STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS ELVIN CERVANTES-PAVON,

APPELLANT,

Appellate Case No. 2015-002472

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. 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?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial judge did not err in denying Appellant's motion for immunity under the Protection of Persons and Property Act because Appellant failed to meet his burden of proof when multiple witnesses testified Appellant was the initial aggressor, Victim was unarmed when Appellant initiated the combat, and Appellant was not reasonably in fear of his life when Victim threw down his weapon and held Appellant in a non-lethal hold.

RESPONDENT'S STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant, Dennis Elvin Cervantes-Pavon, in February 2015, for the murder of Raymond Muniz (Victim). (Indictment Number 2015-GS-1000418.)

Appellant sought immunity under the Protection of Persons and Property Act (the Act), S.C. Code Ann. § 16-11-410 *et seq.* and on November 9, 2015, the Honorable Kristi Lea Harrington conducted a pretrial hearing to determine whether Appellant was entitled to immunity. (Nov. 9, 2015 Transcript pp. 49–113.) Appellant was represented by Christina D. Parnall, Esquire, and Charles Cochran, Esquire, at trial. (Nov. 9 Tr. p. 1.) The State was represented by Bruce Durant, Esquire. (Nov. 9 Tr. p. 1.) After hearing from three witnesses, including Appellant, and after hearing argument from both sides, Judge Harrington denied the motion. (Nov. 9 Tr. p. 114.)

Appellant's case proceeded to trial, and on November 13, 2015, the jury returned a verdict of guilty of murder as charged. (Nov. 12-13 Tr. p. 123, lines 5-9.) Judge Harrington sentenced Appellant to a term of thirty years' imprisonment. (Nov. 12-13 Tr. p. 130, lines 20-23.) Thereafter, Appellant served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on November 18, 2015. (Notice of Appeal).

RESPONDENT'S STATEMENT OF THE FACTS

The Pre-Trial Hearing

Before the trial began but after the jury was chosen, defense counsel moved for a *Duncan*[1] hearing to determine whether Appellant was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act.[2] (Nov. 9 Tr. p. 50, lines 6-20.) Herbie Evans, the supervisor of the construction site at which Appellant and Victim worked, Jose Somosa, a co-worker of both Appellant and Victim, and Appellant all described the events precipitating and surrounding the murder. (Nov. 9 Tr. pp. 53-106.) The witnesses portrayed vastly different accounts of how the fight began, and which man was the initial aggressor.

The Belks Department Store in Mount Pleasant, South Carolina, was undergoing renovations in August of 2014. Frisch and Associates was the contractor for the project. (Nov. 9 Tr. p. 52, lines 16-22; p. 60, lines 8-10.) Because the project was so large, the general contractor sub-contracted some of the work to out of state workers. Evans, as the supervisor for the job site, was familiar with Appellant and Victim, who both worked for a sub-contractor and traveled to the site from Virginia. (Nov. 9 Tr. p. 52, line 23 – p. 53, line 7; p. 60, lines 11-17.) Appellant is a native of Honduras, and at the time of trial had been in the United States for thirteen years, although he was in the country illegally. (Nov. 9 Tr. p. 87, line 24 – p. 88, line 9; p. 104, lines 3-11.) On the day of the murder, Appellant approached Evans and complained Victim was "picking on him and messing with him." (Nov. 9 Tr. p. 54, lines 15-23.) Evans spoke to Victim about Appellant's complaint, and told Victim he would not allow any conflict between the two men, and if it continued, the men would be sent home to Virginia. (Nov. 9 Tr. p. 55, lines 6-11.) Evans similarly warned Appellant about his conduct after learning they "had been mouthing off

[1] *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).
[2] S.C. Code Ann. § 16-11-410 *et. seq.*

at each other all day." (Nov. 9 Tr. p. 56, line 24 – p. 57, line 4.) Later that day, Evans was in another section of the job site and did not see the fight that resulted in Victim's death. (Nov. 9 Tr. p. 55, lines 12-19.)

Jose Somosa did witness the fatal exchange. Samosa worked for the construction company and knew both men. (Nov. 9 Tr. p. 60, lines 8-17.) The men all stayed together in a hotel while working on the job. (Nov. 9 Tr. p. 60, lines 18-22.) On August 12, 2014, the night before the stabbing, Victim approached Appellant in the hotel parking lot and "took off his shirt," indicating he wanted to fight Appellant, but Somosa said Appellant did not want to fight. (Nov. 9 Tr. p. 60, line 22 – p. 61, line 2.) The men had fought the week before over a broom, when Victim took the broom from Appellant. (Nov. 9 Tr. p. 71, lines 8-17; p. 77, line 10 – p. 78, line 1.) In that previous fight, both men "punched each other in the face." (Nov. 9 Tr. p. 78, lines 4-8.)

The following day, Samosa and Appellant were framing a portion of a wall at the Belk's. Appellant was on the ladder, and Samosa was helping him. (Nov. 9 Tr. p. 62, line 17 – p. 63, line 6.) Victim was working on the concrete in the same area. (Nov. 9 Tr. p. 63, lines 10-12.) According to Samosa, as Victim walked by Appellant, he would ask Appellant to fight. (Nov. 9 Tr. p. 63, lines 12-19.) At lunchtime, when Appellant came down from the ladder to eat, the two men did not engage in a fight. (Nov. 9 Tr. p. 64, lines 2-10.) However, at the end of the shift, when Victim continued to engage Appellant about fighting, Appellant became angry, tired of Victim's taunts. (Nov. 9 Tr. p. 64, line 15 – p. 65, line 1; p. 79, lines 18-24.)

Samosa testified, "Elvin got angry and came down and then he later went over to the tools and grabbed that steel thing." (Nov. 9 Tr. p. 65, lines 1-3.) The "steel thing" was the ten inch saw the men used to cut through sheetrock. (Nov. 9 Tr. p. 65, lines 5-6.) Samosa further saw

Appellant grab a pipe first "and **then** [Victim] grabbed like a metal thing for framing and then the two of them went at each other." (Nov. 9 Tr. p. 65, lines 13-17 (emphasis added).) At that point, both men had metal pipes and Appellant also had the keyhole saw at his waist. (Nov. 9 Tr. p. 65, lines 18-24.) The fight occurred near Victim's cement mixer, approximately fifteen feet away from Appellant's ladder. (Nov. 9 Tr. p. 80, lines 14-24.) According to Samosa, at some point as the fight progressed, both men dropped the pipes, but Appellant kept the saw on his belt, under his shirt. (Nov. 9 Tr. p. 66, line 2 – p. 67, line 11.) Victim and Appellant began grappling, holding on to each other. Victim had Appellant in a headlock, facing him, while Appellant's arms were grabbing Victim's waist. Samosa told the police Appellant and Victim were chest to chest, and Appellant was holding Victim close, with his left hand on the small of Victim's back. (Nov. 9 Tr. p. 82, line 24 – p. 83, line 6.) Appellant took out the saw and thrust it upwards into Victim's chest. (Nov. 9 Tr. p. 66, lines 9 – p. 67, line 6; p. 83, lines 10-12.) After Victim was stabbed, he let go of Appellant and both men ran outside. (Nov. 9 Tr. p. 68, lines 17.) Samosa told police Victim was unarmed at the time the men began grappling and when Appellant stabbed Victim. (Nov. 9 Tr. p. 83, lines 17-21.)

Appellant admitted he did not get along with Victim, and he had fought with Victim previously over the use of a broom. (Nov. 9 Tr. p. 89, lines 1-12.) Appellant said Victim called him names and threatened him. (Nov. 9 Tr. p. 90, lines 6-11.) Appellant testified the day of the murder Victim was taunting him with verbal threats and "hand signs," and came at him with a pipe. (Nov. 9 Tr. p. 93, line 15 – p. 94, line 6.) Appellant claimed Victim hit him with the metal pipe and Victim took his pipe from him. (Nov. 9 Tr. p. 95, line 1 – p. 97, line 23.) Appellant described the men's positions as face to face, with Victim holding Appellant with his arm around

his neck. (Nov. 9 Tr. p. 104, line 12 – p. 105, line 20.) Appellant also described the Victim as "a little bit taller" than him. (Nov. 9 Tr. p. 98, line 12.)

The Court's Ruling on the Matter

Before hearing arguments from either the State or the defense, the trial court informed the parties it would not deny the defense's motion for immunity on the basis of Appellant's illegal status. Regarding that argument, the court said, "I am not going to address that issue at this time." (Nov. 9 Tr. p. 107, lines 17-18.)

Following arguments from both parties on the merits of the claim, the court considered the elements of self-defense in determining Appellant's entitlement to immunity. The court denied Appellant's motion, finding the Protection of Persons and Property Act granted immunity from prosecution only if the court found the elements of self-defense were proven "by a preponderance of the evidence." (Nov. 9 Tr. p. 114, lines 8-9.) Further, the court noted the Act offered defensive and not offensive protection, stating the following:

> There must be an absence of aggression. The testimony that has been presented today is that the boss Mr. Evans had told both of them to cut it out, that there had been a mutual confrontation. Both the defendant and the victim had discarded the tools according to Mr. Samosa and at the time the victim was stabbed the victim was not armed and that the witness believed that the victim and the defendant were merely wrestling.

(Nov. 9 Tr. p. 114, lines 14-21.) In other words, as the court ruled, Appellant could not have been the initial aggressor or even complicit in the fight to be afforded immunity. (Nov. 9 Tr. p. 114, line 14.) In light of the testimony of Samosa and supervisor Evans, which contradicted that of Appellant, the court found the issue of self-defense presented a question for the jury. (Nov. 9 Tr. p. 114, lines 22-23.) Specifically, the court said, "I do not believe the testimony rises to a

level beyond a preponderance of the evidence[3] to grant immunity designed by the legislature to protect someone from criminal prosecution." (Nov. 9 Tr. p. 114, line 23 – p. 115, line 1.) The judge advised Appellant he retained the right to argue the affirmative defense of self-defense at trial. (Nov. 9 Tr. p. 115, lines 2-5.)

Appellant's Role as Aggressor Developed at Trial

At trial, the State presented multiple witnesses who testified to the same basic premise: Appellant armed himself with two weapons and approached Victim in his work area to start the fight. Appellant argues he is entitled to immunity for standing his ground in a place he had a right to be. However, Appellant was clearly not standing his ground when he armed himself and crossed into Victim's ground to launch a physical attack on Victim. Further, Victim attempted to diffuse the situation by disarming Appellant before the men engaged in physical combat, but Appellant brought a second, hidden weapon to the fight, indicating a desire to kill the Victim before a single blow was delivered.

Travis Flowers worked with Appellant and Victim at the job site, but did not have a social relationship with either man. (Nov. 10 Tr. p. 176, lines 1-25.) Flowers considered Victim a friend, however, because the men "talked a lot at work." (Nov. 10 Tr. p. 177, lines 2-3.) Flowers was aware of the "bad blood" between the two men and witnessed the verbal exchanges between both men the day of the stabbing. (Nov. 10 Tr. p. 177, line 18; p. 179, lines 5-11.) Flowers described the moments before the fight in vivid detail. Victim unloaded his last batch of concrete into a trench in the floor, and then he walked over to Appellant's work area, where the men argued. (Nov. 10 Tr. p. 181, lines 3-9.) Flowers removed his earphones and heard the men say

[3] Appellant argues the trial court applied the wrong standard in determining Appellant's burden of proof. The State submits the trial judge merely misspoke. The court used the correct standard for Appellant's burden of proof only sentences before this misstatement and correctly stated the law within the particular context of the Protection of Persons and Property Act. (Nov. 9 Tr. p. 114, lines 1-9.)

"mono mono,"[4] then noticed Appellant come down from the ladder and pick up a sprinkler pipe. (Nov. 10 Tr. p. 181, lines 10-15.) Victim was then approximately twenty feet away near his own workstation when Appellant started toward him with the pipe. (Nov. 10 Tr. p. 181, lines 15-22.)

Appellant began walking toward Victim, then stopped, went back to his ladder, and propped the pipe against it while he removed his tool belt. Appellant then started toward Victim again and stopped, returned to his tool belt and reached down to retrieve the keyhole saw, placed the saw into the waistband of his pants, and then covered it with his shirt. (Nov. 10 Tr. p. 182, lines 12-22.) Appellant picked up the sprinkler pipe and quickly advanced toward Victim and swung the pipe. (Nov. 10 Tr. p. 182, lines 23-24.) Appellant swung twice, and Victim was able to pin the pipe down and away, disarming Appellant. (Nov. 10 Tr. p. 182, line 25 – p. 186, line 7.) According to Flowers, Victim never swung his pipe at Appellant to hit him, Victim only used the pipe to defend Victim's blows with the sprinkler pipe. (Nov. 10 Tr. p. 210, lines 13-24.) Victim hit Appellant, and then men began grappling. (Nov. 10 Tr. p. 183, lines 6-8.) Flowers said Appellant held Victim with one hand and stabbed him with the saw in his other hand. (Nov. 10 Tr. p. 183, lines 8-12.)

Jeremiah Oxendine, another worker at the construction site, knew both Appellant and Victim from work, though he knew neither man very well. (Nov. 10 Tr. p. 218, line 14 – p. 220, line 19.) Oxendine worked for a different company than Victim, and then men did not arrive on site at the same time. (Nov. 10 Tr. p. 221, lines 1-12.) Oxendine was unaware of the bad blood between the two men, but he witnessed the stabbing because he was working in the area where the fight occurred. (Nov. 10 Tr. p. 220, line 1 – p. 223, line 2.) Oxendine overheard Appellant say something to Victim as Victim walked by with his wheelbarrow on the way to the concrete

[4] Although the record is unclear, presumably the witness meant "mano a mano," or "hand to hand" as translated from the Spanish expression.

mixer. (Nov. 10 Tr. p. 223, lines 6-23.) Oxendine said Victim looked at him and asked him if he heard Appellant "trying to start with [him]." (Nov. 10 Tr. p. 224, lines 5-6.) Victim asked Appellant if he was saying he wanted to fight, and Appellant said yes. (Nov. 10 Tr. p. 225, lines 1-2.) Oxendine saw Appellant bend down and search for something near the wall where he had been working, and when he stood, Oxendine saw him put something into his right side area. (Nov. 10 Tr. p. 225, line 15 – p. 226, line 7.) Oxendine saw Appellant pick up a sprinkler pipe and approach Victim, who was still standing by the cement mixer. (Nov. 10 Tr. p. 226, lines 8-19.) Oxendine saw Appellant swing the pipe at Victim twice, and both times Victim was able to block the blows. (Nov. 10 Tr. p. 227, lines 1-10.) Oxendine said Victim appeared to be trying to knock the pipe away from Appellant. (Nov. 10 Tr. p. 240, lines 7-8.) After Victim successfully knocked the pipe out of Appellant's hands, he dropped his pipe. (Nov. 10 Tr. p. 240, lines 11-12.) The men grabbed each other in wrestling holds. (Nov. 10 Tr. p. 227, lines 14-20.) Appellant then swung back his arm and stabbed Victim. (Nov. 10 Tr. p. 227, lines 22-25.) After the men broke apart, both men ran outside. Victim had blood running down his shirt, and Appellant was carrying the keyhole saw. (Nov. 10 Tr. p. 227, line 23 – p. 228, line 25.) Oxendine described what he saw to the Mount Pleasant Police. (Nov. 10 Tr. p. 229, line 24 – p. 230, line 4.)

Ronnie Hunt, another co-worker of the men was working in the same area, did not witness the events before the fight, but turned in time to see Appellant swinging a pipe at Victim. (Nov. 10 Tr. p. 249-250.) Hunt saw Victim pick up a piece of metal from the floor to block the blows. (Nov. 10 Tr. p. 250, lines 8-9.) Hunt testified the men "scuffled a little bit and locked up with each other." (Nov. 10 Tr. p. 250, lines 14-15.) Hunt saw the flash of Appellant's arm, and then saw the Victim run away. (Nov. 10 Tr. p. 250, lines 14-16.) Hunt followed Victim outside,

and tried to call the police. (Nov. 10 Tr. p. 251, lines 12-16.) Later, Hunt would give two statements detailing what he saw to the police. (Nov. 10 Tr. p. 252, lines 1-13.)

Victim's father, Rafael Puentes, also worked on the construction at the Belk's. (Nov. 10 Tr. p. 262, line 16 – p. 263, line 21.) Puentes and Victim worked for the same company, and the men came down from Virginia together for this job. (Nov. 10 Tr. p. 264, lines 3-24; p. 265, lines 9-14.) Puentes was aware his son and Appellant argued over a broom and shovel approximately four days before the stabbing, and he witnessed another confrontation between the men a day or two before the stabbing. (Nov. 10 Tr. p. 266, lines 19-24; p. 267, lines 3-14.) Appellant approached Victim and insulted him, calling him names. (Nov. 10 Tr. p. 267, lines 11-14.) Puentes testified his son ignored Appellant, fearing he would lose his job if fought with him. (Nov. 10 Tr. p. 267, lines 15-17.) Puentes did not actually see the fatal confrontation days later, but when he heard someone was stabbed on the construction site, he ran to find his son, who died in his arms. (Nov. 10 Tr. p. 268, lines 1-17.)

Appellant was the only witness for the defense. Appellant's testimony was contrary to that of the previous witnesses and internally inconsistent. Appellant claimed Victim had been threatening him "with his words and also doing signs with his hands and all that" during the day of the stabbing. (Nov. 12-13 Tr. p. 46, lines 21-25.) At the end of the shift, Appellant claimed he descended the ladder on which he was working and Victim already had the pipe in his hands when Appellant approached Victim's area. (Nov. 12-13 Tr. p. 46, line 1 – p. 47, line 2.) Appellant claimed he only approached Victim because his tools were close to Victim's area, although Appellant did not explain why his tools were fifteen to twenty feet away from the area in which he was working. (Nov. 12-13 Tr. p. 47, lines 2-3.) Appellant testified Victim swung his pipe at him twice, and then threw his pipe at him. (Nov. 12-13 Tr. p. 47, lines 5-9.) On cross

examination, however, Appellant said "after he knocked down my pipe ... he came and threw it behind him and that's when he held me here." (Nov. 12-13 Tr. p. 78, lines 19-21.) When pressed further, Appellant said Victim did not throw the pipe at him, but backwards behind Appellant. (Nov. 12-13 Tr. p. 79, lines 18-21.) Appellant's testimony acknowledged Victim disarmed Appellant, then himself, before engaging in the fight. Appellant then claimed Victim held him, face to face, but he could not breathe, so he "took out his work tool and that's when I stabbed him." (Nov. 12-13 Tr. p. 44, lines10-16.) Appellant also acknowledged he and Victim had fought a few days before the incident. (Nov. 12-13 Tr. p. 64, lines 4-13.)

ARGUMENT

I. The trial judge did not err in denying Appellant's motion for immunity under the Protection of Persons and Property Act because Appellant failed to meet his burden of proof when multiple witnesses testified Appellant was the initial aggressor, Victim was unarmed when Appellant initiated the combat, and Appellant was not reasonably in fear of his life when Victim threw down his weapon and held Appellant in a non-lethal hold.

Introduction

The court did not abuse its discretion in denying Petitioner's request for immunity because the denial was supported by the witness testimony Appellant was the armed initial aggressor against an unarmed man in mutual combat. The statutory scheme under which Appellant sought pretrial immunity is the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et seq.* The Act provides, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle . . . ." S.C. Code Ann. § 16-11-420(A) (2006). The South Carolina Supreme Court has concluded "that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either

party, must be decided prior to trial." *Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). In this case, the court properly denied immunity for three basic reasons. First, Appellant armed himself with two weapons before approaching Victim in a mutual confrontation in which he stabbed Victim with the key hole saw. Second, Victim was unarmed when the two men engaged in the hand to hand combat. Third, to the extent the combat was mutual, Victim intended to either wrestle, at best, or engage in a fist fight, at worst, and therefore Appellant did not have a reasonable fear of death or great bodily injury when he stabbed Victim. Indeed, the men had similarly fought days before, with neither suffering any apparent injury.

Standard of Review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [an appellate court] reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing *Duncan*, 392 S.C. 404, 709 S.E.2d 662). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Finally, the abuse of discretion standard of review does not allow an appellate court to re-weigh the evidence or second-guess the trial court's assessment of witness credibility. *State v. Douglas*, 41 1 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014)

Analysis

The common law Castle Doctrine provides "[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." *State v. Gordon*, 128

S.C. 422, 425, 122 S.E. 501, 502 (1924) (citation omitted). In South Carolina, the Legislature codified the Castle Doctrine and extended its reach to include an occupied vehicle and a person's place of business. *See* S.C. Code Ann. § 16-11-420(A) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business."). Subsection (C) addresses the use of force by one who is attacked in another place where he has a right to be:

> 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 (emphasis added); *see also Curry*, 406 S.C. at 370, 752 S.E.2d at 266 (concluding defendant, who sought immunity under the Act after he fatally shot the victim, was defaulted into S.C. Code Ann. § 16-11-440(C) where the victim was a social guest and rightfully in the defendant's mother's apartment). In the instant case, Appellant seeks protection pursuant to subsection (C) because the stabbing occurred at the Appellant and Victim's workplace.

In *Curry*, the South Carolina Supreme Court clarified that the Act does not require a trial court to accept a defendant's version of the underlying facts. 406 S.C. at 371, 752 S.E.2d at 266. Rather, "[c]onsistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-

defense, save the duty to retreat." *Id.* The four elements required by law to establish self-defense are as follows:

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

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

The trial judge's ruling is consistent with the procedure the Supreme Court set forth both in *Curry* and in previous cases dealing with the Act. The trial judge had no obligation to accept Appellant's version of the facts, which even at face value failed to show Appellant was in reasonable fear of imminent danger. Instead, the court properly exercised its discretion to consider the conflicting testimony of the other witnesses and to assess the reenactment of the moments before the stabbing at the hearing. Appellant argues "the undisputed evidence demonstrated ... Muniz as the initial aggressor" and "[t]he undisputed evidence demonstrated that Appellant was not at fault at bringing on the difficulty." (IBOR at p. 17.) However, the record clearly contradicts these assertions. The evidence showed Appellant was not entitled to immunity because Appellant was, in fact, the aggressor, Victim was unarmed, and any belief Appellant had of imminent danger was not reasonable.

Appellant Was the Aggressor

The court succinctly characterized the first prong of the self-defense analysis when she noted the Act does not apply to offensive actions. (Nov. 9 Tr. p. 114, lines 12-13.) In South

Carolina, the common law Castle Doctrine is "predicated on the absence of aggression or fault on [the defendant's] part in bringing on the difficulty; the doctrine is for defensive, and not offensive purposes." *State v. Grantham* 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953); *Curry* at 372, 752 S.E.2d at 267. The record reflects the men were undoubtedly arguing verbally, but Appellant escalated the situation into a deadly confrontation when he decided to arm himself then aggressively attack Victim.

Although Supervisor Evans did not witness the fight, Evans did testify there was tension between the two men, so much so that he felt compelled to warn them they would be fired if they continued the workplace bickering. (Nov. 9 Tr. pp. 54-57.) Evans' testimony was corroborated at trial by that of Victim's father, Rafael Puentes. Puentes said the men had been arguing for days before the fatal stabbing, but according to Puentes, it was Appellant who continuously insulted Victim, calling him names because Appellant had bested Victim in a fistfight days before. (Nov. 10 Tr. pp. 262-268.)

Somosa's testimony was compelling. Samosa, who was Appellant's helper on the job, was called by the defense at the hearing and was presumably biased in Appellant's favor, yet his testimony clearly described how Appellant, fed up with the verbal bickering, decided to take matters into his own hands. (Nov. 9 Tr. pp. 60-78.) Samosa described how Victim asked Appellant to fight on numerous occasions, but, significantly, Victim would not actually engage in any fighting when Appellant did not agree to it. Samosa said the night before the stabbing, Victim took off his shirt, apparently indicating he wanted to fight. Appellant simply ignored him and Victim left him alone. (Nov. 9 Tr. pp. 60-78.) The next day, Samosa claimed Victim would walk by Appellant and ask him to fight, but Samosa also testified Appellant climbed down from his ladder at lunch time, and no incident occurred. (Nov. 9 Tr. pp. 62-64.) Even interpreting the

testimony in the light most favorable to Appellant, the Victim's repeated requests to fight could be ignored without repercussion.

However, instead of ignoring Victim, Appellant became angry. Samosa said Appellant grew tired of Victim's taunts, so at the end of the day, he descended the ladder, went over to his tools, and armed himself with the keyhole saw and a pipe. (Nov. 9 Tr. p. 65.) Until that point, no evidence showed either man had ever used a weapon against the other. At worst, the men had fought with their bare hands in the recent past, and neither man was significantly injured.[5] Appellant's action, in arming himself with the keyhole saw and pipe, aggressively changed the nature of the confrontation from taunting and bickering to deadly combat. Appellant, who was dragging the pipe with the saw concealed under his shirt in the waistband of his pants, advanced toward Victim and then swung the pipe at him. (Nov. 9 Tr. pp. 65-68; pp. 80-83.) Appellant crossed approximately fifteen to twenty feet of work area to attack Victim near the Victim's cement mixer. (Nov. 9 T. p. 80, lines 16-24.)

Samosa's testimony was corroborated at trial by multiple witnesses. Travis Flowers, who was more friendly with Victim than Appellant, but who only had a working relationship with Victim, heard the men bickering back and forth that day, and then later saw Appellant climb down from his ladder, start toward Victim with a pipe, then stop and return to his work area where he removed his tool belt, but reached down for the keyhole saw. (Nov. 10, pp. 176-183.) Flowers saw Appellant cross a span of approximately twenty feet to reach Victim, where he then swung the pipe at him. (Nov. 10 Tr. p. 182.) According to Flowers, Victim only acted defensively by picking up a pipe to defend himself then using it to disarm Appellant of his pipe. (Nov. 10 Tr. p. 210, lines 13-24.) Jeremiah Oxendine also corroborated Samosa's testimony.

[5] No witness testified the men suffered any injury in the previous fight, and both men were capable of working in their respective work areas when the fatal stabbing occurred.

Oxendine saw Appellant bend down near the tools in his work area, grab the keyhole saw and conceal it in his waistband under his shirt. (Nov. 10 Tr. pp. 225-226.) Oxendine saw Appellant approach Victim, who was standing by his cement mixer. (Nov. 10 Tr. p. 226, lines 8-19.) Oxendine also only saw Victim swing his pipe defensively, in an effort to knock down Appellant's pipe. (Nov. 10 Tr. p. 240.) Another witness, Ronnie Hunt, also testified he saw Appellant first swing his pipe at Victim. (Nov. 10 Tr. pp. 249-251.)

All of the witnesses' testimony, with the exception of Appellant's, was consistent. The evidence shows Appellant acted first, sought out Victim from across the room, and was disproportionately violent in his actions. While Victim may have expected and perhaps even agreed to some form of mutual combat, nothing about the men's history suggested the fight would be deadly. Regardless of who started the bickering on the day of the stabbing, Appellant began the physical confrontation that led to Victim's death. The outcome is solely attributable to Appellant's actions, and he cannot claim immunity under the Act.

Even if this Court finds Appellant was not the aggressor, the evidence shows Appellant at a minimum engaged in mutual combat with Victim. To constitute mutual combat, there must exist a mutual intent and willingness to fight, which is manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973). Additionally, whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat. *Id.* at 450, 196 S.E.2d at 495. Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense cannot be established. *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003). Thus,

Appellant, as a participant in mutual combat, cannot claim to be "attacked" pursuant to §16-11-440 (C).

In the instant case, the evidence shows Appellant consented to the fight at the end of the shift, and he cannot show he was attacked by Appellant. However, even if this Court finds that the term "attack" is ambiguous and further determines that the pretrial court abused its discretion in denying immunity on that basis, Appellant is still not entitled to relief because the pretrial court denied Appellant's immunity on other grounds. In particular, the pretrial court concluded that Appellant had not met his burden of showing by a preponderance of the evidence that he was reasonably in fear of death or great bodily injury when he stabbed Victim. The record supports the pretrial court's determination.

Victim was Unarmed

In addition to the testimony showing Appellant aggressively approached Victim with two weapons, the evidence also showed Victim attempted to diffuse the situation by apparently disarming Appellant and tossing aside his own weapon before engaging in hand to hand fighting. Thus, not only was Victim unarmed when Appellant started toward him, he was unarmed when the men began fighting. Recently the South Carolina Supreme Court found in *State v. Manning*, Opinion No. 27664, filed September 7, 2016, 2016 WL 4658956 (S.C. Sept. 7, 2016), the trial did not court abuse its discretion in denying the defendant immunity solely because the victim was unarmed. In *Manning*, the trial court only considered the statement given by the defendant he shot his girlfriend in self-defense after she started toward him. *Id.* The Court said the trial court considered all that was necessarily to make the immunity determination when the uncontroverted evidence showed the victim was unarmed. *Id.* Similarly, in the case at hand,

Victim was unarmed when he was stabbed, and this fact alone supports the trial court's discretion to deny immunity.

Both Samosa and Appellant testified the men were no longer holding pipes when they began hand to hand combat. Samosa told the court Victim "threw" his pipe before the men began "grabbing each other." (Nov. 9 T. p. 66, lines 2-8.) Samosa also told police Victim was unarmed when the men began wrestling. (Nov. 9 T. p. 83, lines 17-20.) Even Appellant testified at the pre-trial hearing Victim "tossed [the pipe] away from" him before grabbing him by the neck. (Nov. 9 T. p. 98, lines 1-2.)

This testimony was supported at trial by Flowers, Oxendine, and Hunt, who witnessed the attack. Flowers described Victim as trying to "block" Appellant's blows with the pipe before he was able to "pin his sprinkler pipe on the ground" before the men fought. (Nov. 10 T. p. 182, line 25 – p. 183, line 6.) Oxendine confirmed Victim used his pipe to "block" Appellant's blows before "they dropped the metal." (Nov. 10 T. p. 227, lines 7-15.) Ronnie Hunt also confirmed Victim "blocked" Appellant's blows, then "they scuffled a little bit and locked up with each other." (Nov. 10 p. 250, lines 9-15.)

Interestingly, Somosa also testified at the pre-trial hearing Appellant stopped to take off his tool belt before attacking Victim. (Nov. 9 T. p. 80, lines 5-10.) Samosa saw Appellant pick up the keyhole saw and later pull it out of his waistband to stab Victim. (Nov. 9 T. p. 82, lines 13-20.) Travis Flowers would later described the moments before the exchange with the following testimony:

> Mr. Pavon, he stopped about halfway to Mr. Muniz and he went back to his ladder and he propped his sprinkler pipe up and he took off his tool belt and set it on the ground.
>
> And he went to step away from his tool belt one foot came off the ground but the other stayed like he realized he forgot something. He put his foot back in

> the line of the belt and reached down and picked up his keyhole saw and he stuck it in his right side in between his pants and his skin. Then he put his shirt over it.

(Nov. 10 T. p. 182, lines 12-22.)

Although the testimony at trial contained more detail, the testimony at the pre-trial hearing was uncontroverted that Victim let go of his pipe, or tossed it aside, in order to engage Appellant, who had already swung at him. The Victim, who could have met Appellant's aggression with equal force, instead sought to diffuse the situation by removing the weapons from the men's hands. Everyone agreed the men fought hand to hand after Victim bested Appellant with the pipe. If Victim sought to hurt Appellant, he would have simply beaten him with the pipe. The evidence showed that although Victim never intended the fight to be serious, Appellant had other plans. Appellant's decision to remove his tool belt and hide the keyhole saw in his waistband under his shirt meant Appellant sought to seriously injure or kill Victim before a single blow was struck. Victim's arguments he is entitled to immunity pursuant to the Act are wholly without merit.

Testimony of "Reasonable Fear" Was Not Credible

Lastly, to be entitled to immunity from prosecution under the Act, a person using deadly force must "reasonably believe[] it is necessary to prevent death or great bodily injury to himself or another person ...." S.C. Code Ann. § 16-11-440. Applicant's belief deadly force was necessary was unreasonable because even if Victim sought out a physical confrontation with Appellant, the history between the men showed Appellant would not have been seriously harmed in the encounter.

Appellant had no reasonable belief death or great bodily injury was imminent because he had engaged Victim in a physical fight previously. Appellant himself admitted the men fought only a few days before the day of the stabbing. (Nov. 9 T. p. 89, lines 5-12.) Appellant

repeatedly testified he was afraid of Victim because of his larger physical size, but Appellant made no mention of any harm he sustained in the previous fight. (Nov. 9 T. p. 97, 14-23.) If neither man sustained any injury worth mentioning at the hearing, Appellant had no reasonable expectation of serious injury from the fight on the day he stabbed Victim.

Next, as mentioned previously, even if Appellant's testimony were to be believed, Victim never attacked Appellant by surprise, nor forced a physical confrontation without Appellant's consent. Appellant and Samosa both testified Victim **asked** Appellant to fight. (Nov. 9 T. p. 63, lines 12-19; p. 90, lines 2-4.) When Appellant declined, no fight occurred. Appellant had no reason to fear for his life if he knew Victim would not attack him or start a fight without his consent. The testimony showed Appellant declined to fight numerous times, including at lunch time on the day of the fatal stabbing. Thus, only Appellant determined the deadly outcome of the hostile verbal exchanges when he descended the ladder at the end of his day. Appellant's testimony he feared for his life when he could have ignored the Victim without repercussion is not credible.

Lastly, the nature of Victim's hold on Appellant contradicts Appellant's testimony he was being choked by Victim when he stabbed him. Both Appellant and Samosa testified in the pre-trial hearing that Victim held Appellant by the back of the head while the men were chest to chest. The testimony also indicated Victim was taller than Appellant. (Nov. 9 T. p. 82, lines 7-10; p. 98, lines 7-16.) The witnesses describe a hold in which Victim held Appellant close to his chest, with his arms around the back of Appellant's head and neck, and not his hands around Victim's throat. (Nov. 9 T. p. 104, line 17 – p. 105, line 20.) The trial judge, who was able to see the maneuvers described in the pre-trial hearing, determined the men were "merely wrestling" when Appellant stabbed Victim. (Nov. 9 T. p. 104, line 21.) Appellant's testimony he could not

breathe when Victim held him tightly against his chest, but at the same time he was able to withdraw the keyhole saw, pull back his arm, and stab upward at Victim, is not credible.

Appellant argues he is entitled to immunity because the facts of his case are analogous to those in *State v. Jones*, 416 S.C. 283, 786 S.E.2d 132 (2016) and *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). In *Jones*, the defendant fatally stabbed her boyfriend after she returned to their shared apartment following a violent altercation in which the boyfriend pushed, punched, and pulled defendant's hair. Witnesses saw the boyfriend dragging Jones down the street by her hair, and called 911. Jones also called a friend to come get her. Although the she was able to escape, Jones later returned, along with a friend, to gather her things. The friend saw the boyfriend argue with Jones while she gathered her belongings, then he grabbed her when she tried to leave and began shaking her. Believing he would hit her again, Jones stabbed her boyfriend with a knife she was holding. *Id.* at 287-288, 786 S.E.2d at 133-135. As issue in *Jones* was whether the Protection of Persons and Property Act, specifically §16-11-440(C), afforded immunity to victims of domestic violence when the deadly force occurred inside the dwelling in which both actors had a right to be. The court determined Jones was entitled to immunity pursuant to the Act.

In *State v. Douglas*, Douglas shot his friend Smith who had been a guest in his home after the men argued over Douglas' medication. *Douglas,* at 313, 768 S.E.2d at 236. Smith teased Douglas about the medication, and then snapped when Douglas demanded Smith return the bottle of medicine. Smith grabbed Douglas by the arms and threw him against the refrigerator. When Smith released Douglas, he fell on the floor and Smith climbed on top of him and struck him in the eye and bit him on the leg. Douglas crawled to his bedroom where he retrieved a gun from the dresser by his bed. Douglas demanded Smith leave, but Smith began approaching

Douglas again. Douglas fired at Smith when Smith was about two feet away. Smith was hit in the chest and died within minutes. *Id.* at 314, 768 S.E.2d at 236. The court determined Douglas was also entitled to immunity.

Appellant's reliance on these cases illustrates the stark difference between the facts of those cases and the case *sub judice.* In both *Jones* and *Douglas*, the defendants were brutally physically assaulted in the moments before the fatal act. Further, in both cases the defendants only engaged in deadly force when it appeared there was no way to avoid the confrontation. In *Jones*, the defendant stabbed her boyfriend when he stopped her from leaving their home, and in *Douglas*, Smith was shot when he continued to advance toward Douglas after being told to leave. Here, Appellant was subject to no threat when he descended the ladder at the end of his shift and started swinging at Victim. Appellant and Victim had fought days before, but there was no ongoing physical battle between the men. Appellant also testified Victim kept **asking** him to fight, but he could ignore Victim without consequence. Whereas in *Jones* and *Douglas* the victims brought the fight to the defendants, here, Appellant brought the fight to the victim. Moreover, he brought a deadly weapon to battle.

Appellant suggests Victim was the initial aggressor because of the verbal exchanges between the men. Appellant argues Victim's "taunting for weeks" justified his fear of Victim. (IBOA at p. 17.) However, even if the court ignores the testimony of supervisor Evans, who said both men participated in the bickering, Victim's words do not justify Appellant's actions. Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951). Thus, Appellant would not even be entitled to a charge on manslaughter, much less immunity under the Act. *See, e.g. State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920) ("Words accompanied

by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter."); *State v. Davis*, 50 S.C. 405, 423-424, 27 S.E. 905, 911 (1897) ("It may be concluded, therefore, that 'the sudden heat [of] passion, upon sufficient legal provocation,' which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an 'uncontrollable impulse to do violence.' ").

Appellant also argues Muniz's "choking" of him required Appellant to use "the only thing he could find—his saw—to stab Muniz once in the chest." (IBOA at 17.) Appellant does not explain why he specifically armed himself with the saw **before** he started the fight with Victim, however. Nor does he explain why, despite his fear of Muniz's physicality, he initiated a physical confrontation in the first place.

Appellant claims he killed Victim out of fear for his life; however, the record does not support his argument. His response to the bickering between the men that day was to descend his ladder, pick up a metal pipe, start toward Victim then stop, remove his tool and hide a keyhole saw under his shirt, then advance toward Victim again and begin swinging, and then finally stabbing Victim. Instead of ignoring Victim, or simply walking away at the end of shift, Appellant retrieved his weapons and went after Victim because he was angry and "fed up." These facts simply do not support the contention that Appellant was without fault in bringing on the difficulty, that Appellant was in fear of losing his life or imminent bodily harm, or that his fear was reasonable because of his previous interactions with Victim. (See IBOA at p. 17.) Instead, the record shows Appellant was the initial aggressor, Victim was unarmed when Appellant initiated the combat, and Appellant was not reasonably in fear of his life when Victim

threw down his weapon and held him in a non-lethal hold. The trial court did not abuse its discretion in finding Appellant was not entitled to immunity under the Act. Appellant's convictions must be affirmed.

CONCLUSION

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

Respectfully Submitted,

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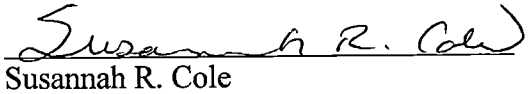


Susannah R. Cole
ATTORNEY FOR RESPONDENT

September 12, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS ELVIN CERVANTES-PAVON,

APPELLANT,

Appellate Case No. 2015-002472

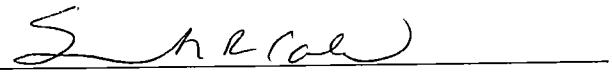
PROOF OF SERVICE

I, Susannah R. Cole, counsel for Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in inter-agency mail, first class, postage prepaid, addressed to his attorney of record at:

Susan B. Hackett
Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

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

This twelfth day of September, 2016.



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ALAN WILSON
ATTORNEY GENERAL

September 12, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Dennis Elvin Cervantes-Pavon
Appeal from Charleston County
Appellate Case No. 2015-002472

Dear Ms. Kitchings:

Enclosed please find the original plus one (1) copy of ***Initial Brief of Respondent*** and ***Designation of Matter***, dated September 12, 2016, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/pjc

Enclosures

cc: Susan B. Hackett, Esquire
The Honorable Scarlett A. Wilson, Ninth Circuit Solicitor
Trisha Allen, Victim Services