STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable D. Craig Brown, Circuit Court Judge
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-001934

The State, Respondent,

vs.

Allen Wesley Massey, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied Appellant's motion for immunity under the Protection of Persons and Property Act when he failed to establish he reasonably feared for serious bodily injury or for his life and when this case "presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution."

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Prior to trial, Appellant requested an immunity hearing pursuant to the Protection of Persons and Property Act and section 16-11-450 of the South Carolina Code. This hearing was held before the Honorable Craig Brown from March 30 to 31, 2015.

Renee Robinson, the mother of the victim, testified her son and Appellant were friends who had known each other for years and that the families were friendly with each other. (3/30T.11-12; R. 11-12). She stated the two never had any problems prior to Appellant shooting the victim. (3/30T.12; R. 12). According to Ms. Robinson, Appellant never indicated he feared the victim, and instead the two "hung together" frequently. (3/30T.16-18; R. 16-18).

Appellant testified that on the morning of October 12, 2013, at approximately 3:00 a.m., he shot and killed the victim following a physical altercation at a party being hosted by his cousin, Malika Harris. (3/30T.22; 24-25; 28; R. 22; 24-25; 28). Appellant stated when he arrived at the house the door was closed, and he was let inside by Lisa Stratford. (R. 24-25). Appellant later explained: "Well, after Malika let me in I spoke to her first and then Shonettia [Hunter]." (3/30T.26-27; R. 26-27).

Appellant testified he had been at another party earlier in the evening in which the victim's cousin, Rashawd Robinson, was present. (3/30T.28; R. 28). Appellant and Rashawd were on "rocky" terms after Appellant turned State's evidence against Rashawd in an armed robbery trial in 2008 that resulted in Rashawd's incarceration. (3/30T.29-31; R. 29-31). Rashawd punched Appellant twice in the face, and other party-goers intervened before the situation escalated. (3/30T.31; R. 31). Appellant told the victim what happened between him and Rashawd at the prior party. He stated: "it didn't really hurt me and I wasn't mad about it, . . . I still felt kind of bad about what happened [incarceration of Rashawd] so I had already let it go."

(3/30T.35; R. 35). The victim shook Appellant's hand and stated, "Okay. Well, that's cool." (3/30T.36; R. 36).

Appellant stated thirty seconds to a minute after this information was allegedly well-received by the victim, the victim punched Appellant in the face once, knocking him to the ground in the kitchen. (3/30T.37; R. 37). He stated he looked up and saw the victim approaching him. Appellant testified the victim was "lunging forward with his fist cocked back." (3/30T.38; R. 38). He compared the victim, a long-time friend with whom he had never had any problems, to a lion, stating: "You see this fierce look in his face and you see he's determined to . . . make the kill. . . . it's coming to do damage." (3/30T.38-39; R. 38-39).

As the victim approached, Appellant stated that he was concerned that he was about to "get beat" and thought he could incur "any amount of significant injuries." (3/30T.43; R. 43). After thinking about the matter for "two to three seconds" Appellant drew his gun from his front pant pocket and shot the victim. Appellant admitted that he was a felon in illegal possession of a handgun on the night of the shooting, and that he should not have had the gun on him at the time. (3/30T.41; R. 41). While in custody pending trial Appellant had a fellow inmate draw a representation of the shooting which showed Appellant sitting on the ground where he landed after the punch, and the victim bent over Appellant. (3/30T.44-45; 99; R. 44-45; 99). Appellant explained the victim fell "straight down kind of forward" after he was shot. (3/30T. 46; R. 46).

On cross-examination Appellant testified he did not have a concealed weapons permit (3/30T. 52; R. 52), and he had been previously charged with unlawful possession so he knew it was a crime to be in unlawful possession of a firearm. (3/30T. 53; R. 53). Appellant admitted although Rashawd punched Appellant in the face twice, he waited for partygoers to intervene in the incident and did not consider drawing his firearm even though he knew he may be injured.

(3/30T. 67; R. 67). Appellant then went to the Harris home, where he testified he always knocked before he was admitted, and never walked in unannounced or without being let inside. (3/30T. 72; R. 72). Appellant testified he was let into the home by Ms. Stratford and "Malika did not come to the door." (3/30T. 73; R. 73). Later, however, Appellant indicated Malika handed him a beer "as soon as I came in." (3/30T. 77; R. 77). Appellant admitted that he had a significant quantity of alcohol prior to going to the Harris residence; specifically Appellant believed that he consumed six or seven beers within a 1 to 2 hour period. (3/30T.77-78; R. 77-78).

Appellant explained he told the victim about the prior incident with Rashawd because he wanted to let the victim know he was "cool about it" and because they were friends. (3/30T.84-85; R. 84-85). Appellant averred he was never afraid of the victim before and they were good friends. (3/30T. 85; R. 85).

Upon meeting with police the day after the shooting Appellant waived his Miranda rights and consented to an interview. (3/30T. 102-103; R. 102-103). Appellant admitted he did not tell the police about the victim's nickname, or that he was afraid of the victim. He never told the police about how the victim looked like a lion going in for the kill. (3/30T. 85-87; R. 85-87). In that interview Captain Scott Grant of the Lancaster Police Department asked Appellant why he shot Marcus. (3/30T. 103-104; R. 103-104). Appellant told the Captain: "I didn't feel like fighting." (3/30T. 104; R. 104). Appellant confirmed this statement to the Solicitor at the hearing, indicating: "Yes. I wasn't in any shape to fight." He admitted he told the Captain: "I'd been drinking and wasn't in any shape to fight." (3/30T. 104; R. 104). When the State questioned Appellant about his fight with Rashawd Robinson, Appellant testified he had told the police "I

had been drinking that night. I wasn't in any - - no shape to fight so I just left it alone, you know, I just left." (3/30T. 105; R. 105).

Appellant further acknowledged the victim only struck him once, and he told his attorney the only injury he suffered was the minor injury to his lip. (3/30T. 107-108; R. 107-108). When questioned about whether Appellant perceived the victim intended to cause him serious bodily injury, or what he defined as serious bodily injury, Appellant stated: "I mean, anything. There wasn't any telling what extent he could have taken it to." (3/30T. 109; R. 109). When questioned about his drinking, Appellant testified the consumption of 6-7 beers may have caused him to be impaired at the time of the fight and the shooting. (3/30T. 111-112; R. 111-112).

Under cross-examination, Appellant admitted it was only after his interview with the police, but before the immunity hearing, when he learned about the Act and the specific language of 'serious bodily injury' he used during the hearing. (3/30T. 116; R. 116). He further testified he didn't tell police he was in fear of serious bodily injury or death from the victim because he "didn't know that it was a factor." (3/30T. 119; R. 119).

Following Appellant's testimony, Dr. Janice Ross, the pathologist who conducted the conducted the autopsy on the victim, was qualified for the hearing as a forensic medical expert. (3/30T. 126-128; R. 126-128). She testified at the time of his death the victim was a 5'10", 220 pound male. (3/30T. 130; R. 130). In comparison to the victim, Appellant testified that he is 5'11" tall, and 210 pounds. (3/30T. 117; R. 117). On her examination, Dr. Ross discovered a single bullet wound beneath the nipple of the right pectoral muscle. (3/30T. 130; R. 130). Following the trajectory of the bullet, the doctor found the path travelled through the diaphragm, through the liver and duodenum, and through the left kidney, coming to rest just outside the kidney. (3/30T. 132; R. 132). Based upon the injuries to the organ systems, and the two liters of

blood found in the victim's abdomen, Dr. Ross determined the cause of death was exsanguination from the liver and kidney secondary to a gunshot wound. (3/30T.132-133; R. 132-133).

Dr. Ross further testified she examined the hands and arms of the victim for what are commonly known as "defensive wounds." She found no cuts, torn skin, marks, bruising, or any other indication that the victim had been in a fight or punched Appellant with any force necessary to cause such wounds. (3/30T. 139; R. 139).

On cross-examination the pathologist testified the trajectory of the bullet may have been consistent with the victim was bent over and Appellant was shooting from a seated position on the floor. (3/30T. 142; R. 142). However, she further testified it could be just as likely that both parties had been standing, and that the fatal shot was fired from a position that was above the wound with the bullet travelling in a downward trajectory. (3/30T. 152-153; R. 152-153). When questioned by the defense about whether a punch to the head could cause serious bodily injury, Dr. Ross opined a head injury could cause serious damage if it was delivered with force sufficient to fracture the skull or cause bleeding around the brain. (3/30T. 147; R. 147). She did not testify that "any" head injury could be a serious injury.

Dorothy Massey, Appellant's mother, testified she received a phone call from her son the morning of the shooting. When he told her of the fight she asked if he was ok, or if he needed to go to a doctor. He told her he was "beat up a little bit but I'm ok." Appellant refused to seek medical attention. (3/30T. 202; R. 202).

Captain Grant stated he interviewed Appellant the following day. (State's Exhibit 24[1]). At that time, the only injury visible on Appellant was some swelling to his lip and that there was

[1] This appears to be the same DVD as State's Exhibit 3 entered at trial.

no bleeding. (3/30T. 213-214; State's Exhibits 10-13[2]; R. 213-214). Appellant declined further medical treatment, and denied having any other injuries. (3/30T. 214; R. 214). Capt. Grant further testified Appellant never indicated that he felt afraid of the victim or felt that his life or safety was in danger. (3/30T. 225; R. 225).

Lieutenant Phillip Hall also interviewed Appellant with Captain Grant. (3/30T.267-268; R. 267-268). The only injury Appellant noted to Lt. Hall was the minor injury to his lip. (3/30T.268-269; R. 268-269). Lt. Hall indicated Appellant never told him he was afraid of the victim. (3/30T.269; R. 269). Lt. Hall confirmed Appellant made the statement: "I had been drinking, didn't feel like fighting, and wasn't in any shape to fight." (3/30T. 271; R. 271).

Three witnesses testified as to witnessing the actual shooting. Malika Harris, Appellant's cousin, testified she first saw Appellant when he entered her kitchen because nobody invited him in. (3/30T.320; R. 310). She did not ask him to leave, but would have if she had known he had a gun. (3/30T.320-321; R. 310-311). As Malika was leaving the downstairs bathroom she witnessed Appellant and the victim "tussling." (3/30T. 322; R. 312). She indicated both Appellant and the victim were standing and "locked a little bit" when Appellant shot the victim and ran. (3/30T. 322; R. 312). She explained Appellant held the gun at shoulder height when he fired, then put the gun back into his pocket and ran. (3/30T. 324-325; R. 314-315).

Malika indicated she never saw Appellant on the floor. (3/30T.327; R. 317). When the State showed Ms. Harris the picture commissioned by Appellant, she testified that the picture was inaccurate. (3/30T.339-340; R. 329-330). She testified neither party was sitting down, but were instead both standing. She also explained she did not see the victim make a fist. (3/30T. 340; R. 330).

[2] These appear to be the same photographs entered as State's Exhibits 41-43 at trial.

Shonettia Hunter was in the bathroom with Malika, and testified she exited seconds after Malika when they heard a commotion in the house. (3/30T. 353; R. 343). She witnessed both Appellant and victim standing, and the victim holding his side. (3/30T. 354; R. 344). She stated after the victim had been shot, Appellant ran out of the house. (3/30T. 354; R. 344).

Sindarous Wells then testified. He stated no one in the house let Appellant in on the night in question, and from where he was sitting, he could see the front door where Appellant entered. (3/30T. 373; R. 363). Though everyone seemed surprised to see Appellant, no one asked him to leave or made it apparent that he was unwelcome. (3/30T. 373-374; R. 363-364). According to Mr. Wells, Appellant began telling a story to those gathered in the kitchen about the confrontation he had earlier in the evening with Rashawd Robinson. (3/30T. 374-375; R. 364-365). Appellant told the group Rashawd wanted to fight and so he pulled a gun out on Rashawd. (3/30T.375; R. 365). Shortly after this disclosure, the victim struck Appellant once in the face. Appellant was knocked just into the living room from the kitchen, and did not fall to the floor. (3/30T. 376; R. 366). Mr. Wells could not see Appellant, but testified the victim was standing and not leaned over. (3/30T. 377; R. 367). He said a single shot was fired and the victim fell in the kitchen. (3/30T. 378; R. 368).

After considering all of the evidence and argument of counsel, the judge denied Appellant's claim of immunity. (4/3T.12; R. 461). The judge ruled there existed considerable discrepancies between Appellant's testimony and that of the other witnesses. (4/3T.7-8; R. 456-457). These discrepancies casted severe doubt on whether Appellant actually believed he was in danger of losing his life or sustaining serious bodily injury. (4/3T.11; R. 460). The judge further opined any fear held by Appellant was not of the kind that a reasonable and prudent man would

have experienced. Citing State v. Douglas,[3] the trial judge found the physical injuries of Appellant lacking in comparison. (4/3T.12; R. 461). The trial court ultimately ruled:

> Based upon the numerous witnesses that have testified in this hearing and based upon the varying testimony of such witnesses as stated by the Court and as supported not only in this Court's recitation of the facts or testimony but which the Court heard over two days and supported in the record, this Court believes that the defendant's claim of self-defense as eloquently stated by the Court in State v. Douglas **presents a quintessential jury question**, and therefore the Court finds that the defendant, Allen Wesley Massey, is not entitled to immunity under section 16-11-440.

(4/3T.12; R. 461) (emphasis added).

[3] State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014)

ARGUMENT

I. The trial court properly denied Appellant's motion for immunity under the Protection of Persons and Property Act when he failed to establish he reasonably feared for serious bodily injury or for his life and when this case "presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution."

Appellant contends the circuit court erred in denying his motion for immunity under the Protection of Persons and Property Act (the Act), and specifically, Section 16-11-450(A) of the South Carolina Code. The circuit court correctly found Appellant failed to establish by a preponderance of the evidence that he was reasonably in fear of sustaining serious bodily injury or for his life. Further, as the circuit court noted, this case presents "a quintessential jury question" regarding Appellant's entitlement to self-defense based on the conflicting testimony presented during the immunity hearing. As a result, the circuit court did not abuse its discretion in denying Appellant's motion for pre-trial immunity.

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, 410, 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. at 411, 709 S.E.2d at 665. Recently, the South Carolina Supreme Court clarified consideration of immunity under the Act does not require a trial court to accept a defendant's version of the underlying facts. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

In an appeal from a circuit court judge's pre-trial determination regarding a claim of statutory immunity, the appellate court reviews the circuit court judge's ruling for an abuse of

discretion. Curry, 406 S.C. at 370, 752 S.E.2d at 266. "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, 647 S.E.2d 144 (2007). The abuse of discretion standard does not allow the evidence to be reweighed or allow for a reassessment of the trial court's assessment of witness credibility or lack thereof. Cf. State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (equating the "any evidence" standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence").

Pursuant to the Act:

> 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) (Supp. 2014). 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. 2014) (emphasis added).

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. 2014) (emphasis added).

In analyzing the interplay between sections 16-11-440(C) and 16-11-450, the South Carolina Supreme Court explained: "Consistent 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." Curry, 406 S.C. at 371, 752 S.E.2d at 266. The Court further articulated: "immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Id. at 372, 752 S.E.2d at 267.

As a result, in addition to establishing application of section 16-11-440(C), Appellant must also the elements of self-defense:

> 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.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (emphasis added). The fourth element of self-defense—the duty to retreat—is excused under the Act if the defendant can establish entitlement to its consideration.

The circuit court in the instant case did not abuse his discretion in denying Appellant's motion for immunity. Initially, this case is similar to the case of State v. Manning, 418 S.C. 38,

791 S.E.2d 148 (2016). In Manning, the victim who was an invited guest and the defendant got into a physical and verbal argument. The victim originally pulled a weapon on the defendant, who was able to take the weapon from the victim. Id. at 41, 791 S.E.2d at 149. The defendant then fired when the victim approached him, shooting the victim in the head. At the hearing, the State maintained because the victim was unarmed at the time of the shooting, the defendant was not reasonably in fear of great bodily injury or death at that time. In affirming the denial of immunity, the South Carolina Supreme Court explained: "the victim was unarmed at the time she was shot, meaning we cannot say that the trial judge abused his discretion in denying Respondent immunity under subsection (C)." Id. at 45, 791 S.E.2d at 151.

In this case, the victim physically assaulted Appellant. At that time, Appellant was armed and the victim was not. This fact is not in controversy. In Manning, the Supreme Court held the trial court did not abuse its discretion in denying immunity when one party was armed, and the other was not, regardless of the other facts presented. The instant case does not present the same level of apprehension experienced by the defendant in Manning, who disarmed his girlfriend of the gun originally pointed at him. In this case, Appellant and the victim were "locked up" and "tussling" according to Malika Harris. Here, the victim was never armed, never drew or presented a weapon, never threatened Appellant with a weapon. The only party armed in this altercation was Appellant, and he never used the gun as a deterrent, but instead immediately fired without warning. The trial court correctly determined Appellant was not reasonably in fear of his life or serious bodily injury at the time of the shooting, especially in light of the fact he was the person holding the only gun.[4] As a result, the circuit court did not err in denying Appellant's motion for immunity.

[4] This conclusion is only heightened given the lack of injuries to Appellant and the witnesses indicated both men were standing at the time the shot was fired and were involved in a "tussle."

Additionally, the objective evidence presented in this case does not establish Appellant's fear of imminent harm was reasonable. First, Appellant and the victim were friends and had never had any animosity or difficulties before. (3/30T.10; 85; 89; R. 10; 85; 89). Appellant admitted he had seen the victim earlier the day of the incident and gave the victim a cigarette. He acknowledged he had never been afraid of the victim. (3/30T.85; R. 85).

Further, the facts and circumstances of this case are clearly distinguishable from State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). In Douglas, the victim taunted the defendant by refusing to give him back a bottle of prescription medicine. When the defendant yelled at the victim, the victim "snapped." The victim grabbed the defendant and threw him up against the refrigerator, causing Douglas to hit his head. Id. at 313, 768 S.E.2d at 236. The victim held him there until the defendant felt his knees buckle underneath him. When the victim released the defendant, Douglas fell on the floor and hit his head again. The victim then got on top of the defendant and struck him in the eye. Douglas told the victim several times to leave him alone and to leave his house, but the victim refused. After biting the defendant in the leg, the victim went into the dining room and started laughing. The victim advanced on Douglas and "looked like a man possessed." The defendant was "terrified" and fired a shot killing the victim. Id. at 314, 768 S.E.2d at 236. The circuit court in Douglas found by a preponderance of the evidence that (1) the defendant reasonably believed shooting the victim was necessary to prevent great bodily injury to himself, and (2) Douglas acted in self-defense. This Court explained: "The evidence supports these findings. [Douglas] presented several photographs showing severe bruising on [his] upper arms, a black eye, a scraped knee, and several marks on his legs and chest." Id. at 319, 768 S.E.2d at 239.

The facts and circumstances of the shooting in Douglas differ dramatically from the facts presented in the current case. Appellant was punched twice by the victim's cousin earlier in the night. According to his testimony, he did not pull the gun or fight back because he was in "no shape to fight so I just left it alone." (3/30T.105; R. 105). Then, according to his testimony, he is punched a single time by the victim. The only injury to Appellant as a result of the punch by the victim was a swollen lip, which did not require any stitches and for which Appellant sought no medical treatment. (3/30T.100-101; 214; R. 100-101; 214). Other witnesses indicated Appellant and the victim were "tussling" and that Appellant never got knocked to the ground as a result of the punch.

While at trial Appellant described the victim as a lion going in for the kill, in his interview with Captain Grant shortly after it happened Appellant explained the shooting by stating: "I didn't feel like fighting." (3/30T.104; R. 104). Appellant admitted he did not even tell the police he was afraid of the victim before he shot him. (3/30T.110; R. 110). Appellant admitted he did not believe the victim would kill him. (3/30T.118; R. 118). Further, he acknowledged he did not tell the police he believed he would be seriously injured by the victim because he "didn't know it was a factor." (3/30T.119; R. 119).

The forensic autopsy of the victim conducted in this case also differs significantly from the one presented in Douglas. In Douglas the pathologist was able to conclusively determine the trajectory of the fatal shot, and this trajectory supported the testimonial evidence offered by the defendant. In the present case Dr. Ross, the forensic pathologist, was unable to conclusively determine whether the victim was bent over a seated Appellant as maintained by Appellant, or whether the victim and Appellant were standing at the time of the shooting, as described by Malika Harris. Dr. Ross averred that while Appellant's version of the shooting was possible

based upon the trajectory of the bullet, it was just as likely that the trajectory supported the contradictory testimony provided by the witnesses' recollections of the shooting indicating both individuals were standing at the time of the shooting. (3/30T.152-153; R. 152-153).

Finally, Appellant's own testimony demonstrated it was more likely than not he shot and killed the victim not out of fear of death or serious bodily injury, but instead due to his voluntarily inebriated state of mind. Appellant admitted he consumed a significant quantity of alcohol in a short period of time, specifically 6-7 beers within one to two hours. (3/30T.77; 112; R. 77; 112). Appellant averred those beers likely caused him to be impaired at the time of the fight and the shooting. Appellant testified at the hearing he told the police: "I didn't feel like fighting. I'd been drinking and wasn't in any shape to fight." (3/30T.104; R. 104). Captain Grant confirmed Appellant's testimony during his examination, stating Appellant told him "I had been drinking, didn't feel like fighting, and wasn't in any shape to fight." This voluntary intoxication caused Appellant to take an action that a reasonable, prudent, and sober person would not otherwise take.

The evidence in this case supports the trial court's determination Appellant failed to demonstrate he was in reasonable fear for his life or of serious bodily injury at the time he shot the victim. Instead, the evidence indicates Appellant did not fear the victim, harbored no reason to believe the victim would significantly harm him, suffered very minor injury to his lip as a result of, at most, a single punch, and "didn't feel like fighting" because he was significantly impaired by the 6-7 beers he drank prior to the incident. The trial court's denial of Appellant's motion for immunity should be affirmed because there is evidence to support the finding Appellant failed to establish the requisite elements of self-defense because he could not have

reasonably feared for his life or feared he would suffer serious bodily injury at the time of the shooting.

At a minimum, the testimony and evidence presented in this case, as found by the trial court, "presents a quintessential jury question" and supports the trial court's decision to deny Appellant's motion for immunity. As discussed above, Appellant maintained he was knocked to the ground by a sucker punch from the victim, regained a seated position, saw Appellant over him with a look like he wanted to kill Appellant, and he shot the victim. Several witnesses disputed his version of the events. Specifically, Malika Harris testified Appellant and the victim were "locked up" and "tussling" but that neither was on the ground. She indicated Appellant pulled a gun and shot it from about shoulder height without any warning. Shonettia Hunter also indicated both appeared to be standing, and Sindarous Wells testified he never saw Appellant fall to the ground. As a result, this case presents a question for the jury to resolve based on its view of the evidence and credibility of the witnesses and the court did not err in allowing the case to go forward to trial when presented with conflicting testimony surrounding the events of the shooting. See Curry, 406 S.C. at 372, 752 S.E.2d at 267.

Finally, Appellant does not qualify for the protection of section 16-11-440(C) because he was engaged in an unlawful activity at the time of his use of force. He was unlawfully carrying a pistol, a crime he admitted to committing at the time of the shooting. (3/30T.53-56; R. 53-56). The legislature clearly did not intend to allow someone acting unlawfully to be entitled to the statutory grace of the Act. The Act specifically applies only to "law-abiding citizens" pursuant to section 16-11-420(B). The phrase "not engaged in an unlawful activity" should be given its ordinary, everyday meaning. State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) ("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."). The term should preclude application of section 16-11-440(C) when the defendant is engaged in any unlawful activity, and unlawful possession of a firearm is an "unlawful activity." See S.C. Code Ann. §16-23-20 (Supp. 2014).

While his unlawful possession of a firearm may not ultimately preclude at trial the application of the common law doctrine of self-defense, it is in direct contradiction to the requirements of section 16-11-440(C) for Appellant to avail himself of the ability to stand his ground and not have a duty to retreat. Further, he must be able to meet the requirements of the section 16-11-440(C)—including the fact he was not acting unlawfully—in order to avail himself of the immunity provision in section 16-11-450(A) without a duty to retreat. The clearly expressed legislative intent is for the Act to only apply to "law-abiding citizens" and not to someone knowingly engaged in an unlawful activity as Appellant was at the time of the shooting. As a result, Appellant had a duty to retreat and there is certainly testimony from the various witnesses that indicates Appellant could have retreated as they indicated he was standing or in a "tussle" at the time of the shooting. The circuit court's denial of immunity should also be affirmed based on the additional sustaining ground that Appellant was not entitled to stand his ground, but instead had a duty to retreat which he did not attempt.

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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March 24, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lancaster County
Honorable D. Craig Brown, Circuit Court Judge
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-001934

The State, Respondent,

vs.

Allen Wesley Massey, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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