STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Colleton County
The Honorable Perry M. Bucker, III, Circuit Court Judge
Appellate Case No. 2015-001447

THE STATE,

Respondent,

v.

TAQUAN L. BROWN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court did not abuse its discretion in denying Appellant's motion for immunity from prosecution under the Protection of Persons and Property Act.

II. The circuit court properly denied Appellant's directed verdict motion because there was sufficient direct and circumstantial evidence reasonably tending to prove Appellant's guilt, which warranted submitting the case to the jury.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On December 19, 2013, the Colleton County Grand Jury indicted Appellant Taquan L. Brown on one count of murder, one count of possession of a weapon during a crime of violence, and one count of obstruction of justice, arising from the shooting death of Maurice Kemp and Appellant's statements after the shooting. The case was called for a jury trial on June 22, 2015, before the Honorable Perry M. Buckner, III, Circuit Court Judge.

Prior to trial, Appellant moved to dismiss the case pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410 – 450 (2015), commonly referred to as the "Stand Your Ground" or "Castle Doctrine" statute, contending he was entitled to immunity from prosecution. At the motion hearing, Appellant presented testimony from several witnesses who purportedly witnessed the shooting, and an investigator from the Public Defender's Office.

Larry Council testified he was riding with Appellant and another man at some point prior to the night of the shooting, and they went to the Southern Inn to find a woman who was living with Kemp at the time. Kemp got angry about them coming to find his girlfriend, went back inside his room and came back outside with a gun in his hand, and told Council they better leave the premises "before [Kemp] drops one of us out there." Appellant called 911, but hung up, and when the 911 operator called him back, Appellant stated he "was just going to let it ride; just let it go." (Trial Transcript [TT], pp. 15-20; Record on Appeal [R.], pp. ______).

On cross-examination, Council admitted he told police Kemp merely had the gun in his waistband, and he had changed his story on the witness stand. He also stated Kemp never pointed the gun at anyone that night. (TT, pp. 20-23; R., pp. _____).

Jessica Fulks testified Kemp came to her house the night of the shooting looking for his girlfriend, but she did not know where the girlfriend was. He stayed at her house for awhile

drinking and smoking marijuana, and left just before midnight to pay his phone bill so his phone would not get cut off. She stated she had heard he carried a gun, but she never saw him be violent, and he was a nice person who treated her nice. (TT, pp. 25-28; R., pp. _____).

Appellant testified about the incident at the Southern Inn, and stated he asked Kemp for a cigarette. Kemp got angry when one of the men with Appellant said Kemp's girlfriend had called him, and "just flipped," and told them to get out of there. Appellant stated he "was in a shock, like, where did this come from". Kemp then went into his room, got a gun and threatened to kill them if they did not leave. Appellant testified he told the 911 operator to "never mind," and stated he "didn't go back around [Kemp], because he wasn't a person who [Appellant] had to deal with on a daily basis. (TT, pp. 29-31; R., pp. _____).

Appellant further testified he was in his apartment sleeping on the night of November 20, 2013, when he woke up to the sound of someone beating on his door. One of Appellant's guests unlocked and opened the front door, and when Appellant got to the front room, Kemp pushed by Appellant's guest into the apartment. Kemp looked in every room in the apartment to see if his girlfriend was there until Appellant's guest told him she was next door in another apartment. Kemp then went out the back door of Appellant's apartment and over to the next apartment. According to Appellant's account of events, while Kemp was trying to get inside the next door apartment, one of the residents of that apartment entered Appellant's apartment through the front door and he was holding a gun, which Appellant took away from him. (TT, pp. 31-35; R., pp. ______).

Appellant stated Kemp came back to his back door after he was unable to get into the apartment next door, and asked if he could come back through Appellant's apartment to get to his car parked in front of the apartments. Kemp got angry when Appellant told him no, and

Appellant claimed Kemp said he was going to kill Appellant. Kemp did not push his way into Appellant's apartment, but walked around the apartment building to get to his car. (TT, pp. 35-36; R., pp. _____).

Rather than stay inside his apartment, Appellant walked out his front door. He saw Kemp come around the building, and Kemp's girlfriend came out of the next door apartment. Kemp and his girlfriend then went to Kemp's car, with the girlfriend getting in on the passenger side and Kemp "got in the driver's seat." Appellant testified some words were exchanged and Kemp got out of the car and called his name. Appellant waved his hand and told Kemp to leave but he came around the car "to the front panel by the front tire, and he started running towards [Appellant]." Appellant stated Kemp was reaching in his waistband as he ran, so Appellant shot him from approximately twelve to thirteen feet away. (TT, pp. 36-39; R., pp. _____).

On cross-examination, Appellant testified Kemp did not break into his apartment, and he did not force his way in when Appellant told him he could not come back through. Appellant stated he came out of his apartment because there were people in his yard, and his next door neighbor was coming over in her wheelchair. After Appellant stated he was afraid of Kemp, the solicitor asked him "[w]hy didn't you just stay inside your apartment," Appellant testified "I can't answer that question." (TT, pp. 39-44; R., pp. _____).

Jermaine Brown testified he was at Appellant's apartment the night of the shooting, and he was sleeping when he woke to "a big man standing over me, causing all type of chaos inside the house." After the man left through the backdoor, Brown left the apartment through the front door, and saw the man coming around from the back of the building toward his car. Brown testified the man was "yelling" at Appellant and threatening that he wanted to do something to Appellant, who was standing in his front yard approximately ten to twelve feet from the street,

but at the time of the shooting, Appellant was approximately six to seven feet from the man because the man ran at Appellant and looked like he was reaching for something to pull out. (TT, pp. 45-54; R., pp. ______).

Wylie James testified he was in Appellant's apartment the night of the shooting when Kemp "bust up in the house," and looked through the apartment for a woman. His testimony regarding the events that followed tracked with Appellant's and Brown's version of events, with one major difference. James testified Kemp went out the backdoor of Appellant's apartment and then came back through the apartment to the front yard. On cross-examination, James admitted he originally told the police he was not there that night, which was a lie. (TT, pp. 60-72; R., pp. _____).

After Appellant presented testimony from a Public Defender's Office investigation regarding measurements he took at the scene based on a photograph and information he received from Appellant's next door neighbor, the State presented testimony from the first officer to arrive at the scene after the shooting, who stated Kemp was lying on his stomach and his feet were approximately a step off the sidewalk beside the street, and was closer to the sidewalk than the apartment building. When the officer saw Kemp's face, he observed a gunshot wound to Kemp's forehead, which he testified would be a difficult shot for a novice to make if someone was running at him. He stated he was a firearms instructor and well versed in firearms, and for him to make such a shot, the target would have to be standing stationary right in front of him. (TT, pp. 73-101, State's Exhibit Two (Video); R., pp. _____).[1]

Captain Jason Walker of the Colleton County Sheriff's Office testified he responded to a reported shooting on the night of November 20, 2013. He assisted other investigators with taking photographs of the scene. Based on measurements taken that night, investigators

[1]State's Exhibit Two and numerous photograph exhibits were transported to the Court for consideration.

determined there was approximately thirty-eight feet from the blood spot where Kemp's head was to the front door of Appellant's apartment. (TT, pp. 101-114; R., pp. _____).

A SLED analyst testified she found gunshot residue on Appellant's right and left hands, and multiple gunshot residue particles on Kemp's hands. She further testified residue from a smaller caliber gun, such as the .32 caliber handgun determined to be the murder weapon, would not travel more than two and a half to three feet, and for Kemp to have gun residue on his hands, he had to be close to the gun barrel when it was fired. (TT, pp. 115-125; R., pp. _____).

Nyle Eltzroth testified he was a criminal investigator with the Colleton County Sheriff's Office in November, 2013, and responded to the shooting scene. He interviewed Appellant at the scene, and Appellant stated he was asleep and did not see or hear anything. In a subsequent interview that day, Appellant again stated he was asleep and only learned about the shooting when one of his guests woke him up to tell him about it. (TT, pp. 168-172; R., pp. _____).

Eltzroth interviewed Appellant again a couple of days after the shooting. At that time, Appellant told him about Kemp coming to the apartment looking for his girlfriend, and when he tried to come back through the apartment, Appellant told him he was not allowed to come back into the apartment and closed the door. Appellant told Eltzroth Kemp walked around the building, got his girlfriend and was walking to his car when a third person walked down the sidewalk, talked trash to Kemp and shot Kemp when he got out of his car. (TT, pp. 173-175; R., pp. _____).

After receiving additional information, Eltzroth interviewed Kemp's girlfriend, Coco. She stated she and Kemp were inside the car when Appellant came down the sidewalk with a gun in his hand. Kemp saw the gun and got out of the car. He put his hands out and said: "If

you're going to pull it, use it." Appellant then shot Kemp several times. (TT, pp. 175-176; R., pp. ____).[2]

Eltzroth confirmed Coco's version with a third party witness, who admitted he disposed of the gun Appellant used to shoot Kemp, and subsequently took officers to that location. The officers recovered a handgun, and it was subsequently forensically confirmed to be the weapon used in the shooting. (TT, pp. 176-177, 500-510; R., pp. ____).

While he was in jail, Appellant asked to speak with Eltzroth. At that time, he admitting shooting Kemp, but stated Kemp was coming toward him, and after the shooting, he found a revolver on Kemp, which he sold to a third party. Eltzroth interviewed the third party, who denied purchasing a weapon from Appellant. When he questioned the third party witness, who originally told him Appellant was the shooter, about Appellant's claim they found a weapon on Kemp, the witness stated "absolutely not," and said they did not even search Kemp that night. (TT, pp. 177-186; R., pp. _____).

After hearing the witnesses and argument of counsel, the circuit court ruled Appellant did not meet the burden of proving self defense by a preponderance of the evidence for purposes of the immunity hearing. In particular, the court found Appellant did not prove he was without fault in bringing on the controversy, and there was conflicting evidence regarding whether Appellant actually believed he was in imminent danger of death or serious bodily harm such that he was entitled to immunity under the statute. (TT, pp. 213-215; R., pp. _____).

The witnesses testified at trial much like they did during the immunity hearing. (TT, pp. 243-269, 364-399, 420-310; R., pp. _____). A pathologist testified Kemp had two bullet

[2]Eltzroth testified Coco died prior to the trial. (TT, pp. 177-178; R., pp. ____).

wounds, a significant and fatal wound to the middle of his forehead, and a wound in his abdomen. (TT, pp. 291-307, State's Exhibit 41 [Photo]; R., pp. _____).

The jury convicted Appellant of voluntary manslaughter on the murder charge, and of possession of a weapon during a crime of violence and obstruction of justice. (TT, pp. 656-657; R., pp. _____). The circuit court sentenced Appellant to five years incarceration on the possession of a weapon conviction, and twenty-five years on the voluntary manslaughter conviction, to be served consecutively. The court also sentenced Appellant to ten years incarceration on the obstruction of justice charge, to run concurrent with his other sentences. (TT, pp. 667-670; R., pp. _____). This appeal followed.

ARGUMENT

I. The circuit court did not abuse its discretion in determining Appellant was not entitled to immunity from prosecution under the Protection of Persons and Property Act.

Appellant contends he was entitled to immunity from prosecution under the Protection of Persons and Property Act ("the Act") because he was without fault in bringing on the difficulty, and he actually and reasonably believed he was in imminent danger of losing his life or sustaining serious bodily injury. Even though both contentions are meritless, the inquiry need go no further than whether Appellant established by a preponderance of the evidence he was without fault in bringing on the difficulty.

Under the mandates of the Act, any person who uses deadly force in a manner permitted by the provisions of the Act is immune from criminal prosecution for the use of deadly force.[3] S.C. Code Ann. § 16-11-450(A) (2015). Part of the legislative intent in implementing the Act was to "codify the common law Castle Doctrine." S.C. Code Ann. § 16-11-420(A).

The question of whether a defendant is entitled to immunity under the Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662, 665 (2011). "[W]hen 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." *Id.*

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[3] Specifically, Section 16-11-450(A) reads: "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 acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer." S.C. Code Ann. § 16-11-450(A).

In an appeal from a circuit court judge's pre-trial determination regarding a claim of immunity under the Act, the appellate court reviews the circuit court judge's ruling for an abuse of discretion. State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 237 (Ct. App. 2015); *see also* State v. Curry, 406 S.C. 364, 752 S.E.2d 263, 266 (2013) ("[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review."). The circuit court judge abuses his discretion when his conclusions lack evidentiary support, or are controlled by an error of law. State v. Elders, 386 S.C. 474, 688 S.E.2d 857, 861 (Ct. App. 2010); *see also* Reed v. Becka, 333 S.C. 676, 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.'") (citation omitted)). If **any** evidence supports the circuit court judge's immunity determination, an appellate court must affirm it. Curry, 752 S.E.2d at 267; *see also* Douglas, 768 S.E.2d at 237 ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility.").

In order to qualify for immunity under the Act, the defendant must establish a valid case of self-defense, which requires proof of four elements: 1) the defendant must be without fault in bringing on the difficulty; 2) 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; 3) if the defense is based upon actual 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 this particular instance. State v. Davis, 282 S.C. 45, 317 S.E.2d

452, 453 (1984). In determining whether the defendant is entitled to immunity, the trial court must necessarily consider the elements of self-defense, except the duty to retreat. State v. Curry, 406 S.C. 364, 752 S.E.2d 263, 266 (2013).

In this case, the circuit court found Appellant failed to establish by a preponderance of the evidence he was without fault in bringing on the difficulty, and there is ample evidence to support the circuit court's finding. Based on Appellant's own pre-trial testimony, the original altercation with Kemp associated with his abrupt entrance into Appellant's apartment, if an altercation occurred at all, ended when Kemp left the apartment and went next door to find his girlfriend. Then, after Appellant told Kemp he could not come back through the apartment, although Kemp verbally made it clear he was unhappy about Appellant's refusal, Kemp voluntarily went around the side of the building and was getting in his car when Appellant came outside with the gun in his hand, which led to the fatal shooting. When asked why he did not simply stay inside his apartment, Appellant admitted he did not have an answer. (TT, pp. 32-44; R., pp. _____).

It cannot be seriously disputed the subsequent fatal encounter occurred only because Appellant **chose** not to stay in his apartment and just let Kemp drive off. Instead, while claiming he was afraid of Kemp, Appellant **chose** to go outside **with a gun**, which was sure to cause difficulty, and engage in a verbal argument with Kemp until he shot him. *See* State v. Slater, 373 S.C. 66, 644 S.E.22d 50, 52 (2007) (an act in violation of the law and reasonably calculated to incite the occasion amounts to bringing on the difficulty and bars self-defense); State v. Wigington, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct. App. 2007) (a person who provokes or initiates an assault cannot use self-defense to escape legal liability); State v. Santiago, 370 S.C. 153, 634 S.E.2d 23, 27 (Ct. App. 2006) (defendant not entitled to a jury charge on self-defense

because he brought about the difficulty by going to the victim's house with a loaded gun in his car, which the victim saw when putting items into the car, and words alone are insufficient to constitute legal provocation). Even though Kemp did get out of his car after he saw Appellant approach with a gun, there is no evidence he had a weapon,[4] and Appellant's claim Kemp charged at him while reaching in his waistband is not supported by the forensic evidence.

According to Appellant, he was approximately twelve to thirteen feet away from Kemp when he shot Kemp. (TT, pp. 38-39; R., pp. _____). The forensic evidence established, however, there was approximately thirty-eight feet from the entrance to Appellant's apartment and where Kemp's head landed when he fell, Kemp was closer to the street than Appellant's apartment when he fell, and the amount of gunshot residue on Kemp indicated the fatal shot was fired from only three to four feet away. (TT, pp. 95-101, 108-109, 121-122, State's Exhibits 5, 8, 14,17 [Photographs]; R, pp. _______).

Kemp was shot twice, and the location of the most serious bullet wound is also very telling. The pathologist testified the head wound was almost exactly in the center of Kemp's forehead between his eyebrows, and other evidence established such accuracy would be extraordinarily difficult for a novice if Appellant was as far away as he claimed, especially given the condition of the weapon he used. (TT, pp. 299-298, 265-266, State's Exhibit 24; R., pp. _____).

There was ample evidence to support the circuit court's finding Appellant failed to prove he was without fault in bringing on the difficulty. On the contrary, it is clear from the evidence any altercation initiated by Kemp was over, and Appellant, who never saw a gun on Kemp, was

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[4] Kemp did have a weapon at his residence, and the fact he did not have it on him when he came over to Appellant's looking for his girlfriend, and never even implied he had the weapon that night, belies Appellant's claim he actually feared for his life or serious bodily harm.

directly at fault in bringing on the fatal encounter by coming out into the yard with a gun to engage in a verbal altercation with Kemp. But for Appellant's conduct, Kemp would not have been shot that night.

B. Reasonable Belief or Actual Danger

Under the circumstances of this case, Appellant's claim he believed he was in actual danger of death or great bodily injury falls under its own weight. As noted above, Kemp never brandished a weapon. At most, he engaged in trash talking just like Appellant did. Merely saying you are going to kill someone does not give rise to a right of self-defense unless the person making the statement affirmatively takes action designed to kill you. Further, the mere fact Appellant saw Kemp with a gun at Kemp's residence a week prior to the shooting is insufficient to cause a reasonable man to believe he is in actual imminent danger of death or great bodily injury. Again, evern if Appellant felt threatened by Kemp's words, his own conduct caused the situation.

In essence, Appellant created a situation so he could shoot a man and then claim self-defense. For the same reasons set forth in subsection A, the circuit court acted well within his discretion in finding there were questions about whether Appellant feared death or great bodily harm at the time he shot Kemp. Accordingly.there was evidence to support the circuit court's denial of Appellant's claim of immunity under the Act, and the ruling should be affirmed.

II. The circuit court properly denied Appellant's directed verdict motion because there was sufficient direct and circumstantial evidence supporting the circuit court's conclusions, and warranted submitting the case to the jury.

Appellant also contends the circuit court erred in denying his directed verdict motion because he was not at fault in bringing on the difficulty, and was in actual, reasonable fear of imminent death or bodily injury. While Appellant presents the evidence on these issues as virtually undisputed, as discussed above in Issue I, the "witnesses" for Appellant, and Appellant himself, gave multiple versions of the events. At a minimum, this raised significant credibility issues, which was for the jury to determine. In addition, the actual evidence at the scene and the forensic evidence, did not support any of Appellant's and his witnesses' multiple versions of events.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Walker, 349 S.C. 49, 562 S.E.2d 313, 315 (2002). In reviewing a defendant's directed verdict motion, the trial judge is only concerned with the existence of evidence, not with its weight, and the appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. State v. Larmand, 415 S.C. 23, 780 S.E.2d 892, 895 (2015). If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find the trial judge properly submitted the case to the jury. *Id.*

As discussed in depth above in Issue I, there was evidence indicating the original altercation (assuming for purposes of discussion there actually was an "altercation") was over, and Kemp was actually getting into his car to leave when Appellant came out of his apartment holding a gun, and initiated an argument with him. Thus, there were factual disputes regarding

Appellant's role in initiating the conflict, and whether he reasonably feared for his life. These factual disputes alone support the denial of Appellant's directed verdict motion.

Even looking at the evidence in a light favorable to Appellant, the directed verdict motion was still meritless. At best for Appellant, there were jury issues regarding his fault in bringing on the difficulty, and whether he was actually in danger of suffering death or seriously bodily injury. At a minium, witness credibility was a big fact for the jury to determine, and the fact the witness gave investigators varying stories over a period of time, created serious credibility problems.

The circuit court did not abuse its discretion in denying Appellant's directed verdict motion, and the evidence amply supports Appellant's convictions. Therefore, the circuit court ruling should be affirmed.

CONCLUSION

Based on the foregoing, Respondent submits the circuit court's denial of Appellant's immunity and directed verdict motion should be affirmed.

Respectfully submitted,

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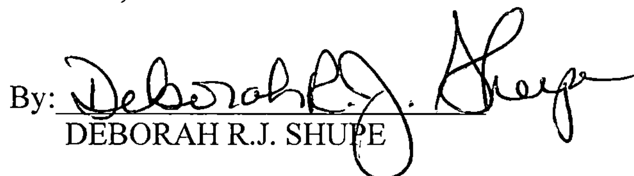

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ATTORNEYS FOR RESPONDENT

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THE STATE,

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TAQUAN L. BROWN,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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

This 30th day of September, 2016.

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SC Court of Appeals

September 30, 2016

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Re: The State v. Taquan L. Brown
Appellate Case No. 2015-001447

Dear Mr. Strom:

Enclosed are two copies of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)