ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

APPELLANT

APPELLATE CASE NO. 2014-001404

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENTS IN REPLY

1. The lower court erred in denying Appellant's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act.

In addressing Section (A) of the Act in the order denying immunity from prosecution, the judge failed to address the fact that the Act provides that a person is presumed to have a reasonable fear of imminent peril or death or great bodily when using deadly force against another person if the person against whom the deadly force is used **removes or is attempting to remove another person against his will from an occupied vehicle**. Instead, the judge relied solely on the portion of the statute providing the presumption of reasonable fear if the person against whom the deadly force is used is in the process of unlawfully and forcibly entering or has unlawfully and forcibly entered an occupied vehicle. In the order the judge wrote:

> It is clear to the Court from the evidence presented that the case at hand is not covered by the{sic]this portion of the Act. The facts presented do not show that at the time of the shooting Carlos was unlawfully or forcibly entering or had entered, Oates' vehicle. Carlos was walking away from Oates' tow truck at the time Oates got out of the vehicle and shot Carlos. Statements from witnesses as well as the video of the incident support these findings

(R. p. 235, Order Denying Immunity R. p. 239).

The statute, however, provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, **or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; 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 §16-11-440(A) (emphasis added).

As argued in the brief of appellant, the evidence established that the deceased, Carlos Olivera, during the argument with Appellant in which he was demanding that Appellant release his booted vehicle, either brandished or displayed a weapon while Appellant sat in the cab of his tow truck. On the night of the incident Nelson Olivera told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (Nov. 17, 2011, R. p. 27, lines 1-6; R. p. 500, Court's Exhibit #12, Supplemental Incident Report). Investigator Biens testified that Nelson Olivera, the brother of the deceased, provided a written statement on the night of the incident indicating, "My brother pull his gun and toll (sic) him to release the car." (Nov. 17, 2011, R. p. 34, lines 15-16). Nelson Olivera also stated in the written statement given the night of the incident, "The guy said $400, then when the guy saw my brother with the gun in hand, the guy handed the keys and said, 'Do it. Unlock the padlock.'" (Nov. 17, 2011, R. p. 34, lines 20-23).

When Nelson Olivera was unable to remove the boot, Appellant told officers:

> And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 285, Transcript of 12/24/10 Oates interview, R. p. 304, lines 1-7; State's Exhibit #16, interview CD to be transported to the Court). When Nelson Olivera was unable to remove the boot with the keys and tool, the next step was for Carlos Olivera to force Appellant out of his truck and force him to remove the boot. At the time Carlos Olivera was shot by Appellant, Carlos was either attempting to remove Appellant against his will from his tow truck or had forcibly removed

Appellant from the tow truck in order to force Appellant to remove the boot. Pursuant to the statute it does not matter that Carlos Olivera may have been walking away from Appellant when he was shot because Carlos Olivera was either in the process of forcing Appellant from his tow truck or had forced him out to remove the boot when Appellant shot him. Carlos Olivera was still armed. Appellant is entitled to the presumption of having a reasonable fear of imminent peril or death or great bodily injury to himself when he used deadly force and shot Olivera provided by S.C. Code §16-11-440(A) because the deceased was either attempting to remove Appellant or had forcibly removed Appellant from his tow truck. The judge erred in failing to address this portion of the statute.

The State argues, "Likewise, as Victim was moving toward his minivan with his back turned to Appellant, Victim was not attempting to remove Appellant from his vehicle against his will, and the circuit court judge specifically found Appellant's version of events in which he claimed to have been ordered from the tow truck to be less credible that the other testimony and evidence presented during the pre-trial hearing." (Initial Brief of Respondent p. 29). The judge however, simply failed to address the relevant portion of the statute dealing with removing or attempting to remove another person from their occupied vehicle and instead simply addressed the portion dealing with forcefully and unlawfully **entering** the vehicle. The fact that Carlos Olivera, armed with a gun in his waistband, was walking back to his minivan to check and see if his brother had been unable to remove the boot, does not indicate that Carlos Olivera had not attempted or succeeded in forcing Appellant from the cab of his tow truck in order to force him to remove the boot.

During the motion to reconsider the denial of immunity the judge stated, "Now, arguably he gave him the key voluntarily without threat of being – without any threat of being armed or anything else." (March 13, 2012 pretrial hearing R. p. 267, lines 21-23). The judge's statement is

unsupported by the record and ignores the statements of the deceased's brother, Nelson Olivera, who confirmed that the deceased pulled a gun during the argument with Appellant. The only witness to testify that Appellant "gave the keys and tool to the Olivera brothers was Claudia Olivera, Nelson Olivera's wife. In her written statement she said, "I looked and my husband was coming with the key, and I said, he gave you the keys? My husband said, yes, he is going to give us back the car; and I said, thank God." (R. p. 497, Court's Exhibit #10 from Pre-trial Hearing). Appellant surrendered the keys only after Carlos Olivera flexed his shirt, displayed his weapon and asked, "Think that you going to scare me?" (R. p. 493, Court's Exhibit #9 from pre-trial hearing, R. p. 494). The judge erred in failing to address in his written order the portion of the statute that provides that a person is presumed to have reasonable fear when using deadly force to another person if the person against whom the deadly force is used removes or is attempting to remove another person against his will from an occupied vehicle. Appellant was entitled to the presumption of S.C. Code §16-11-440(A). The record does not support a finding that Appellant voluntarily gave the key and tool to the Olivera brothers.

In addressing Section (C) of the Act in the order denying immunity from prosecution, the judge wrote:

> Assuming that there was an 'attack' previously, there was no such event at the time of the shooting. In short, there was no force to be met. Carlos was walking away from Oates when he was shot five times in the back and once in the side. Other evidence presented supports the Court's finding that the argument had ended at the time Oates fired the fatal shots. The Court will not interpret the language of the statute to mean that a person may shoot and kill another when a perceived attack has ended.

(R. p. 235, Order Denying Immunity R. p. 240). As discussed in the brief of appellant, the record does not support the judge's conclusion that the attack had ended.

S.C. Code §16-11-440(C) provides:

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

At the time of the shooting the Olivera brothers still had keys and a tool belonging to Appellant. The minivan belonging to Carlos Olivera was still demobilized by the boot. Carlos Olivera was not simply walking away from Appellant when he was shot. As discussed above, at the time Carlos Olivera was shot, he was attempting to force Appellant out of his tow truck in order to force Appellant to unlock the boot and release the minivan. Appellant was entitled to immunity pursuant to §16-11-440(C) because at the time of the shooting Appellant was in a place where he had a right to be, as found by Judge Dennis in his order (R. p. 235, Order Denying Immunity R. p. 237), and Appellant had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force because he reasonably believed that it was necessary to prevent death or great bodily injury. This is not a situation where Carlos Olivera had given up on trying to convince Appellant not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. Carlos Olivera was determined to prevent his van from being towed and threatened Appellant with a gun. Appellant stood his ground and met force with force, as provided by the statute The record does not support the trial judge's finding that the conflict had ended at the time Carlos was shot. The judge erred in refusing to grant Appellant immunity from prosecution pursuant to §16-11-440(C).

2. The lower court erred in refusing to direct a verdict of acquittal when the State failed to disprove that Appellant acted in self defense.

Without conceding any issue in regard to the immunity argument above, as an alternative argument, Appellant was entitled to a direct verdict of acquittal because the State failed to disprove self-defense. As discussed above, the record does not support the conclusion that the assault upon appellant had ended at the time of the shooting. The State argues that the deceased, Carlos Olivera, "communicated his withdrawal from any conflict he had been engaged in with Appellant by taking the actions of securing his weapon in his waistband, turning his back to Appellant, and walking away, and Victim was simply directing traffic with his back turned to Appellant when he was shot and killed." (Brief of Respondent pp, 38-39). The State's argument ignores the fact that the Olivera brothers still had the key and tool belonging to Appellant and were still trying to unboot the minivan. The deceased, pursuant to his brother's statement, was not simply directing traffic but was walking back to his minivan to check and see if his brother had been unable to remove the boot. The deceased had not withdrawn from the conflict. Instead, the conflict had halted momentarily because the Olivera brothers thought they had forced appellant to release the minivan. This is not a situation where Carlos Olivera had given up on trying to convince Appellant not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. Carlos Olivera was determined to prevent his van from being towed and threatened Appellant with a gun.

There are four elements required by law to establish a case of self-defense: 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. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)

Appellant was without fault in bringing on the difficulty. As noted by the lower court in the order denying immunity, Appellant, a tow truck operator working in the Edgefield neighborhood in Beaufort County, located an illegally parked car belonging to Carlos Olivera. Appellant placed a boot on the vehicle in preparation to tow. The Olivera brothers confronted Appellant and an argument ensued. By his own brother's statement, Carlos Olivera brandished a weapon. Appellant was without fault in bringing on the difficulty. Appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Appellant and the Olivera brothers were involved in a heated argument. Appellant was outnumbered, Carlos Olivera had brandished a pistol and there was talk of another person going to get a shotgun. . (R. p. 285, Transcript of 12/24/10 Oates interview, R. p. 292, lines 16-23; State's Exhibit #16, interview CD to be transported to Court). Nelson Olivera testified that as he was talking with Appellant, who was inside the cab of his tow truck, he heard a ratchet like noise and then heard his brother state, "Nobody's going to take my car." (R. p. 635, line 17 – p. 636, lines 1-4). Appellant's fear was reasonable under the circumstances. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of

self-defense." State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)).

As to the duty to retreat, "A defendant is not required to retreat if he has "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 [the] particular instance." State v. Wiggins, 330 S.C. at 545, 500 S.E.2d at 493 (1998). If, after relinquishing the keys to Nelson Olivera, Appellant had driven off in his tow truck with the minivan still demobilized by the boot, he risked being shot and killed by Carlos Olivera who he knew was armed, or by others who may have retrieved a shotgun. Carlos Olivera told Appellant he would kill him if he did not unhook the minivan. (Nov. 17, 2011, R. p. 80, line 23 – p. 79, lines 1-8; State's Exhibit #1, CD of 911 tape to be transported to the Court). The State failed to disprove that Appellant had no other probable means of avoiding the danger. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to disprove that Appellant acted in self defense.

3. The lower court erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter.

The State originally indicted Appellant for voluntary manslaughter, indictment #2011-GS-07-120. (R. p. 1108). The State later indicted Appellant for murder, indictment #2014-GS-07-00359. Appellant proceeded to jury trial for the charges of murder and possession of a weapon during the commission of a violent crime. At the close of the case the State requested a charge on the lesser included offense of voluntary manslaughter. (June 2014, R. p. 904, lines 7-9). The State argued that Appellant's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire collectively constitute sudden heat of passion. (June 2014, R. p. 914, lines

5- p. 915, lines 1-25). Appellant objected citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). (June 2014, R. pp 916 – 924). The judge overruled the objection and charged the jury with the lesser included offense of voluntary manslaughter. ((June 2014, R. p. 924, lines 12-16; p. 1006, line 4 – p. 1007, lines 1-20). Appellant renewed the objection at the close of the charge. (June 2014, R. p. 1014, lines 19-21).

The jury returned a verdict of guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The State nolle prossed indictment #2011-GS-07-120 for voluntary manslaughter. The judge erred in charging the jury with lesser included charge of voluntary manslaughter when there was no evidence of the element of heat of passion required for voluntary manslaughter and the evidence presented at trial indicated that Appellant either acted with malice or acted in self defense.

The State, in seeming contradiction to the arguments made in issues one and two in regard to the argument ending, now argues that, ". . . .Appellant's immediate response to Victim's provocative act was to become fearful and arm himself with a pistol and Appellant then suddenly and **repeatedly** shot Victim **in the back** in the 'heat of the moment' in a manner he personally described as instinctual or reactionary, which supported a conclusion his actions were the product of a heat of passion and an uncontrollable impulse to do violence as opposed to the product of cool, deliberate thought." (Brief of Respondent p. 48, emphasis in the original). According to the deceased's brother, Nelson Olivera, however, the shooting did **not** take place immediately after the deceased brandished a pistol, chambered a round and announced, "Nobody's going to take my car." Instead, according to Nelson Olivera, when the deceased brandished the pistol, Nelson Olivera told him to put it away and the deceased returned the pistol to his waistband. (R. p. 623, lines 1-23; R. p. 635, line 17 – p. 636, lines 1-8). Then, Nelson Olivera continued his discussion

with Appellant who was inside the cab of his tow truck moving papers with keys in his hands. (R. p. 623, line 24, p. 624, lines 1-4). Nelson Olivera then testified:

> With a set of key. And he just was moving them like that. And I say, what is that; the keys for the device? And I thought in mind, well, this gentleman, he don't talk hick, I don't know. But give me the keys, I told him, you know, I can release it. And he say, okay, here. And he handed the keys to me. At that moment I thought in my mind, everything is okay. He's a gentleman. He understood it's Christmas Eve. And so I say, Carlos, look, I got the keys. And I don't remember. But I went over to the – my brother's minivan and I tried to unlock the device.

(R. p. 624, lines 5-15).

In Appellant's statement to police he said:

> ...From training, I ...you know... assess your situation, learn your distances, learn your ...I got attacked at knife point when I was in Istanbul back in October so ... I 've been through anti ... classes, all that stuff ...so I'm stalling to regain my composure, get my surroundings ...I was looking at his line of sight, my line of sight, how many people, look around at my mirrors, just stalling, buying time. So I had my keys and the actual lock tool that holds the boot onto the vehicle. And I've got my hand...I'm kind of fumbling, and I drop my keys and I said oh I'm sorry ...just...un momento, por favor...un momento por favor...one moment please... and pick the keys back up and I drop them again and I was...I'm sorry, I'm sorry, I'm scared...I'm sorry...I'm scared...I'm sorry, just one minute. I kept kind of freaking out a little bit fumbling my keys around.

(December 24, 2010 R. p. 298, line 16 – p. 299, lines 1-8). Appellant then told officers that one of the men grabbed the keys that had no relation to the boot. Appellant admitted that he had been using the keys as a distraction. (December 24, 2010 R. p. 299, lines 10-15). Appellant's acts of stalling to regain his composure and using the keys as a distraction prior to the shooting support that he made a calculated decision to shoot in self defense. These actions support that Appellant was not acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

Appellant additionally told officers:

> Yeah, I've been in this business a long time. So now I'm really nervous. I knew I had my Glock in the glove box. His friend was on the way to retrieve a shotgun and I heard a pistol ratchet already, so I figured It'd be ... since it was my right to retreed [sic]...I really couldn't retreed, [sic] I had a guy standing on my truck, so said you know, let me step back into conservation mode. So I said, no, no, no, paperwork...and I pulled my metal ledger out which I keep all my tow tickets in. So I pulled it up and flip it open and I say see look and I just ...and I open up my glove box where my Glock was. And I knew I had my insurance paperwork and just some whatever random
>
> So by doing that, I was able to pick up both my holstered weapon and my papers in one and sit it right on my lap. And I said see look, this Acura, this Mazda, this Ford, this ...no...none of your car, I have not towed it yet...If I tow it, then yes, paperwork. But no like tavaho...don't like to work...(makes a sound)...like that...just trying to relax him, trying to stall and buy time again.

(December 24, 2010, R. p. 300, line 15 – p. 301, lines 1-11). Appellant then described how he kept the gun hidden but managed to unholster it. ((December 24, 2010 R. p. 302, line 7 – p. 303, lines 1-23). Appellant described how one of the men opened the door to the truck and demanded that Appellant take the boot off the van as the man pulled his weapon. (December 24, 2010 R. p. 304, lines 2-15). Appellant told officers, "And I was backing out, and I looked and my line of sight was through him straight down to the ground. It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or, if he knew I didn't have any paperwork on his vehicle and ...ah, bye, bye Preston...regardless, he was in motion, he was in draw and I reacted. I know...I remember the very fist shot. I caught him on the left side." ((December 24, 2010 R. p. 306, line 22 – p. 307, lines 1-7). These are either the actions of a man acting in self defense or with malice. These are not the actions of a man acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

In a later interview Appellant told officers, "And when his elbow come up like that, I saw the gun come out of his pants, that's when I said, I'm gonna die... " (December 27, 2010, R. p. 400,

lines 8-14). He also told officers, " At an angle, yeah ...cause I remember he had the gun in his right hand and I don't know why I thought this, but I said okay...if he's got the gun in his right hand, disable his right hand." (December 27, 2010, R. p. 402, lines 13-16). Appellant made a calculated decision to try and disable the armed man. This is not an action of sudden heat of passion. Appellant described the fourth shot as panic fire. (December 27, 2010, R. p. 412, lines 15-18). Appellant told officers, "When we made eye contact and his body was turning toward me, it was fight or flight, I just closed my eyes and squeezed the trigger." (December 27, 2010, R. p. 412, lines 20-22). These statements do not support sudden heat of passion. Instead, the statements reflect a decision to shoot in self defense. There was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an uncontrollable impulse to do violence. See State v. Niles, 412 S.C. 515, 525, 772 S.E.2d 877, 882 (2015). The trial judge erred in charging the jury with voluntary manslaughter.

In State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000) the South Carolina Supreme Court found that the trial judge erred in charging voluntary manslaughter because there was no evidence of sufficient legal provocation. In Cooley the Court wrote:

> Since the jury heard no evidence of legal provocation, Defendant's voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict. As such, it is fair to assume that at least one member of the jury may have believed the State's position that Defendant murdered Victim by shooting her with a shotgun in the face at close range. However, due to the error in granting the solicitor's request for a voluntary manslaughter charge, Defendant will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for solicitors as to the pitfalls of requesting a potential "compromise" charge which is unsupported by the evidence.

State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000). The trial judge in the present case erred in granting the State's request for a voluntary manslaughter charge because there was no

evidence of sudden heat of passion. See Cook v. State, No. 2013-000366, 2015 WL 8349232 (S.C. Dec. 9, 2015) (Petition for Rehearing filed December 22, 2015).

CONCLUSION

Based on the argument presented in issue one, this court should find that appellant was immune from prosecution pursuant to the Protection of Persons and Property Act. Alternatively, based on issue two, this court should reverse the convictions as Appellant acted in self defense. As a third alternative, based on issue three, this Court should reverse the convictions and sentences.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT.

This 16th day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply 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."

May 16th, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2016.

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