STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS E. CERVANTES-PAVON,

APPELLANT

APPELLATE CASE NO. 2015-002472

INITIAL BRIEF OF APPELLANT

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in denying Appellant's request for immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed the deceased was the initial aggressor, Appellant was in reasonable fear of imminent death or great bodily harm, and because Appellant was in his place of business, he had no duty to retreat, but could meet force with force?

STATEMENT OF THE CASE

On February 10, 2015, a Charleston County grand jury indicted Appellant for murder (2015-GS-10-418). R. *(indictment). The state, represented by Bruce Durant, called the case to trial before the Honorable Kristi L. Harrington and a jury on November 9-13, 2015. Tr. 1. Christina D. Parnall and Charles Cochran represented Appellant. Tr. 1. Prior to trial, Appellant moved for the court to find him immune from prosecution pursuant to the Protection of Persons and Property Act. R. *(Motion); Tr. 50, ll. 6-20. After a hearing on the motion, Judge Harrington denied Appellant's request for immunity. Tr. 114, l. 1 – Tr. 115, l. 5. Thereafter, the case proceeded to a jury trial. At the conclusion of the evidence, Judge Harrington charged the jury with murder, voluntary manslaughter, and self-defense. Tr. II. 103, l. 20 – Tr. II. 118, l. 12. During their deliberations, the jury asked numerous questions, including a request for an "explanation of the charges," to see a video again, and to take an overnight break. Tr. II. 119, l. 10 – Tr. 1120, l. 19; Tr. II. 121, l. 4 – Tr. II. 122, l. 16; R. *(Court's Exhibits #3-6). Ultimately, the jury found Appellant guilty of murder. Tr. II. 123, ll. 5-9. Judge Harrington sentenced Appellant to thirty years' imprisonment. Tr. II. 190, ll. 20-23; R. *(sentence sheet).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

In August of 2014, the Belk Department Store in Mount Pleasant, South Carolina, was undergoing remodeling of its women's store. Tr. 271, ll. 15-18. Frisch and Associates was the lead contractor on the job. Tr. 271, ll. 10-18. Short on labor, Frisch and Associates subbed out some of the work. Tr. 272, ll. 9-13. C.D. Contractors out of Richmond, Virginia, was one of the sub-contracting companies. Tr. 272, ll. 2-12. Appellant and Raymond Muniz worked for C.D. Contractors and traveled to South Carolina for the work. Tr. 271, l. 19 - Tr. 272, l. 3. Problems soon developed between Appellant and Muniz.[1]

During the early part of August, Appellant was cleaning an area at work with a broom. Tr. II. 43, ll. 1-4. As he was sweeping, Muniz snatched the broom from him. Tr. II. 43, ll. 5-6. When Appellant went to complain to the boss, the office was empty. Tr. II. 43, ll. 10-14. When Muniz realized what Appellant was doing, he checked to ensure there were no security cameras in the area. Tr. II. 43, ll. 14-15. Seeing no cameras, Muniz began to physically assault Appellant. Tr. II. 43, ll. 15-18.

During the evening, on August 12, 2015, Muniz accosted Petitioner at the hotel where the C.D. Contractors employees were staying. Tr. II. 45, ll. 1-14. Muniz removed his shirt and tried to fight Appellant. Tr. 45, ll. 11-14. Appellant moved away to avoid the confrontation. Tr. II. 45, ll. 11-14. In light of these incidents, Muniz's much larger size and greater strength, and Muniz's campaign of harassment, Appellant was terrified. Tr. II. 45, l. 18 – Tr. II. 46, l. 2.

[1] Raymond Muniz confided in his friend and co-worker, Travis Flowers, that there was bad blood between Appellant and Muniz. Tr. 177, ll. 16-20.

Around 9 a.m., on August 13, 2014, Travis Flowers, Muniz's good friend at work, approached Appellant and threatened him. Tr. II. 45, ll. 1-8.[2] At lunch, Flowers and Muniz threatened Appellant at the entrance. Tr. II. 48, l. 25 – Tr. II. 49, l. 3. Shortly after 1 p.m., Appellant went to his boss, Herbie Evans, to report his problems with Muniz. Tr. 273, l. 5 – Tr. 274, l. 7; Tr. II. 48, ll. 4-17. Evans spoke to Appellant and Muniz to explain he would not tolerate conflict at the jobsite and warned of termination if the problems continued. Tr. 273, l. 14 – Tr. 273, l. 4.

At the end of the work day, Appellant climbed down from the ladder where he was framing a wall. Tr. II. 46, ll. 19-24. In light Muniz's threats and the fact that Muniz had a large piece of metal in his hands, Appellant picked up a pipe for protection.[3] Tr. II. 47, ll. 1-4; Tr. II. 51, ll. 4-8.[4] Appellant was terrified. Tr. II. 48, ll. 19-22. As Appellant walked by Muniz, which was necessary in order for him to get his tools and to leave the building, Muniz swung the metal at him twice, striking him. Tr. II. 47, ll. 5-6; Tr. II. 48, l. 23 – Tr. II. 49, l. 5; Defendant's Exhibit

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[2] According to Flowers, he confronted Appellant around noon to ask if he were talking trash about him in Spanish because Muniz had informed him that Appellant was doing so. Appellant denied saying anything about Flowers and told him he had no problems with him. Tr. 179, l. 12 – Tr. 180, l. 8.

[3] Appellant picking up the pipe for protection was confirmed by the testimony of Jeremiah Oxendine who described Appellant as dragging the pipe behind him as he walked near Muniz. Tr. 226, ll. 1-16.

[4] Flowers claimed that Appellant picked up a sprinkler pipe and walked toward Muniz, who picked up a hammer. Tr. 181, l. 12 – Tr. 182, l. 9. However, Appellant stopped returned to his work station. Tr. 181, ll. 16-17. Appellant then removed his tool belt, picked up his keyhole saw, and "stuck it in his right side in between his pants and skin. Then he put his shirt over it." Tr. 182, ll. 12-22. Appellant picked up the sprinkler pipe again and moved toward Muniz. Tr. 182, ll. 23-24. According to Flowers, Appellant swung the pipe twice, but Muniz blocked it with a piece of metal. Tr. 182, l. 25.

#1; Defendant's Exhibit #2. Muniz knocked the pipe from Appellant's hand. Tr. II. 51, ll. 9-15.[5] Muniz then began to assault him. Tr. II. 47, ll. 6-8; Tr. II. 51, ll. 16-19. Muniz was holding Appellant with one arm and punching him with the other. Tr. II. 47, ll. 9-12; Tr. II. 61, ll. 9-13.[6] Due to the way Muniz was holding him, Appellant could barely breathe – he was being choked. Tr. II. 47, ll. 13-14; Tr. II. 61, ll. 2-4. Each time Muniz struck Appellant, his grip tightened. Tr. II. 47, l. 14; Tr. II. 51, ll. 20-23. Having no other option, Appellant pulled out his saw and stabbed Muniz once. Tr. II. 47, ll. 14-16; Tr. II. 52, ll. 3-9; Tr. II. 61, ll. 14-15.

Muniz ran from the building, down the sidewalk, and around the corner until finally stopping on a patch of grass. Tr. 146, l. 20 – Tr. 147, l. 1; Tr. 229, l. 1-12. Fearing retaliation by Muniz's friend, Appellant left the area. Tr. II. 61, ll. 21-25. Appellant left with the small saw in his hands, but threw it away while he was walking. Tr. II. 62, ll. 1-8.[7] Muniz died at the scene. Tr. 147, l. 24 – Tr. 148, l. 2.

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[5] Flowers said Muniz pinned the sprinkler pipe to the ground. Tr. 183, ll. 4-6.

[6] Flowers also testified that Muniz punched Appellant in the face a couple of times. Tr. 183, ll. 6-7.

[7] The police never found the keyhole saw. Tr. 165, l. 24.

ARGUMENT

The trial judge erred in denying Appellant's request for immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed the deceased was the initial aggressor, Appellant was in reasonable fear of imminent death or great bodily harm, and because Appellant was in his place of business, he had no duty to retreat, but could meet force with force.

Relevant facts

Prior to trial, Appellant moved for a pre-trial hearing to determine whether he was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act (hereinafter, the "Act"). R.*(Motion). After selecting a jury, the judge entertained Appellant's motion. Tr. 50, ll. 4-20. The state argued the Act did not apply because Appellant "is an illegal alien and has no right to be in the country at all much less over there." Tr. 51, ll. 1-5.[8] Additionally, the state argued the "evidence will show that there will be a jury issue as to whether or not it was self-defense in this case." Tr. 51, ll. 5-7.

The evidence

Herbie Evans was the superintendent over the construction site at Belk for Frisch and Associates on August 13, 2014. Tr. 52, ll. 16-22; Tr. 55, ll. 16-19. Appellant and Muniz were construction workers and reported to Evans. Tr. 52, l. 23 – Tr. 53, l. 1. On August 13, 2014, Evans became aware of a problem between the two men. Tr. 53, ll. 2-4. Although Appellant spoke very little English, around one o'clock in the afternoon, Appellant reported to Evans that

[8] Judge Harrington refused to address the state's argument that Appellant was not entitled to immunity under the Act because he was not in the United States legally. According to Judge Harrington, "the statute was indicated to protect all persons," and therefore, Appellant would be entitled to immunity if he satisfied the other statutory requirements.

Muniz was "picking on him and messing with him." Tr. 54 ll. 15-23; Tr. 54, l. 24 – Tr. 55, l. 3; Tr. 56, ll. 4-13. Appellant asked Evans to intervene. Tr. 54, ll. 21-23. Evans did so by speaking with Muniz about his conduct. Specifically, Evans told Muniz that he "would not allow conflict or any problems on the project ... and if there was going to be conflict between any employees that [Evans] would immediately send them home." Tr. 55, ll. 8-11. Evans also told Appellant that he would not tolerate conflict at work. Tr. 56, l. 24 – Tr. 57, l. 12.

Jose Somosa was also working on the remodeling project at Belk during August of 2014. Tr. 60, ll. 8-10. He and Appellant had traveled from Richmond, Virginia, for the work. Tr. 60, ll. 14-17. Somosa, Appellant, and Muniz were staying at a hotel during the construction project. Tr. 60, ll. 18-22; Tr. 70, ll. 21-22. During the early part of August, Muniz and Appellant had a physical altercation over a tool. Tr. 71, ll. 8-16. Appellant had a broom, and Muniz snatched it from him. Tr. 77, l. 21 – Tr. Tr. 78, l. 1. Then, the two fought, punching each other in the face. Tr. 78, ll. 2-9.

On August 12, 2014, Muniz, who was yelling at Appellant, took off his shirt and tried to fight Appellant at the hotel. Tr. 60, l. 23 – Tr. 61, l. 4; Tr. 62, ll. 3-12; Tr. 70, l. 25 – Tr. 71, l. 3; Tr. 78, ll. 10-13. However, Appellant refused to fight. Tr. 61, ll. 9-10; Tr. 62, ll. 12-13; Tr. 78, ll. 17-19.

The following day, Somosa and Appellant were framing a wall. Tr. 62, ll. 17-24. Appellant was up on the ladder while Somosa was on the ground acting as Appellant's helper. Tr. 62, l. 25 – Tr. 63, l. 9. Muniz was in the same area working on the concrete floors. Tr. 63, ll. 10-11. Every time Muniz passed Appellant, who was standing ten feet off the ground on a ladder, Muniz would taunt him about fighting. Tr. 63, ll. 12-21; Tr. 78, l. 24 – Tr. 79, l. 7. Appellant responded that he did not want any trouble. Tr. 63, ll. 22-24.

Around 5:30 p.m., Appellant climbed down the ladder to end his workday. Tr. 64, ll. 3-14. Muniz, who was taller and bigger than Appellant, continued his taunts by suggesting they take it "outside," but Appellant refused. Tr. 64, ll. 15-18; Tr. 66, ll. 15-18. However, Appellant grabbed a pipe, and Muniz grabbed a metal object used for framing. Tr. 65, ll. 13-17; Tr. 79, l. 25 – Tr. 80, l. 4; Tr. 80, ll. 11-13. The two then "went at each other." Tr. 65, l. 17. During the scuffle, Appellant and Muniz dropped their pieces of metal. Tr. 65, l. 25 – Tr. 66, l. 2; Tr. 81, ll. 3-5. Then, "they were grabbing each other." Tr. 66, l. 8; Tr. 81, ll. 6-8; Tr. 82, ll. 7-8. Appellant grabbed Muniz around his waist, and Muniz grabbed Appellant around his shoulders. Tr. 66, ll. 11-15. Muniz had his arms around Appellant's neck. Tr. 66, l. 20 – Tr. 67, l. 3. Appellant grabbed his saw from his waist and stabbed Muniz once. Tr. 67, ll. 5-24. After the stabbing, Muniz released Appellant and ran outside. Tr. 68, l. 9-23. Somosa was emphatic – Muniz started the fight. Tr. 69, ll. 2-3.

Appellant testified at the pre-trial hearing as well. He explained that he worked for a construction company in Richmond, Virginia, that was contracted to do work at Belk in Charleston. Tr. 88, ll. 3-20. About a week before the stabbing, Appellant and Muniz fought when Muniz snatched a broom from him. Tr. 89, ll. 4-10. On another day, Appellant tried to inform his boss of Muniz's threats, but the boss was not in his office. Tr. 89, ll. 17-20. Seizing the opportunity, Muniz first checked to ensure no security cameras were monitoring, and then, he began to assault Appellant. Tr. 89, l. 25 – Tr. 90, l. 2. Thereafter, Muniz continued his campaign against Appellant by calling him a "faggot" and threatening to kill him. Tr. 90, ll. 4-11.

Around 9 a.m. on August 13, 2014, Muniz's friend and co-worker approached Appellant, getting "on top of him like he wanted to hit" Appellant. Tr. 91, ll. 10-18. At lunchtime,

Appellant went to his boss and asked for help. Tr. 92, ll. 17-22. Appellant was "terrified, afraid." Tr. 93, ll. 1-3. The boss called attention to it, but Muniz was undeterred. Tr. 93, ll. 4-9. The threats continued into the afternoon. Tr. 93, ll. 15-17. While Appellant remained up on the ladder, Muniz threatened him with a pipe. Tr. 93, ll. 21-25. At the end of the day, Appellant got down from the ladder, and Muniz approached him with a pipe. Tr. 94, ll. 3-6. Appellant grabbed a pipe as well. Tr. 94, l. 6. Muniz began his assault. Tr. 94, ll. 6-7. Muniz struck Appellant on his stomach and his jaw. Tr. 94, ll. 15-22; Defendant's Exhibit #1.

During the attack, Muniz, who was stronger and taller than Appellant, took the pipe from Appellant. Tr. 97, ll. 14-23; Tr. 98, ll. 6-12. Muniz grabbed Petitioner around the neck, strangling him. Tr. 98, ll. 1-2; Tr. 98, ll. 13-20; Tr. 104, ll. 12-14. Appellant had a saw used to cut sheetrock in his tool belt. Tr. 65, ll. 20-24. Appellant pulled out his saw and stabbed Muniz once. Tr. 98, ll. 3-5; Tr. 98, ll. 21-24; Tr. 99, ll. 2-13. Muniz released Appellant and ran outside. Tr. 99, ll. 14-20. Still fearful, Appellant left. Tr. 99, ll. 19-25.

The state presented no witnesses during the immunity hearing. Tr. 107, ll. 3-10.

Argument on the motion

Trial counsel argued that Appellant was in a place where he had a right to be – his place of business, and therefore, the duty to retreat was not applicable pursuant to the Act. Tr. 108, ll. 1-14. According to trial counsel, Appellant was not causing any problems with Muniz, but that there was "continual harassment, bullying" by Muniz directed toward Appellant. Tr. 108, ll. 15-23. In fact, there had been a physical altercation between the two prior to this shooting incident. Tr. 108, ll. 23-24. Additionally, a co-worker was joining Muniz's harassment of Appellant at Muniz's instigation. Tr. 108, l. 24 – Tr. 109, l. 4. During Muniz's threats, Appellant was on top of a ladder – "a very vulnerable position." Tr. 109, ll. 5-9. Appellant stood approximately "five

foot three" and was "very small in stature." Tr. 109, ll. 9-10. However, Muniz was "about six feet." Tr. 109, ll. 10-11.

Muniz was armed with a large piece of metal, which he swung at Appellant. Tr. 109, ll. 11-13. Appellant also had a piece of metal and there was "a clash of metal" as Appellant tried to defend himself. Tr. 109, ll. 14-18. Appellant was struck by Muniz's metal pole and received several injuries, which were documented by the police. Tr. 109, ll. 14-21. Muniz wrapped his arm around Appellant and began to strangle him. Tr. 109, l. 25 – Tr. 110, l. 2. Then, Appellant was forced to pull his saw from his tool belt and stab Muniz. Tr. 110, ll. 2-5. Only then did Muniz let him go. Tr. 110, l. 5. According to trial counsel, Appellant testified he was actually afraid and that fear was reasonable because of the difference in sizes and the fact that Muniz's friend had been threatening earlier in the day. Tr. 110, ll. 7-23. In conclusion, trial counsel explained Appellant satisfied each element of self-defense except the duty to retreat, which he was not required to satisfy because he was in his place of business. Tr. 110, l. 23 – Tr. 111, l. 4.

The prosecutor argued that the case presented a "clear question of fact" based on the testimony of Somosa and Appellant. Tr. 112, ll. 1-4. According to the prosecutor, Somosa testified to a physical altercation involving a broom and an offer to fight the night before, but "that at no time other than mouthing off at each other at no time was Mr. Muniz armed until he came after him with a pipe in which point he picked up the piece of pipe." Tr. 112, ll. 4-10. The prosecutor claimed that both men were unarmed when Appellant stabbed him in the chest and killed him. Tr. 112, ll. 11-14.

Trial counsel added to her previous argument that despite the fact that the men were unarmed when the fatal blow was struck, the evidence presented showed that Muniz was holding

Appellant around the neck, which placed Appellant at risk of serious bodily harm. Tr. 113, ll. 1-12.

Ruling on the motion

At the conclusion of the hearing and counsel's arguments, Judge Harrington denied Appellant's request for immunity. According to the judge, in order for the Act to apply, "[t]here must be an absence of aggression." Tr. 114, ll. 12-14. The judge construed the testimony as showing "there had been a mutual confrontation." Tr. 114, ll. 16-17. She relied heavily upon Somosa's testimony, which she interpreted to show that Appellant and Muniz "had discarded the tools" and at the time of the stabbing, Muniz was unarmed. Tr. 114, ll. 17-20. The judge also noted that Somosa "believed" that Muniz and Appellant "were merely wrestling." Tr. 114, ll. 20-21.

Thus, the judge denied the motion for immunity and concluded the issue of self-defense was for the jury. Tr. 114, ll. 22-23. According to the judge, "[t]he intent of the Act is for defensive not offensive protections." Tr. 114, ll. 12-13. The judge explained she did "not believe the testimony [rose] to the level beyond a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution." Tr. 114, l. 23 – Tr. 115, l. 1.

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons

residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). One of the provisions of the Act 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.

S.C. Code Ann. § 16-11-440(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in

imminent danger of losing his life or sustaining serious bodily injury; (3) 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, or if the defendant was actually 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; and (4) 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 the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Supreme Court recently affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that

had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[9] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768

[9] The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, Op. No. 27647 (S.C. Sup. Ct. filed July 16, 2016)(Shearouse Adv. Sh. No. 28 at 38).

S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to this Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In light of the immunity statute's incorporation of the elements of self-defense save the retreat prong, an examination of South Carolina's self-defense jurisprudence is necessary and helpful. An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. "[T]he mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). In Slater, the Court determined the defendant was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty where the defendant was "in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The South Carolina Supreme Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot

until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

As an initial matter, the trial judge used the wrong legal standard when examining Appellant's request for immunity. Although the judge at first correctly stated that Appellant must prove his case by a preponderance of the evidence, when she was ruling on the motion, she stated she did "not believe the testimony [rose] to the level beyond a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution." Tr. 114, l. 23 – Tr. 115, l. 1. By requiring Appellant prove his entitlement to immunity beyond a preponderance of the evidence, the judge committed a legal error and a reversal is necessary.

Examining the evidence in the proper light reveals Appellant established his right to statutory immunity from prosecution by a preponderance of the evidence. The undisputed evidence demonstrated prior difficulties between Appellant and Muniz and Muniz as the initial aggressor during those prior difficulties. The undisputed evidence demonstrated that Appellant was not at fault at bringing on the difficulty. Muniz had been taunting Appellant for weeks and continued his campaign of threats and harassment on the day of the stabbing. Although Appellant sought help, his pleas were unanswered and Muniz was undeterred. Appellant testified that he was in fear of losing his life or imminent bodily harm. Appellant's fear was reasonable in light of the difference in size, Muniz choking Appellant, and Muniz's prior threats and physical assaults. Appellant had to act in an effort to save his life. He used the only thing he could find – his saw – to stab Muniz once in the chest. Finally, Appellant had no duty to retreat because he was at his place of business.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the trial judge and find that he was entitled to immunity from prosecution pursuant to Protection of Persons and Property Act.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2016.