THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2016-UP-486 (S.C. Ct. App. filed November 23, 2016)

Appellate Case No: 2017-000549

State of South Carolina, ... Respondent,

v.

Kathy Leonard Revan, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's pretrial determination that Petitioner failed to carry her burden of proving by a preponderance of the evidence that she was entitled to immunity under the Protection of Persons and Property Act where that determination had evidentiary support and was not based on an error of law.

STATEMENT OF THE CASE

Kathy Leonard Revan (Petitioner) was indicted at the October 2011 term of the grand jury for Laurens County for murder (2011-GS-30-1625), possession of a weapon during a violent crime (2011-GS-30-1626), and attempted murder (2011-GS-30-1627). She was represented by Kim R. Varner, Esquire, and Evan Bramhall, Esquire, and Respondent (the State) was represented by solicitors Lance Sheek and Taylor Daniel of the Fourteenth Circuit Solicitor's Office. On January 13, 2014, the case was called for trial at the Laurens County Courthouse before the Honorable Eugene C. Griffith, Jr. (R.p.1). Prior to the jury being sworn, Petitioner made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The trial court conducted a pretrial immunity hearing. At the close of that hearing, after taking testimony, observing evidence, and hearing arguments from both sides, the trial court found that Petitioner had failed to establish she was entitled to immunity under the Act and denied her motion to dismiss. The case proceeded to trial. (R.p.7-p.185).

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Petitioner was on her own premises—the jury found Petitioner guilty of voluntary manslaughter, attempted murder, and possession of a weapon during a violent crime. (R.p.186-p.216; p.217-p.218). The trial court sentenced Petitioner to twenty (20) years' imprisonment for voluntary manslaughter, twenty (20) years' concurrent imprisonment for attempted murder, and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. Petitioner filed a notice of intent to appeal the denial of her motion for immunity and Tara D. Shurling, Esquire,

subsequently filed a brief in support of Petitioner's appeal. The State filed a brief in response. Petitioner's conviction and sentence were affirmed in an unpublished opinion from the Court of Appeals. State v. Revan, Op. No. 2016-UP-486 (S.C. Ct. App. filed November 23, 2016). (App.p.1-p.2). Petitioner submitted a timely Petition for Rehearing and by Order filed February 1, 2017, the Petition was denied. (App.p.3-p.10). On March 23, 2017, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

STATEMENT OF FACTS

On August 11, 2011, following a physical altercation, Petitioner shot and killed Shawn Faye Morrigan (Victim) inside their shared residence. See S.C. Code Ann. § 16-11-430(3) (Supp. 2010) (defining "residence" as a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest). (R.p.143). Victim and her partner, Tammy Jo Morrigan (Morrigan), had been temporarily residing at Petitioner's home for several weeks before the incident, with Petitioner's permission. (R.p.105). The purpose of the visit was to allow Morrigan to spend as much time as possible with her father, Lynn Straley (Straley), who was also a resident of the dwelling on Revan Road. Straley died from cancer shortly after Petitioner shot and killed Victim and thus was not available to testify at the time of the immunity hearing; however, his deposition testimony about the incident (taken for the purposes of a civil case arising out of this shooting) was read into the record (R.p.147-p.169).

After a heated discussion and immediately before the physical altercation which preceded the shooting, Victim and Morrigan were packing their luggage and preparing to leave the residence by taking their belongings out to the car. (R.p.123). At some point during the process, Petitioner got up from her chair and pulled Victim to the floor by her hair. The two women were lying on the floor struggling as Morrigan came back into the residence to see Petitioner clutching

Victim's hair in both of her hands. Morrigan intervened and punched Petitioner in the face several times until she released Victim. Petitioner then went to her bedroom, retrieved a gun from under her mattress, returned to the living room and shot Victim in the leg. The gunshot severed Victim's femoral artery and she died from wound. (R.p.125-p.127; p.298; p.299).

When the case was called for trial, prior to the jury being sworn, the solicitor advised the court that Petitioner wished to raise an issue under section 16-11-440 of the Code. Petitioner then made a "brief opening statement." She said this was a case of what is commonly referred to as the Castle Doctrine and that she would be raising a statutory "stand your ground" defense as well as self-defense under the common law. Petitioner then summarized the provisions of the Act as well as the facts she intended to elicit during the immunity hearing before arguing:

> It will be [Petitioner's] position that she was then attacked or another beating was going to occur, that - - that [Morrigan] at least was coming at her, she was blind out of her left side. She put the gun across her, fired a shot to the left, possibly as a warning shot, but certainly to stop the situation. Unfortunately, that bullet hit [Victim] in the femoral artery in the leg of which she shortly died thereafter, Your Honor.

(R.p.12, lines 11-19). Petitioner did not offer any more specific argument as to why she believed she was entitled to immunity, or under what particular language from the Act. (R.p.7-p.12).

The solicitor responded by describing the State's version of the facts and arguing that because Victim and Morrigan were both residents of the home, subsections (A) and (B) of section 16-11-440 were inapplicable. The State contended subsection (C) was the only provision that could possibly apply but argued that pursuant to State v. Curry[1] Petitioner would still not be entitled to immunity under the facts of the case. The solicitor went on to argue that none of the provisions of the Act should apply because Petitioner could not have been attempting to stand her ground if, as she claims, she accidentally shot Victim. (R.p.12-p.15).

[1] State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).

Next, pursuant to the procedures set forth in State v. Duncan,[2] Petitioner presented testimony and evidence to the trial court in an effort to persuade the judge she should be granted immunity under the Act. First, Petitioner called Lieutenant Keith McIntosh of the Laurens County Sheriff's Department to the stand. McIntosh investigated the scene and took statements from Petitioner and the two other individuals who survived the incident, Straley and Morrigan. (R.p.17-p.18). He testified that based upon the information gathered from Morrigan, he understood that Petitioner pulled Victim down by her hair and would not let go. (R.p.24). McIntosh recorded a full statement from Petitioner the night she shot and killed Victim and that recorded statement was played for the court. (R.p.34; State's Ex. Nos. 9 & 10). McIntosh testified he determined Petitioner was the owner of the property based on her statement. (R.p.37). The State did not cross-examine McIntosh. Next, Lieutenant Michael Benjamin Blackmon testified that he arrived at the scene after McIntosh. (R.p.38). Blackmon took notes to document his conversations with Straley and Morrigan. (R.p.39). Based on those conversations, Blackmon determined Petitioner had an altercation with Victim and Petitioner ultimately shot Victim inside the residence. (R.p.39).

Petitioner then called Morrigan to the stand. She was the first eyewitness to testify during the pretrial immunity hearing. Morrigan explained she was Victim's female partner and that she legally assumed Victim's last name but they were not formally married. (R.p.42). She testified to her educational background, which includes undergraduate degrees in mathematics and computer science and a master's degree in finance. (R.p.44). She also described her military experience in the Army. Morrigan explained that because her "ankles are fused," she cannot do weightlifting or anything of that nature. (R.p.45). Prior to visiting her father's home in Laurens County, where the shooting occurred, Morrigan had been living in Atlanta. (R.p.45-p.46). The

[2] State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

purpose of her visit was to see her father. (R.p.46). At the time of the visit, Straley was undergoing chemotherapy for terminal cancer. (R.p.47). Morrigan testified that while living in the residence, she and Victim helped support the household by purchasing food and working around the house. (R.p.52).

Morrigan testified that Straley and Petitioner had spoken to her the night before the incident and expressed their concern that Victim was only interested in Morrigan's money. Following that discussion, Morrigan and Victim made the decision they would leave the residence that next morning. They began packing and loading their vehicle. (R.p.56). Morrigan and Victim were maneuvering through a tight area of the dwelling to bring their luggage out to the car. (R.p.58). At some point when Morrigan was coming back in from outside, she observed Petitioner holding on to Victim by the hair while the two women were lying on the floor. Morrigan attempted to get Petitioner to let go of Victim's hair when Petitioner kicked Morrigan in the face. (R.p.59). After being kicked, Morrigan punched Petitioner three times in the eye. (R.p.59). Following the initial altercation, Petitioner disappeared into the bathroom. (R.p 61). Meanwhile, Morrigan was helping Victim get up, but it took a couple of minutes to get her off the floor. (R.p.62). After Morrigan got Victim back to her feet, Morrigan saw Petitioner appear in the doorway with a gun. (R.p.63). Petitioner pointed the gun to the side and pulled the trigger. (R.p.63). Petitioner then turned the gun on Morrigan, who grabbed it and forced the second shot into the ceiling. (R.p.63). Morrigan heard Victim scream and realized that she had been shot. (R.p.65). After Victim crawled into the bedroom, Morrigan tried to help her stop the bleeding from the leg wound. (R.p.65).

Next, Petitioner took the stand to offer her own version of events. She testified that she resided at the house where the incident took place, in Mountville, South Carolina. (R.p.87). She

explained that she began a relationship with Straley before learning of his cancer. (R.p.99). Petitioner said Victim and Morrigan called one night and said they needed directions to the farm without any advance notice of their trip. (R.p.103). Straley provided directions to the residence. (R.p.104). Petitioner testified she gave permission for Morrigan and Victim to stay at her house to visit Straley as long as possible before he died. (R.p.105).

The day before the deadly incident, Petitioner and Straley had a conversation with Morrigan and voiced their concerns regarding the relationship between Morrigan and Victim. (R.p.113). Petitioner testified that while Morrigan and Straley were outside, she and Victim started to argue. (R.p.118-p.119). Petitioner claimed Victim berated and belittled her, and Petitioner responded by saying that Victim was being childish. (R.p.119). Petitioner told Victim it was "time for [Victim] to get her shit and get out of [Petitioner's] damn house." (R.p.122). Victim and Morrigan then went into the back bedroom and began packing. (R.p.122). Petitioner testified Morrigan and Victim repeatedly came out with bags and hit the bottom of the leg rest of the recliner, knowing that Petitioner's knee was throbbing. (R.p.123). She estimated that her recliner was bumped at least four times. (R.p.123). Petitioner claimed the only reason her chair could be bumped was if they did it intentionally. (R.p.124). After the fourth bump, Petitioner told Straley, "[T]he hell with this, I'm gonna help them carry it out." (R.p.124). Petitioner said Victim then came through the living room, "took her body, and knocked into" her. When she did, Petitioner lost her balance and reached out and grabbed Victim's hair. (R.p.125).

Petitioner testified that Morrigan came into the house, screamed for her to let go of Victim, stepped on Petitioner's hand, and began beating Petitioner in the face. (R.p.127). Petitioner testified she was hit about twenty times. (R.p.127). After the beating, she got up, walked to the bathroom, and washed her face off with water. (R.p.129). She stated Morrigan

was still in the living room talking with Straley. (R.p.130). Petitioner testified she believed Morrigan and Victim were going to come into the bathroom and jump on her again. (R.p.130). She walked out of the bathroom, got her pistol from under the mattress in her bedroom, and went into the dining room area. (R.p.130-p.31). Petitioner testified that, at this point, Morrigan and Victim were on the other side of the living room pointing and laughing at her. (R.p.131). Petitioner stated that Morrigan started to run at her, and Petitioner lifted the gun and pointed toward the left, down toward the floor, and fired. (R.p.137). Petitioner stated she believed Morrigan was going to jump on her and "finish her off," so she fired a "warning shot." (R.p.137). On cross-examination, Petitioner contended she did not intend to shoot Morrigan or Victim when she fired the shot that hit Victim. She claimed she was purely intending to fire a warning shot and insisted she did not mean to shoot anybody. (R.p.142-p.145).

Finally, Petitioner presented the deposition testimony of Straley by reading it into the record. Straley described the argument that led to Petitioner asking Victim and Morrigan to leave the house and their efforts to pack up and move their belongings out the door. He admitted the pathway through the living room was tight but said Victim and Morrigan appeared to be bumping into Petitioner's chair on purpose each time they walked past. Straley said Petitioner eventually got up to help them move when Victim bumped into her hip and knocked Petitioner off balance. He said Petitioner then grabbed Victim's hair and they both fell to the floor. Petitioner and Victim were struggling on the floor when Morrigan walked into the room and entered the fray. Straley said Morrigan stepped on Petitioner's right hand, put her knee in Petitioner's chest, and began beating Petitioner in the head with her fist while Victim was screaming for Petitioner to let go of her hair. He said he was able to get Morrigan to stop hitting Petitioner, but Petitioner was bleeding out of her nose and mouth and her eye was swelling up, so

he helped her to the bathroom to get washed up. Straley then went to the kitchen to get a bag of ice and heard Morrigan say: "[A]re you crazy?" He looked back and saw Petitioner with a gun in her hand so he made a dive to grab the gun. Straley said Morrigan made a dive for Petitioner at the same time and that either just before or as he reached Petitioner, the gun went off and Victim was shot in the leg. He said he got the gun from Petitioner after a second shot went into the ceiling. (R.p.147-p.170).

At the conclusion of the pretrial immunity hearing, the trial court heard arguments from Petitioner as to why she believed she was immune from prosecution under the Act. First Petitioner commented that because the incident happened in her residence, the duty to retreat does not apply. She then described the differing physical characteristics between herself and the two younger women, as well as her various medical conditions. Petitioner recounted her version of the initial confrontation with Victim and argued the court could review the subsequent shooting as a case where Petitioner was trying to eject trespassers from her property while they continued to aggravate an already tense situation. She claimed the trial court should accept her version of the initial confrontation as the truth because she is the only person still alive who saw it, and because it was the only version that is logical and consistent with the facts. Petitioner argued she got the gun from the bedroom because she believed she could not take another beating from Morrigan and Victim, and that the two women would kill her. She claimed her discharge of the gun was an act of self-defense as Morrigan was yelling and coming at her. Petitioner insisted she fired the gun to stop the attack and that though she did not mean to shoot Victim, it was not an accidental discharge. She argued her version of the shooting itself was more credible that Morrigan's version and suggested Victim and Morrigan should have retreated when she returned to the living room with the gun. Petitioner contended that instead, Victim and

Morrigan employed a military tactic of separating and coming toward her from different angles. She argued firing the gun was justified and met the criteria of the Castle Doctrine, self-defense, and the legislative intent of "stand your ground." Petitioner never claimed she was entitled to the presumption of "reasonable fear of imminent peril or death or great bodily injury to himself or another person" described in subsection (A). (R.p.171-p.180).

In response, the State repeated the arguments raised at the beginning of the hearing: that the claim of accident put Petitioner outside the realm of the Act, that because Victim was also a resident of the house the incident did not implicate subsection (A) of section 16-11-440, and that under subsection (C) of section 16-11-440 Petitioner could not satisfy the three remaining elements of self-defense to make a valid claim of immunity under the Act. Specifically, the solicitor argued Petitioner was not without fault in bringing on the difficulty because she was the one who introduced a deadly weapon into the altercation. He referenced Petitioner's recorded statement to the police wherein she claimed she went and got the gun to show Morrigan and Victim: "I mean business." (R.p.180-p.184).

At the conclusion of the immunity hearing, the trial 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. Certainly it's gonna be a difficult thing for a jury to try to sort out, but anyway that's my ruling.

(R.p.184, line 11-p.185, line 6) (emphasis added). In denying immunity, the trial court acknowledged there was conflicting testimony as to exactly what happened after the initial altercation; however, upon considering that testimony, which necessarily involved assessing the credibility of the witnesses, the court concluded Petitioner was not in imminent danger when she fired the fatal shot and she had not carried her burden of proving "the parameters outlined in the statute" by a preponderance of the evidence. The Court of Appeals affirmed this decision pursuant to Rule 220(b), SCACR, with reference to several opinions from this Court including State v. Curry.

CERTIORARI

Petitioner argues this Court should grant certiorari because the Court of Appeals either overlooked or misapprehended certain issues of material fact or law in reaching its decision. First, she claims the Court of Appeals opinion contained no ruling that she was NOT entitled to the "presumption of a reasonable fear of imminent peril" found in § 16-11-440 and, as she argued to the Court of Appeals, she continues to argue to this Court that she is entitled to that presumption. Petitioner further claims the ruling of the trial court denying immunity totally overlooked her right, both at common law and under the Act, to act in defense of others in addition to protecting herself. Finally, Petitioner argues that even without the presumption, the evidence showed she remained in imminent danger because Victim and Morrigan were still in the residence and just outsider her bedroom door where they posed an ongoing threat to both Petitioner and Straley. (Petition, p.19-p.22). The State disagrees and submits the Court of Appeals properly affirmed the trial court's pretrial determination that Petitioner failed to carry her burden of proving by a preponderance of the evidence that she was entitled to immunity under the Protection of Persons and Property Act. The Court of Appeals employed the proper

standard of review in concluding Petitioner's claim of self-defense presented a quintessential jury question and refusing to grant immunity from prosecution. The decision is consistent with precedent in South Carolina. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of reviewing and affirming the trial court's application of statutes, logic, and practical consideration of the particular facts and circumstances of Petitioner's case. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

ARGUMENT

The Court of Appeals properly affirmed the trial court's pretrial determination that Petitioner failed to carry her burden of proving by a preponderance of the evidence that she was entitled to immunity under the Protection of Persons and Property Act where that determination had evidentiary support and was not based on an error of law.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in failing to find she was immune from prosecution under the Act, S.C. Code Ann. §§ 16-11-410 to -450, because she was in her residence, standing her ground against an attack while under a reasonable fear of imminent peril of great bodily injury or death. She claims the trial court abused its discretion in finding she was no longer in imminent danger once the initial physical altercation between her and Victim had been broken up. The Court of Appeals rejected this claim with reference to State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) and its "finding the defendant's 'claim of self-defense present[ed] a quintessential jury question, which, must assuredly, [was] not a situation warranting immunity from prosecution' when the defendant was in a prior altercation with the victim and later retrieved a gun and shot the victim." (App.p.1-p.2).

Petitioner continues to advance essentially the same argument in her petition for a writ of certiorari and the State continues to maintain the trial court properly denied immunity. The trial court followed the appropriate procedure under rulings from this Court the Court of Appeals—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Petitioner did not carry her burden of proving she was entitled to immunity under the Act. Petitioner's argument cannot prevail under this Court's standard of review. As in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), Petitioner's claim of self-defense presented a quintessential jury question, which is not a situation warranting immunity from prosecution. The trial court's finding that Petitioner failed to carry her burden of proving she was in imminent peril at the time the fatal shot was fired has evidentiary support and is not controlled by an error of law; therefore, Petitioner's convictions were properly affirmed by the Court of Appeals.

Standard of Review

This Court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543

S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 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.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

The Protection of Persons and Property Act

The subsection in the Act which creates immunity 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, unless the person against whom deadly force was used is a law enforcement officer . . . .

S.C. Code Ann. § 16-11-450 (Supp. 2010). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). 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. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.")

Section 16-11-440 of the article, which is the central provision of the Act by which a person is permitted to use deadly force, states:

(A) person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) 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.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or

. . . .

(C) 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 (Supp. 2010) (emphasis added).

Discussion / Analysis

Ample evidence supports the trial court's denial of immunity under the Act. Indeed, the trial court's finding that Petitioner did not meet her burden of proving "the parameters outlined in the statute" by a preponderance of the evidence is supported by evidence from the immunity hearing, both in regard to the trial court's specific finding of Petitioner was not in imminent danger, as well as several alternative grounds on which immunity was properly denied. The trial court carefully considered the conflicting testimony from Morrigan and Petitioner, necessarily assessed their credibility, and concluded Petitioner was not in imminent danger when she fired

the fatal shot. Therefore, the trial court's denial of immunity under the Act was not an error of law. The case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The trial judge's pretrial immunity ruling must be affirmed.

In her brief on appeal to the Court of Appeals and now in her Petition, Petitioner first argues the trial court should have presumed she had a reasonable fear of imminent peril under subsection (A) of the Act. (Brief of Appellant, p.25; Petition, p.20-21). However, this argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Here, although Petitioner summarized the provisions of the Act (R.p.7-p.12), and later argued the court could review the shooting as a case where Petitioner was trying to eject trespassers from her property, Petitioner never actually claimed or argued she was entitled to the presumption of "reasonable fear of imminent peril or death or great bodily injury to himself or another person" described in subsection (A). (R.p.171-p.180). Similarly, when denying immunity the trial court did not expressly find Petitioner was not entitled to the presumption of reasonable fear found in subsection (A). (R.p.184, line 11-p.185, line 6). Petitioner acknowledges the absence of such a ruling in her brief. (Brief of Appellant, p.26). Because the statutory presumption was neither raised to nor ruled upon the trial court, it is not a proper subject of appellate review. Similarly, it

is not preserved for review by this Court because it was not ruled upon by the Court of Appeals. Petitioner acknowledges the absence of such ruling in her Petition for Certiorari. (Petition, p.20).

Nevertheless, even if preserved, this argument fails on its merits for two reasons. First, subsection (B) specifically provides the presumption in subsection (A) does not apply if the person against whom the deadly force is used had a right to be in or is a lawful resident of the dwelling or residence. S.C. Code Ann. § 16-11-440(B) (Supp. 2010). "Residence" is defined in the Act as "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." S.C. Code Ann. § 16-11-430 (Supp. 2010). The evidence in the record clearly demonstrates Victim was temporarily residing in the house with Petitioner and Straley. Morrigan testified they had been living there for several weeks before the incident and helped support the household by purchasing food and working around the house. (R.p.52). Petitioner herself acknowledged she gave permission for Morrigan and Victim to stay at her house to visit Straley as long as possible before he died. (R.p.105). Because Victim was a resident of the dwelling, Petitioner was simply not entitled to the presumption of reasonable fear in subsection (A).

Petitioner claims this analysis overlooks the fact that Victim and Morrigan had been told to get out of the residence and argues "their status as guests had been terminated" and, therefore, the presumption should still apply. (Brief of Appellant, p.25). The State disagrees. Even though the definition of "residence" encompasses invited guests, Victim and Morrigan were more than invited guests. By contributing to the household and living there for an extended period of time, they were temporary residents, and Petitioner's attempt to downgrade their status to mere guests should be disregarded. In any event, the State submits a person's status as a resident cannot be terminated instantaneously. Here, Victim and Morrigan were in the process of moving their

belongings to the car in order to comply with Petitioner's request that they leave. Petitioner admitted she got up from her chair to help them carry things out, not to eject them. (R.p.124). Victim's status as a resident was still in effect when the shooting took place; therefore, Petitioner was not entitled to the statutory presumption.

Second, and more importantly, the presumption in subsection (A) only applies if the person against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or is removing or attempting to remove another person against his will from the dwelling, residence, or occupied vehicle. S.C. Code Ann. § 16-11-440 (A)(1) (Supp. 2010). Absolutely no evidence was presented during the immunity hearing to suggest this was what was happening. Petitioner never alleged Victim was unlawfully and forcefully entering the house; rather, everyone agreed Victim was already in the house when the initial altercation and the subsequent shooting occurred. Petitioner also never alleged Victim was trying to remove another person from the house against his or her will. Therefore, even if this Court determines Victim's status as a guest was terminated the moment Petitioner asked her to leave the residence, Petitioner was still not entitled to the statutory presumption.

Also in her brief to the Court of Appeals, Petitioner challenged the State's argument at trial that she was not entitled to a claim of immunity because she was advancing a defense of accident rather than self-defense. She insisted she was indeed pursuing a claim of self-defense and could seek immunity under the Act because she never claimed to have accidentally discharged the firearm, and instead claimed she intended to fire a warning shot, not aiming at anyone, with the intent to warn her attackers away. Petitioner argued it makes no common sense to claim that a death or injury inadvertently flowing from a warning shot would not fall under the

protections of the Act. (Brief of Appellant, p.25-p.26). As with her argument about the statutory presumption in subsection (A), this argument is also not preserved for appellate review because it was never ruled upon by the trial court. State v. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94 (2003). Although both parties made arguments to the trial court about the State's contention that the Act should not apply where Petitioner did not intend to shoot anybody, the trial court's ruling never addressed this argument, and instead applied the terms of the Act and found Petitioner had not proven she was not entitled to immunity. (R.p.184, line 11-p.185, line 6). Thus, this issue is not preserved for appellate review.

If this Court finds the issue is preserved, the State maintains the factual scenario set forth by Petitioner nevertheless precludes a finding of immunity under the Act. There is quite a difference between someone who: (1) intentionally attempts to shoot an attacker but accidentally shoots another person instead and (2) someone who fires a warning shot with no intent to shoot an attacker, and that warning shot hits another person. Both scenarios could be described as accidental; however, the intent behind the shot is critical in the context of a person who "has the right to stand his ground and meet force with force, including deadly force." S.C. Code Ann. § 16-11-440(C) (Supp. 2010). The immunity provision itself grants immunity to "[a] person who uses deadly force as permitted by the provisions of this article . . . ." A person firing a warning shot has no intent to use deadly force against an attacker. Indeed, they have the opposite intent—trying to **not** use deadly force. Thus, a person who intentionally fires a warning shot should never qualify for immunity under the Act, and the trial court properly denied Petitioner's request.

Finally, Petitioner challenged the trial court's ruling that she was not in imminent danger when the fatal shot was fired. (Brief of Appellant, p.26-p.28). Petitioner first contended it was

"undisputed" that she had a reasonable fear of imminent peril. (Brief of Appellant, p.6). However, her actions following the initial altercation and her statement to the police suggest otherwise. According to Morrigan, a minute or two after the initial fight, as she was helping Victim up from the floor, Petitioner appeared in the doorway with a gun, pointed the gun to the side and pulled the trigger. (R.p.63). Petitioner then turned the gun on Morrigan, who grabbed it and forced the second shot into the ceiling. (R.p.63). Later that night, when Petitioner was giving a statement to police, she said she retrieved the gun from her bedroom before shooting Victim so she could "show them I mean business." (State's Exhibit #9: DVD Statement, Part 1). Thus, rather than being undisputed, this evidence contradicts Petitioner's self-serving testimony that she was in fear of imminent peril from Victim and Morrigan.

In any event, even if Petitioner's assertion was accurate, Petitioner's emphasis on the lack of directly contradictory evidence improperly discounts Petitioner's burden of proof and the trial court's broad discretion in determining matters of credibility. Here, Petitioner appears to argue that the Act should be construed to require that a trial court accept the accused's version of the underlying facts. As this Court stated in Curry, if it adopted Petitioner's approach, the trial court would only be able to determine if the accused is not engaged in an unlawful activity and is in a place she has a right to be. 406 S.C. at 371, 752 S.E.2d at 266. This Court expressly found that the General Assembly did not intend such an application. Id. Moreover, undisputed testimony is of no value if that testimony is not credible, and a lack of contradictory evidence does nothing to carry a proponent's burden of proof. Here, although the trial court did not make a specific finding that Petitioner was not credible, that finding was necessarily implied in the conclusion that there was no imminent danger at the time of the shooting.

While the Act may be considered "offensive" in the sense that the immunity operates as a bar to prosecution, such 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, save the duty to retreat. Curry, 406 S.C. at 371-72, 752 S.E.2d at 266-67. Four elements are required by law to establish a case of self-defense. Only the last element, i.e., the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 371, 752 S.E.2d at 266. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed she was in imminent danger of losing her life or sustaining serious bodily injury, or she actually was in such imminent danger. Third, if her defense is based on her belief of imminent danger, a reasonably prudent person 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 person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save herself from serious bodily harm or losing her own life. Id. at 371 n.4, 752 S.E.2d at 266 n.4 (citation omitted).

Because "[a]ny act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense," State v. Douglas, 411 S.C. 307, 321, 768 S.E.2d 232, 240 (Ct. App. 2014), reh'g denied (Feb. 19, 2015) (quoting State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)), Petitioner's own brief—in its recitation of Morrigan's testimony—identifies sufficient grounds for affirming the trial court's determination that Petitioner did not deserve immunity under the Act. Morrigan testified she did not hit Petitioner until after Petitioner kicked her. (Brief of Appellant, p.15). Additionally, Morrigan testified she never heard Victim threaten Petitioner. Once Petitioner let go of Victim's hair, Victim did not hit Petitioner again. (Brief of Appellant,

p.15). Also, as noted by the solicitor during the immunity hearing, Petitioner retrieved the gun from another room after she and Victim were separated following the initial altercation, and then returned to show Victim "I mean business." Although not specifically found by the trial court, the evidence demonstrates Petitioner was not without fault in brining on the difficulty. Consequently, she failed to carry her burden of proof by a preponderance of the evidence and statutory immunity was properly denied.

Petitioner's account of the events immediately leading to the altercation and the deadly shooting of Victim differs factually from Morrigan's testimony. Morrigan testified that she and Victim were packing their things to leave the house and neither she nor Victim made any intentional contact with Petitioner; neither she nor Victim bumped Petitioner's chair. (R.p.58). Even if her chair was bumped, however, any possible contact with Petitioner's recliner would have been unintentional because there was not a lot of room to maneuver with luggage. (R.p.58). By contrast, Petitioner testified that while Victim and Morrigan were packing and preparing to leave the residence, "they would come out with a bag and hit the bottom of the leg rest part on [the] recliner . . . knowing that [Petitioner] would have to bend that knee again that was already throbbing from . . . the running around . . . earlier that day." (R. 123). Petitioner estimated that her chair had been "bumped" at least four times. (R. 123). Confronted with the evidence that the space inside the residence near the recliner was a "tight area," Petitioner testified it would be impossible for Victim and Morrigan to unintentionally bump her chair while walking by; instead, she claimed that someone could have bumped her chair "[o]nly if they did it intentionally," because there was "enough room for them to have gotten through to the door without ever touching [her] chair." (R.p.124). It is precisely this sort of conflicting evidence that is for a fact-finder to sort out. Accordingly, during the pretrial immunity hearing, the judge evaluated the

credibility of the witnesses and, based on his conclusions, necessarily found Petitioner to be less credible. Notably, the jury made this same determination in convicting Petitioner after the case went to trial. Significantly, portions of Petitioner's own testimony during the pretrial immunity hearing support both the trial court's determination that Petitioner could not satisfy the elements of immunity under the Act, and the jury's ultimate determination that the State proved beyond a reasonable doubt that Petitioner did not act in self-defense.

Lastly, Petitioner's appeal largely ignored the standard of review and requested that the Court of Appeals, and now this Court act as a second trial judge in order to overturn the trial judge's credibility finding in regard to Petitioner's testimony and the other evidence presented during the pretrial hearing. However, under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.") Taken as a whole, the testimony and evidence presented at the immunity hearing supported the trial judge's factual finding that Petitioner failed to carry her burden of proof. Moreover, the trial judge was in the best position to weigh Petitioner's credibility and conclude that her version of events was not accurate. Petitioner failed to meet her burden and the trial court did not abuse its discretion in denying immunity. Petitioner's pretrial testimony was not wholly uncontradicted, and her testimony was not deemed credible by the trial court.

Therefore, the Court of Appeals had to accept the trial judge's factual findings, and had to affirm the trial judge's ruling that Petitioner was not entitled to immunity under the Act. Black, supra; Gracely, supra, Wilson, supra.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court's refusal to grant Petitioner immunity. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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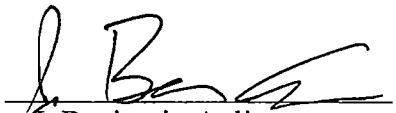
BY: 
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 24, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2016-UP-486 (S.C. Ct. App. filed November 23, 2016)

Appellate Case No: 2017-000549

State of South Carolina, ...Respondent,

v.

Kathy Leonard Revan, ...Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated April 24, 2017, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204

I further certified that all parties required by Rule to be served have been served. This 24th day of April, 2017.

Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

April 24, 2017

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
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RE: The State, Respondent, v. Kathy Leonard Revan, Petitioner
Appellate Case No. 2017-000549

Dear Ms. Shurling:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse (original and six copies enclosed)
Victim Services