

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2014-000161

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KATHY LEONARD REVAN,

APPELLANT.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

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S.C. Code Ann. §16-11-440	4, 6, 9
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ARGUMENT IN REPLY

ISSUE PRESERVATION

In Reply to Respondent's Brief, Appellant would submit the following. Respondent argues that Appellant has not preserved the legal assertion that she was entitled to the presumption of "*reasonable fear of imminent peril or death or great bodily injury to himself or another person.*" Brief of Respondent, p. 16-17. Appellant notes that she repeatedly testified that she was in fear for her life and that she, having already been badly beaten, was afraid they were going to come back after her. ROA p. 139, l. 1- p. 141, l. 22. She testified that while she was in her bedroom she could hear Tammy cursing at her father. Appellant stated that she was afraid that they were going to either come in her room and jump on her again, or, that they were going to jump on Straley. Because of those fears, she armed herself before going back out of her bedroom. ROA p. 129, l. 3 - p. 130, l. 15.

Appellant would submit that the Court had a duty to apply the appropriate law once she moved for immunity pursuant to the act. Respondent argues that Appellant would not be entitled to the presumption because the facts on her case do not meet the requirements of S. C. Code Ann. § 16-11-440 (Supp. 2010), which Respondent acknowledges is the central provision of the act. Respondent's analysis on the issue is both flawed and incomplete.

Respondent argues first that Petitioner's argument that she was entitled to the presumption that she had a reasonable fear of imminent peril under § 16-11-440 is not preserved for appellate review. Petitioner urges the Court to rule to the contrary. Petitioner moved for immunity pursuant to the act. This was a hearing not a jury trial.

The cases cited by Respondent on the question of issue preservation all dealt with jury trials in General Sessions Court. In *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003), this Honorable Court dealt with a pre-trial Motion to Suppress which was argued at trial purely on the general authority of both State and Federal constitutional provisions. Specifically, this Court found that *Dunbar* had not argued that the search warrant, and its supporting affidavit, failed to comply with *state statutory requirements*. *Id.*, 356 S.C. at 142-143, 587 S.E.2d at 694. In Appellant's case she expressly argued that she was entitled to immunity under the act.

In *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006) this Court found *Freiburger* failed to preserve his objection to the admissibility of a pawn shop receipt and other records that indicated he had purchased a revolver where he failed to enter a timely objection to their admission. In so ruling, this Court found the following,

Freiburger next contends the trial court erred in admitting certain pawn shop records pursuant to the Ancient Documents rule and the Business Records Exception, claiming *135 they were not properly authenticated by the state. We find this issue is not adequately preserved for review, and the record is, in any event, insufficient to enable this Court to make an intelligent review.

It appears Freiburger primarily objects to admission of the Capital Loan and Pawn receipt and records which indicate Freiburger purchased the H & R revolver on February 28, 1961. However, there is no objection to their admission during the testimony of Ms. Russ, the then 77 year old daughter of the pawn shop owner. In fact, certain exhibits were specifically entered without objection. To the extent that Freiburger did object, the objections came long after the documents had been received into evidence, most of which had been introduced into evidence without objection.

Id, 366 S.C. at 134-135, 620 S.E.2d at 742. Here, Appellant's counsel argued at the outset of her immunity hearing that the presumption of fear of imminent serious bodily injury or death, as provided for in the act, would apply to Appellant.

State v. Fleming, 254 S.C. 415, 175 S.E.2d 624 (1970), dealt with a challenge to the trial court's supplemental jury charge, in response to a jury question, in a case involving convictions for rape and assault and battery of a high and aggravated nature. In ruling that the appellate issues argued in *Fleming* were not preserved, this Court found that the errors argued on appeal had not been argued at trial. Specifically, the Court noted that at trial *Fleming* had argued that the trial court erred in recharging only "*on the single element of force*" as opposed to recharging "*the entire charge on the matter of rape and what constitutes rape.*" As this Court ultimately found, on appeal *Fleming* argued two entirely different claims; trial court error " (1) in failing to give a proper definition of force and justifiable fear, and (2) in his definition of force and fear he commented on the facts." For that reason, the issues argued on appeal in *Fleming* were found not to be "*preserved for consideration here by an appropriate exception ...*". Id, 254 S.C. at 421, 175 S.E.2d at 627. In the case before the Court, Appellant's lawyer moved for immunity under the act. While his arguments in support of that motion may not have been perfectly articulated, they nevertheless made out a claim for immunity under the act and specifically referenced her right to the presumption of fear of peril set forth in the act.

In this case, Appellant made a Motion for Immunity pursuant to the Castle Doctrine. In arguing for a grant of immunity, Appellant's counsel expressly addressed the "*presumption of a reasonable fear of imminent peril*" found in § 16-11-440. ROA

p. 8, l. 6 - p. 9, l. 23. As set forth in detail in the Initial Brief of Appellant, at the time of the shooting in this case, Appellant had been badly beaten, and was facing continued jeopardy at the hands of two much younger women who not only outnumbered her, but also significantly outweighed her. One of these women was known to Appellant to have been trained in hand to hand combat. These women had been asked to leave Appellant's home. As she cleaned herself up after being savagely beaten, she heard Tammy cursing at her father who was dying of stage IV cancer. Appellant testified that she feared these women were either going to "*come into my room and jump on me again or that they were going to jump on Lynn [Straley].*" ROA p. 130, ll. 1-11.¹ Photographs of Appellant introduced during the immunity hearing illustrated her injuries. See, Defense Exhibits, No. 1-8. Thus, not only did Appellant's counsel raise the presumption of reasonable fear of imminent peril, but Appellant testified to her ongoing fear and presented evidence of the extent of her injuries prior to this shooting. Appellant submits that this aspect of her argument was clearly preserved below. In addition, Appellant would bring the Court's attention to the fact that Respondent fails to even mention Appellant's assertion that she was afraid not only for herself, but for her gravely ill companion who was dying from stage IV cancer. Thus, Appellant not only asserted self-defense, but defense of others as well.

MERITS

Respondent argues that even if this issue is deemed preserved, Appellant would not be entitled to the presumption because the Victims had a right to be in the residence as lawful residents of Appellant's home within the meaning of § 16-11-440 (B) (Supp.

¹ State's Exhibits No. 33 and 33 B diagrams of the residence, were introduced during Appellant's trial. Those exhibits document that there was no door to the outside in Appellant's bedroom.

2010). Respondent's Brief, pgs. 17-18. In support of this position, Respondent states that, "*Appellant herself acknowledged she gave permission for [Tammy] Morrigan and Victim to stay at her house to visit Straley as long as possible before he died.*" Respondent's Final Brief, p. 1, para. 1, (emphasis added). The testimony referenced by Respondent actually stated, "*it was fine with me that they wanted to visit Lynn and I wanted him to have as much time with his children as he could before he died.*" ROA p. 105, ll. 1-5. Thus, Appellant did not extend the kind of open ended invitation argued by Respondent. Likewise, Respondent states that, "*Appellant admitted she got up for her chair to help them carry things out, not to eject them.*" Respondent's Final Brief, p. 18, para. 2. The exact testimony of Appellant reflects that Straley's daughter and her girlfriend were taking a long time to pack their belongings and leave, after being told to leave. This prompted Appellant to say, "*the hell with this, I'm going to help them carry it out ...*". ROA p. 124, l. 1- p. 125, l. 8. While it is accurate that Appellant testified that Straley attempted to get the two women to "*think it over and see how things are in the morning*", that statement was made after the Victim confronted him and Appellant about the conversation between Appellant, Straley and Tammy during which they told Tammy they had concerns about Victim's motives for being involved with her. The record below reflects two important considerations on this point. The residence was owned by Appellant and she and Straley were not a married couple. Therefore, he had no legal authority to give these women permission to stay. More importantly, Appellant's testimony confirms that *after* the verbal altercation, but *before* she was first physically assaulted, she told Tammy, "*it's time for you to get your s—t and get out of my d—n house.*" ROA p. 121, l. 1- p. 122, l. 18. After Appellant heard Straley urge his daughter

to sleep on the decision to leave, Appellant testified that she heard Tammy respond, “*no, they were gonna leave.*” ROA p. 123, ll. -10. Appellant therefore initially had reason to believe these two women were going to honor her demand that they leave notwithstanding any effort by Straley to change their minds. It was therefore, unnecessary for her to make an issue out of the fact that it was her residence and that Straley did not have the authority to override her demand for them to leave.

Appellant’s testimony reflected that after packing for approximately thirty (30) minutes, Tammy and Victim made multiple trips to their car with bags and that, in the process of doing so, they deliberately bumped the leg rest on her chair “*at least four*” times causing her pain. After Appellant decided to help the women get their belongings to their car, she personally put two bags she found in the room they had been using outside. ROA p. 123, l. 11- p. 125, l. 15. The record therefore, clearly establishes that these guests had been firmly told to leave by the only person with the authority to give them permission to stay and that most, if not all, of their possessions had been packed and removed from the residence before the physical altercation began when the deceased “*took her body and knocked into*” Appellant causing her to lose her balance. ROA p. 125, ll. 1-15. Therefore, Appellant submits that even if these women were entitled to adequate time to remove their belongings, that factor would be far outweighed by the fact that they had already removed most of their property from the residence and by the violent nature of their altercation with Appellant. Appellant submits that their right to pack and remove what little remained of their belongings certainly did not outweigh Appellant’s right to safety in her own home.

Next Respondent argues that there was no evidence presented that the person

against whom the deadly force was used was engaged in behavior that would meet the requirements of § 16-11-440 (A)(1). Respondent's Final Brief, p. 18-19. Respondent however, totally ignores § 16-11-440 (A)(2) which provides for the presumption of fear of imminent peril if the person who uses deadly force, "*knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.*" (Emphasis added). Appellant would submit that her initial assault by Victim, and her subsequent beating by both women, constituted "*an unlawful and forcible act*" which had occurred before this shooting. She submits that there was ample evidence in this case that Appellant had every reason to fear for her safety and that of Straley, and therefore, that she had the right to stand her ground and not retreat pursuant to S.C. Code Ann. § 16-11-440 (C). As previously noted, Appellant had been seriously injured, her assailants were not leaving her home despite being told to vacate, and one of these women could be heard continuing to scream at her frail, dying companion. On the facts of this case Appellant had every right to retrieve her gun and use it to protect herself and her companion, Straley.

With regard to Respondent's assertion that Appellant was not entitled to the protections of the act because she testified that she didn't *deliberately* shoot Victim, Appellant most respectfully submits that argument borders on being just plain silly. Such an analysis is not only illogical, it would lead to absurd results. Appellant *is not* claiming the first shot was *accidentally fired*. She does assert the shot she fired deliberately as a warning shot accidentally hit Victim. Simply put, if in any situation a person would have the right to use deadly force in self-defense, it is ridiculous to suggest that an individual prudent enough to try and avoid shooting someone by firing a warning shot would not be

eligible for immunity under the act. Likewise, the evidence in this case, when viewed under the preponderance of the evidence standard, indicated that the second shot was not deliberately fired at all, but rather went off accidentally while Appellant and Tammy were tussling for control over the weapon. ROA p. 64, ll. 16-18. Once again, Appellant would submit that she had good cause to defend herself by resisting allowing Tammy to gain control over this pistol. Appellant submits that she was acting in self-defense when both shots were fired and should not be penalized by an interpretation of §16-11-440 would not allow her to try and minimize harm by firing a warning shot.

Respondent additionally argues that Appellant did not meet the element of self-defense which requires that she be without fault in bringing about the difficulty. Respondent's Final Brief, pgs. 22-23. In support of that position, Respondent argues that Appellant admitted the fact that Tammy testified she didn't punch Appellant until after Appellant kicked her, and that she never heard Victim threaten Appellant. Respondent's Final Brief, pg. 22, para. 2. Respondent's analysis ignores key factual issues. Tammy was outside taking luggage to the car when this event escalated into a physical fight after Victim shoved Appellant with her body causing Appellant to lose her balance and begin to fall. Once that happened, Appellant had every right to defend herself, and under the circumstances, to view these two women as acting together and as jointly posing a clear and present danger to her safety and that of Straley as well. Furthermore, Respondent's argues that Appellant further failed to meet this requirement for a valid claim of self-defense because she armed herself after she, Victim and Tammy were separated, and she had gone into her bedroom. Once again, Appellant most respectfully submits that Respondent's argument is flawed. These two women did not leave Appellant's home

after they were all physically separated by Straley, despite have been told to go. The diagrams of the residence introduced by Respondent at trial verify that there was no exit to the outside in Applicant's bedroom. See, State's Exhibits 33 and 33B. Even if Appellant could have crawled out a window, which she had no legal obligation to do, she perceived her companion, Straley, to be in danger. She testified that she could hear Tammy cursing at him in the other room before she made the decision to arm herself. While Appellant could arguably have protected *herself* by staying in her bedroom armed against any effort by the women to come in her bedroom to attack her further, she could not have protected Straley by doing so. Appellant could hear a heated discussion between Tammy and Straley during which he was being cursed at by his daughter. Straley was in a very delicate physical condition due to his advanced cancer.

At some point during the scuffle between Appellant, Tammy and Victim, Straley's feeding tube had been ripped out and he was bleeding. He went to the kitchen to reinsert the tube and when he came back out, Victim and Appellant were on the floor. According to Straley's deposition he thought Victim pulled his feeding tube out. He stated that he actually went in the kitchen to fill a ziplock with ice for Appellant's face. He looked up when he heard Tammy say, "*are you crazy*" and at that point he saw Defendant had a gun in her right hand. ROA 64, ll. 6-15 and ROA 157, l. 19 – p. 159, l. 22. Given the events which had just taken place, Appellant submits that it was not unreasonable for her to believe it necessary to go back out of her bedroom to demand that these women leave her residence. Considering the beating she had already suffered, it was not unreasonable for Appellant to arm herself in self-defense before going back out to demand their departure. Once Tammy lunged at her, Appellant was within her rights

to defend herself with that weapon. She should be no less entitled to immunity because she tried to avoid actually shooting anyone by firing a warning shot. The decision to fire a warning shot when Tammy ran toward her was perfectly understandable since Tammy was her dying companion's daughter.

Lastly, Respondent states that Appellant has largely ignored the standard of review in arguing that the lower court erred in denying her immunity on the facts of this case. Respondent's Final Brief, pgs. 24-25. In making his ruling in this matter, the presiding judge ruled that Appellant was no longer in imminent danger once the physical altercation broke up. Appellant again most respectfully asserts that this ruling supports the conclusion that *the Court, not Appellant*, failed to apply the proper standard. Specifically, the Court ruled as follows:

I've read the statute very, very carefully this morning three times and I've read several cases that we've been referencing also this morning. I mean, where I have a problem with the testimony as far as what started what is once the fight breaks up, everybody goes back to each end of the house and then they come back, depending on who you hear, they come back in different orders, but understanding how the statute's written, I'm - - I'm gonna respectfully deny your motion for immunity. I - - ***I just don't believe that there was an imminent danger when they departed.*** Once they departed, they departed, and had it been an on-going thing, but I - - but there is conflicting testimony both ways as to what happened next, who came back in the room first. No question where the gun came from, but I do not believe that it's met the parameters outlined in the statute of, what, 16-11-440 and 430, 420. So, respectfully, your motion is denied on the immunity request.

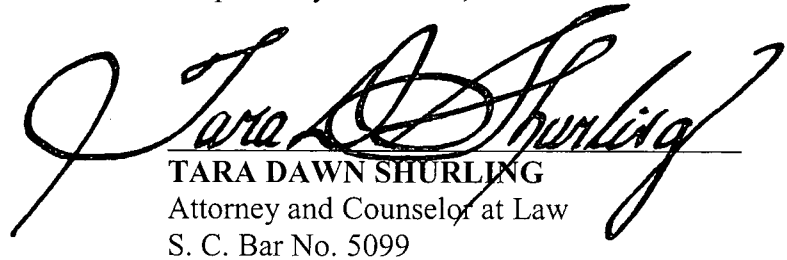
ROA p. 184, l. 11- p. 185, l. 6, (Emphasis added). As argued by Appellant in her Initial Brief of Appellant, "*the operative question is whether a reasonably prudent person, of*

ordinary firmness and courage would have entertained the belief that they were in imminent danger”, not whether the Court believed she actually was. See, *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Applying that standard, Appellant submits the trial court abused its discretion in failing to grant immunity in this case. The question before the Court was not whether the trial judge thought Appellant was in peril, but rather she believed she was under the reasonable person standard. Victim and Tammy had been told to get out of Appellant’s home. They continued to act in an aggressive manner and failed to leave even after the conflict turned violent. Tammy was heard cursing at Straley who was literally a dying man. Appellant acted reasonably in believing Tammy and Victim posed an ongoing threat. Immunity should have been granted.

CONCLUSION

Based upon all the arguments and authorities addressed herein, as well as those advanced in Appellant's Initial Brief, Appellant asks that her convictions and sentences be reversed and that her case be remanded to the circuit court for entry of an order granting immunity on all charges.

Respectfully submitted,



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This 20th day of July, 2016.

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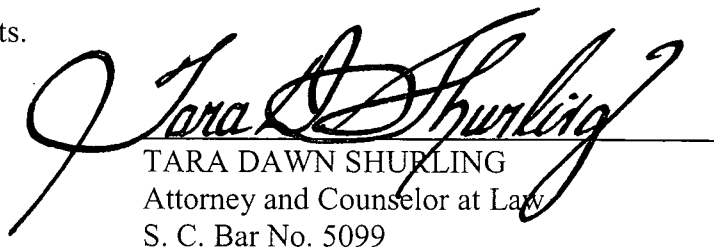
v.

KATHY LEONARD REVAN,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.


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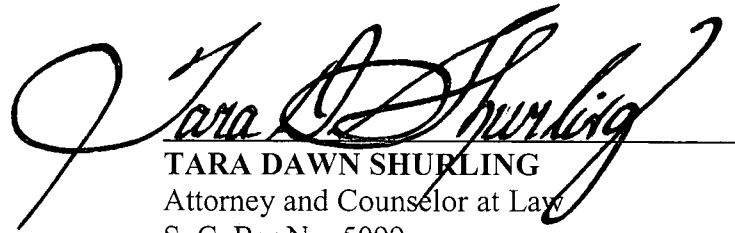
KATHY LEONARD REVAN,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Final Reply Brief in the above-entitled case has been served upon opposing counsel by depositing in the U.S. Mail, postage prepaid, this 20th day of July, 2016, addressed as follows:

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SWORN TO BEFORE me this 20th day
of July, 2016.

Shawn H. McAllister (L.S.)
Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017