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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-513 (S.C. Ct. App. filed 11/12/15)

13-GS-21-00391

THE STATE, RESPONDENT,

V.

WAYNE ALBEON SCOTT, PETITIONER

APPENDIX

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KAYCIE S. TIMMONS
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wayne Albeon Scott, Jr., Appellant.

Appellate Case No. 2013-002365

Appeal From Florence County
George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-513
Submitted October 1, 2015 – Filed November 12, 2015

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Kaycie Smith Timmons, all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

PER CURIAM: Wayne Scott appeals his convictions for murder and possession of a weapon during a violent crime, arguing the trial court erred in failing to (1) grant him immunity from prosecution for the murder charge pursuant to section 16-11-410 South Carolina Code (Supp. 2014), the Protection of Persons and Property Act (the Act), and (2) charge the jury on the Act. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in failing to grant immunity under the Act: *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility."); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense 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."); *id.* ("This includes all elements of self-defense, save the duty to retreat."); *id.* at 372, 752 S.E.2d at 267 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.").

2. As to whether the trial court erred is failing to charge the jury on the Act: *State v. Dunbar*, 356 S.C. 138, 141, 587 S.E.2d 691, 694 (2003) ("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. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (stating failure to contemporaneously object to jury charges fails to preserve the issue for appellate review); *State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("[A] party cannot complain of an error which his own conduct has induced.").

AFFIRMED.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

HUFF, WILLIAMS, and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE, RESPONDENT,

V.

WAYNE ALBEON SCOTT, APPELLANT

APPELLATE CASE NO. 2013-002365

Appeal from Florence County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-513

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on November 12, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Scott raised two issues on appeal: (1) the circuit court erred in not granting him 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) the trial court erred in 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.

On Issue One, this Court 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. This court 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.

On Issue Two, this Court 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).

Respectfully, this Court misapprehended these issues.

Issue One: 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.

Issue Two: The Court of Appeals held that this issue was not preserved for appellate review. However, 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:

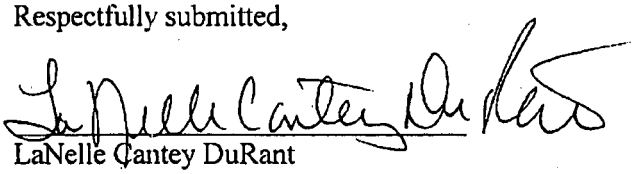
> The full reach of the Act and whether the statutory provisions in the Act extend beyond the common law Castle Doctrine are questions for another day. Yet, in this context, the error in the jury charge, and any resulting ambiguity caused no prejudice to Appellant. Under the castle Doctrine, one in not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

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Scott's case for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 23rd day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

George C. James, Jr., Circuit Court Judge

THE STATE, RESPONDENT,

V.

WAYNE ALBEON SCOTT, APPELLANT

APPELLATE CASE NO. 2013-002365

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 Kaycie S. Timmons, Esquire, and Mr. Wayne Scott, #357576, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 23rd day of November, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day of November, 2015.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Wayne Albeon Scott, Jr., Appellant.

Appellate Case No. 2013-002365

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

December 16, 2015

cc:
Alan McCrory Wilson, Esquire
LaNelle Cantey DuRant, Esquire
Donald J. Zelenka, Esquire
Kaycie Smith Timmons, Esquire
Edgar Lewis Clements, III, Esquire

John W. McIntosh, Esquire