STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD A. CAPELL,

APPELLANT

APPELLATE CASE NO 2016-000475

INITIAL REPLY BRIEF OF APPELLANT

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Appellant was not required to shoot the alleged victim in order to be entitled to immunity from prosecution under the Protection of Persons and Property Act.

When the mere act of pointing one's gun toward their advancing attacker is sufficient to neutralize the threat against him, he is not required to fire his weapon in order to be entitled to immunity from prosecution on the charge of pointing and presenting a firearm. Notably, the section prohibiting the pointing or presenting of a loaded or unloaded firearm at another person specifically provides: "This section must not be construed to abridge the right of self-defense or to apply to theatricals or like performances." S.C. Code Ann. § 16-23-410. Our courts have long-recognized the underlying requirement of "reasonableness" in a defendant's use of force in order to excuse his liability. See State v. Marin, 415 S.C. 475, 483, 783 S.E.2d 808, 813 (2016) (approving self-defense charge that "[a] person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable"); State v. Quin, 5 S.C.L. 515, 694 (S.C. Const. App. 1815) ("Proof that the prosecutor was the aggressor would not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defence.") State v. Wood, 1 S.C.L. 351, 346 (1 Bay 351) (1794) ("But there must be however, in all cases, some proportion between the battery given, and the first assault.").

Markedly absent from Respondent's brief is any mention of the threatening language used by Bunucci as he came after Capell. The video of the incident shows that Bunucci swung the office door open, rushed toward Capell, and yelled "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down." State's Ex. 1, 02:40 – 03:29. Bunucci was eight inches taller than Capell and outweighed Capell by at least one hundred pounds, though his stature is best appreciated by a review of the video itself. Capell was 5'6" and

weighted one-hundred fifty pounds. Imm. Tr. 20, l. 16 – 21, l. 3; R. * (defense memo); State's Ex. 1. Capell also suffered from medical problems since his birth, which rendered him disabled and particularly susceptible to serious injury from even one blow to the stomach. Imm. Tr. 4, l. 7 – 10, l. 15. Thus, neither Capell nor a reasonably person in Capell's position would have thought that Bunucci "followed Appellant to continue the verbal altercation" or "conversation." See Resp. Brief, pp. 10 and 12. Rather, Capell reasonably believed that Bunucci rushed out of the office to physically assault him, justifying Capell in pulling his lawfully owned handgun. Once he saw Bunucci stop advancing toward him and place his hands in the air, Capell determined that the use of deadly force was not necessary. Capell's ability to show restraint in the midst of a frightening circumstance was the result of his firearms training received prior to and after obtaining his concealed weapons permits. Imm. Tr. 21, l. 18 – 26, l. 16; see Trial Tr. 165, l. 16 – 166, l. 22; Trial Tr. 168, l. 18 – 169, l. 21.

Nevertheless, Respondent points to legislative intent and statutory language to argue that the immunity provision of the Protection of Persons and Property Act ("the Act") applies only to the use of deadly force. Resp. Brief, p. 9. Respondent avers:

> 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).

Resp. Brief, p. 9. S.C. Code Ann. § 16-11-450(A), provides: "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...." A narrow reading of only section 16-11-450(A) of the Act could lead to the

conclusion that Respondent suggests. However, our state's rules of statutory interpretation will not tolerate such an absurd result. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Id.

As our Supreme Court noted in State v. Jones, 416 S.C. 283, 296, 786 S.E.2d 132, 139 (2016), "the Legislature clearly enunciated its intent and reasons for promulgating the Act in section 16–11–420." The complete text of S.C. Code Ann. § 16-11-420 provides:

> (A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.
>
> (B) 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.
>
> (C) **The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.**

> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.
>
> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, **nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.**

(emphasis added).

In order to accomplish the objectives set forth in section 16-11-420, the Legislature enacted section 16-11-440. Jones, 416 S.C. at 296, 786 S.E.2d at 139. S.C. Code Ann. § 16-11-440 "identifies the circumstances for which a person may invoke the protection of the Act." Id. Subsection (C) of section 16-11-440 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, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground **and meet force with force, *including* deadly force**, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). Thus, while the legislature contemplated the potential use of deadly force under subsection (C) of the Act, it did not specifically require it.

The state's proposed interpretation of the Act would improperly limit it to only the use of deadly force, even when a lesser force is sufficient to repeal the threat. Such an interpretation is inconsistent with the language in section 16-11-440(C) and would undoubtedly infringe on the person's Second Amendment right to bear arms, which was specifically identified in section 16-11-420(C) as a foundational basis for the Act. See Jones, 416 S.C. at 297-98, 786 S.E.2d at 140; District of Columbia v. Heller, 554 U.S. 570, 628, 128 S.Ct. 2783 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right."). Oftentimes, it is the most vulnerable of our society who *need* to carry a firearm for protection. Moreover, the prospect of requiring the use of deadly force or risk criminal liability for otherwise reasonably acting in self-

defense to repel an attack is an affront to basic principle that "[a]s a society . . ., our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence." Willis v. Wu, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004) (quoting Blake v. Cruz, 698 P.2d 315, 321–22 (Idaho 1984)).

In sum, the language and purpose of the Act, and common sense, dictate that Capell was not required to fire his weapon in order to be entitled to immunity from prosecution.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Richard A. Capell respectfully requests that this Court vacate his conviction and reverse the trial court's denial of immunity under the Protection of Persons and Property Act.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2017.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Richard A. Capell, at 6905 Cleaton Rd., Condo I149, Columbia, SC 29206, this 6th day of April, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .