STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

The Honorable Clifton B. Newman, Circuit Court Judge
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2016-000475

THE STATE,

Respondent,

v.

RICHARD A. CAPELL,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly denied Appellant's motion for immunity under the South Carolina Protection of Persons and Property Act.

STATEMENT OF THE CASE

Appellant was indicted at the November 2015 term of the Grand Jury for Richland County for Pointing and Presenting a Firearm. (2015-GS-40-6008). On January 13, 2016, Appellant filed a motion seeking immunity from prosecution pursuant to S.C. Code Ann. §16-11-440 (C). An evidentiary hearing was held before Judge Clifton Newman on January 19, 2016 to determine whether Appellant was immune from prosecution. Judge Newman ultimately denied Appellant's motion for immunity.

On January 25-26, 2016, Appellant appeared for trial before Judge Robert E. Hood and a jury. The jury returned a verdict of guilty. On February 19, 2016, Judge Hood sentenced Appellant to five years suspended upon the completion of three years, followed by five years on probation. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

John Bunucci began working as the property manager for the Point Arcadia apartment complex in September of 2007. Tr. p. 32. Bunucci's responsibilities included bookkeeping, maintenance, and operating the apartment complex's swimming pool. Tr. p. 32. Bunucci worked in a small office in the apartment complex's clubhouse. Tr. pp. 32-33. Appellant was a resident at Point Arcadia. Tr. p. 33. Bunucci stated he and Appellant initially had a very good relationship. Tr. p. 38. Bunucci noted on one occasion, Appellant told him, "I carry and everybody knows it." Tr. p. 38. Buncci clarified Appellant was talking about carrying a weapon. Tr. p. 38. Bunucci explained he and Appellant later had a disagreement involving whether Appellant could take his service dog into the community pool with him. Tr. pp. 38-40. Bunucci stated he was concerned whether there were any DHEC regulations concerning pets in the pool, so he told Appellant he would check into the matter. Tr. p. 38. Bunucci later wrote Appellant a letter telling Appellant the dog was allowed in the pool, however asking him to use the pool after hours for the safety of other swimmers as well as Appellant's dog. Tr. pp. 39-40. Bunucci also noted Appellant confronted him on an earlier occasion because "he was very angry with stray cats." Tr. p. 40.

On February 16, 2015, Appellant entered Bunucci's office and loudly exclaimed "what are you criminals up to today!" Tr. pp. 34-36, R. p. * (Video). Appellant previously attached a cell phone with video capabilities to his chest to create a homemade body camera, which was recording throughout the incident. Tr. p. 18. Appellant then began to verbally harass Bunucci regarding the prior issue between the parties. R. p. * (Video). Once Appellant decided Bunucci was not going to give him the answers he desired, he slammed his hands on Bunucci's desk and told him, "I'll see you in court." Tr. p. 14.

As Appellant left Bunucci's office, Bunucci rose out of his chair and asked Appellant whether he was threatening him. Tr. pp. 14-15, R. p. * (Video). Appellant then slammed the door to Bunicci's office. Tr. p. 15. Bunucci then stated, "As soon as I threw the door open I had a gun pointed at me." Tr. p. 45. Appellant told Bunucci to "get the fuck back." R. p. * (Video). Bunucci then turned and returned to his office, where he called the police. Tr. p. 46. As Appellant was leaving the building, he jubilantly exclaimed, "And I got it on video too!" R. p. * (Video). Bunucci noted he had no intention of hitting Appellant and that his hands were at his side at the time Appellant pulled a gun on him. Tr. p. 45. Bunucci also noted he was not armed on the day of the incident. Tr. p. 45.

Appellant's Testimony

Appellant testified during a pre-trial hearing on his assertion of immunity under the Protection of Persons and Property Act. Tr. pp. 12-31. Appellant stated he went to confront Bunucci regarding the issue of whether his service dog was allowed to accompany him in the swimming pool. Tr. p. 14. When describing his conversation with Bunucci, Appellant testified:

> Well, he was just being extremely evasive towards me and that just kind of boiled my blood a bit. And you know, like anybody that has, you know property problems with someone, when they're being ignored or they're being evasive towards them they tend to get a little perturbed with them so I said fine, I'll see your ass in court, slammed my fist on the desk, not him, not at all, I never touched him. Slammed my fist on the desk and then I turned around and started to leave. And as I was leaving, before I could even get the office door closed he's up out of his desk and he's charged towards me towards the door. Now he's becoming a threat towards me and he's yelling, are you threatening me; and I said no, wham, slammed the office door shut and then I started to retreat further. And as I was, I heard the office door open behind me and he became a real threat and I turned around and engaged the threat to stop him. And I was prepared to use deadly force to stop the man if he didn't stop; and when I spun around and identified him, you know, or engaged the threat, he stopped. And once he stopped I didn't have the need to go any further with my self-defense or, you know, no need to shoot him, he stopped. That's – my intentions was to make the man stop; he did. And I told him to step back; well, I used profanity. But anyway, told him to step back, he

> stepped back, and he went in his office and I re-holstered my weapon and I went home.

Tr. pp. 14-15. During cross-examination, Appellant conceded that Bunucci was walking, rather than running when he was moving towards him. Tr. p. 25. Shortly after Appellant returned to his home, the Forest Acres Police Department arrived at Appellant's door. Tr. p. 16. Appellant refused to open the door, noting, "any good lawyer will tell you don't talk to the police. They can never help you, never, never, never talk to police so I didn't." Tr. p. 16. Appellant subsequently uploaded his self-recorded video of the incident to YouTube and emailed a copy to Sergeant Lori Tumblin of the Forest Acres Police Department. Tr. p. 30. Appellant then turned himself in to the police. Tr. p. 16.

Judge Newman's Ruling

Judge Newman ruled that with the exception of establishing he was not engaged in an unlawful activity, Appellant had failed to establish by a preponderance of the evidence any of the elements of § 16-11-440(C). Tr. p. 67. Specifically, Judge Newman found

> The defense has failed to establish by preponderance of the evidence any of the elements of Section 16-11-440 (C) except the first section not engaged in an unlawful activity. I guess with the concealed weapons law is as it is, allowing people to randomly carry guns, perhaps he stablishes that. Subsection two, a person who is attacked in place where he has a right to be. He was not attacked by anyone. He was the aggressor attempting to incite the property manager. He has, number three, has no duty to retreat, has the right to stand his ground meet force with force including the deadly force. There was no intent by anyone to impose any force upon him. Number four, if he reasonably believes it's necessary to prevent death or great bodily injury. There's nothing in the contact, nothing in the conduct of the defendant in this case that I've observed that demonstrates any reasonable action by the defendant and any basis for having any belief that he needed to use death, great bodily injury or pull a weapon on the victim. He failed to convince the Court by a preponderance of the evidence that he's entitled to immunity.

Tr. pp. 67-68. Judge Newman further observed:

> I think the entire hearing in that connection is a waste of time if you believe that he can enter into the property manager's office in a threatening and menacing

fashion and pull a gun on him after threating to get him arrested and sued and all that, and then to expect the law to protect his actions.

R. p. 67-68.

ARGUMENT

I.

The trial judge properly denied Appellant's motion for immunity under the South Carolina Protection of Persons and Property Act.

Appellant contends the trial court erred in ruling Appellant was not immune from prosecution pursuant to the Protection of Persons and Property Act. Specifically, Appellant asserts he established all required elements of S.C. Code Ann. § 16-11-440 (C). Appellant further avers he established a valid case of self-defense. Both of Appellant's claims lack merit. Appellant's misdeeds conclusively fail to qualify for immunity pursuant to the Act where Appellant did not use deadly force as required by S.C. Code Ann. § 16–11–450, nor did he establish the required elements under S.C. Code Ann. § 16-11-440 (C). Further, Appellant was not properly acting in self-defense where he unreasonably pulled a firearm on Bunucci during a verbal altercation Appellant instigated.

Protection of Persons and Property Act

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or

forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

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) (Supp. 2011). The Act also states, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16–11–420(B) (Supp. 2011).

The Act further provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, . . ., his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (Supp. 2011) (emphasis added). The Act contains a definition of deadly force, defining it as force "that is intended or likely to cause death or great bodily injury to another person." S.C. Code Ann. § 16-11-440(A) (Supp. 2011). The Act defines great bodily injury: "'Great bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-11-430(2) (Supp. 2011).

The immunity provision at issue provides:

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

S.C. Code Ann. § 16–11–450 (Supp. 2011).

The South Carolina Supreme Court considered the immunity provision in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The Court concluded: "We agree with the circuit court 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." Id. at 410, 709 S.E.2d at 665 (emphasis added).

A clear reading of the immunity provision indicates it only applies when an individual uses deadly force as authorized by the Act. In this case, Appellant pointed his firearm at Bunucci's chest. The simple act of pointing a firearm is not an act that is "intended or likely to cause death or great bodily injury to another person." Without Appellant completing an overt action, i.e., actually firing the weapon, there was no exertion of deadly force. Pointing a weapon at someone could invariably lead to the use of deadly force, however the mere act of pointing and presenting in itself does not constitute the use of deadly force. As a result, Appellant's conduct does not entitle him to immunity even if he did otherwise act in accordance with Section 16-11-440(C).

Additionally, even if this Court overlooks the fact that Appellant does not qualify for immunity when he did not use deadly force, the Supreme Court determined the defendant has the burden of proving his entitlement to immunity. The Court further held: "when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Duncan, 392 S.C. at 411, 709 S.E.2d at 665. As noted above, pursuant to S.C. Code Ann. § 16-11-440(C), a person has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if (1) he was not engaged in an unlawful activity; (2) he was attacked in another

place where he had a right to be, and (3) he reasonably believed the use of force was necessary to prevent death or great bodily injury to himself. There is considerable evidence to support the trial judge's finding Appellant was never faced with any force, was not attacked in a place he had a rightful place to be, and could not reasonably believe the use of force was necessary to prevent death or great bodily injury to himself. First, Appellant was never faced with any force whatsoever; therefore he had no right to meet "force with force." Appellant initiated a verbal altercation with Bunucci and when Bunucci followed Appellant to continue the verbal altercation, Appellant needlessly pulled a pistol and pointed it at Bunucci. Rather than meeting "force with force," Appellant met words with force. Second, and similarly, Appellant was never "attacked." While Appellant did have a right to be in the clubhouse, Bunucci was simply continuing the verbal confrontation Appellant started. At no point was Appellant "attacked." Finally, as noted by the trial judge, nothing in Appellant's actions approaches reasonable behavior. Appellant started a verbal confrontation, threatened Bunucci, and slammed Bunucci's office door. When Bunucci followed Appellant to continue discussing the matter, Appellant pulled a gun on him. Bunucci was walking towards Appellant and had his hands by his side. There is absolutely no credible evidence to support the assertion Appellant reasonably believed the use of force was necessary to prevent death or great bodily injury to himself. Appellant, thus, completely failed to establish by a preponderance of the evidence that he satisfied the requisite elements to qualify for immunity under the Protection of Persons and Property Act. Appellant's action of pulling a gun on a man with whom he was arguing is certainly not the type of conduct the legislature meant to protect in codifying the Act.

Self Defense

Appellant also contends he established a valid case of self-defense because he was not at fault in bringing on the difficulty, he believed he was in imminent danger of sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. To the contrary, the State disproved at least three of the elements of self-defense. When a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544–45, 500 S.E.2d 489, 492–93 (1998). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Williams, 400 S.C. 308, 315, 733 S.E.2d 605, 609 (Ct. App. 2012) (quoting State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010)). To establish self-defense in South Carolina, four elements must be present: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did. State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) (citing Jackson v. State, 355 S.C. 568, 570-71, 586 S.E.2d 562, 562 (2003); State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000).

In Appellant's case, the State demonstrated an absence of three of the four elements. First, the State showed Appellant was at fault in bringing about the difficulty. Appellant went to Bunucci's office with a phone with video capabilities strapped to his chest to confront Bunucci about the issue regarding Appellant's dog. Appellant swung open the door without knocking and asked Bunucci "what are you criminals up to today." Appellant then harassed Bunucci,

imploring him to "confess" and threatening police and judicial intervention in the event that he did not. After threatening Bunucci, Appellant slammed the door to his office. When Bunucci exited the office to continue the verbal confrontation started by Appellant, he found a gun pointed at his chest. Appellant was thus at fault in bringing about the situation that ended in him drawing his weapon on a man who was just arguing with him.

Second, the State also demonstrated a reasonable prudent person of ordinary fitness and courage would not believe he was in danger of losing his life or sustaining serious bodily injury. The facts demonstrated that Appellant and Bunucci were engaged in a verbal disagreement. Appellant threatened Bunucci, telling him he would see him in court, before slamming the door. When Bunucci left his office to continue the conversation with Appellant, he was walking with his hands by his side. No reasonable person would believe someone walking towards them during a verbal altercation could result in serious bodily injury.

Finally, since the Protection of Persons and Property Act did not apply in Appellant's case, it did not eliminate Appellant's responsibility to retreat or seek other means of avoiding the danger. Appellant's action of telling Bunucci he would see him in court and then slamming the door did not constitute a "retreat." Instead, Appellant's parting threat and forceful slam of the door was an effort to instigate Bunucci and continue the verbal confrontation. Once Bunucci left his office to respond to Appellant's threats, Appellant was seemingly waiting for him with a gun pointed to his chest. Had Appellant continued walking instead of pointing a gun at Bunucci's chest while telling him to "get the fuck back," he could have avoided any potential danger. However, Appellant continued to provoke Bunucci, therefore giving him an occasion to use the gun he long bragged about carrying. Accordingly, the State disproved multiple elements of self-defense.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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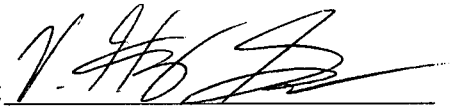
BY: 
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February 22, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Clifton B.Newman, Circuit Court Judge
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No: 2016-000475

THE STATE,

Respondent,

v.

RICHARD A. CAPELL,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 22nd day of February, 2017.

Anne Mueller

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RECEIVED
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SC Court of Appeals

February 22, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Richard Capell
Appellate Case No: 2016-00475

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: Laura R. Baer (with two copies)
Ms. Trisha Allen