

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to from Florence County

George C. James, Jr. Circuit Court Judge

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

THE STATE,

RESPONDENT,

V.

WAYNE ALBEON SCOTT, JR.,

PETITIONER,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- I. Whether the Court of Appeals erred in affirming the trial court's refusal to grant Petitioner 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 Petitioner was at his own home; the victim was on Petitioner's property although he had been asked not to come; Petitioner asked the victim to leave; and the victim continued to advance?
- II. Whether the Court of Appeals erred in affirming the trial court not charging the jury on S.C. Code Section 16-11-410 when standing his ground was a valid defense, which the jury should have been able to consider in their deliberations, in conjunction with self-defense which the trial judge had emphasized was a valid defense?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON CERTIORARI

- I. Whether the pretrial court erred in denying immunity under the Protection of Persons and Property Act where the court found Petitioner did not meet its burden of proof.
- II. Whether the Court of Appeals properly found the issue was procedurally barred when the trial court did not charge language from the Protection of Persons and Property Act where no request was made to charge such language and the trial court did not err where immunity had been denied.

RESPONDENT'S STATEMENT OF THE CASE

A Florence County Grand Jury indicted Petitioner, 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).

Petitioner 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 Petitioner was entitled to immunity. (R. pp. 1–110). Petitioner was represented by Assistant Public Defender

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

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 Petitioner, 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, Petitioner’s case was called to trial before the Honorable George C. James. (R. p. 111). Petitioner 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 Petitioner 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, Petitioner served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on November 4, 2013. (R. p. 460 – 461). On November 12, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. *State v. Scott*, Op. No. 2015-UP-513 (Ct. App. filed November 15, 2015). App.p. 1-3. Petitioner made a timely petition for rehearing. App.p. 4-11. On December 16, 2015, the Court of Appeals denied the petition for rehearing. App.p. 12.

The Petition for Writ of Certiorari was filed on January 14, 2016. This return follows.

RESPONDENT’S STATEMENT OF THE FACTS

Tensions Rise

Victim worked as a heating and air repairman for Petitioner’s wife’s company, and, prior to June 2012, he would come to Petitioner’s house to pick up his check every

week from Petitioner'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 (Petitioner'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 ashamed [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 “[Petitioner] 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, Petitioner went hunting with Michael Bruce² 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 Petitioner on the phone arguing and cussing. (R. p. 231, line 21–p. 234, line 8). Michael Bruce drove Petitioner home that night, and according to Bruce’s testimony, Petitioner 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

² Both Larry Michael Bruce and Larry Michael Bruce, II, testified at Petitioner’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.

14–20). At some point, Michael Bruce took the phone from Petitioner and ended the call, but the man on the other line called back. (R. p. 235, lines 1–13). Petitioner and Michael Bruce had a couple beers on the way home. (R. p. 236, lines 2–9). By the time Michael Bruce dropped Petitioner off at his house that night, Petitioner had hung up the phone, but Petitioner 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 Petitioner 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 [Petitioner] 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 [Petitioner] back.

(R. p. 307, lines 19–25). According to Hanna, Petitioner threatened to “beat [Victim’s] mother[,]” and Victim responded that he did not want to fight Petitioner. (R. p. 308, lines 8–19). Petitioner told Victim that he could meet him at Petitioner’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 Petitioner’s house and that he would see her when he left. (R. p. 309, lines 15–21).

Petitioner Shoots Victim

Petitioner’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 Petitioner in his backyard talking on a cell phone. (R. p. 321, lines 9–14). Watson heard

Petitioner say, "I shot him." (R. p. 321, line 15–16). Once Petitioner was off the phone, Watson called out to Petitioner and asked if that was him shooting a gun. (R. p. 321, lines 17–20). Petitioner responded yes and told Watson that the gun went off, and the bullet jammed in the gun. (R. p. 321, lines 20–22). Petitioner and Watson then walked to Watson's property line and started talking about hunting. (R. p. 322, lines 6–11). Petitioner confessed to Watson that he had shot Victim. (R. p. 322, lines 12–13). Watson did not believe Petitioner because he was acting totally normal. (R. p. 322, line 19–p. 323, line 3). Petitioner 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 Petitioner's house and saw Victim's van there with the door open and the cab light on, and he realized that Petitioner was telling the truth. (R. p. 323, lines 4–22).

Petitioner instructed Watson to put Victim's body in the van and take it down the road, but Watson refused, and Petitioner threatened him again. (R. p. 323, line 23–p. 324, line 4). Petitioner 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). Petitioner 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). Petitioner 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 Petitioner 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 Petitioner on the couch drinking a beer and watching wrestling. (R. p. 329, lines 14–16). Scott tried to get Petitioner 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 Petitioner 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 Petitioner 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 Petitioner had told her he was headed. (R. p. 254, line 25–p. 255, line 4). While Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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). Petitioner was sitting on the porch. (R. p. 162, lines 13–18). Rhodes asked Petitioner who did the shooting, and Petitioner responded, "I did." (R. p. 163, lines 14–20). Rhodes then handcuffed Petitioner. (R. p. 163, line 21).

Once other police officers arrived at the scene, Petitioner was given his *Miranda* warnings, and he made statements to police. (R. p. 167, line 18–p. 173, line 11). Petitioner 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 Petitioner 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). Petitioner 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 Petitioner’s breath but noted that Petitioner did not seem to have any problem answering Gifford’s questions. (R. p. 172, line 22–p. 173, line 8).

Petitioner also gave a statement to Investigator William Hester. (R. p. 191, line 21–p. 203, line 16). Petitioner described the phone calls he had gotten from Petitioner when he was on his way home from hunting. (R. p. 195, line 15–p. 196, line 19). When Petitioner 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). Petitioner 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). Petitioner told Victim that he needed to leave, but Victim stepped out from behind the car door. (R. p. 199, lines 2–5). Petitioner 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 Petitioner shot him. (R. p. 199, lines 7–8). Petitioner told Hester that Victim was holding a screwdriver in his hand at the time. (R. p. 199, line 21–p. 200, line 4). Petitioner told Hester that he heard Victim “say help me[,]” but Petitioner did not go to help Victim. (R. p. 201, lines

15–20). Petitioner 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 Petitioner 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 Petitioner 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 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.

Certiorari is not warranted where the Court of Appeals summarily found the pretrial court did not err in denying Petitioner’s motion for immunity under the Protection of Persons and Property Act because the court found Petitioner did not meet his burden of proof.

Introduction

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

The statutory scheme under which Petitioner 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 Petitioner was not being attacked at the time he shot Victim and, second, that Petitioner 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 Petitioner. (R. pp. 7–85). Michael Bruce testified about the phone calls between Petitioner 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 Petitioner 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).

Petitioner also testified at the hearing about the events of September 24, 2012. Petitioner testified that on the phone that night Victim threatened to beat him. (R. p. 56, line 17–p. 57, line 13). Petitioner 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 Petitioner, Victim pulled in Petitioner’s yard—only five to eight feet from Petitioner. (R. p. 60, lines 2–11). Petitioner 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). Petitioner testified that he believed Victim was five feet from him when he fired the shot. (R. p. 62, lines 22–24).

On cross-examination, Petitioner testified that Victim came “around the door in a lunge.” (R. p. 72, lines 12–16). Petitioner testified that he did not see a weapon and that it was dark. (R. p. 72, lines 6–11). Petitioner 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). Petitioner 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 Petitioner 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).

⁶
In response, the State first pointed out that Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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).

In summarily denying relief, the Court of Appeals found:

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.”).

App.p. 2.

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 Petitioner's motion for immunity as *Curry* was decided a few months after the pretrial hearing. Nevertheless, the trial 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 Petitioner's immunity for two separate reasons—first, because Petitioner was not being attacked at the time he shot Victim, and second, because Petitioner's testimony regarding his "reasonable fear" was not credible.

Petitioner 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 Petitioner'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, Petitioner is still not entitled to relief because the pretrial court denied Petitioner's immunity on a separate, alternate ground. In particular, the pretrial court concluded that Petitioner 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 Petitioner 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 Petitioner, who was armed with a rifle, and got no closer than four or five feet from Petitioner before Petitioner shot him. (R. p. 108, lines 17–25). The pretrial court further concluded that Petitioner's testimony as to his "reasonable fear" was "not credible." (R. p. 108, lines 24–25). *See State v. Douglas*, 411 S.C. 307,316, 768 S.E.2d 232 (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."), cert. granted November 5,

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 Petitioner’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” Petitioner 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, Petitioner was not entitled to immunity. Furthermore, those factual findings were supported by the record. Accordingly, the pretrial court did not abuse its discretion. The Court of Appeals assessment does not require this Court’s reconsideration on certiorari.

II.

Certiorari is not warranted where the Court of Appeals reasonably held the issue is procedurally barred on whether 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

Petitioner asserts that the trial court erred in failing to charge the statutory language of the Act. As properly found by the Court of Appeals, this issue has not been preserved. App.p. 2. However, even if this issue had been properly preserved, Petitioner 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

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.

Petitioner 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 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) (emphasis added).

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,

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).

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).

In denying the Appeal, the Court of Appeals summarily addressed the issue as follows:

2. As to whether the trial court erred in 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.”).

App.p. 2.

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 where no written request was made.

As an initial matter, the Court of Appeals summarily found that the issue Petitioner now raises has not been properly preserved. App.p. 2. 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 Petitioner’s requests to charge included a request that the trial court charge specific language from the Act.⁶ 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

⁶ As stated above, Scott submitted eight written requests to charge: (1) burden of proving self-defense, (2) appearances to defendant, (3) appearances – perspective of defendant, (4) words and hostile acts, (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. 462-468). None of these requests included any specific language from the Protection of Persons and Property Act. (R. pp. 462-468).

issue has been properly preserved in light of these facts. Petitioner abandoned this issue at trial.

The Petitioner now asserts that the judge ruled on the issue by not charging it. However, he did not expressly request a similar charge in the charge conference or object to the exclusion of the charge at trial R. pp. 355, 415-416.

The Act's Immunity Language Is Not a Proper Jury Charge and the Jury was Properly Instructed on Self-defense.

Petitioner asserts that the trial court “should have charged the jury on 16-11-440(C) as an affirmative defense since immunity was denied.” (Petition for Writ of Certiorari, p. 23). However, *State v. Curry* directly contradicts that notion—*Curry* states, “the trial court had denied Petitioner 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 Petitioner 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.⁷

CONCLUSION

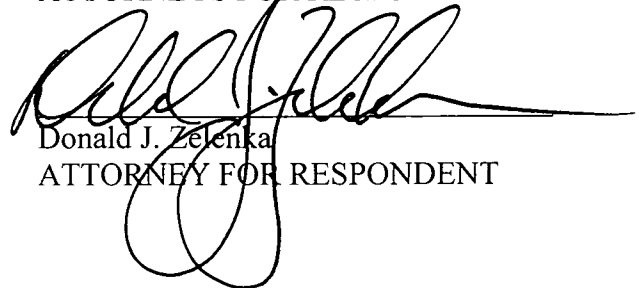
For all the foregoing reasons, Respondent respectfully asserts that certiorari should be denied.

Respectfully Submitted,

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February 16, 2016
Columbia, South Carolina

⁷ 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, Petitioner is not entitled to reversal.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE ALBEON SCOTT, JR.,

PETITIONER,

Appellate Case No. 2015-00391

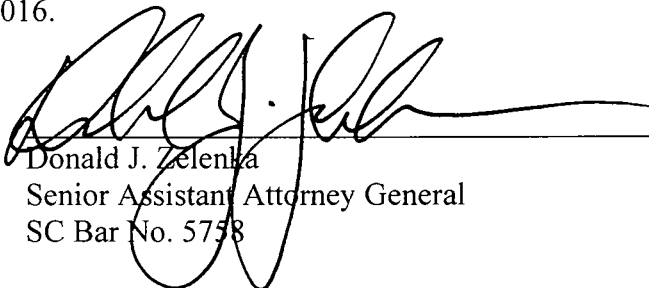
PROOF OF SERVICE

I, Donald J. Zelenka, counsel for Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record at:

LaNelle Cantey Durant
Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

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

This 16th day of February, 2016.


Donald J. Zelenka
Senior Assistant Attorney General
SC Bar No. 5758