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, JR.,

APPELLANT

APPELLATE CASE NO. 2013-002365

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the circuit court err in not granting 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. Did the trial court err 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?

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. Scott's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

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 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.

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[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).

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 a 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.

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.

ARGUMENT

I

The circuit court erred in not granting 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.

S.C. Code 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 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 Section 16-11-440(A) provides:

> 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.

S.C. Code Section 16-11-440(B) explains that subsection (A) does not apply if the person against whom the force is used has a right to be in the place; is trying to remove a

child or grandchild who is in the custody of the person against whom the force is used; if the person who uses the deadly force is engaged in an unlawful activity; and if the deadly force is used against a law enforcement officer.

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.

In State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), the Supreme Court ruled that immunity under the Protection of Persons and Property Act was to be determined pretrial by a preponderance of the evidence.

In State v. Issac, 405 S.C. 177, 747 S.E.2d 677 (2013), the Supreme Court held that an order granting a request for immunity under the Protection of Persons and Property Act was immediately appealable because it was a final order in the case. However, an order denying immunity under the Act was not a final order but interlocutory, and therefore was not immediately appealable.

In State v. Duncan , *supra,* Gregory Kirk Duncan shot his friend, Chris Spicer, one time as Spicer, who was intoxicated, attempted to re-enter Duncan's dwelling after having been ejected from the premises for making crude sexual comments about Duncan's teenaged daughter. The State indicted Duncan for murder.

Defense counsel filed a motion to dismiss the prosecution pursuant to S.C. Code §16-11-450 of the Protection of Persons and Property Act, which provides in relevant part, "A person who uses deadly force as permitted by the provisions of this article ... is justified in using deadly force and is immune from criminal prosecution." On March 24, 2009, Judge Edward W. Miller heard arguments on Duncan's motion and limited testimony and received

a number of written statements concerning the incident. By subsequent order, the judge found Duncan immune from prosecution under the statute and dismissed the indictment.

The trial judge here relied on State v. Duncan, Id. and Section 16-11-410 in reaching his decision to deny immunity to Scott. However, the trial court in Duncan relied on 16-11-440 (A) because the victim continued to force his way into the defendant's home. Even so, there was no evidence Duncan himself was being attacked.

Section 16-11-420(E) provides that:

> The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of **intrusion** [emphasis added] or attack.

Section 16-11-440(C) provides that a person 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** [emphasis added] to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime.

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.

ARGUMENT

II

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.

The Supreme Court held in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), that the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given.

The Supreme Court ruled in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), that the trial court erred in instructing the jury in accordance with the Protection of Persons and Property Act as the trial court had denied immunity under the Act to Curry, and the error was beneficial to the defendant.

The Court also wrote in Curry, Id. 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 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.

In Curry, the Supreme Court wrote that a valid case of self-defense must exist consistent with the Castle Doctrine and the Act. 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 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. Here, 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.

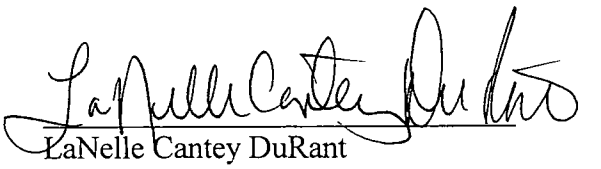
Section 16-11-420 through 16-11-450 did not provide a process to follow if immunity was denied. Although the Supreme Court in State v. Duncan, *supra,* wrote that the "legislature intended to create a true immunity, and not simply an affirmative defense," the Court did not rule that it could not be considered a defense at trial if immunity was denied since immunity was granted in Duncan's case.

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, Scott's conviction and sentence should be reversed and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 1st, 2015

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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

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Kayce S. Timmons, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of April, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of April, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
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Appeal from Florence County

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THE STATE,

RESPONDENT,

V.

WAYNE ALBEON SCOTT, JR.,

APPELLANT,

Appellate Case No. 2013-002365.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in not granting 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?

II. Did the trial court err 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?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the pretrial court erred in denying immunity under the Protection of Persons and Property Act where the court found Appellant did not meet its burden of proof.

II. Whether the trial court erred in failing to charge language from the Protection of Persons and Property Act where no request was made to charge such language and where immunity had been denied.

RESPONDENT'S STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant, Wayne Albeon Scott, Jr.,[1] in March 2013 for the murder of Steve B. Springs (Victim) and for possession of a weapon during commission of violent crime. (R. p. 458 – 459).

Appellant sought immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et seq.*, and on September 19, 2013, the Honorable Howard King conducted a pretrial hearing to determine whether Appellant was entitled to immunity. (R. pp. 1–110). Appellant was represented by Assistant Public Defender William Grove during the hearing. (R. p. 1). The State was represented by Assistant Solicitor Matthew Ozment. (R. p. 1). After hearing from three witnesses, including Appellant, and after hearing argument from both sides, Judge King denied the motion. (R. p. 104, line 18–p. 109, line 3).

On October 21, 2013, Appellant's case was called to trial before the Honorable George C. James. (R. p. 111). Appellant was represented by Assistant Public Defender Grove during the four-day trial. (R. p. 111). Assistant Solicitor Ozment represented the State. (R. p. 111). On October 24, 2013, the jury returned a verdict of guilty on all counts as charged. (R. p. 441, line 24–p. 442, line 10). Judge James sentenced Appellant to life imprisonment for murder and to five (5) years incarceration for possession of a weapon, the sentences to run concurrently. (R. p. 456, lines 18–24).

Thereafter, Appellant served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on November 4, 2013. (R. p. 460 – 461).

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[1] Appellant also goes by the name "Sunny" and is sometimes referred to as such in the testimony.

RESPONDENT'S STATEMENT OF THE FACTS

Tensions Rise

Victim worked as a heating and air repairman for Appellant's wife's company, and, prior to June 2012, he would come to Appellant's house to pick up his check every week from Appellant's wife, Gloria Scott. (R. p. 245, lines 21–p. 247, line 25). Scott testified that she learned in April or May of 2012 that Victim and Scott's daughter (Appellant's stepdaughter) were having an affair. (R. p. 246, lines 11–21). Both Victim and Scott's daughter, Crystal Hanna, were married. (R. p. 244, line 15–p. 246, line 17). Scott disapproved of the relationship, and according to Scott, Victim knew that she disapproved, and that is why he stopped coming to her house to pick up his check. (R. p. 246, line 18–p. 248, line 3). Instead, Victim would send someone else to pick it up, or he would meet Scott at one of the properties she managed. (R. p. 248, lines 4–9).

Scott testified that she and Victim had very heated exchanges about his relationship with Hanna. (R. p. 248, line 10–20). Hanna testified to an exchange that she witnessed on the Thursday before Victim's death, September 20, 2012:

> [H]e was at my house to pick me up and we were leaving. And my mom showed up unannounced and him and her exchanged words. And he went to go walk out the front door to sit in the truck and wait on me to finish getting my stuff and, you know, leave and she pushed him down the steps. He didn't fall, but I mean she just put her hands on him, pushed him down the steps and a police report was made.

(R. p. 303, line 25–p. 304, line 13).

On Saturday, September 22, 2012, Scott was on an overnight camping trip with her grandson's cub scouts troop when she learned that one of her properties was having problems with their air conditioning unit. (R. p. 248, line 21–p. 249, line 12). She tried to call Victim about the issue, but she did not reach him. (R. p. 249, lines 9–16). Scott

then called Hanna and told her she was trying to get in touch with Victim. (R. p. 249, lines 16–22). Hanna told Scott to call Victim's son. (R. p. 249, lines 20–22). According to Scott, she tried multiple times to call Victim's son but was unable to reach him. (R. p. 249, line 22–p. 250, line 3). However, Scott was able to post on Facebook about the camping trip. (R. p. 250, lines 3–10). Sometime later that evening, Scott received a call from Victim, who was "upset because [Scott] had gotten on [her] phone and was able to make a post, but [she] wasn't able to get through to his son." (R. p. 250, lines 10–18).

Scott ended up having to leave the camping trip early, and she posted on Facebook something to the effect of "it is ashame [sic] that my grandson's night got F up by this asshole . . . ." (R. p. 250, line 19–p. 252, line 11). Later in that conversation on Facebook, Scott said "yeah, and the asshole is going to cause me to kill him." (R. p. 251, lines 4–7). At trial Scott explained, "[M]y sister-in-law asked me what had happened and I told her that I would call her tomorrow and explain that just because I didn't want to put on Facebook that my daughter was messing with a married man." (R. p. 251, lines 7–10). Scott also posted that "[Appellant] did nothing yet, but when he finds out . . . ." (R. p. 251, line 13–p. 252, line 3). Scott affirmed that the "asshole" she was referring to was Victim. (R. p. 251, lines 7–11).

Two days later, on September 24, 2012, Appellant went hunting with Michael Bruce[2] on Bruce's property in Pamplico. (R. p. 229, line 14–p. 231, line 9). They finished right before dark. (R. p. 231, lines 10–13). When Michael Bruce came out of the woods, he found Appellant on the phone arguing and cussing. (R. p. 231, line 21–p.

[2] Both Larry Michael Bruce and Larry Michael Bruce, II, testified at Appellant's trial. The senior Bruce goes by Larry Bruce, and the junior Bruce goes by Michael Bruce, and Respondent will refer to them as such in this brief.

234, line 8). Michael Bruce drove Appellant home that night, and according to Bruce's testimony, Appellant and the man on the phone were arguing for almost the entire fifteen minute drive. (R. p. 234, lines 1–24). Though Michael Bruce could not tell what the two were arguing about, he heard them threaten to "beat each others butt." (R. p. 235, lines 14–20). At some point, Michael Bruce took the phone from Appellant and ended the call, but the man on the other line called back. (R. p. 235, lines 1–13). Appellant and Michael Bruce had a couple beers on the way home. (R. p. 236, lines 2–9). By the time Michael Bruce dropped Appellant off at his house that night, Appellant had hung up the phone, but Appellant was locked out of his house because he did not have his keys. (R. p. 236, line 10–p. 237, line 9).

Hanna testified that she was on the phone calls between Appellant and Victim that Monday. (R. p. 307, line 1–p. 308, line 7). According to Hanna,

> [Victim] called me because he said that he had a really bad feeling about it. Something just didn't sit right with him about [Appellant] calling him so persistently about the air condition situation. So he wasn't going to go down there and called him back to let him know that and had me on three way when he called [Appellant] back.

(R. p. 307, lines 19–25). According to Hanna, Appellant threatened to "beat [Victim's] mother[,]" and Victim responded that he did not want to fight Appellant. (R. p. 308, lines 8–19). Appellant told Victim that he could meet him at Appellant's house if Victim wanted to talk. (R. p. 308, line 8–p. 309, line 1). Victim later called Hanna and told her that he was almost to Appellant's house and that he would see her when he left. (R. p. 309, lines 15–21).

Appellant Shoots Victim

Appellant's neighbor, George Watson, was watching television the night of September 24, 2012, when he heard a gunshot. (R. p. 319, line 10–p. 320, line 21). The gunshot sounded like it was in Watson's backyard, so he grabbed his fiancé's .45 and went outside to see what was going on. (R. p. 320, line 22–p. 321, line 3). Watson saw Appellant in his backyard talking on a cell phone. (R. p. 321, lines 9–14). Watson heard Appellant say, "I shot him." (R. p. 321, line 15–16). Once Appellant was off the phone, Watson called out to Appellant and asked if that was him shooting a gun. (R. p. 321, lines 17–20). Appellant responded yes and told Watson that the gun went off, and the bullet jammed in the gun. (R. p. 321, lines 20–22). Appellant and Watson then walked to Watson's property line and started talking about hunting. (R. p. 322, lines 6–11). Appellant confessed to Watson that he had shot Victim. (R. p. 322, lines 12–13). Watson did not believe Appellant because he was acting totally normal. (R. p. 322, line 19–p. 323, line 3). Appellant then threatened Watson, saying "if you tell anybody, I will shoot you or you gone have to shoot me or I'm going to burn your house down with your kids in it." (R. p. 323, lines 4–9). Watson looked towards Appellant's house and saw Victim's van there with the door open and the cab light on, and he realized that Appellant was telling the truth. (R. p. 323, lines 4–22).

Appellant instructed Watson to put Victim's body in the van and take it down the road, but Watson refused, and Appellant threatened him again. (R. p. 323, line 23–p. 324, line 4). Appellant told Watson that he had killed Victim because he was not going to have his grandkids call Victim "daddy." (R. p. 324, lines 9–14). Watson then testified to the following:

Q. What did you say to that?

A. I said, well, did he have anything in his hand Sunny. He said no. I said, well, you know that's plan [sic] out cold-blooded murder. I said if he didn't come after you with something, it was murder.

Q. What did Sunny say to that?

A. He said that he didn't have nothing in his hand, so that's when he proceeded over to his boat and he got a screwdriver out, a black one red tip about this long whipped it off with his jacket and went around there to put it in his hand. I stayed around back. I never went around towards the front of the house. I stayed around back, that's when he come back and told me that Steve was still alive.

(R. p. 324, line 15–p. 325, line 3). Appellant told Watson that he was going to shoot Victim again, but instead, he handed his gun to Watson and told him to get rid of it. (R. p. 326, line 8–p. 327, line 1). Appellant said, "I don't care what you do with it, throw it woods [sic] for all I care." (R. p. 326, line 25–p. 327, line 1). So Watson took the gun and tossed it into the woods across the street. (R. p. 327, lines 15–18).

Shortly thereafter, Scott called Watson and asked what Appellant had told him. (R. p. 328, lines 11–18). Scott then pulled up in her truck, asked where the gun was, and instructed Watson to retrieve it from the woods. (R. p. 328, line 18–p. 329, line 3). Watson testified that he did so and put the gun in the bed of Scott's truck. (R. p. 329, lines 6–12). At that point, the truck was parked at the home of Carl Munn, another neighbor and Watson's brother-in-law. (R. p. 329, lines 2–12). Watson then went in Munn's house. (R. p. 329, lines 14–15). Inside he saw Appellant on the couch drinking a beer and watching wrestling. (R. p. 329, lines 14–16). Scott tried to get Appellant off the couch and told him "you better get your story straight because we got a dead man in the front yard. We got to get our story straight before we call the law." (R. p. 329, lines 14–

18). Everyone then went outside, and Scott told Watson, if he was asked, to tell the cops that all he heard was arguing and a gunshot. (R. p. 329, line 23–p. 330, line 2).

Watson then went back to his place and waited on the police. (R. p. 330, lines 3–8). Police arrived about twenty minutes later. (R. p. 330, lines 9–11). When the police first talked to Watson, he told them exactly what Scott had told him to say. (R. p. 330, line–p. 331, line 2). However, after the police took Appellant away, Watson asked one of the officers to meet him down the road at Waffle House. (R. p. 331, lines 4–11). There, he told Investigator William Hester and another officer what really happened. (R. p. 331, lines 12–17).

Scott's testimony about the evening of September 24th differed from Watson's testimony. Scott testified that she had just dropped her grandson off at his home when she received a call from Appellant that caused her to rush home. (R. p. 253, line 4–p. 254, line 4). Scott saw Watson at some point and asked him to get the gun for her. (R. p. 255, lines 8–12). She went to Munn's where Appellant had told her he was headed. (R. p. 254, line 25–p. 255, line 4). While Appellant was at Munn's house, Watson put the gun in the bed of Scott's truck. (R. p. 255, line 23–p. 256, line 14). Scott and Appellant then got in her truck to go home. (R. p. 256, lines 15–21). Scott testified that she called 9-1-1 as soon as they got in the truck. (R. p. 256, lines 15–18). Scott testified that she did not remember telling Appellant to get his story straight and that she did not tell Watson what to tell the police. (R. p. 256, line 22–p. 257, line 11).

When Scott and Appellant got home, she took the gun into the house and laid it on her bed. (R. p. 258, lines 1–4). Scott checked on Victim at the 9-1-1 operator's

direction but found no signs of life. (R. p. 258, line 20–p. 259, line 2). Scott testified that it only took police about three minutes to get there. (R. p. 259, lines 3–5).

Police Arrive

Investigator Rollins Rhodes, the first police officer on the scene, arrived and found Victim laying on the ground near the driver's side doorway of his van. (R. p. 162, lines 5–13). Appellant was sitting on the porch. (R. p. 162, lines 13–18). Rhodes asked Appellant who did the shooting, and Appellant responded, "I did." (R. p. 163, lines 14–20). Rhodes then handcuffed Appellant. (R. p. 163, line 21).

Once other police officers arrived at the scene, Appellant was given his *Miranda* warnings, and he made statements to police. (R. p. 167, line 18–p. 173, line 11). Appellant told Deputy Michael Gifford that Victim had come to his house uninvited and unannounced and that they had a verbal altercation. (R. p. 169, lines 2–6). Gifford testified that Appellant told him that Victim approached him with something in his hand and that he then shot Victim. (R. p. 169, line 6–p. 170, line 11). Appellant told Gifford that after he shot Victim, he threw the cartridge casing in a burn pile, put the gun inside, went to a friend's house, and called his wife. (R. p. 171, line 8–p. 172, line 3). Gifford noticed the smell of alcohol on Appellant's breath but noted that Appellant did not seem to have any problem answering Gifford's questions. (R. p. 172, line 22–p. 173, line 8).

Appellant also gave a statement to Investigator William Hester. (R. p. 191, line 21–p. 203, line 16). Appellant described the phone calls he had gotten from Appellant when he was on his way home from hunting. (R. p. 195, line 15–p. 196, line 19). When Appellant arrived home, he realized he was locked out of his house, so he decided to sit on his porch, drink a beer, and wait for his wife to get home. (R. p. 196, line 20–p. 197,

line 2). Appellant told Hester that Victim pulled into his driveway, turned his van headlights off, and opened the door. (R. p. 198, line 20–p. 199, line 2). Appellant told Victim that he needed to leave, but Victim stepped out from behind the car door. (R. p. 199, lines 2–5). Appellant told Victim, "Steve if you take one more step, you know, I'm going to shoot you." (R. p. 199, lines 5–7). Victim took another step, and Appellant shot him. (R. p. 199, lines 7–8). Appellant told Hester that Victim was holding a screwdriver in his hand at the time. (R. p. 199, line 21–p. 200, line 4). Appellant told Hester that he heard Victim "say help me[,]" but Appellant did not go to help Victim. (R. p. 201, lines 15–20). Appellant told Hester that after he shot Victim, he put the gun in his home, took the cartridge out of the gun and dropped it in the burn pile, went to Carl Munn's house, and drank a few beers there before calling his wife. (R. p. 201, line 2–p. 202, line 13).

Larry Bruce testified that on the night of September 24, 2012, he got a couple of calls from Appellant asking him to come over to beat up Victim. (R. p. 266, line 18–p. 270, line 4). Larry Bruce refused. (R. p. 270, lines 4–7). The next day, Larry Bruce found out through Scott that Appellant had shot Victim. (R. p. 270, lines 8–12). Scott also told Larry Bruce that she was in "trouble" because she had "put a knife in his hand and [she was] worried about the DNA coming back matching [her]." (R. p. 270, lines 14–21). Scott told Larry Bruce that there was a screwdriver in Victim's hand, and she replaced it with a knife.[3] (R. p. 270, line 24–p. 271, line 3).

Police collected a red and black screwdriver five to seven feet from Victim's body and a silver lock-back hinge knife about a foot from Victim's hand. (R. p. 184, line 8–p. 187, line 15; R. p. 204, lines 6–23). Victim's body was located approximately seventeen

[3] Scott denied telling Larry Bruce such things. (R. p. 259, line 15–p. 261, line 6).

feet from the porch. (R. p. 189, line 17–p. 190, line 4). Though officers searched the burn pile, they were not able to locate the shell casing. (R. p. 188, lines 2–21).

ARGUMENT

I.

The pretrial court did not err in denying Appellant's motion for immunity under the Protection of Persons and Property Act because the court found Appellant did not meet his burden of proof.

Introduction

The statutory scheme under which Appellant sought pretrial immunity is the Protection of Persons and Property Act (the Act or Stand Your Ground), S.C. Code Ann. § 16-11-410 (2006) *et seq.* The Act provides, "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 . . . ." S.C. Code Ann. § 16-11-420(A) (2006). The South Carolina Supreme Court has concluded "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." *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). In this case, the pretrial court did not abuse its discretion in denying Petitioner's request for immunity because the denial was based on a proper interpretation of the statute and on factual findings, which were supported by the evidence presented. The pretrial court denied immunity based on two separate findings—first, that Appellant was not being attacked at the time he shot Victim and, second, that Appellant did not have a reasonable fear of death or great bodily injury when he shot Victim.

How the Issue Was Raised

Three witnesses testified at the pretrial hearing—Michael Bruce, Scott, and Appellant. (R. pp. 7–85). Michael Bruce testified about the phone calls between

Appellant and Victim that night. (R. p. 10, line 7–p. 16, line 19). On direct examination Scott testified about what she did when she found out Victim had been shot. (R. p. 21, line 16–p. 25, line 1). On cross-examination she testified regarding her history with Victim. (R. p. 25, line 8–p. 29, line 13). Scott also testified that Appellant told her that he and Victim had gotten into a verbal argument and that he had shot Victim. (R. p. 30, line 10–p. 32, line 8).

Appellant also testified at the hearing about the events of September 24, 2012. Appellant testified that on the phone that night Victim threatened to beat him. (R. p. 56, line 17–p. 57, line 13). Appellant testified that he was waiting on his porch for his wife to get home when he saw Victim's white van come down the road. (R. p. 58, line 13–p. 59, line 25). According to Appellant, Victim pulled in Appellant's yard—only five to eight feet from Appellant. (R. p. 60, lines 2–11). Appellant testified to the following:

> He had his headlights on and he jumps out of the van. He cuts the van off and jumps out of the van and goes to cussing me and stuff about what I was going to do and what I was going to tell my wife and all this, and I was like, man, I thought we was friends, you know. Why are you doing this? Oh, this, that and the other and all this here, and I—I was like, man, the best thing for you to do is—and we'll talk about it later, is get back in your van and please leave. Several times I asked him to please leave . . . .
>
> . . . .
>
> Then he got more or less outrageous about it I reckon because I—I didn't want nothing to do with the situation though he was getting mad with me because I told him I didn't care what happened between them, you know. I didn't want nothing to do with the situation that they was having.
>
> . . . .
>
> He kept getting more irate and irate and irate, and he was standing there with his hand on the door and then eventually he said—I said the

best thing for you to do is leave and he said no. He said better than me telling you, he says, I'll show you. And I was like, man—

. . . .

And then like, man, you know, go on and just leave me alone, you know, and he said, no, just because you've got that gun laying in your lap, you think I'm f'ing scared of you. He said I'll take it and wrap it around your f'ing neck. And I said, Steve, you know, we're supposed to be friends. Come on now, you know, it ain't got to go to this, and then he come around the door at—you know, in a—what I would say in a threatening way.

. . . .

I just picked the gun up, pointed it at him, and pulled the trigger.

(R. p. 60, line 13–p. 62, line 16). Appellant testified that he believed Victim was five feet from him when he fired the shot. (R. p. 62, lines 22–24).

On cross-examination, Appellant testified that Victim came "around the door in a lunge." (R. p. 72, lines 12–16). Appellant testified that he did not see a weapon and that it was dark. (R. p. 72, lines 6–11). Appellant also testified that Victim was not running but was swinging his arms "how people are when they're angry." (R. p. 74, lines 16–23). Appellant affirmed that he was a convicted felon. (R. p. 80, line 20–p. 82, line 14).

At the conclusion of the testimony, Judge King heard argument from both sides. Defense counsel argued that the Act was applicable. (R. p. 85). Defense counsel indicated that he was specifically seeking immunity under S.C. Code Ann. § 16-11-440(c)—not S.C. Code Ann. § 16-11-440(a). (R. pp. 85–86). When the court questioned whether Appellant was attacked, as required by the statute, defense counsel articulated his position "that this defense was done in an effort to prevent a violent crime from occurring." (R. p. 86). Defense counsel further argued that it was not necessary that someone seeking immunity under the Act "be assaulted and to any particular degree

before you can defend yourself. If there is a reasonable expectation that a violent crime is about to occur, this statute by my interpretation affords protection to any reasonable force that is extended." (R. p. 87).

In response, the State first pointed out that Appellant was a convicted felon, and therefore, it was unlawful for him to possess a firearm, and thus, he was not engaged in lawful activity when he shot Victim. (R. pp. 87–88). As to the issue of whether Appellant was being attacked when he shot Victim, the State noted,

> Mr. Scott said he came at him. He said he didn't see any weapons. He said he didn't—well, he said he couldn't tell, but he certainly didn't affirmatively see any weapons. He said that Mr. Springs was standing back from him and was coming towards him, but he said he wasn't running. He just said he was moving quickly. He said he was flinging his arms, but certainly the right to meet force with force, no force had been exerted at this point and certainly deadly force was then exerted by Mr. Scott. So that would be the State's position on the application of subsection (c).

(R. pp. 88–89).

Defense counsel disagreed that Appellant was in unlawful possession of a weapon, arguing that someone can be acting lawfully even if in unlawful possession of a weapon because he can arm himself in self-defense under state law. (R. pp. 89–91). Defense counsel also again argued that the legislature intended "attack" to encompass assault and did not necessarily require a battery. (R. pp. 91–94).

The State again argued that Appellant was in unlawful possession of the weapon and that Victim's actions that night did not constitute an attack. (R. pp. 94–96). He then summarized the State's position, stating,

> I would argue that kind of three points, the first being unlawful activity; next, that he was not attacked; and lastly, that even if you somehow say he was attacked, he was not in—he, by his own testimony, was not in fear of

death or great bodily injury. He was merely in fear that he was about to be attacked by a man who had no weapons.

(R. pp. 96–97).

After taking some time to review the cases that both sides had handed up during argument, the court ruled as follows:

> Scott had already through his attorney already indicated that he is not relying on subsection (a) granting him a presumption of reasonable fear or imminent peril or death entitling him to use deadly force because there's no evidence that there was anyone in the process of unlawfully or forcefully entering a dwelling or a residence. And so subparagraph (a) of the statute does not apply.
>
> Rather, according to Scott's own argument, he is relying on section—subsection (c), which states as follows: a person who is not engaged in unlawful activity or 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.
>
> That being the case and relying on that statute, there are three things that I think that the person asserting the right to the immunity must prove by the greater weight or preponderance of the evidence. First, that a—he's not a person who is engaged in an unlawful activity; second, who is attacked in another place where he has a right to be; and third, reasonably believes it necessary to prevent death or bodily injury to himself or another.
>
> The State contends that he was engaged in an unlawful activity, i.e. the possession of a weapon because he was a convicted felon, and relies upon the federal law which prohibits a convicted felon from being in possession of any kind of a firearm. The defendant contends unconvincingly that that is federal law and not what the statute meant to apply or not meant that that statute should not apply. I disagree with that. I think if it's an unlawful activity, it's an unlawful activity, whether it's a violation of a state statute or a federal law.
>
> But it is not necessary for this Court to reach a decision on whether the unlawful activity in this case, that is the possession of the violent—of the weapon, precludes the defendant from asserting the immunity under the Stand Your Ground law. I've reviewed Slater and Burris, and I'm

making no finding with regard as to whether the unlawful activity, i.e. the possession of the weapon, precludes him from raising the unlawful—or raising the immunity granted by the Stand Your Ground Act or any other defenses that he might have in this case.

In my view, the defendant does not meet the second prong of—of subparagraph (c), that he be attacked. Had the legislature meant a threat of attack or an assault, accompanied or unaccompanied by a battery, it very clearly could have said so.

It is the duty of this Court to give to the acts passed by the General Assembly their plain and unequivocal meaning and to me attacked means a physical contact attack. As I said, the legislature could have used the term assault and battery. It could have used the term a threat of assault, but it did not, or threat of attack. It did not. It used the word who is attacked. And in my view, the defendant has not met that prong of the requirement of subparagraph (c).

Furthermore, Scott has not proven by the greater weight or a preponderance of the evidence that he could reasonably believe that he was in fear of death or great bodily injury. The testimony is clearly—the only testimony in the record is that the victim in this case was unarmed, that he came—he was behind the door of the vehicle originally. He came no closer than four or five feet to an armed man who was sitting there with a weapon in his lap at least. In my view, the testimony of reasonable fear is simply not credible.

For those reasons, the Court denies the motion under the Stand Your Ground Act and finds that the defendant is not entitled to immunity granted by that Act.

(R. p. 106, line 8–p. 109, line 3).

Standard of Review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [an appellate 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) (citing *Duncan*, 392 S.C. 404, 709 S.E.2d 662). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 570,

647 S.E.2d 144, 166–67 (2008) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Analysis

In *State v. Curry*, our Supreme Court clarified that the Act does not require a trial court to accept a defendant's version of the underlying facts. 406 S.C. at 371, 752 S.E.2d at 266. Rather, "[c]onsistent 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. This includes all elements of self-defense, save the duty to retreat." *Id.* The four elements required by law to establish self-defense are as follows:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. at 371 n.4, 752 S.E.2d at 266 n.4.

The pretrial court did not have the benefit of the Supreme Court's decision in *Curry* at the time it denied Appellant's motion for immunity as *Curry* was decided a few months after the pretrial hearing. Nevertheless, the court's analysis is consistent with the procedure our Supreme Court set forth both in *Curry* and in previous cases dealing with the Act. The pretrial court denied Appellant's immunity for two separate reasons—first,

because Appellant was not being attacked at the time he shot Victim, and second, because Appellant's testimony regarding his "reasonable fear" was not credible.

Appellant Was Not Being Attacked

The pretrial court interpreted the word "attack" in the Act to require some sort of physical contact, rejecting the idea that the term encompassed a mere assault or threat of an attack. "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Duncan*, 392 S.C. at 408, 709 S.E.2d at 664 (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). The verb "attack" means "to act violently against (someone or something): to try to hurt, injure, or destroy (something or someone)" according to Merriam-Webster's definition. *Attack Definition*, Merriam-Webster, http://merriam-webster.com/dictionary/attack (last visited Mar. 6, 2015). The pretrial court's interpretation of the word "attack" is consistent with the ordinary meaning of that word. The pretrial court further found that Appellant's description of Victim's acts prior to the shooting did not constitute an attack based on the pretrial court's understanding of that term. Respondent submits that the pretrial court did not abuse its discretion in denying immunity on that basis because the record supports the pretrial court's findings and because the court's decision was not based on an error of law.

Testimony of "Reasonable Fear" Was Not Credible

However, even if this Court finds that the term "attack" is ambiguous and further determines that the pretrial court abused its discretion in denying immunity on that basis, Appellant is still not entitled to relief because the pretrial court denied Appellant's immunity on a separate, alternate ground. In particular, the pretrial court concluded that

Appellant had not met his burden of showing by a preponderance of the evidence that he was reasonably in fear of death or great bodily injury when he shot Victim. As outlined above, this is clearly a relevant inquiry as established by *Curry*. And the record supports the pretrial court's determination. The pretrial court noted that the testimony was that Victim was unarmed (and that Appellant did not see any weapons in Victim's hands though he noticed Victim's hands were "swinging . . . . how people are when they're angry[,]" (R. p. 74, lines 11–24)) and that Victim came toward Appellant, who was armed with a rifle, and got no closer than four or five feet from Appellant before Appellant shot him. (R. p. 108, lines 17–25). The pretrial court further concluded that Appellant's testimony as to his "reasonable fear" was "not credible." (R. p. 108, lines 24–25). *See State v. Douglas*, Appellate Case No. 2013-000148, 2014 WL 7273646, *3 (S.C. Ct. App. Dec. 23, 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."), *rehearing denied* Feb. 19, 2015. The pretrial court's ruling could go to either the second or third prong of self-defense depending on how one interprets it—presumably, the pretrial court found that Appellant's testimony that he was in "fear" was not credible, and thus, the second prong was not satisfied, but the pretrial court's ruling could also mean that the court found that the "fear" Appellant claimed to have felt when he shot Victim was not reasonable, and thus the third prong was not satisfied.[4] Either way, based on the pretrial court's factual findings, Appellant was not entitled to

[4] Again, the pretrial court did not have the benefit of *Curry* where the Supreme Court clearly announced that a court must necessarily consider the prongs of self-defense in an immunity determination.

immunity. Furthermore, those factual findings were supported by the record. Accordingly, the pretrial court did not abuse its discretion.

II.

The trial court did not err in failing to charge language from the Protection of Persons and Property Act as no request was made to charge such language and such a charge would have been improper under South Carolina law.

Introduction

Appellant asserts that the trial court erred in failing to charge the statutory language of the Act. This issue has not been preserved. However, even if this issue had been properly preserved, Appellant is not entitled to relief because our Supreme Court has directed that a charge of the statutory language of the Act is not proper.

How the Issue Was Raised at Trial

Appellant submitted eight requests to charge: (1) burden of proving self-defense, (2) appearances to defendant, (3) appearances – perspective of defendant, (4) words and hostile acts,[5] (5) burden of proving self defense, (6) defendant not required to make best choice, (7) duty to retreat, and (8) reputation of good character. (R. p. 462). None of these requests included specific language from the Protection of Persons and Property Act. (R. p. 462).

The trial court brought up the Act during the charge conference:

> THE COURT: And I assume both sides will agree that I will not charge any part of the immunity statute that's a pretrial defense. It is not a jury issue.
>
> MR. GROVE: I might disagree, but I do agree that that is the law. I might disagree with the principle of it, but obviously being such a relatively new statute it is a pretrial matter. We had a pretrial hearing that obviously being here, that pretrial hearing was denied. The only case law I was able to find about the castle doctrine or the protection against person

[5] The numbering on the requests to charge is off because there were two requests entitled "Defendant's Request to Charge #3." (*See* R. p. 462).

and property act being submitted to a jury were cases that might have otherwise fallen under the statute, but predated the issuance of the statute. Again, there's not much case law out there nothing is directly on point, but I will concede we [sic] been heard on that matter.

THE COURT: As a practical matter, the codified common law on self defense is still in the jury charge. The juries [sic] just not told anything about the specific content of the statute.

MR. GROVE: Certainly.

(R. p. 355, line 8–p. 356, line 2).

Consistent with its indication during the trial conference, the trial court charged the jury on the principles of self-defense, including "that if the defendant is on his own premises, the defendant has no duty to retreat before acting in self defense." (R. p. 410, lines 9–11). The court later recharged the portion of its instructions that dealt with self-defense at the jury's request. (R. p. 420, line 14–p. 427, line 3; R. p. 471). The court also clarified some of its self-defense instructions for the jury after they asked specific questions regarding self-defense. (R. p. 427, line 6–p. 437, line 10; R. p. 473).

Standard of Review

As this Court has stated, "[t]he trial court is required to charge the correct law applicable to the case. When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle." *State v. Marin*, 404 S.C. 615, 619–20, 745 S.E.2d 148, 151 (Ct. App. 2013) (citations omitted).

"'In reviewing jury charges for error, [appellate courts] must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial.'"

State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)).

"'To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Zeigler*, 364 S.C. 94, 105, 610 S.E.2d 859, 865 (Ct. App. 2005) (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).

Analysis

Jury Charge Issue Not Preserved for Appeal

As an initial matter, Respondent asserts that the issue Appellant now raises has not been properly preserved. It is a well-settled rule in this state that an issue is not preserved for appellate review unless it is both presented to and passed upon by the trial judge. *See, e.g., State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting that an argument must be raised and ruled upon by a trial court to be preserved for appellate review); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court."). None of Appellant's requests to charge included a request that the trial court charge specific language from the Act. Also, when the trial court broached the subject of charging language from the Act and indicated its understanding that the Act was only for a pretrial immunity determination and not an appropriate jury charge, defense counsel conceded that was the case, stating, "I do agree

that that is the law." (R. p. 355, lines 8–12). Respondent fails to see how this issue has been properly preserved in light of these facts. Appellant abandoned this issue at trial.

The Act Is Not a Proper Jury Charge

Appellant asserts that the trial court "should have charged the jury on 16-11-440(C) as an affirmative defense since immunity was denied." (Final Br. of Appellant, p. 23). However, *State v. Curry* directly contradicts that notion—*Curry* states, "the trial court had denied Appellant immunity, and section 16-11-440(C) should not have been charged to the jury." 406 S.C. at 373, 752 S.E.2d at 267. Though Appellant attempts to distinguish the instant case from *Curry* because in this case immunity was determined pretrial and a different judge presided over the pretrial hearing than presided over trial (and in *Curry* the request for immunity was not made pretrial but was made at the directed verdict stage, thus the same judge determined both issues), Respondent sees no reason for such a distinction. *Curry* establishes that when immunity is denied, a charge on § 16-11-440(C) is not proper. The opinion by Justice Pleicones, concurring in part and dissenting in part, makes this principle even more clear:

> I agree with the majority that the Protection of Persons and Property Act (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. I therefore agree that appellant was not entitled to a jury charge on the presumption created by S.C. Code Ann. § 16-11-440(C) (Supp. 2012).

Id. at 375, 268. Justice Pleicones further described the Stand Your Ground charge given in addition to the common law self-defense charge as "hopelessly confusing." *Id.* Here, too, a charge of the statutory language of § 16-11-440(C) in addition to the common law self-defense charge would have been confusing to the jury. And the trial court properly

declined to so charge the jury though it did not have the Supreme Court's clear directive from *Curry* as a guide.[6]

[6] Even if this Court disagrees, Respondent submits that the substance of the trial court's jury charge is substantially correct and properly covers the law. (R. p. 394, line 14–p. 415, line 12). As such, Appellant is not entitled to reversal.

CONCLUSION

For all the foregoing reasons, Respondent respectfully asserts that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully Submitted,

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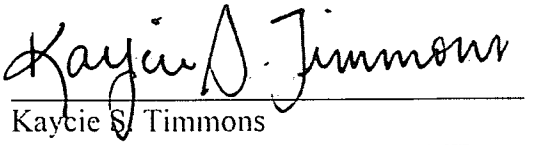

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THE STATE,

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APPELLANT,

Appellate Case No. 2013-002365.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record at:

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

This twentieth day of April, 2015.

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