STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-513 (S.C. Ct. App. filed 11/12/2015)

2013-GS-21-00391

THE STATE, RESPONDENT,

V.

WAYNE ALBEON SCOTT, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/16/2015.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's refusal to grant Appellant Scott immunity from prosecution for the murder charge pursuant to S.C. Code Section 16-11-410, the Protection of Persons and Property Act, when Appellant was at his own home; the victim was on Appellant's property although he had been asked not to come; Appellant asked the victim to leave; and the victim continued to advance?

2. Whether the Court of Appeals erred in affirming the trial court not charging the jury on S.C. Code Section 16-11-410 when standing his ground was a valid defense, which the jury should have been able to consider in their deliberations, in conjunction with self-defense which the trial judge had emphasized was a valid defense?

STATEMENT OF THE CASE

On March 28, 2013, the Florence County Grand Jury indicted Wayne A. Scott, Jr. on the charges of murder and possession of a firearm during the commission of a violent crime. On September 19, 2013, Scott appeared before the Honorable Howard King for a hearing on the defense motion for immunity pursuant to S.C. Code Section 16-11-410 entitled the Protection of Persons and Property Act, and the case law of State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Scott was represented by William E. Grove, and the state was represented by Matthew R. Ozment. R. 1 - 4. Judge King denied the motion following testimony by three witnesses including Scott. R. 104, ll. 18 – R. 109, ll. 3.

On October 21-24, 2013, Appellant Scott proceeded to trial before the Honorable George C. James and a jury. Scott was represented by William Grove, and the state was represented by Matthew Ozment. R. 111. The jury returned a verdict of guilty on both charges of murder and the possession of a weapon during a crime of violence. R. 441, ll. 16 – R. 442, ll. 9. Judge James sentenced Scott to the maximum sentence of life imprisonment. R. 456, ll. 9 – 24. The South Carolina Court of Appeals affirmed Scott's conviction and sentence on November 12, 2015. State v. Scott, Op. No. 2015-UP-513 (Ct. App. filed November 12, 2015). App. 1-3. Appellant counsel filed a petition for rehearing which was denied on December 16, 2015. App. 4-12. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's refusal to grant Appellant Scott immunity from prosecution for the murder charge pursuant to S.C. Code Section 16-11-410, the Protection of Persons and Property Act, when Appellant was at his own home; the victim was on Appellant's property although he had been asked not to come; Appellant asked the victim to leave; and the victim continued to advance.

IMMUNITY HEARING

Wayne Scott was charged with murder after he shot and killed a long time friend, Steve Springs, on September 24, 2012. R. 25, ll. 8 – 25; Indictment 2013-GS-21-0391. Defense counsel made a motion to the court pursuant to S.C. Code Section 16-11-410, entitled the Protection of Persons and Property Act, for immunity for Appellant Scott. R. 4, ll. 1 – 16. A hearing on the motion was held before The Honorable Howard King on September 19, 2013. R. 1.

Three witnesses testified for the defense: Gloria Scott, wife of Appellant; Michael Bruce; and Wayne Scott. R. 2. Gloria Scott's testimony was that she had known Steve Springs for years because he was the heat and air repairman for her boss. She managed rental properties for her boss so Springs did work for her. Springs was also a friend outside work who came to their home. R. 18, ll. 4 – 23; R. 25, ll. 8 – 25; R. 27, ll. 18 – R. 28, ll. 4.

In March or April of 2012, Gloria learned that Springs was in a relationship with her married daughter who had two small children. Springs was also married to someone else. Gloria did not approve of the relationship especially because of her two young grandchildren. She told her daughter and Springs of her feelings which became an ongoing dialogue. R. 26, ll. 1 – R. 27, ll. 23. She and Springs had verbal fights about his relationship with her daughter who was Appellant Wayne Scott's step-daughter. Scott did not approve of the relationship either. She and Scott had

given up on the situation although it made them angry. Gloria said it made her husband a "little bit angry." R. 28, ll. 1 – R. 29, ll. 13.

On September 24, 2012, Gloria had taken her grandson to Skateland for the school sponsored night from 5:30 to 8:00. Then she took him home. R. 18, ll. 1 – R. 19, ll. 24. On the way to her home, she received a phone call from her husband, Appellant, whom she knew had been hunting with Michael Bruce. When she answered, Scott told her that he shot Springs. She called 911 and said her husband had gotten into an altercation with a gentleman. Gloria checked Springs for a pulse but he did not have one. R. 21, ll. 1 – R. 23, ll. 24.

When she arrived home, she went to her neighbor Carl's house because Scott was there. She then took Scott home. Scott had asked another neighbor, George Watson, to do something with the gun, a Remington .06. While Gloria was at Carl's house, Watson told her he had the gun. She asked him to bring the gun to her. She put the gun in her house on her bed. R. 29, ll. 14 – R. 30, ll. 15; R. 33, ll. 15- R. 35, ll. 22.

Scott told her that Springs had come to their house, and they got into a verbal argument. Springs then threatened Scott. Springs got out of his vehicle and was approaching Scott. Scott asked him to leave. Scott was sitting on the front porch of her office which was attached to the end of their trailer home. R. 30, ll. 1 - R. 33, ll. 14. Scott still had the Remington gun with him because he had taken it hunting that day. R. 35, ll. 8 – 22.

When the police arrived, Gloria talked with them, and they talked with Scott. Springs' van was parked in front of her office, and his body was in the doorway of his van. R. 35, ll. 23 – R. 37, ll. 25.

Michael Bruce testified that he knew Wayne Scott because he had been "buddies" with Michael's father, Larry Bruce, for many years. Also, Scott was a painter. He and Michael worked together painting houses almost every day. R. 7 - R. 8, ll. 24.

On September 24, 2012, he and Scott had been painting, and then went hunting after work. They hunted until almost dark. Michael had to take Scott home then. When Michael came out of the woods, Scott was on the phone with Springs. Michael did not know who originated the call. The two were arguing with each other steadily. Michael was not sure what they were arguing about. Michael told Scott to just hang up the phone on the 'joker.' Springs heard Michael say that and then wanted to talk to Michael although Michael did not know Springs. When Michael took the phone, Springs was cursing him, and told him he was going to beat his butt. Michael hung up. Springs called right back and Scott answered. They continued to argue. Scott hung up and Springs called right back. This happened multiple times. Michael knew that Springs told Scott he was coming to Scott's house and beat his "butt." Michael told Scott not to worry because Springs was not coming to his house. Michael had to leave Scott outside on his porch because he was locked out, and he had to wait for Gloria to get home. Michael found out the next morning that Springs was dead. R. 8, ll. 25 – R. 16, ll. 22.

Appellant Scott testified that he went hunting with Michael Bruce after work on September 24, 2012. They went by Scott's house to see if his grandson wanted to go, but the boy decided to go skating with Gloria. After hunting, Scott called Springs to see if Springs could obtain some items to cool the houses they were painting. Springs started talking about his relationship with Scott's stepdaughter. On the way to Scott's house with Michael driving, Springs kept calling and Scott kept hanging up on him because Springs was cursing him and threatening to beat Scott and Michael.

This happened at least two times or more times. Scott was surprised as Springs did not seem like that kind of guy. Scott did not know what was wrong with Springs. R. 50, ll. 14 – R. 57, ll. 15.

Michael dropped Scott at his house and then left. Scott tried to get in to put his gun away. He was locked out because he left his keys in his truck and his wife drove his truck to the skating rink. He just sat on the small platform porch in front of the office. He saw a white van coming down the road and realized it was Springs who drove in very fast, and stopped close, only five to seven feet, from Scott. Springs jumped out and started cursing Scott. Scott told him he thought they were friends and asked why he was doing this. Scott told him to get back in his van and please leave. He asked him several times. Scott had asked Springs not to come to his house. Springs then became enraged and Scott told him that he wanted nothing to do with the "situation" as long as his grandkids were fine. R. 56, ll. 11 – R. 61, ll. 17.

Springs just kept getting more irate, and Scott told him again to just leave as that was the best thing. Springs said no, and told Scott he would "show him." Springs told Scott that he would take Scott's gun and wrap it around his neck. Springs then stepped around the van door in a threatening way. Scott felt highly threatened. Scott then picked up his gun, pointed at Springs, and pulled the trigger one time. Springs was about six feet away. He was not sure that he hit Springs, but Springs fell on the ground and said help me. R. 61, ll. 16 – R. 62, ll. 25.

Scott was then in shock, and did not know what to do. He walked away and tried to call his wife. He finally reached her and told her he was going to Carl's house. She was going to call 911. His neighbor, George Watson then appeared. He finally told Watson that he shot Springs. R. 63, ll. 1 – R. 66, ll. 13.

On cross examination, Scott said he drank a beer at Michael's and had two beers while sitting on his porch when he arrived at home. He took Springs' threats as real. He had previously

asked Springs not to come to his house because he was dating Scott's step daughter. He thought Springs was coming to hurt him. Scott could not get up and run and could not get in the house. When the law officers arrived, Scott talked to them and told them the truth. He believed Springs was trying to attack him. Springs was a big man: 240 to 260 pounds and taller than Scott. Scott was five feet eight to ten inches tall and 131 pounds. He just wanted to stop Springs. R. 66, ll. 14 – R. 84, ll. 20. Scott did not see a weapon on Springs but then he really could not tell. R. 89, ll. 1-25. Scott admitted to a conviction in 2000 or 2001 for manufacturing marijuana. R. 80, ll. 1 – 25.

Defense counsel argued that Section 16-11-410, the "Stand your Ground Law," applied in Scott's case, and he should be granted immunity from prosecution. Scott was in his home and had a reasonable fear for his life or of being seriously injured. Section 16-11-440 (C) provides that the Act applied to a person who was not engaged in unlawful activity and was in a place where he had a right to be. The judge stated that the statute provided applied only to a person who was being attacked. Defense counsel argued that a person need not be assaulted to a particular degree before he could defend himself. Counsel stated that if there was a reasonable expectation that a violent crime was about to occur, any reasonable force could be used. The judge then noted that counsel was relying on subsection (C) of 16-11-440. R. 85, ll. 1 – R. 88, ll. 3.

The state argued that Scott was a convicted felon in possession of a gun. Therefore, he was not engaged in lawful activity when the incident occurred. Scott could not tell if Springs had a weapon or not but did not actively see one. R. 88, ll. 4 – R. 89, ll. 12.

Defense counsel replied that by citing State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), where McCaskill and Goodson[1] stood for the proposition that a person could be acting

[1] State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994).

lawfully even if he was in unlawful possession of a weapon if he were entitled to arm himself in self-defense at the time of the shooting. Counsel argued that the Legislature did not intend for a person to wait until he was being assaulted if he were threatened. R. 89, ll. 25 – R. 92, ll. 6.

The judge replied that the intent of the Legislature was to prevent people from being attacked in their homes or businesses or vehicles. It had nothing to do with preventing people from being attacked on the street or anywhere else. Defense counsel argued that Scott had no where else to go and wanted to avoid the attack. The judge ruled the statute required a physical attack and not just an assault because the word attack was used in the statute. Defense counsel respectfully disagreed, and argued that the word attack encompassed an assault without a battery. R. 92, ll. 7 – R. 104, ll. 15.

The judge ruled that he was relying on Section 16-11-410 and State v. Duncan, 392 S.C. 404, 7-9 S.E.2d 662 (2011), in making his decision. He was not making a decision on whether the unlawful activity, the possession of a weapon, precluded Scott from raising the immunity granted by the statute. The judge's ruling relied on the second prong of 16-11- 440 (C). The legislature could have clearly used the word assault if that was their intent. He held that the Legislature's "plain and unequivocal" meaning meant a physical contact attack. Therefore, the judge denied Scott's motion for immunity under the Stand Your Ground Law. R. 104, ll. 18 – R. 109, ll. 3.

TRIAL TESTIMONY

The jury trial was held October 21-24, 2013 before a different judge, the Honorable George C. James. R. 111-116.

Michael Burch testified that on September 24, 2012, he and Scott had been painting. They then went hunting after work until almost dark. Michael had to take Scott home. When Michael came out of the woods, Scott was on the phone with Springs. Michael did not know who originated

the call. The two were arguing with each other steadily. Michael was not sure what they were arguing about. Michael told Scott to just stop arguing with the man, and Michael took the phone and hung up. Springs had told Michael that he was going to "beat Michael's butt." Springs called right back and they continued to argue. Scott did not really threaten Springs but both said they were going to "beat each other's butt." Michael could hear the conversation and knew that Scott was being threatened. Springs told Scott he was coming to Scott's house and beat his "butt." Michael told Scott not to worry because Springs was not coming to his house. Michael left Scott outside on his porch because he was locked out. Michael found out the next morning that Springs was dead. R. 229, ll. 14 – R. 242, ll. 10.

Gloria Scott testified as a state's witness. She and Scott had been married eighteen years and had no children together. Gloria had a daughter, Crystal Hanna, who was twenty-seven, married with two small children. R. 244, ll. 1 – R. 245, ll. 20.

Gloria knew Steve Springs because he did heat and air repair for her boss's rental houses, and she managed the rentals. She knew Springs was married also. When she learned of the relationship between her daughter and Springs, she did not approve. She did not want Springs around her grandkids. Before their affair, Gloria's relationship with Springs had been friendly. He used to come to her house weekly but stopped when he the affair began with Crystal. R. 245, ll. 21 – R. 248, ll. 25.

The weekend before Springs died, Gloria called him about a need in a rental unit for air service. She could not reach him but her daughter told her to call Springs' son. However, Gloria had poor phone service and could not reach him. She did post a message on Facebook about taking her grandson and what fun they were having. Springs called irate cursing her because she could post on Facebook but could not call his son. Gloria then posted a message on Facebook that "that asshole is

going to cause me to kill him." She did not tell Scott about Springs' call. R. 248, ll. 21 – R. 252, ll. 17.

She took her grandson to Skateland on September 24, 2012. Scott was going hunting. Scott called her on her way home, and she picked him up at her neighbor, Carl's, house. She called 911 as she was taking Scott home. She asked another neighbor, George, to get the gun and put in her truck. Gloria took the gun in her house and put it on the bed. She checked on Springs when 911 operator told her to, but there was no sign of life. She denied telling Larry Bruce that she had put a knife on the ground next to Springs, and that she was worried her DNA may be on it. R. 252, ll. 18 – R. 261, ll. 12.

Investigator William Hester talked to Scott at the scene the night of the incident. Scott agreed to talk to Hester. Deputy Michael Gifford had told Hester that he talked to Scott earlier in the evening and had Mirandized him. Hester did not read the Miranda rights again to Scott. Hester did not record Scott's statement. Scott told him that he had gone hunting that afternoon with a co-worker. He had verbal altercations with the deceased on the way home from hunting. He started getting phone calls from Springs talking about issues with his personal life. Springs was cursing Scott and screaming at him so Scott hung up the phone. This happened multiple times. Hester checked their telephones and confirmed there were numerous calls between the two. R. 191, ll. 21 – R. 196, ll. 19.

When Scott arrived at home, he realized that he did not have his keys as his wife had taken the kids skating. He decided to sit on the porch and drink a beer and wait for her. The lights were not on. It was dark. Scott saw the white van coming down the driveway and realized it was Springs. Springs turned the van lights off and turned the vehicle off. He got out of the van. Scott told him that he needed to just leave. Springs then stepped out from around the van door. Scott told him that

if he took another step, he would shoot him. Springs took a step out and Scott fired the gun. R. 196, ll. 20 – R. 199, ll.8.

Scott saw a screwdriver in Springs' left hand. Springs fell to the ground, and said "help me." That scared Scott and went around to the back of the mobile home. Scott told Hester that Springs had advanced towards him one step. Scott told him that he put the gun in the house. Then he went to his neighbor Carl's house. Scott drank a few beers there and called his wife. Scott did not call 911 but his wife, Gloria, did. Hester found a screw driver about five to seven feet from the deceased, and a open-blade lock knife where the deceased's hand was dropped. Hester transported Scott to jail, and obtained warrants for murder and possession of a weapon during a violent crime. R. 199, ll.9 – R. 209, ll. 24.

Catherine Leisy, a forensic scientist with SLED, analyzed the screwdriver and knife for DNA. R. 210, ll. 7 – 212, ll. 16. She also analyzed Scott's DNA for comparison, but was not able to develop DNA profiles from the screwdriver or knife. R. 212, ll. 1 – R. 217, ll. 6.

George Watson was a neighbor of Scott, and they were good friends who saw each other almost daily. On September 24, 2012, he heard a gunshot which he thought was in his backyard. He went to investigate and saw Scott in his backyard. Scott was talking on his cell phone. Watson heard him say that he shot him. Scott told Watson that he fired the shot. Watson did not believe him at first. Scott threatened to shoot Watson and burn his house down if Watson told anyone. Watson then saw Springs' van and realized that Scott was telling the truth. R. 319, ll. 8 – R. 323, ll. 22.

Scott told Watson he killed Springs because he did not want his grandkids calling Springs daddy. When Watson asked if Springs have anything in his hands, Scott said no. Scott went to his boat and got a screwdriver and went to put it in Springs' hand. When Scott returned, he told Watson that Springs was still alive and he may have to shoot him again. But he did not. Scott asked Watson

to get rid of the gun so Watson threw it into the woods. He retrieved the gun and put it in Gloria's truck when she called an asked him to do that. R. 323, ll. 24 – R. 329, ll. 3.

Watson talked to the police at the scene very briefly but did not tell them the truth because he was afraid. After the police took Scott, Watson asked to go somewhere else to talk. He met Investigator Hester at the Waffle House and told him what really happened. R. 329, ll. 6 – R. 331, ll. 24.

Sabrina Hartfield, Watson's girlfriend, testified that about two weeks before the shooting, Gloria told her of a conflict Gloria had with Springs at Crystal's house. Gloria was going to "whip Spring's ass or kill him." R. 332, ll. 15- R. 350, ll. 6.

Hubert Black knew Scott from installing hardwood floors. Sometime in September 2012, they left work early because they got into liquor cabinet and then smoked a joint. Black, Scott, Carl Munn, and another man were riding in the truck together. Black said Scott was a "good fellow" when he was not drinking. He never thought Scott would hurt anyone. But that day, Scott said he was going on a killing spree. There were three people he wanted to kill: Larry Bruce, Black's half brother, and this other "boy" who was messing with Scott's step daughter who was making phone threats to Scott and "putting his grandchildren through that stuff." R. 218, ll. 9 – R. 223, ll. 19.

Crystal Hanna, Gloria's twenty-seven year old daughter, had known Scott about twenty-five years. She became involved with Springs at work Springs and her mother had an altercation at Crystal's house four days before the shooting where Gloria pushed Springs down the steps. On Monday, the day of the shooting, she was on a three way call with Springs and Scott. Her story was that Scott was upset and Springs was saying he not trying to fight Scott and had no beef with him. Scott said they needed to talk. The first plan was for them to talk at Crystal's house, but she said no

because she was putting her children to bed. They decided to meet at Scott's house. She heard no threats from Springs. Crystal admitted that she hated Gloria and Scott. R. 300, ll. 1 – R. 318, ll. 14.

Kevin Hanna was Crystal's husband. About a week before Springs was shot, Springs showed up at Kevin's job and threatened him. He would not let Kevin out of his car. Springs threatened to "kick Kevin's ass." Kevin took this seriously and the police were called. Kevin filed a police report but did not file a charge because Kevin did not want to cause any more problems. R. 357, ll. 1 – R. 363, ll. 25.

Larry Burch was a good friend of Scott. Gloria told him that she put the knife in Springs' hand. Bruce was shocked that Scott would do this because Scott would not hurt anyone. Bruce knew Scott real well and Scott was not capable of doing this on his own. R. 267, ll. 1 – R. 283, ll. 7.

Dr. Erin Presnell, a forensic pathologist with MUSC, performed the autopsy on Springs. Due to the extent of damage from the single gunshot, Springs would not survived no matter how long it took EMS to arrive or even if he had been in the hospital. R. 285, ll. 11 – 25; R. 288, ll. 15 – R. 298, ll. 24.

The jury returned a verdict of guilty on the murder and gun charge. R. 441, ll. 14 – R. 442, ll. 10.

During sentencing, the judge stated that the claim of self defense was valid or he would not have charged it. He allowed it to go to the jury for that reason. But he said, the jury had spoken. The judge sentenced Scott to life in prison. R. 455, ll. 8 – R. 457, ll. 11.

Discussion

The Court of Appeals ruled, citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), that a valid case of self-defense consistent with the Castle Doctrine and the text of the Act, must exist, and the trial court must necessarily consider the elements of self-defense in determining a

defendant's entitlement to the Act's immunity which must include all the elements of self-defense except the duty to retreat. App. 2. The Court of Appeals continued to rule that "immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Id. App.2.

The Court of Appeals misapprehended the issue.

In State v. Curry, *supra,* the South Carolina Supreme Court listed the elements of self-defense as: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant was actually in imminent danger of death or serious bodily injury, or the defendant actually believed he was in imminent danger of death or bodily injury; (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or circumstances were such as would warrant a man of ordinary prudence , firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; (4) and the defendant had no other probable means of avoiding danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. The Supreme Court held that in order to be granted immunity under the Act, a defendant had to demonstrate all the elements of self-defense save the duty to retreat.

S.C. Code Section 16-11-440 is entitled: Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle, or place of business.

S.C. Code Section 16-11-440 (C) provides that if a person **reasonably** [emphasis added] believes deadly force 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, then he has no duty to retreat if he is in a place where he has a right to be.

S.C. Code Section 16-11-440(A) provides that 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 likely to cause death or great bodily injury to another person if the person: (1) against whom the force is used is in the process of unlawfully 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

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 likely to cause death or great bodily injury to another person if the person: (1) against whom the force is used is in the process of unlawfully 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.

The evidence at the immunity hearing demonstrated clearly that Scott reasonably believed that he was in danger of death or great bodily harm when Springs appeared unexpectedly. Springs had threatened Scott numerous times on the phone as corroborated by the witness Michael. Scott had no duty to retreat. Springs was intruding on Scott's property which included his residence as the wife's office was physically attached to the residence. Scott was also sitting on the porch of his wife's business. He was locked out.

The word "attack" was not defined in Section 16-11-430 which provided the definitions for words in the statutes. Nor was "attack" defined in any other section of the statute from 16-11-410

through 16-11-450. It was unreasonable, as defense counsel argued, that the General Assembly meant for a person to wait until he was attacked to defend himself as the first blow could be fatal.

Although the trial judge did not rule on the issue of Scott acting unlawfully because he was in possession of a weapon as a convicted felon, the Supreme Court ruled in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), that a person who shoots another can be acting lawfully even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.

The Supreme Court also wrote in Curry, *supra,* that: "The full reach of the Act and whether the statutory provisions in the Act extend beyond the common law Castle Doctrine are questions for another day. ....Under the Castle Doctrine, one is not required to retreat from his dwelling place." The Supreme Court cited State v. Gordon, 128 S.C. 422, 425, 122 S.E.2d 501,502 (1924) which held that one attacked without fault on his part, **on his own premises**, [emphasis added] has the right in establishing his plea of self –defense, to claim immunity from the law of retreat which is ordinarily am essential element of that defense. Section 16-11-420 codified the Castle Doctrine.

Curry's case is distinguished from Scott's in several ways as Curry was decided in a different context. Curry was a social guest and visitor in the home where the shooting occurred. The victim was also a social guest in the home. There were eyewitnesses to the shooting in Curry's case. There were no eyewitnesses in Scott's case. The Supreme Court ruled that his claim of self-defense was a "quintessential" jury question. There was no pretrial hearing to determine immunity as this case was before State v. Duncan, *supra.* Therefore, the same trial judge determined immunity as he conducted the trial. In Scott's case, there was a pretrial hearing but immunity was decided by a different judge from the trial judge. The trial judge here ruled that immunity was a pretrial issue exclusively.

The trial judge in Scott's case believed that the claim of self-defense was valid. That was the reason he instructed the jury on self-defense. This was after he had heard all of the evidence. R. 455, ll. 8 – R. 457, ll. 11. The state agreed that self defense was appropriate to charge to the jury. R. 355, ll. 5-7.

It was clear from the record that Scott believed he was in danger based on the argumentative history between Scott and the deceased. Springs, the deceased, had made numerous threats against Scott just shortly before this incident. Any reasonable man would have believed his life was in danger if the man threatening him suddenly showed up at his home.

ARGUMENT

II

The Court of Appeals erred in affirming the trial court not charging the jury on S.C. Code Section 16-11-410 when standing his ground was a valid defense, which the jury should have been able to consider in their deliberations, in conjunction with self-defense which the trial judge had emphasized was a valid defense.

At the close of the testimony, the judge requested for jury charges. All parties agreed that self defense would be charged. The judge said he assumed all parties would agree that he would not charge any part of the immunity statute because it was a pretrial defense and was not a jury issue. Defense counsel said that he might disagree. He agreed that it was the law, but he might disagree with the principle of it. The only cases he could find regarding the statute being submitted to the jury on the castle doctrine predated the statute. He argued that there was not any case law directly on point. But he conceded that it was heard in pretrial. The judge stated that the codified common law on self defense was still in the jury charge. R. 355, ll. 1 – 25.

The judge charged n self defense. R. 407, ll. 12 – 410, ll. 25. During deliberations, the jury sent three questions to the judge. One question asked for a copy of the self defense statute. Judge agreed to recharge the jury on self defense since there was no statute. After further deliberation, the jury asked two additional questions. One asked for clarification on element one of self defense: if both parties are at fault can self defense be claimed. The second question asked if all of the elements of self defense had to apply or if only one was needed. The judge explained to the jury that all of the elements must be present and the defendant had to be without fault in bringing on the difficulty. The jury sent another question on the requirements for a murder conviction to which the judge repeated the charge on murder. R. 420, ll. 14 – R. 440, ll. 19.

The jury returned a verdict of guilty on the murder and gun charge. R. 441, ll. 14 – R. 442, ll. 10.

During sentencing, the judge stated that the claim of self defense was valid or he would not have charged it. He allowed it to go to the jury for that reason. But he said, the jury had spoken. The judge sentenced Scott to life in prison. R. 455, ll. 8 – R. 457, ll. 11.

Discussion

The Court of Appeals ruled that "in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). App. 2.

The Court of Appeals misapprehended the issue.

Defense counsel's colloquy on the correctness of charging the Act as a defense when the judge asked for jury charges on R. 355, did adequately preserve this issue for appellate review. At the close of the testimony, the judge requested jury charges. All parties agreed that self defense would be charged. The judge said he assumed all parties would agree that he would not charge any part of the immunity statute because it was a pretrial defense and was not a jury issue. Defense counsel said that he might disagree. He agreed that it was the law, but he might disagree with the principle of it. The only cases he could find regarding the statute being submitted to the jury on the castle doctrine predated the statute. He argued that there was not any case law directly on point. But he conceded that it was heard in pretrial. The judge stated that the codified common law on self defense was still in the jury charge. R. 355, ll. 1 – 25.

Defense counsel did raise the issue of the jury charge at trial. The judge ruled on the issue by not charging it. At the close of the jury charges, the judge asked for any objections:

Court: Any objections or additions from the state other than what you previously mentioned?

State: No, Your Honor.

Court: Any from the defendant?

Defense: Not already that I haven't raised, Your Honor. I would renew my position on the state's burden of disproving self defense.

Section 16-11-420 through 16-11-450 did not provide a process to follow if immunity was denied. Although the Supreme Court in State v. Duncan, *supra,* wrote that the "legislature intended to create a true immunity, and not simply an affirmative defense." A fair reading is that an affirmative defense was also created.

In Curry's case, Curry had argued that the trial court erred in charging the jury on both the Act and self defense because the two were inconsistent. In State v. Curry, *supra,* the Supreme Court held that the trial court did err in charging the jury on the Act because the trial court had denied Curry immunity under the Act. Curry's case was prior to the Act which required a pretrial hearing on the immunity issue. However, the Supreme Court wrote:

> The full reach of the Act and whether the statutory provisions in the Act extend beyond the common law Castle Doctrine are questions for another day. Yet, in this context, the error in the jury charge, and any resulting ambiguity caused no prejudice to Appellant. Under the castle Doctrine, one in not required to retreat from his dwelling place.

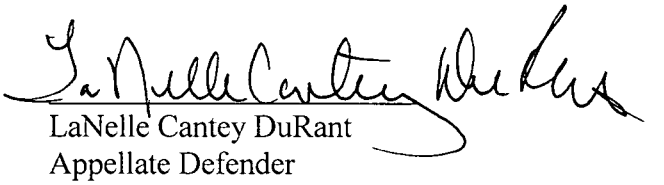
The Supreme Court cited State v. Gordon, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924) which held that "One attacked, without fault on his part, on his own premises, has the right , in establishing his plea of self-defense, to claim immunity from the law of retreat, which is ordinarily an element of that defense."

The trial judge in Scott's case should have charged the jury on 16-11-440 (C) as an affirmative defense since immunity was denied. The jury was confused on the issue of self-defense. During jury deliberations, the jury sent questions to the trial judge on two occasions for clarification on self-defense. If the jury had been given the charge on Section 16-11-440 (C) or the Act, the result of the trial very reasonably could have been different as it would have clarified self-defense. Immunity was a different issue from an affirmative defense although the two were correlated. If self-defense was required for immunity under the Act, then a consideration of the protection of persons and property should be considered along with self-defense.

CONCLUSION

Based on the above, certiorari should be granted; the Court of Appeals' decision should be reversed; the conviction and sentence should be reversed; and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of January, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-513 (S.C. Ct. App. filed 11/12/2015)
2013-GS-21-00391

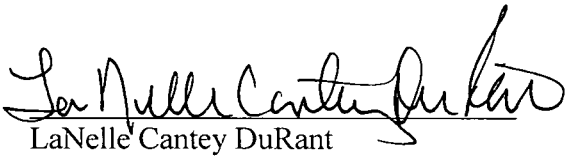
THE STATE, RESPONDENT,

V.

WAYNE ALBEON SCOTT, PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Kaycie S. Timmons, Esquire, Wayne Scott, #357576, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 14th day of January, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of January, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.