact that the rationale in Curry for stating that a jury charge under the Act was error is that the trial court considered the immunity request after hearing evidence but denied the claim; therefore, giving a jury charge under the Act would be inappropriate. This is distinguishable from the case at hand because the Court agrees that the trial court committed error by not holding a pretrial evidentiary hearing on the issue of immunity. The required pretrial evidentiary hearing regarding immunity never took place, and unlike in Curry, the trial judge never denied the immunity claim after considering the evidence. Accordingly, since there was evidence

presented at trial consistent with the Act a charge under the Act should have been given. The law to be charged to the jury is determined by the evidence presented at trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (S.C. 2008). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (S.C. 1999). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (S.C. 2007). There was evidence presented at trial that the killing occurred in the second story hallway of the Defendant's home where McPhatter did not live. Manning's testimony at trial was that McPhatter armed herself inside Manning's house and leveled a firearm against him. Manning was in fear for his life but successfully wrestled the firearm away and he demanded that she leave his home. However, Manning's testimony was that McPhatter continued to advance towards him, finally lunging for the firearm, and he shoots causing her death. Tr. 1505, ln 7 - 1508, ln 6. This is evidence that falls within the protections of the Castle Doctrine. Although the trial court did not find it appropriate to submit the Castle Doctrine jury charge, it did however find there was evidence to support a self-defense charge.

"Although self-defense and defense of habitation are analogous, it is insufficient to charge only self-defense when a charge on defense of habitation is warranted." State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (S.C. App. 2010). Just as it is insufficient to only charge self-defense in a defense of habitation case, it is insufficient to only charge self-defense in a case where evidence has been presented to sustain a Castle Doctrine charge.

III. Photographs

Manning also raised the issue of whether or not the trial court abused its discretion by refusing to exclude a photograph of McPhatter's skeletal remains. The Court dismissed this issue pursuant to 220(b) and cited State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 399 (Ct. App. 2010) ("[R]ulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion."). Moses does not address the issue of admissibility of photographs but rather stands for the general proposition that rulings on admission of evidence are rulings that will not be disturbed absence an abuse of discretion by the trial court. Because the trial court abused its discretion in admitting the gruesome, inflammatory photo at issue here the Court should reconsider its affirmance of this issue.

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (S.C. Ct. App. 2012) (gruesome photos of a deceased child should not have been admitted at trial even though they corroborated other witnesses' testimony where the photos were not necessary to substantiate any material fact at issue in the trial); State v. Torres, 390 S.C 618, 703 S.E.2d 226 (2010) (photos calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts or conditions); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862

(Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 401 S.E.2d 146, 149 (1991)). Probative means tending to prove or disprove a fact in issue at trial. Probative value is "the measure of the importance of "that tendency to the outcome of a case." Collins, at 4. "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. 'The more essential the evidence, the greater its probative value.'" Collins, 398 S.C. at 202, 727 S.E.2d at 754 quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007). Thus, the trial court must determine the probative value of a particular piece of evidence, not in a vacuum, but in the context of the specific issues present at trial.

In the present case, the inflammatory information contained in the admitted photograph was neither relevant nor necessary to the disputed issues at Manning's trial. McPhatter's skeletal remains were not at the place of the shooting. The ghastly photograph depicts the scorched remains of McPhatter's skull, spine, and pelvis curled across the spare tire well of the trunk of her burned car located in the woods of Fairfield County, yet the shooting occurred inside the hallway of Manning's house miles away in Richland County. Moreover, the picture did not even indicate the cause of

McPhatter's death—the bullet wound to her head was located on the back right side, which is not visible in the photograph. In fact at the time the photograph was entered into evidence, the cause of death had already been proven at trial by Dr. Marcus' testimony using x-rays to show the damage to McPhatter from the bullet. Additionally, Manning never contested how McPhatter was killed; from opening statement to closing argument, Manning's position throughout trial was that he indeed shot McPhatter in self defense. The admission of this photograph was purely gratuitous and designed to evoke an emotional response.

Further, while the issue of malice was contested, the picture of McPhatter's charred remains does not show malice at the time she was killed. The element of malice must be present at the time McPhatter was killed in order to prove murder, not after. As Manning's counsel repeatedly emphasized at trial, the State's case focused primarily on what occurred before or after McPhatter's death rather than the events that occurred inside Manning's home on the afternoon of May 6, 2009. Counsel's concerns were proven correct, as the State's attempt to justify admission of the photograph of McPhatter's burned skill, spine, and pelvis in the trunk of her car was thinly premised on showing malice. However, if anything, the fact that McPhatter's remains were burned in her car at a remote location in Fairfield County indicates Manning's attempt to hide or cover up the crime, not whether he harbored malice at the earlier time McPhatter was shot in Gadsden. Thus, the grotesque imagery of McPhatter's partial remains was irrelevant to even the contested issue of the case, and created a tendency to suggest a decision on an improper, emotional basis. See, e.g., Rules 401 and 402, SCRE; Middleton, 288 S.C. at 24, 339 S.E.2d at 693.

Moreover, the information contained in the photograph was already established by the State. As indicated above, the cause of death was already proven at trial by Dr. Marcus' testimony and McPhatter's x-rays well before the inflammatory picture was admitted. Also, testimony from

multiple officers indicated where and in what conditions McPhatter's partial remains were found. Tr. 722, ll. 7-14; Tr. 967, ll. 10-15; Tr. 1123, ll. 11-15. Therefore, although the photograph corroborates other testimony, its probative evidentiary value was nonexistent as the facts it could prove were both repetitive and uncontested. Accordingly, the only value of the gruesome photograph devolves to the one reason expressly forbidden by law: to arouse the sympathies and prejudices of the jury. See, e.g., Rules 401, 402, and 403, SCRE; Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (reversing conviction where the information contained in prejudicial photographs "was not really at issue," and where testimony from the forensic pathologist negated any arguable evidentiary value of the photographs."); Waitus, 224 S.C. at 27; 77 S.E.2d at 263.

Finally, the photograph of McPhatter's partial remains served to prejudice Manning. The State was permitted to enter a photograph into evidence displaying the scorched and twisted spine, pelvis, and skull of the victim inside the trunk of her burned out car. As in Waitus, the information contained in these photos was not disputed and was already established by testimony. Id. (reversing where four pictures of the victim at the crime scene that showed marks, bruises and abrasions, and the condition of the victim's clothes, were admitted into evidence even though those facts were not disputed and were already established by testimony). Therefore, the only remaining value of the photographs of McPhatter's partial remains was to arouse the sympathies and the prejudices of the jury, thus creating a tendency to suggest a decision on an improper basis. Middleton, 288 S.C. at 24, 339 S.E.2d at 693; Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71. Less inflammatory photographs of autopsy pictures have been described as being at the outer limits of what the law permits a jury to consider in a death penalty case. Torres, 390 S.C. at 624, 703 S.E.2d at 229. In Torres the South Carolina Supreme Court specifically cautions "all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory..." Id. In Torres the Court

ultimately found that the gruesome photographs were admissible to show the circumstances of the crime and the nature of the defendant but it is important to note that Torres was a capital case in which other factors are at issue. That is not the case here. In this case the central issue was whether or not Manning killed Ms. McPhatter in self defense. Admitting into evidence this harrowing photograph served no purpose other than to cloud the solitary issue of the trial with emotion rendering the jury incapable of cool reflection and analysis.

Accordingly, the trial court erred in admitting the photographs in Manning's trial and Manning was prejudiced by the erroneous admission, as "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." Id. (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940)); see also Rule 403, SCRE. Therefore, Manning respectfully seeks rehearing of this issue by the Court of Appeals.

IV. Search Warrant Issue

Appellant appealed the trial court's failure to suppress the search warrant. This Court affirmed this issue pursuant to Rule 220(b) SCACR citing State v. Wright, 706 S.E.2d 324 (2011) for the proposition that an appellate court must affirm a Fourth Amendment Search and Seizure issue where there is any evidence to support the ruling. In this case there was no evidence to support the ruling and this Court should grant the petition for rehearing. The Court went on to cite several additional cases in support of affirming the trial court's ruling in addressing specific issues raised by Appellant.

As an initial matter the Court cited State v. Sullivan, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623-624 (1976) for the proposition that "it is not unusual for an affidavit of a law enforcement officer to contain hearsay information" gathered by another officer, and that the magistrate is called to evaluate the information in the affidavit to determine whether the affiant gained it in a reliable

way. However, the affidavit was based on multiple levels of hearsay which the State could not establish was gained in a reliable way. RCSD Investigator Tommy Croxton did not have personal knowledge of the facts stated by him in the affidavit and did not provide a substantial basis for crediting hearsay at each level. Upon questioning by the Court at trial Croxton admits that he does not know who typed up the probable cause used in the affidavit to obtain the search warrant. Tr. 513, ln 21 – Tr. 514, ln 7. The information provided in the affidavit by Croxton appears to be hearsay statements of RCSD Sergeant D. Robinson. The record is replete with the fact that Detective Fitch of CMPD constructed the probable cause for the search warrant prior to ever entering Richland County, and Sergeant Robinson confirms that he obtained Fitch's probable cause from a flash drive and entered it into a RCSD form. Tr. 521 ll2-10. Robinson admits on cross examination that he essentially cut and pasted Fitch's probable cause into a RCSD form and that his affidavit was virtually identical to what Fitch had previously prepared. When pressed on the subject Robinson claims that he did author the final conclusory phrase "[b]ased on these facts, it is believed that there is probable cause to believe that evidence of murder contained within the residence located at 8047 Bluff Road, Gasden, South Carolina 29052." Tr. 525-526, Tr. 526, ln 11 – Tr. 528, ln 8. The trial judge even goes as far as to describe Robinson as a "transmitter of someone else's written form." Tr, 518, ln 16 – Tr. 519, ln 7. As it is clear from the record that Robinson had no personal knowledge of this case at this point, and only obtained his probable cause from an out of state agency, he could not have provided Croxton with a substantial basis to obtain the search warrant on his behalf.

Here, it is evident that Croxton has no personal knowledge and a level of hearsay exists, as he is signing on behalf of Robinson. Consequently, the affiant is tasked with the responsibility of establishing a substantial basis for crediting the hearsay. At no point in the affidavit, however, does

Croxton explain the circumstances on how the information was provided to him by Robinson. The affiant failed to establish a substantial basis for crediting the hearsay received by Robinson. Moreover, the affidavit, which appears to contain double and even triple hearsay, fails to establish a substantial basis for crediting the hearsay at each level as is required by Dunbar. At no point in the affidavit signed by Croxton, does the affiant indicate who Robinson is and where he stands in the chain of custody of hearsay information that was ultimately relayed before the magistrate judge on May 22, 2009. The affidavit mentions an "Officer Pickler" and generically refers to "Detectives," but the affidavit does not indicate who the detectives were, nor does it even attempt to provide a substantial basis for the multiple levels of hearsay statements by crediting the appropriate declarant at each step of the chain of custody.

The Court also cites State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004) for the proposition that the magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched. The Court further cites Dunbar for the proposition that the appellate court should give great deference to the magistrate's determination of probable cause. The search warrant at issue is plainly insufficient. It sets forth no facts to establish probable cause that (1) McPhatter is dead, (2) that Manning killed McPhatter, or (3) that a crime occurred in Manning's residence or car, which the police searched pursuant to the warrant. Indeed, there is not even a single allegation that a crime occurred in the body of the affidavit. Thus the magistrate had insufficient information upon which to make a determination of probable cause and this Court should reconsider its affirmance of this issue.

An examination of the Search Warrant provides no basis to believe that a crime has been committed or that such items would constitute evidence of a crime or would be found at the residence of Manning, his car, or that the seizing of DNA material could prove evidence of an enumerated crime from. From CMPD's first arrival in Columbia, SC on May 21st, 2009 to May 22nd, 2009 when they searched the house, they learned nothing in their investigation that would have risen to the level of probable case. "Mere suspicion, rumor, or strong reason to suspect [wrongdoing] are not sufficient." United States v. Han, 74 F.3d 537, 541 (4th Cir.1996)

Defense counsel argued extensively during the pretrial suppression motion that RCSD and CMPD only had probable cause to believe this was a missing person case at the time they obtained the murder search warrant. Tr. 498, ln 16 – Tr. 501, ln 11. This argument was supported by the May 22, 2009 search warrant return stating case type as "Missing Person," and more telling was that RCSD Captain Stan Smith's report described how only on May 28th, 2010 had the investigation turned into a homicide investigation. It took six days of additional investigation into the information that was obtained from the search of Manning's residence for the investigation to transform from a Missing Persons case into a homicide investigation. Furthermore, when Manning's uncle arrived on scene during the execution of search warrant he was informed this was a missing person's investigation per police reports. Defense counsel's complaint that this search warrant lacked probable cause is confirmed by the testimony of Investigator Robinson when he admits that at the time he prepared the affidavit for the warrant law enforcement did not have evidence that McPhatter was even deceased. Tr. 528, ll 11-14. Upon inquiry by the trial Court as to how probable cause can exist for a murder search warrant when a crime is not even alleged to have been committed, the prosecution responded that "the fact that there is no evidence leads to a conclusion of murder." Tr. 532, ln 15 – Tr. 533, ln, 13. This assertion by the state is not supported by the caselaw supra and

underscores the fact that at the time of the search probable cause did not exist for a murder search warrant. Accordingly the search warrant and all of its fruits should have been suppressed by the Court.

The affidavit provided on May 22, 2009 ultimately fails to meet the probable cause requirement of the Fourth Amendment to the U.S. Constitution. Accordingly, the trial Court erred by not suppressing this search warrant and all the fruits of the search.

Respectfully submitted,

Luke Shealey, The Shealey Law Firm
E. Fielding Pringle, Chief Public Defender
for Richland County

Date: 5/20/14

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THEODORE MANNING,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Blitch, Esquire, this 20th day of May, 2012.

Luke A. Shealey (signature)

Luke Shealey, The Shealey Law Firm
E. Fielding Pringle, Chief Public Defender
for Richland County

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of May, 2014.

Brittany Arnold (signature) (L.S.)
Notary Public for South Carolina
My Commission Expires: April 4th, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

RETURN TO PETITION FOR REHEARING

On May 7, 2014, this Court properly affirmed Appellant's conviction and sentence. Petitioner filed a Petition for Rehearing on all four grounds raised in his initial brief. This Court correctly decided the issues of whether the photographs and evidence obtained based on the search warrant were properly admitted. Further, this Court correctly determined Appellant was not entitled to a jury charge emanating from section 16-11-440 of the South Carolina Code. Finally, while the Court incorrectly determined an evidentiary hearing must be held pre-trial in all cases in which the Protection of Persons and Property Act is implicated, the Court correctly determined if a hearing must be held it was not error in this case because Appellant could not qualify for immunity under the Act.

Immunity under the Act

Appellant contends in his Petition for Rehearing this Court erred in its interpretation of the Act and in finding he was not entitled to immunity. First, the State submits the trial court specifically found he was not entitled to immunity[1] and Appellant did not contest that issue. He merely asserted he was denied an evidentiary hearing[2], not that the trial court's determination the Act did not apply was incorrect. The issue of whether the trial court correctly determined whether he was entitled to immunity is not preserved for review on appeal and should not be allowed to be addressed in the Petition for Rehearing. State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010) (noting issue cannot be raised for first time in a petition for rehearing); Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of South Carolina, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved). Further, because Appellant failed to appeal from the trial court's determination the Act did not apply and he was not entitled to immunity, the issue is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case). This Court correctly concluded that Appellant failed to present argument on appeal that he was entitled to immunity and any analysis under the Act by this Court was unnecessary.

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[1] Mr. May: So, I'm sorry, Your Honor. Are you ruling that this is not – that the act – the defense of Property and Person's Act is not applicable to this case?
Court: Yes.
Mr. May: Okay. (R.471).

[2] The State notes it filed a Petition for Rehearing regarding the Court's determination that Appellant was entitled to an evidentiary hearing and believes this Court incorrectly construed the statute to require a hearing. Even if a hearing is required, the trial court found he was not entitled to immunity and this Court properly affirmed that finding.

While the Court could have relied on the trial court's determination that Appellant was not entitled to immunity and the fact it is the law of the case to determine any error[3] in failing to have an evidentiary hearing was harmless, the Court properly analyzed the provisions of section 16-11-440(A) and (C) and ultimately reached the correct conclusion Appellant was not entitled to immunity under section 16-11-450. Sections 16-11-440(A) and (C) create presumptions for use in determining whether a defendant is entitled to immunity from prosecution.

Section 16-11-440(A) provides:

> (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;

S.C. Code Ann. § 16-11-440(A) (Supp. 2013). This subsection creates a presumption a person has a reasonable fear of imminent peril of death or great bodily injury when someone has unlawfully entered, is unlawfully entering, or is attempting to remove a person from a residence, dwelling, or occupied vehicle. The provision, does not on its

[3] The State of course submits there was no error committed by the trial court in the procedure utilized because Appellant was able to submit the statement and facts relied on to support his claim of immunity, Appellant was allowed to make argument, and the State was allowed to provide its argument. At no time, at the pre-trial hearing or on appeal in his Brief, did Appellant provide this Court with any information regarding the evidence he would have submitted so the issue was not preserved for review. The State has submitted a Petition for Rehearing for consideration on this issue and, at this time, the Petition is still pending.

own, entitle a person to immunity. See State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

This Court properly analyzed whether Appellant was entitled to the presumption under subsection A. There was no evidence the victim had unlawfully entered, was entering at the time she was shot, or was attempting to remove anyone from the residence. As a result, this Court properly found subsection A did not apply.

Additionally, section 16-11-440(C) provides:

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

S.C. Code Ann. § 16-11-440(C)(Supp. 2013). Again, this provision does not create immunity for Appellant, but merely establishes there is no duty to retreat in the event the provision is met. In this case, this Court correctly concluded the provision cannot be met because the incident took place in Appellant's residence, not "another place where he has a right to be."

While immunity must be premised on a defense such as self-defense, defense of habitation, Curry, 406 S.C. at 371, 752 S.E.2d at 266, this Court correctly found none of the presumptions of section 16-11-440 apply in Appellant's case. Section 16-11-440 does not provide the basis for immunity, but merely provides either a presumption of reasonableness as in 16-11-440(A) or the elimination of the required element of retreat for self-defense as in 16-11-440(C). He must still establish some basis for immunity

based on his actions. Appellant has failed to provide any evidence sufficient to establish he was entitled to immunity under any provision of law. For additional argument, the State incorporates and craves reference to its Brief. Accordingly, this Court should deny the petition for rehearing as to this issue.

Jury Charge

This Court correctly determined Appellant was not entitled to a jury charge regarding section 16-11-440(A). This Court properly relied on the holding in Curry to determine a charge regarding the Act should not be given. See Curry, 406 S.C. at 373, 752 S.E.2d at 267.

Appellant attempts to distinguish Curry by arguing because he did not receive a testimonial evidentiary hearing he should have received the jury charge. Whether he did or did not receive a hearing is irrelevant to whether the trial court charged the jury with the appropriate law for them to consider. It is not for the jury to decide whether Appellant is entitled to immunity or the benefit of 16-11-440(A). The statutory provisions of the Act only apply in the pre-trial immunity hearing.

Further, the State submits Appellant received a hearing, one in which he presented evidence in the form of his statement and argument to the court. Additionally, there is no requirement in the Act or any case law requiring the hearing and so none should be required.[4] Finally, the trial court specifically found, and Appellant's counsel even clarified the trial court's holding, that Appellant was not entitled to immunity and the Act did not apply in this case. As a result, there is nothing to distinguish Curry and Appellant

[4] The State notes it has submitted a petition for rehearing arguing this Court's finding that the trial court erred in the type of hearing it provided Appellant was insufficient and instead requiring a full testimonial evidentiary hearing which has no basis in the Act.

received the charge he was entitled to receive—one based on the common law castle doctrine eliminating the requirement he retreat because he was in his own home. For additional argument, the State incorporates and craves reference to its Brief. Accordingly, this Court should deny the petition for rehearing as to this issue.

Picture and Search Warrant

The State submits this Court correctly determined the picture of the crime scene and evidence seized during the search warrant were properly admissible and no error occurred. The State incorporates and craves reference to its Brief for argument related to these issues. Accordingly, this Court should deny the petition for rehearing as to these issues.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

May 28, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

E. Fielding Pringle, Chief Public Defender
Richland County Public Defender's Office
1701 Main Street
Columbia, South Carolina 29201

Luke A. Shealey, Esquire
The Shealey Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 28th day of May, 2014.

SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

v.

Theodore Manning, Appellant.

Appellate Case No. 2010-176707

ORDER

On May 7, 2014, this court published an opinion affirming Appellant Theodore Manning's conviction. *See State v. Manning*, Op. No. 5228 (S.C. Ct. App. filed May 7, 2014) (Shearouse Adv. Sh. No. 18 at 16). Manning filed a petition for rehearing on May 20, 2014. The State filed a petition for rehearing on May 22, 2014. We grant both Manning and the State's petitions for rehearing. The opinion filed May 7, 2014, is withdrawn pending further order by this court as to oral arguments or a new opinion.

John Cannon Few, C.J.

Daniel F. Pieper, J.

______________________ J.

Columbia, South Carolina

cc:

Elizabeth Fielding Pringle, Esquire
William M. Blitch, Jr., Esquire
Luke Adcock Shealey, Esquire

FILED
June 26, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-000204

The State, Respondent/Petitioner,

v.

Theodore Manning, Petitioner/Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Supplemental Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to,

E. Fielding Pringle, Chief Public Defender
Richland County Public Defender's Office
1701 Main Street
Columbia, South Carolina 29201

Luke A. Shealey, Esquire
The Shealey Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 6th day of February, 2015.

SALLY ELLISON
Office of the Attorney General
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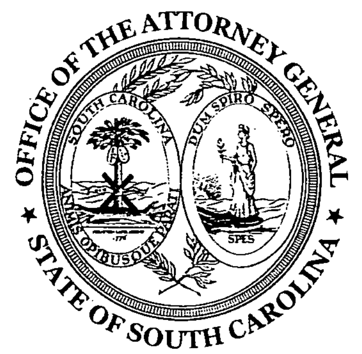
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB - 6 2015
S.C. Supreme Court

February 6, 2015

HAND-DELIVERED
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, S. C. 29211

Re: State v. Theodore Manning
Appellate Case Tracking No. 2015-000204

Dear Mr. Shearouse:

Enclosed please find two copies of the Supplemental Appendix, along with Proof of Service, in the above-referenced case.

Thank you for your attention to this matter.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

Enclosures

cc: E. Fielding Pringle, Esquire (one copy enclosed)
Luke A. Shealey, Esquire (one copy enclosed)
Victim Services