STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001810

THE STATE, ...RESPONDENT

v.

MARQUEZ DEVON GLENN, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly found Appellant was not entitled to immunity from criminal prosecution under the Protection of Persons and Property Act where he failed to carry his burden of proving by a preponderance of the evidence that he was "in another place he had a right to be" when he shot Victim three times, because: (1) he was on the apartment complex's "no trespass" list due to his family being evicted from their apartment in 2010, (2) he had been being given a verbal trespass notice by police officers prior to the shooting; and (3) the resident who invited him to her apartment on the night of the shooting had previously entered into a contract with the managers of the complex whereby she specifically agreed she could not invite any person onto the property or into her unit who is listed on the site's trespass list.

   A. If, regardless of whether Appellant could be held criminally liable for trespass on the night of the shooting, the trial court properly found he was not in a place he had a right to be because he was on the apartment complex's "no trespass" list, he had been being given a verbal trespass notice by police officers, and he could not attain the status of a lawful guest or licensee where the resident who invited him to her apartment had previously entered into a contract with the apartment complex prohibiting her from extending that invitation.

   B. Whether Appellant's argument that the express language of section 16-11-620 of the Code implies an intent requirement for criminal trespass through creation of a "good excuse" exception is preserved for appellate review where it was neither raised to nor ruled upon by the trial court, and, if preserved, whether the argument is irrelevant where Appellant was not charged with or convicted of criminal trespass and where the tenant had contracted away her right to invite Appellant to her apartment.

   C. Whether Appellant's argument that section 16-11-410's invocation of location rights refers to relative rights versus an attacker and does not contemplate an individual's forfeiture of protections during lawful egress from a posted property is preserved for appellate review where it was neither raised to nor ruled upon by the trial court, and if preserved, whether the trial court's broad interpretation of the restrictive language from the Act is entirely consistent with the protections afforded by the Act in the context of an individual's right to self-defense.

2. Whether Appellant's argument that section 16-11-620 of the Code in conjunction with a no trespass list is in violation of the United States Housing Act and HUD's implementing regulations is preserved for appellate review where it was neither raised to nor ruled upon by the trial court, and if preserved, whether it is without merit because the 2010 model lease consisted of forms that appear to have been approved by HUD.

3. Whether Appellant's argument that the use of a non-specific allegation of loitering as a basis for a summary adjudication of a trespass violation on a public housing project property is unconstitutionally vague is preserved for appellate review where it was neither raised to nor ruled upon by the trial court, and if preserved, whether the argument lacks merit because Appellant was already on the no trespass list due to his previous eviction at the time he was given the verbal trespass notice by the police for loitering, and because he was never adjudicated guilty for a trespass violation.

4. Whether Appellant's argument that the use of a three year old trespass notice as a bar to statutory immunity under the Act deprives him of his right to due process of law is preserved for appellate review where it was neither raised to nor ruled upon by the trial court, and even if preserved, whether the argument lacks merit where Appellant was never charged with or found guilty of criminal trespass.

STATEMENT OF THE CASE

Marquez D. Glenn (Appellant) was indicted at the July 2014 term of the grand jury for Greenville County for attempted murder (count 1) and possession of a weapon during the commission of a violent crime (count 2) (2013-GS-23-006789). He was represented by Christopher Brumback, Esquire, and Spencer Langley, Esquire, and Respondent (the State) was represented by assistant solicitor Ryan Holloway of the Thirteenth Circuit Solicitor's Office. On August 3, 2015, the case was called for trial at the Greenville County Courthouse before the Honorable John C. Hayes, III. (Tr.p.1). At the call of the case, Appellant made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2012) (the Act). After the parties argued their respective positions, the jury was qualified and selected. Prior to the jury being sworn, the trial court conducted a pretrial immunity hearing pursuant to the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). At the close of that hearing, after taking testimony, observing evidence, and hearing additional arguments from both sides, the trial court found Appellant had failed to establish he was entitled to immunity under the Act because, at the time of the shooting, he was not in a place he had a right to be. The trial court denied Appellant's motion to dismiss the charges and the case proceeded to trial. (Tr.p.13-p.222).

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Appellant guilty beyond a reasonable doubt of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. Citing mitigating circumstances, the trial court sentenced Appellant to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. (Tr.p.493-p.497; p.526-p.527;

Sentencing Sheets). Appellant filed a notice of intent to appeal the denial of his motion for immunity and his conviction, and he subsequently filed a brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On April 12, 2013, during an altercation in the parking lot of a Greenville apartment complex, Appellant pulled a gun from the pocket of his shorts and shot Elfonso Bruster (Victim) three times, which resulted in Victim being paralyzed from the waist down. Although Appellant spoke to a responding officer shortly after the shooting, he did not give that officer the gun during the conversation. Instead, he concealed the gun and later threw it in the Reedy River. It was never recovered by the police. (Tr.p.150-p.184; p.202, lines 8-15; p.203-p.210). Appellant was subsequently charged with attempted murder and possession of a weapon during the commission of a violent crime. He was later indicted by the Greenville County grand jury and was taken to trial in August of 2015.

Pretrial Immunity Hearing: Preliminary Arguments

When the case was called for trial, the trial court noted Appellant had submitted a pretrial motion for immunity from prosecution under the Act, or what the judge noted was commonly called the "stand-your-ground law." The trial judge said he had reviewed Appellant's written memorandum in support of the motion and asked for preliminary arguments from the parties. (Tr.p.13-p.14).

Appellant contended the evidence presented at the immunity hearing would establish beyond a preponderance of the evidence that all of the requirements for statutory immunity in his case were met. He argued there was not much dispute about the facts of the case and that his arguments centered on a disagreement about the law as it applies to those facts. In particular, he

claimed there were two legal issues in dispute. First, Appellant argued that regardless of whether he was under a trespass notice from the apartment complex, he was attacked in a place he was lawfully permitted to be because he was an invited social guest of a tenant of the complex, and as such, he had a license to reasonably ingress and egress the apartment in order to effectuate his visit to that tenant, and that license overrode any objection of the landlord. Second, Appellant argued that although he was admittedly engaged in an unlawful activity by carrying an unpermitted concealed weapon, this did not preclude him from lawfully arming himself in self-defense, and therefore would not preclude immunity under the Act. (Tr.p.14-p.16).

In regard to Appellant's first point, the State responded by arguing that under the plain language in the Act Appellant had no right to stand his ground because he simply had no right to be at the apartment complex in the first place. In support of this argument the solicitor handed up copies of eviction paperwork from April 2010, a model lease for the complex from 2010, and a model lease for the complex from 2014. He outlined what he expected certain witnesses would say about those documents in regard to Appellant being subject to a no trespass notice for the apartment complex. The solicitor noted the model lease agreements included a provision stating that a current tenant cannot invite into an apartment a guest who would violate state or local laws, and that this lease provision effectively limits the scope of a tenant's authority to delegate a right of entry to a guest. In regard to Appellant's second point, the State argued Appellant was not acting lawfully because he armed himself before entering the properly rather than arming himself at the moment in time he perceived a threat. (Tr.p.16-p.20; Court's Exhibit No. 1 – Rule to Vacate; Court's Exhibit No. 2 – Model Lease-2014; & Court's Exhibit No. 3 – Model Lease-2010).

Under questioning from the trial judge, the parties continued to advance their respective positions on the two issues raised by Appellant. Relying on case law from Massachusetts and a non-binding opinion issued by the South Carolina Attorney General's Office, Appellant argued a landlord gives up certain property rights when he or she leases property to a tenant, including the right to prohibit a person placed on trespass notice from entering the property at the invitation of the tenant. He contended that if he could not be considered a trespasser, "the State's entire argument about him not being lawfully permitted to be there is void." (Tr.p.21-p.26). The solicitor countered that the tenant's rights are not unlimited and could be in fact be limited by the terms of the lease the tenant signs. He read from particular paragraphs of the 2010 model lease, which the trial court found "would be the operable one in 2013," (Tr.p.28, lines 16-17), specifically noting the lease provided "a resident may not invite any person on the property or into a unit who's listed on the site's trespass list" and "residents may not share their property with anyone who's not on the lease."[1] The State argued Appellant's restriction against being at the apartment complex would be "more of a breach of contract issue" rather than what Appellant was claiming to be a pure question about the right of a tenant to invite guests when those guests are under a no trespass notice. (Tr.p.26-p.30).

In making his final pitch before calling witnesses, Appellant did not dispute he was under a no trespass notice from the apartment complex at the time of the shooting, and he did not dispute the fact that the standard lease terms for all tenants in the apartment complex prohibited

[1] Notably, Appellant did not object to or otherwise challenge these findings of fact by the trial judge, instead arguing that the tenant's right to invite individual social guests to her apartment trumped the apartment complex's right to control access to the property by way of either trespass notice or terms of the lease. In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. Parker , 391 S.C. at 611-12, 707 S.E.2d at 801. Thus, this Court is bound by the factual findings of the circuit court in regard to the applicability of the 2010 model lease.

them from inviting a person on the property or into a unit who is listed on the site's trespass list. Instead, he opined: "I simply don't think that the landlord has the right to tell someone that they cannot invite someone to an apartment." Thus, Appellant maintained the tenant's right to invite guests to his or her apartment is an absolute right which is not subject to restriction, even if that restriction is part of a contract. (Tr.p.30-33).

Pretrial Immunity Hearing: Testimony

After jury qualification and selection, and pursuant to the procedures set forth in State v. Duncan, Appellant presented testimony to the trial court in an effort to persuade the judge he should be granted immunity under the Act. First, Appellant called his brother, Tivarius Henderson (Tivarius), to the stand. Tivarius testified that on the evening of April 12, 2013, he was sitting at home with Appellant, Jamar [a/k/a Jamarus] Smith (Jamar), and his father, John Henderson (John),[2] when he got a call from Shelricka Duncan (Shelricka) asking if they all wanted to come to her apartment and "chill." He said they accepted the invitation and were later at Shelricka's playing cards when Shelricka's friend Derisha asked Appellant if he would drive with her to the store. Tivarius said that after Appellant and Derisha left, Kevin Bruster (Kevin) suddenly came busting in the door of the apartment, threw a beer can, started yelling that he was going to kill Shericka's mother, and went towards the room where she was sleeping. He said that when Shelricka tried to stop Kevin, Kevin hit her. Tivarius claimed he then got up from the table, grabbed Kevin, and tried to get him out the door, but Kevin pulled out a razor blade and sliced his face. Tivarius said Jamar and John then joined in his efforts and helped him get Kevin out of the apartment. (Tr.p.59-p.62).

[2] Although the Transcript indicates Tivarius testified his father's name was John "Anderson," Appellant subsequently testified their father's name was John "Henderson," which is likely more accurate considering Henderson is the same last name shared by Appellant and Tivarius. (Tr.p.151, line 1).

Tivarius testified that after the altercation in Shericka's apartment, he briefly went to his grandmother's house but returned to Shelricka's apartment just as Appellant and Derisha were coming back from the store. Tivarius said he told Appellant about the incident with Kevin in part because his grandmother had asked him to go get Appellant to make sure nobody tried to hurt him. Tivarius testified Appellant stated he was going to walk to Tivarius' grandmother's house, which was in "the next court over" at the complex, when an officer pulled up and asked if anybody was fighting. Tivarius told the officer "no" and shortly after the officer pulled away, Victim and his Kevin showed up. He claimed he had just gotten back in the car while Appellant started to walk to his grandmother's house, when he saw some individuals coming around the corner of the building. Tivarius backed up and turned on his high beams and recognized the individuals as Victim and Kevin. (Tr.p.62-p.63).

Tivarius testified that Kevin made a comment to Victim that "you said we was gonna get one of these N-word in this car, if not all of them," and then Kevin hit Appellant, knocking a drink out of Appellant's hand and into his face. He claimed he saw Victim reaching under his shirt, and then saw a gun in Victim's hand, so he jumped out of his car and pushed Victim. He claimed Appellant was wiping the spilled drink out of his eyes when Tivarius heard a female voice say "gun." Tivarius testified he saw Victim drawing his weapon again and that he looked like he was going to shoot Appellant, when Appellant pulled out a gun and shot Victim first. He said Jamar and John were in the back of the car when the shooting took place, and that he had no idea Appellant had a gun with him. Tivarius described Victim and Kevin as "hostile" when they initially approached and claimed Victim said: "who jumped my mother fucking uncle?" (Tr.p.63-p.66). Tivarius proceeded to point out specific locations where these events took place in the Spring Grove Apartment complex by using an aerial photograph which was subsequently

introduced into evidence by the State. (State's Exhibit No. 3 – Aerial Photo; Tr.p.66-p.71). The solicitor then cross-examined Tivarius about details from his story. (Tr.p.71-p.82). Tivarius repeated his statement that rather than merely leaving Shelricka's apartment, Appellant said he was going to walk to Tivarius' grandmother's house. (Tr.p.80, lines 1-9). Tivarius also acknowledged he was told Appellant threw the gun he used to shoot Victim, into the river. (Tr.p.82, lines 7-14).

Next, Appellant put Shelricka Duncan on the stand. She explained she knows Appellant, Tivarius, Jamar, and John because she is a friend of the family and that she knows Victim through her best friend Derisha. She testified she also knows Kevin because at the time of the incident he was her mom's boyfriend. Shelricka then testified as to the events of April 12, 2013, providing a similar story as the one given by Tivarius. She said she invited Appellant, Tivarius, Jamar, and John to her apartment that evening and that despite being under a no-trespass notice, Kevin showed up later. She said Kevin was drunk and angry at her mother, and had to be physically removed from the apartment. (Tr.p.84-p.92). Shelricka testified that about fifteen minutes after the initial altercation, she went outside and saw Appellant talking to the deputy. She said she walked towards Appellant after the deputy left and then saw Victim and Kevin approach. Shelricka said Kevin made a comment about wanting to "get somebody" and then hit Appellant, at which point she took off running. She testified she did not know Appellant had a gun and never saw anyone with a gun that evening. Shelricka described Kevin's demeanor as "amped" and Appellant's demeanor as "calm" before the incident. She testified she believed Kevin was the aggressor and that Appellant had no other option to avoid serious bodily injury than to shoot Victim. Shelricka said her invitation to Appellant to come over that evening included an invitation for him to return after going to the store with Derisha. She concluded her

testimony by describing the approximate height and weight of the four men involved in the shooting incident. (Tr.p.92-p.98). On cross-examination Shelricka confirmed she never saw Victim with a gun; however, she would not confirm she gave a statement to the police that suggested Appellant also had not seen a gun and instead simply assumed Victim had a gun when Victm reached for his waistband. (Tr.p.98-p.104).

Appellant then called Delni Nunez to the stand. Delni testified she knew all the parties involved and was hanging around outside at the apartment complex on the night of April 12, 2013, at the time of the shooting. She said she first heard Kevin yelling that somebody had "jumped him" and noticed he had blood on his shoes and a black eye. Delni said a few minutes later she saw Victim trying to speak to Appellant when Kevin suddenly hit Appellant in the face. She testified she turned her back, heard four gunshots, and then turned around again in time to see Victim lying on the ground. Delni testified Kevin and Victim were standing between Appellant and the parking lot so that he would have to pass by them to leave; however, Kevin and Victim were both "really calm" and she did not hear anything they said. She said only seconds passed between the punch and the gunshots. (Tr.p.106-p.112). On cross-examination, Delni emphasized Kevin was the person who attacked Appellant, not Victim, and that Victim did not make any threats to Appellant before the shooting. She testified she never saw Victim with a gun and never saw Victim move like he was going to draw a gun. (Tr.p.112-p.117).

Next, Appellant called Jamarus [a/k/a Jamar] Smith to the stand. He described Appellant and Tivarius as his "homeboys" and said he knew everyone involved in the two altercations that evening besides Kevin. Jamar first described the incident at Shelricka's apartment on the night of April 12, 2013, repeating the story previously told by Tivarius and Shelricka. He then described the altercation that ended in the shooting. Jamar said he was standing beside Appellant

when Kevin and Victim approached from behind the building. He claimed everybody in the neighborhood knows Victim "keeps a gun." Jamar testified Kevin said "we gonna get one of these N's in this white car," which he believed meant Kevin intended to either fight or kill him, Appellant, and Tivarius. He said Kevin then hit Appellant, knocking liquor out of his hand and into his eye. Jamar said he then noticed Appellant reaching for something and heard three shots. He claimed he did not know Appellant had a gun and that it all happened very fast. (Tr.p.119-p.127). On cross-examination Jamar testified he never saw Victim with a gun but saw him reaching under his shirt and figured he had a gun. (Tr.p.127-p.132).

Appellant then called his grandmother, Terry Glenn, to the stand. She testified she moved into the Spring Grove apartment complex in December of 2012. Ms. Glenn testified that before she moved she asked the apartment manager if Appellant was on the no trespass list and was told he was not. (Tr.p.134-p.137). Under cross-examination, Ms. Glenn could not explain why she would have asked the manager this question in the first place, and she then claimed she knew nothing about her own lease or whether it included a provision prohibiting her from inviting someone from the no trespass list to her apartment. (Tr.p.137-p.140). After denying Appellant's request to introduce a recorded audio statement from Kevin, Appellant took the stand to offer his own version of events.

Appellant testified that on the evening of April 12, 2013, he, Jamar, Tivarius, and John were invited to Shelricka's apartment to have drinks. After they arrived, he offered to drive Derisha to the store in her car because she was already intoxicated. Appellant said when they returned nobody was in the apartment, so he went outside where he saw two women named Kiana and Maria trying to flag him down from the apartment building across the street. He said as he walked over to talk to them, he was met by Jamar and they all filled him in on the events

that had happened while he was gone. Appellant claimed he set his bag down in Kiana's apartment and then saw Shelricka walking to the middle of the parking lot to talk to the officer, so he walked over as well. He said the officer asked if he had seen or knew anything about an earlier altercation and he explained he did not because he had just arrived. Appellant testified he then walked back to Kiana's apartment to get his bag and pay for a pizza she had ordered for him, while Tivarius finished talking to the officer. He said Tivarius then got in Appellant's car, backed it out of a parking space at Shelricka's apartment, and moved it closer to Kiana's apartment. (Tr.p.150-p.153).

Appellant testified that as he walked out of Kiana's apartment he was "greeted" by Victim and Kevin. He said Victim asked him what happened to his mother f'ing uncle and he responded that he did not know and had no part in it because he was gone to the store. Appellant testified Kevin then said to Vicitm: " . . . let's do what we said – what you just said we came to do. You said we gonna get one of these [n's] in this white Lincoln right here, we gonna get all these [n's] right here, so let's do what we came to do." (Tr.p.156, lines 2-6). He said Kevin then took a swing at him, which knocked him off balance and knocked a cup out of his hand, splashing alcohol into his eyes. Appellant testified he heard someone yell "gun" and when he finally wiped away the alcohol and regained his vision he saw Victim with a black handgun in his hand. He claimed approximately 45 seconds passed between being hit and hearing the word "gun", and that approximately 20 seconds passed between seeing Vicitm's gun and when he pulled out his own gun and shot Victim. Appellant testified he had no opportunity to avoid Kevin and Victim as he left Kiana's apartment because he had to walk past then to get to his car, and that if he could have avoided the assault he would have just left. (Tr.p.153-p.159).

Appellant admitted he was carrying a concealed weapon without a permit and claimed nobody knew he had it until he pulled it out and shot Victim. He noted that during the altercation Kevin was the one who was aggressive while Victim was just standing there as backup; however, when Victim started tussling with Tivarius, Appellant saw Victim holding a black gun so he pulled his own gun and shot Victim. Appellant claimed that after the shooting he told the responding officer he had shot Victim and that he was bleeding and needed help. (Tr.p.159-p.163). On cross-examination, Appellant claimed he did not know he was not allowed to carry a gun despite having a prior conviction for criminal domestic violence. He testified he bought the gun off the streets seven or eight months before the shooting and carried it everywhere with him. (Tr.p.163-p.178). On redirect, Appellant testified he was not holding or touching the gun during the altercation until he heard someone yell gun and that he immediately drew it and fired at Victm when he saw a gun in Victim's hand. (Tr.p.178-p.181).

Finally, Appellant called Kiana Grayson to the stand. She explained she was a friend of Appellant's and knew Kevin through Shelricka, but did not know Victim. Kiana testified that on the night of April 12, 2013, she was outside of her apartment when she saw Kevin drive up, park, go into Shelricka's apartment, and get pushed back out. She said she later saw the deputy talking to Appellant in the parking lot just before Kevin and Victim walked up. Kiana testified she saw Kevin hit Appellant, and then saw Appellant stumble back and start shooting. She described Kevin as angry. Kiana insisted that only seconds passed between Kevin's blow and when shots were fired. She testified that from her perspective, Appellant did not have any opportunity to avoid the attack and she believed Appellant's life was in jeopardy. (Tr.p.185-p.190). On cross-examination Kiana testified she did not see Victim with a gun and never saw him reaching for a gun. She also agreed that Kevin initiated the altercation, not Victim. (Tr.p.190-p.192). On re-

direct Kiana testified that when Kevin struck Appellant, both Kevin and Victim were moving towards Appellant and both were a threat. Finally, on re-cross Kiana testified she could not say Victim was attacking Appellant when he was shot. (Tr.p.192-p.193).

After Appellant completed presenting evidence in an attempt to establish statutory immunity, the State presented three witnesses in response, including Victim. First, Deputy Dorsy Lay of the Greenville County Sheriff's Office (GCSO) took the stand. He explained that in October of 2010 he was assigned to secondary employment at the Spring Grove Apartments where he and several other deputies were doing security detail. He said they worked for the management as far as enforcing some of the lease terms along with enforcing criminal laws under their regular jurisdiction. Deputy Lay testified that when issuing no trespass notices the deputies are acting as employees of the apartment complex, and that the notices just had to be verbal. He explained the GCSO records department keeps a database of people who have been placed on no trespass notices, and that there were several ways for an officer to confirm if a particular individual had been placed in that database, including calling records on the phone and providing the individual's name. Deputy Lay testified that in October of 2010 he made contact with a group of people congregating in a breezeway of an apartment building, including Appellant. He remembered Appellant was on a list of people whom had previously been evicted from the complex, so he and Deputy Jumper verbally placed him on trespass notice for loitering and not having a residence. Deputy Lay used Appellant's State issued ID along with a mobile mugshot on his in-car computer to verify the person he place on verbal trespass notice was in fact Appellant. (Tr.p.194-p.197).

Next, the State called GCSO Master Deputy Eric Whaley to the stand. Whaley explained he was working as a homicide investigator at the time of the shooting and although he did not

respond to the scene that night, he later interviewed several of the key witnesses as part of the overall investigation. He testified Tivarius, Appellant, and their father, John, all came to the law enforcement center to be interviewed. Whaley recounted the interview with Appellant, who said he was at the party, then went to the store and came back to learn there had been an altercation while he was gone. Appellant further claimed Kevin and Victim came back after the initial altercation, Kevin assaulted Appellant, Appellant was blinded by alcohol, and then Appellant pulled out a gun, fired three shots, jumped in his car, spoke to the police, and left. Whaley testified that while the officers who responded to the scene remembered talking to several people after the shooting, they did not remember if one of those people was Appellant. He said that whoever talked to those deputies did not say they had been the one who shot Victim because if they had, they would have been detained. Whaley testified that during the interview Appellant claimed the gun he used to shoot Victim was in the Reedy River. He said Appellant never came back to offer to help police try to find the gun. (Tr.p.199-p.202).

Finally, the State called the Victim, Elfonso Bruster, to the stand. He testified he was at the apartment complex visiting his kids on the night of April 12, 2013, and was standing in the breezeway when he heard his uncle Kevin calling his name. He said Kevin claimed someone had jumped on him and beat him down like a rag doll, and he asked Victim to come help get his moped back. Victim testified he agreed to walk towards Shelricka's apartment when they came upon Appellant, who he knew from the neighborhood. Victim said he asked Appellant what happened when suddenly Kevin punched Appellant. As Appellant was getting up off the ground, Victim saw him fumbling in his pocket. Victim testified Appellant then got up with a gun, yelled "die n-----" and started shooting. He said he hit the ground and while he was down Tivarius ran over and kicked him in the face. Victim testified he was shot in the arm and the

front of the chest and that as a result of the shooting he is paralyzed from the waist down. He testified he was not carrying a gun that night and he had no reason to carry a gun. (Tr.p.204-p.207). On cross-examination, Victim testified he did not go looking for trouble and that his only intention that night was to help Kevin get his moped back. (Tr.p.207-p.210).

Pretrial Immunity Hearing: Post-Evidentiary Arguments

At the conclusion of the pretrial immunity hearing, the trial court heard additional arguments from Appellant as to why he believed he was immune from prosecution under the Act, focusing on three particular issues. First, Appellant argued he had established by a preponderance of the evidence that was an invitee to the property that evening and that as a result, regardless of the existence of a trespass notice, he was lawfully permitted to be outside of the invited apartment for the purposes of ingress and egress, and that he was leaving the apartment to return to the vehicle and depart when the incident occurred. Second, he argued that even if he unlawfully had possession of a gun, he was nevertheless entitled to arm himself in self-defense at the time of the attack such that he would not be precluded from statutory immunity. Third, Appellant argued that because the gun was concealed and no one knew he was carrying it, it could not have had any relation to the escalation of the verbal confrontation or been the reason for the attack from Kevin and Victim. (Tr.p.210-p.212).

In response, the solicitor argued Appellant had failed to carry his burden of proving each of the three elements of self-defense which would be required to warrant statutory immunity. He noted the contradictory facts presented by Appellant's own witnesses and argued those witnesses simply were not credible. The trial judge asked the solicitor to focus on the statutory question of whether Appellant was in a place he had a right to be. The solicitor responded by arguing the eviction and the subsequent verbal no trespass notice given to Appellant by Deputy Lay meant

Appellant did not have a right to be at the apartment complex. He then continued to argue Appellant also had failed to sufficiently prove the elements of self-defense. (Tr.p.212-p.217).

In reply, Appellant argued the trespass notice he was given was no longer valid at the time of the incident because it was made when the complex was under prior ownership. He also repeated his argument that a lessee who invites a person to their apartment grants a license allowing reasonable ingress and egress to that apartment even though the person is under trespass notice. Appellant referenced the out of state cases and other authorities set out in his written pretrial motion, including a 2013 opinion issued by the South Carolina Attorney General's Office, and argued a person who rents a property has a right to invite persons to their premises even over the objection of a landlord. (Tr.p.217-p.220).

At the conclusion of the immunity hearing, the trial court ruled as follows:

> All right. Well, I'm reviewing this. And keep in mind that this ruling is solely for the purpose of this immunity motion and does not bear on any self-defense defense, but I deny the motion for immunity.
>
> I find that to follow the Defendant's logic and the logic of the Massachusetts' cases and the other literature in essence neuters trespass notices. I think a landlord has a right, if not the duty and obligation, to protect the safety of all the tenants of a project.
>
> I do not believe the rights of the tenant to have guests of their choice overrides the duty and right of the landlord to protect the entire community from having troublemakers, and that's generally what trespassers are, and I'm not saying that Mr. Glenn is a troublemaker, but that's generally where we find trespass, from having troublemakers on the property. This overriding duty trumps any particular rights that the tenant may have.
>
> In spite of the well articulated argument and the cases, I do not believe, at least under the South Carolina -- well, there is no real South Carolina law, but I do not believe that a landlord -- a tenant has unfettered rights. As the way of example, they can be told they can't have pets, they can be told they can't have a business, they can be told they can only have a certain number of occupants, they can be told that the occupants have to be relatives.

So I do not follow the logic of the Massachusetts cases that there are certain rights, and our Appellate Courts may determine different, that there are certain rights that exist and override the rights -- and, again, I think it's an obligation and a duty.

We have cases dealing not directly with this that indicate that owners of property have a duty to keep the people who come upon the property. There's a recent case dealing with the Harbison Community in -- it's not directly on point, but my point is that the property owner has an obligation and a duty to protect anyone that comes on the premises.

So I do not -- I find that the immunity argument fails solely on the issue of whether or not he had a right to be there. I find he did not.

As to any illegal activity, I believe this phrase addresses active illegal activity such as a drug deal, an assault, armed robbery. I believe passive activity, even if it allegedly does not come under the phrase, under this phrase, does not -- let me rephrase that. Passive activity such as Mr. Glenn's carrying an illegal weapon, I don't believe comes under the phrase illegal activity as envisioned by the Legislature. I think it has to be a more active illegal activity.

I find that Mr. Glenn's, and this, again, is solely for the purposes of this motion, Mr. Glenn's illegal activity or illegal act of having the pistol was not a proximate cause of the incident. So as to the two sort of prongs, I find that immunity fails based on his not having the right to be there, but that I do not find that he was engaged in an illegal activity, which would prevent him from -- from having immunity but for his not being allowed on the property.

So I find that he is not clothed with the immunity provided by section 16-11-440 and 450 because he was not at a place he had a lawful right to be at the time of the incident. So the motion is denied.

(Tr.p.220-p.222) (emphasis added). After addressing additional pretrial matters and conducting a Jackson v. Denno hearing, the case proceeded to trial.

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Appellant guilty beyond a reasonable doubt of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. Citing mitigating circumstances, the trial court sentenced

Appellant to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. (Tr.p.479-p.527).

ARGUMENT

I.

The trial court properly found Appellant was not entitled to immunity from criminal prosecution under the Protection of Persons and Property Act where he failed to carry his burden of proving by a preponderance of the evidence that he was "in another place he had a right to be" when he shot Victim three times, because: (1) he was on the apartment complex's "no trespass" list due to his family being evicted from their apartment in 2010, (2) he had been being given a verbal trespass notice by police officers prior to the shooting; and (3) the resident who invited him to her apartment on the night of the shooting had previously entered into a contract with the managers of the complex whereby she specifically agreed she could not invite any person onto the property or into her unit who is listed on the site's trespass list.

Appellant argues the trial court erred in failing to find he was immune from prosecution under the Act on the ground that he was not in a place he had a right to be. He contends that, even if he was in violation of a trespass notice for the apartment complex where the shooting took place, he was "in fact in a place where he had a right to be when he was forced to defend himself" because he was "an invitee reasonably egressing the residence to which he was invited at the time he was attacked." (Brief of Appellant, p.8).[3] Appellant argues that by failing to acknowledge that his status as an invitee conferred upon him the absolute right to be at the apartment complex, the trial court's ruling was an abuse of discretion and stands in direct opposition to the expressly stated legislative intent of the Act. He contends that absent this legal

[3] To the extent Appellant's argument hinges upon the claim, as explicitly stated in his argument heading, that he held the status of an "invitee" at the apartment complex, there is absolutely no evidence in the record to support such a claim and the entire argument should be denied and dismissed out-of-hand. See Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997) (explaining the difference between a licensee and an invitee and finding: "Goode was not a public invitee because an apartment complex is not a place held open to the public and is instead a private place only for people who are specifically invited.").

error, he is entitled to statutory immunity as a matter of law and asks that his convictions be vacated. The State disagrees with Appellant's argument as well as his prayer for relief on several grounds.

Standard of Review

This Court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. 364, 370,752 S.E.2d 263, 266 (2013). In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Scott, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

The Protection of Persons and Property Act

The subsection of the Act which creates immunity provides:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer . . . .

S.C. Code Ann. § 16-11-450 (Supp. 2012). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). 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. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[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.")

Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. It creates a presumption of reasonable fear of imminent peril of death or great bodily injury when a person is subject to an unlawful or forceful entry of his or her dwelling, residence, or occupied vehicle, or when a person is subject to removal or attempted removal against his or her will from a dwelling, residence, or occupied vehicle, and it establishes certain exceptions to this presumption. S.C. Code § 16-11-440(A) & (B) (Supp. 2012). The Act then provides:

> (C) 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.

S.C. Code Ann. § 16-11-440(C) (Supp. 2012) (emphasis added). As noted above, Appellant's overarching contention is that he was attacked in a place where he had a right to be, and that the trial court erred in finding he was not.

Improper Remedy

Initially, the State submits the relief sought by Appellant—that his convictions be vacated—is not a proper remedy under the circumstances of his case. The trial court found that Appellant's immunity argument failed "solely on the issue of whether or not he had a right to be there" and therefore, it specifically did not address whether Appellant had satisfied his burden of proving entitlement to immunity by a preponderance of the evidence. See Duncan, 392 S.C. at 411, 709 S.E.2d at 665 ("We hold that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence."). 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. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[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.").

Here, despite Appellant's claim that "it is clear that the trial court found that [Appellant] satisfied all other requirements for immunity" (Brief of Appellant, p.35), the trial court did no such thing. Indeed, the trial judge was so focused on the issue of whether Appellant was in a place he had a right to be pursuant to Section 16-11-440(C), that he asked the parties to limit

their arguments on the actual elements of self-defense. (Tr.p.210-p.220). The trial judge then specifically restricted his ruling to a finding that Appellant was not entitled to immunity because he was not in a place he had the right to be. The court did not rule on whether Appellant otherwise had demonstrated the elements of self-defense by a preponderance of the evidence. Appellant would only be entitled to statutory immunity "as a matter of law" if the trial court explicitly found he had proven the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. Curry, supra. Because no such findings were made, vacating Appellant's conviction would be an entirely inappropriate remedy. Instead, if this Court determines the trial court erred in finding Appellant was not in a place he had a right to be at the time of the incident, the only appropriate remedy would be to remand to the lower court with instructions to make findings as to whether Appellant carried his burden of proof as to each element of self-defense.

Discussion / Analysis

In Appellant's case, the trial court followed the appropriate procedure under rulings from this Court and our supreme court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Appellant did not carry his burden of proving he was entitled to immunity under the Act. Appellant's argument cannot prevail under this Court's standard of review. As in Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant's claim of self-defense presented a quintessential jury question, which is not a situation warranting immunity from prosecution. The trial court's finding that Appellant failed to carry his burden of proving he was in a place he had a right to be at the time the shots were fired has evidentiary support and is not controlled by an error of law. The case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having

to disprove at least one element of self-defense beyond a reasonable doubt. The trial judge's pretrial immunity ruling must be affirmed.

In support of his position, Appellant first argues the conclusion reached by the trial court was an abuse of discretion because the trial judge's broad interpretation of the statutory language was "in direct opposition to the expressly stated legislative intent of the [Act]." (Brief of Appellant, p.9). After artfully rendering a favorable version of the facts which led to the shooting,[4] Appellant argues the question before this Court is "fundamentally a determination of the scope of a bona fide individual's right to defend himself against attack." He references the legislative intent expressed in the language of Section 16-11-420(B) concerning the right of "law-abiding citizens to protect themselves" and "that no person or victim of crime should be required to surrender his personal safety to a criminal," and contends the Act is intended to extend the right to defend one's self to victims of crime "indiscriminate of where an attack may occur and without obligation to flee when attacked." (Brief of Appellant, p.10). Yet, the Legislature itself ensured the Act is not indiscriminate in this regard. Section 16-11-440(C) contains clear limitations, one of which provides that a person can stand his ground and meet force with force, including deadly force, only if he is attacked in a "place where he has a right to be." Generally, a specific statutory provision prevails over a more general one. Dreher v. S.C. Dep't of Health and Envtl. Control, 412 S.C. 244, 251, 772 S.E.2d 505, 509 (2015). Thus, the sweeping scope of the Act as propounded by Appellant must succumb to the more restrictive and specific provisions of the Act that were enacted by the Legislature.

[4] Appellant claims he was "unaware of the events that transpired in his absence" at the time of the shooting; however, Tivarius testified he told Appellant what happened and Appellant himself testified Kiana, Maria, and Jamar filled him in on the events that had happened while he was gone. Appellant also describes Kevin and Victim as "concealing themselves in the shadows and lying in wait" despite testimony that the two men walked up to Appellant in view of several other people. Finally, Appellant notes he "willingly cooperated with the police officers investigating the reports of the [earlier] assault perpetrated by Kevin" but fails to mention the fact that he disposed of the gun he later used to shoot Victim instead of giving it to the police. (Brief of Appellant, p.8).

The State submits the legislative intent to significantly restrict when a court may grant pretrial immunity for the use of deadly force is further supported when considered in the context the principles of self-defense upon which it is founded. Prosecutors are already imbued with broad discretion to decline to prosecute where they determine the circumstances of the case do not merit pursuit of criminal charges. Ex parte Littlefield, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000). Also, individuals may avail themselves of the common law Castle Doctrine and the common law defenses of habitation, of others, and self-defense in the event of a trial. Granting an individual immunity from prosecution rather than letting a jury determine whether the State has disproven self-defense beyond a reasonable doubt is an extreme result and should occur only in circumstances where a defendant has carried his burden of proof as to each and every aspect of the Act. Contrary to Appellant's assertion, any other result would be absurd and would lead to a society akin to the wild-wild-west, where an individual in an altercation can shoot first, and if he kills another person, attempt to justify his actions by giving self-serving facts which cannot be contested by the person who has been killed. Even where a person is in a place he has no right to be when attacked, he may still be able to rely on self-defense before the jury. Thus, a pretrial denial of immunity does not eliminate the presumption of innocence or the State's high burden of proof for a criminal conviction. Here, the trial court properly considered whether Appellant carried his burden of proving he was in a place he had a right to be in ruling on his request for immunity, and that ruling should be affirmed. See Duncan, 392 S.C. at 411, 709 S.E.2d at 665 (affirming the pretrial ruling on immunity because there was evidence to support the trial court's findings).

A.

Regardless of whether Appellant could be held criminally liable for trespass on the night of the shooting, the trial court properly found he was not in a place he had a right to be because he was on the apartment complex's "no trespass" list, he had been being given a verbal trespass notice by police officers, and he could not attain the status of a lawful guest or licensee where the resident who invited him to her apartment had previously entered into a contract with the apartment complex prohibiting her from extending that invitation.

After his generalized and largely unsupported reliance on the legislative intent behind the Act, Appellant moves on to the central tenet of his argument: that "[Appellant's] status as a guest and licensee of a resident of the apartment complex conferred on [Appellant] a license to ingress and egress through the common areas of the complex such that [Appellant], while reasonably exercising his license to egress, was 'in [a] place where he ha[d] a right to be' when he defended himself from an unprovoked attack." (Brief of Appellant, p.11). Appellant argues "the trial court's interpretation and application of S.C. Code Ann. § 16-11-620 resulting in the denial of immunity to [Appellant] under the [Act] constitutes clear error of law."

In making this argument, Appellant relies primarily upon an opinion issued by the South Carolina Attorney General's Office which, among other things, purported to answer the following question: "Does law enforcement have the authority to arrest someone for trespassing if it is determined that an apartment manager has had them placed on trespass notice?" 2013 WL 3133638 at 1 (S.C.A.G. June 5, 2013) (emphasis added). He contends the opinion is "on all fours with the central issue presented by this appeal" and that it "provides in-depth and persuasive analysis of the respective property rights of landlords and tenants in housing complexes and the ability of tenants to lawfully invite persons to a complex over objection of the landlord." (Brief of Appellant, p.12). Appellant further relies on two published opinions from Massachusetts, Commonwealth v. Richardson, 48 N.E.2d 678 (Mass. 1943) and Commonwealth

v. Nelson, 909 N.E.2d 42 (Mass. App. Ct. 2009), on which the South Carolina Attorney General's opinion is based, as well as published opinions from several other jurisdictions and law review articles discussing the propriety of public housing authorities having unwanted visitors arrested for trespassing. (Brief of Appellant, p.13-p.17). Next, Appellant claims the referenced the authorities cited "are consistent with those found in South Carolina [property] jurisprudence." (Brief of Appellant, p.18-p.21).

The State submits Appellant's argument fails for a number of reasons. First, he misconstrues the trial court's ruling in regard to criminal trespass. Nothing in the record suggests the trial court was making an "interpretation or application" of section 16-11-620 of the Code. In fact, the trial judge did not reference section 16-11-620 and never made a finding that Appellant should be held criminally guilty of trespass under the statute. Instead, the trial judge broadly interpreted the restrictive language from the Act to conclude Appellant was not in a place he had a right to be. The court referenced a recent case concerning a lawsuit which alleged an apartment complex was negligent in failing to providing adequate security to its tenants[5] and concluded the landlord's obligation to its tenants was superior to that of the tenant's rights to invite social guests to that property, at least in the context of seeking immunity under the terms of the Act. Based on this finding, the trial court held the trespass notice given to Appellant was sufficient to mean he was not in a place he had a right to be when he disregarded that notice and accepted Shelricka's invitation to come onto the landlord's property to get to her apartment.

Appellant makes the mistake of equating the State's ability to hold an individual criminally liable for trespassing, with a private property owner's ability to determine whether an individual has the right to enter that property. Although the two concepts are related, they are

[5] Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015) (discussing a lawsuit filed against an apartment complex located in the Harbison community in Columbia).

not one and the same. Indeed, the South Carolina Attorney General's opinion, Richardson, Nelson, and the other authorities cited by Appellant all seem to concern criminal trespass statutes and whether law enforcement has the authority to **arrest** someone for trespassing if it is determined that an apartment manager has had them placed on trespass notice. That was not the issue before the lower court; therefore, the authorities as a whole are inapplicable and certainly do not dictate the result sought by Appellant. The denial of immunity should be affirmed.

In regard to the Attorney General opinion itself, the State submits it should only be considered as to the purpose for which it was written. The municipal judge who requested the opinion did not ask any questions about the Act or whether a person on trespass notice from an apartment complex could be deemed to be in a place he had a right to be if he had been invited to the apartments by a tenant, for purposes of the Act. The opinion similarly does not address immunity under the Act; therefore, it has no applicability to the question before the trial court in Appellant's case. Furthermore, it is well settled that although it may be persuasive authority, an Attorney General's opinion is not binding on the Court. State v. Ramsey, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014). Given the limited purpose and nature of the Attorney General's opinion, and South Carolina's still developing jurisprudence on the provisions of the Act, this is a question that should be resolved under this Court's independent reasoning, not that of the Attorney General, or the appellate courts of Massachusetts.

Notably, in one of the cases Appellant finds persuasive, the Appeals Court of Massachusetts applied contract law when determining the customary usage of hallways in Boston Housing Authority (BHA) properties. Nelson, 909 N.E.2d at 45-46. It noted the BHA police department's trespass policy specifically gave a resident the right to invite an individual to visit, even if they had been served with a No Trespass Notice, and it further noted the model

BHA public housing lease terms acknowledged that residents are entitled to have guests in their apartments. Id. Stating it was "loath to construe contracts in a manner that would render any provision meaningless" the court concluded "the lease's provisions indicate that it is customary to permit invited guests to pass through the common hallways in order to reach their tenant-host's apartment." Nelson, 909 N.E.2d at 46. Here, the 2010 model lease for Shelricka's apartment included terms that are the polar opposite from those in Nelson. Specifically, the 2010 model lease provided in part:

> 15. Residents may not invite any person onto the property or into their unit who is listed on the site's No Trespass List.
>
> . . . .
>
> 19. Under federal regulations applying to this community, **Residents may not share their apartment with anyone who is not on the lease or allow unauthorized persons in the unit or on the property.** Management has the right to prohibit anyone, other than the resident from coming on the leased premises or any part of the community for any length of time once the resident receives a copy of a written notice barring an individual from entering the community.

(Court's Exhibit No. 3, p.13) (emphasis added). Although he now questions the applicability of the 2010 model lease on grounds it was used by a prior management company for the apartment complex, Appellant did not object or otherwise challenge the trial court's finding of fact that the 2010 model lease: "would be the operable one in 2013." (Tr.p.28, lines 16-17). Thus, the factual finding is the law of the case. Parker, 391 S.C. at 611, 707 S.E.2d at 801; Wilson, 345 S.C. at 5-6, 545 S.E.2d 829.

Appellant's entire argument hinges on whether he was a lawful guest or licensee when he was invited to Shelrick's apartment. However, that determination depends on whether Shelricka had the right to extend the invitation. Under the model 2010 lease, which was the operable lease

in 2013, she did not. Shelricka validly and legally gave up any right to invite guests on the site's no trespass list to her apartment. Appellant was on the site's no trespass list, as confirmed by Deputies Lay and Jumper when they encountered Appellant loitering at the complex in October of 2010. At trial, the lower court appears to have acted in accordance with the contract principle espoused in Nelson by being loath to construe Shelricka's contract in a manner that would render any provision meaningless. In seeking support for his position from South Carolina property jurisprudence, Appellant comments that "the landlord cannot exercise a right he has previously given up to a tenant." (Brief of Appellant, p.20). Yet here, Appellant implores this court to let a tenant exercise a right she has previously given up to her landlord. Appellant was not a legal guest or licensee of a resident of the apartment complex; therefore, he had no right to visit Shelricka's apartment, no right to ingress and egress, and was not in a place he had a right to be for purposes of the Act.

B.

Appellant's argument that the express language of section 16-11-620 of the Code implies an intent requirement for criminal trespass through creation of a "good excuse" exception is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. Furthermore, the argument is irrelevant where Appellant was not charged with or convicted of criminal trespass and where the tenant had contracted away her right to invite Appellant to her apartment.

In his brief on appeal, Appellant argues the express language of section 16-11-620 implies an intent requirement through creation of a "good excuse" exception to criminal trespass. He contends this further supplements his position that, as a matter of law, he should not have been denied immunity on the ground he was not in a place he had a right to be. Appellant argues he had a "bona fide claim of right" as a defense to trespass because he had a good faith reasonable belief that he was allowed to visit his friend who invited him to her apartment. (Brief

of Appellant, p.22-p.32). However, this argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Here, Appellant did not make an argument about the level of intent required for a trespass conviction in his written motion or in his arguments to the trial court. He never claimed he had a bona fide claim of right to violate the no trespass notice and go to Shelricka's apartment. Consequently, the trial court did not make any ruling in regard to this claim. Because the argument was neither raised to nor ruled upon the trial court, it is not a proper subject of appellate review.

Nevertheless, even if preserved, this argument fails because Appellant continues to make the mistake of equating the State's ability to hold an individual criminally liable for trespassing, with a private property owner's ability to determine whether an individual has the right to enter that property. The bona fide claim of right defense and the good excuse defense are exactly that, defenses to a charge of criminal trespass. Appellant faced no such charge; therefore, these defenses are inapplicable to the Act and whether Appellant was in a place he had a right to be for purposes of the Act.

In a footnote, Appellant claims "he would have no means of knowing what provisions were contained in the "model" lease (Brief of Appellant, p.25); however, Appellant was a former resident evicted in 2010. While this does not prove he had actual knowledge of the provisions in the 2010 model lease, it certainly gave him a means of knowing those provisions. Appellant also

complains no evidence was presented that the 2010 model lease was the operative legal document defining Shericka's rights as a tenant. (Brief of Appellant, p.25). But the trial court made a finding of fact that it was operative as to all tenants of the complex in 2013, making this "fact" the law of the case and binding on this Court. Parker, 391 S.C. at 611-12, 707 S.E.2d at 801; Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829. Whatever the case, the State submits Appellant's knowledge of the lease terms or lack thereof has no bearing on whether he was in a place he had a right to be under the Act. If, as Appellant argues, his right to violate the trespass notice flows from the invitation of a tenant, then that right also terminates when the tenant voluntarily gives up the right to extend such an invitation. When a tenant executes a contract with her landlord that gives up her right to invite guests who are on the no trespass list, there is no longer a basis to contend a defendant has a right to be at that apartment by virtue of an invitation, or to contend he is entitled to immunity under the Act.

Appellant goes on to argue that in ruling on immunity, the trial court should have concerned itself not with whether he had a legal right to be at the apartment complex, but whether he had a good faith reasonable belief that he was allowed to visit his friend who invited him to her apartment. In support of this argument he references a 2006 opinion from Maryland, In re Antoine M, 907 A.2d 158 (Ct. App. 2006). (Brief of Appellant, p.27). However, the parenthetical Appellant includes from that opinion perfectly illustrates the fallacy of his argument. The Court of Appeals of Maryland stated: "While the teenage daughter may not, as a matter of property law, have been able to "countermand" the [trespass] notice, that is not the appropriate standard for determining whether the trespass was [criminal]." Here, the trial court appropriately focused not on whether Shelricka's invitation would constitute a defense to criminal trespass, but on whether her invitation could "countermand" the underlying trespass

notice so as to give Appellant a right to be there for purposes of immunity. The trial court properly found it could not, and concluded Appellant was not in a place he had a right to be.

Next, Appellant turns to the facts presented at the immunity hearing and asserts: "Shelricka, as a tenant of Spring Grove, had the right to bestow upon those persons she chooses to invite to her residence a right of way in the nature of an easement through such common areas, stairs, breezeways, and passageways which afford access to her apartment." (Brief of Appellant, p.27). However, under the terms of the 2010 model lease, which was in effect for Shelricka at the time of the shooting, she explicitly did not have the claimed right. Appellant continues addressing the "facts" and asserts he was engaged in "a completely peaceable and lawful endeavor" despite the undisputed fact he was unlawfully carrying a concealed weapon when he went to the "social gathering with mutual friends." (Brief of Appellant, p.30).

Appellant also insists he was "passing through the common areas of the Complex only to reasonably ingress and egress from Shelricka's apartment and stopping only at the explicit request of law enforcement officers to assist them in the investigation of the assault previously perpetrated by Kevin." (Brief of Appellant, p.30). Yet the testimony from the hearing does not support this claim. Tivarius testified Appellant said he was not merely egressing from Shelricka's apartment, but was going to walk to his grand grandmother's house, which was in "the next court over" (Tr.p.62-p.63; p.80, lines 1-9). Appellant himself testified that instead of merely egressing from Shelricka's apartment, he walked to Kiana's apartment to get his bag and pay for a pizza. (Tr.p.150-p.153). These facts discredit Appellant's entire argument, because they take his actions outside of the alleged license he claims he was given by Shelricka's invitation, and demonstrate he was not actually departing as directly as he contends.

Finally, Appellant argues it would be absurd result to require him to: "choose between (1) suffering great bodily injury and/or death at the hands of unprovoked assailants or (2) suffering a twelve (12) year prison sentence for defending himself. (Brief of Appellant, p.31). However, Appellant, like every other citizen, had and still has the right to act in self-defense. The issue here is not whether Appellant had to choose one of these two options, but whether his choice should be excused by a finding of immunity, or was appropriately presented to a jury when he shot the Victim while at an apartment complex where Appellant had no right to be.

C.

Appellant's argument that section 16-11-410's invocation of location rights refers to relative rights versus an attacker and does not contemplate an individual's forfeiture of protections during lawful egress from a posted property is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. Furthermore, the trial court's broad interpretation of the restrictive language from the Act is entirely consistent with the protections afforded by the Act in the context of an individual's right to self-defense.

In his brief on appeal, Appellant argues the trial court erred in denying immunity on grounds that he did not have the right to be at the Apartment complex because S.C. Code section 16-11-410's "invocation of location rights refers to relative rights versus an attacker and does not contemplate an individual's forfeiture of protections during lawful egress from a posted property." He contends the trial court's reasoning for denying immunity would wreak havoc on the rights of people to stand their ground and would run counter to the General Assembly's intent to "loose an innocent person's right to defend themselves from the archaic and technical limitations previously placed on the right to self-defense." (Brief of Appellant, p.32-p.34) This argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94. In any event, the argument is

without merit. The only person who wreaked havoc during the incident was Appellant when he pulled out his unlawfully concealed pistol and started shooting instead of attempting to retreat, which resulted in his paralyzing an unarmed man who was with the person who actually punched Appellant in the head. Contrary to Appellant's assertion, the "archaic and technical" limitation previously placed on the right to self-defense, i.e., the duty to retreat, has not been eliminated by our Legislature in every situation. Instead, the Legislature deliberately restricted the circumstances in which a person does not have a duty to retreat. One of those restrictions was to only make immunity possible for someone "in another place where he has a right to be." The trial court properly found Appellant was not in a place he had a right to be, and properly denied immunity on this ground.

II.

Appellant's argument that the apartment complex's use of section 16-11-620 of the Code in conjunction with a no trespass list is in violation of the United States Housing Act and HUD's implementing regulations is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. It also is without merit because the 2010 model lease consisted of forms that appear to have been approved by HUD.

In his brief on appeal, Appellant argues: "The housing project's use of [16-11-620] in conjunction with the project's "Ban List" are in violation of the United States Housing Act's statutory mandate and HUD's implementing regulations such that they cannot constitute the grounds for the forfeiture of an individual's statutory right to self-defense." (Brief of Appellant, p.36). This argument is not preserved for appellate review because it was not raised to and ruled upon by the trial court. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94. Furthermore, the argument is without merit. The 2010 model lease consists of forms promulgated by HUD, each

page of which bears the HUD "equal housing opportunity" logo. Even if it was raised, it is incredulous to suggest lease forms approved by HUD would be deemed by the trial court to be in violation of HUD regulations. Indeed, it is incredulous to believe a lease term prohibiting a resident from inviting a person onto the property or their unit who is listed on the site's no trespass list would be considered by the trial court to be an unreasonable term or condition, notwithstanding the opinion of the District Court of Maryland in Diggs v. Housing Authority, 67 F. Supp.2d 522 (D. Md. 1999). The trial court properly considered the lease terms in the 2010 model lease in rejecting Appellant's claim that he was in a place he had a right to be and its decision should be affirmed.

III.

Appellant's argument that the use of a non-specific allegation of loitering as a basis for a summary adjudication of a trespass violation on a public housing project property is unconstitutionally vague is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court, and even if preserved, the argument lacks merit because Appellant was already on the no trespass list due to his previous eviction at the time he was given the verbal trespass notice by the police for loitering, and because he was never adjudicated guilty for a trespass violation.

In his brief on appeal, Appellant argues: "The trial court's interpretation of the immunity and trespass after notice statutes would deprive citizens of an important liberty interest conferred by S.C. Code Ann. § 16-11-410 et seq. in an arbitrary fashion and without appropriate due process." (Brief of Appellant, p.39). This argument is not preserved for appellate review because it was not raised to and ruled upon by the trial court. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review."). Here,

Appellant did not mention the Fifth or Fourteenth Amendments in his written motion or in his arguments to the trial court. Consequently, the trial court did not make any ruling in regard to these constitutional claims. Because the argument was neither raised to nor ruled upon the trial court, it is not a proper subject of appellate review.

In any event, even if preserved, the argument lacks merit. Appellant was never adjudicated guilty of trespass, and he was not given a verbal trespass notice solely because he was loitering. Instead, the officers who encountered Appellant at the apartment complex checked the no trespass list, determined Appellant was on that list, confirmed his identity, and gave him a verbal trespass notice. Thus, contrary to Appellant's claim, none of the actions in regard to his being placed on trespass notice were unconstitutionally vague.

IV.

Appellant's argument that the use of a three year old trespass notice as a bar to statutory immunity under the Act deprives him of his right to due process of law is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court, and even if preserved, the argument lacks merit where Appellant was never charged with or found guilty of criminal trespass.

In his brief on appeal, Appellant argues his "right to immunity under [the Act] constitutes an important liberty interest" and argues: "The trial court's assumption that [Appellant] was guilty of trespass violates his constitutional right to due process." (Brief of Appellant, p.42). As with his argument about the non-specific allegation of loitering, this argument is also not preserved for appellate review because it was never raised to or ruled upon by the trial court. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94; McCracken, 346 S.C. at 92, 551 S.E.2d at 238. In addition, the argument lacks merit. As explained above, the trial court never assumed or found Appellant was guilty of trespass. Indeed, Appellant was never charged with criminal

trespass. Had he been so charged, he would have been afforded due process of law by way of South Carolina's existing criminal procedures. Furthermore, Appellant's claim that he has a liberty interest in statutory immunity presupposes he meets the requirements in the Act. Here, after following the immunity hearing procedures set out by our supreme court in Duncan, the trial court found he did not. Appellant's right to due process was provided by the trial court and the decision to deny immunity should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court affirm the trial court's ruling that Appellant was not entitled to immunity under the Protection of Persons and Property Act, and affirm Appellant's conviction and sentence.

Respectfully submitted,

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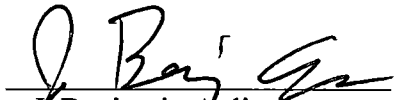
BY: 
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
July 18, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001810

THE STATE, ...RESPONDENT

v.

MARQUEZ DEVON GLENN, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated July 18, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Christopher T. Brumback, Esquire
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I further certified that all parties required by Rule to be served have been served. This 18th day of July, 2016.

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July 18, 2016

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Re: The State v. Marquez Devon Glenn
Appellate Case No. 2015-001810

Dear Mr. Brumback, Mr. Scully, and Mr. Harmon:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services