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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

APPELLANT

APPELLATE CASE NO. 2017-002012

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in denying Appellant's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act?

2. Did the lower court err in refusing to direct a verdict of acquittal when the State failed to disprove that Appellant acted in self defense?

3. Did the lower court err in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter?

STATEMENT OF THE CASE

On February 17, 2011, the Beaufort County Grand Jury indicted Appellant for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1108). On July 28, 2011, Appellant filed a petition for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410-450. [the Act]. (R. p. 1, Petition for Immunity). On November 17, 2011, the Honorable R. Markley Dennis, Jr. held an immunity hearing. Jared S. Newman and Donald Colonegi represented Appellant at the immunity hearing. Isaac McDuffie Stone, III, and Sean Thorton represented the State. On March 1, 2012, Judge Dennis signed an order denying the Appellant's motion for immunity. (R. p. 235). The order was filed with the Beaufort County Clerk of Court on March 6, 2012. (R. p. 235). On March 12, 2012, Appellant filed a motion to reconsider. (R. p. 241). On March 13, 2012, Judge Dennis heard Appellant's motion to reconsider. (R. pp. 253-283). In a written order signed March 13, 2012, Judge Dennis denied the motion to reconsider. (R. p. 284). A timely notice of intent to appeal was filed and briefs filed by both the Appellant and the State. While the appeal from the denial of immunity was pending, the South Carolina Supreme Court decided State v. Issac, 392 S.C. 404, 709 S.E.2d 662 (2013) holding that the denial of immunity pursuant to the Act, S.C. Code §16-11-410, is not immediately appealable.

On February 20, 2014, the Beaufort County Grand Jury indicted Appellant for murder, indictment #2014-GS-07-00359. (R. p. 1112). On June 16, 2014, Appellant proceeded to jury trial for murder and possession of a weapon during the commission of a violent crime before the Honorable Brooks P. Goldsmith. Jared S. Newman and Donald

Colonegi represented Appellant at trial. Sean Thorton and Mary Concannon prosecuted the case. On June 19, 2014, the jury returned a verdict of guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The State nolle prossed indictment #2011-GS-07-120 for voluntary manslaughter on June 19, 2014. (R. p. 1116). That same day Judge Goldsmith sentenced Appellant to twenty six (26) years for voluntary manslaughter and five (5) years concurrent for the weapon charge. On June 27, 2014, appellant filed post trial motions. That same day, on June 27, 2014, Appellant filed a timely notice of intent to appeal.

On July 7, 2014, Judge Goldsmith heard arguments in regard to the post trial motions. Judge Goldsmith granted Appellant's motion to reduce sentence. In a written order signed July 7, 2014, Judge Goldsmith reduced the sentence from twenty six (26) to twenty four (24) years. (R. p. 1107, Order reducing sentence). This appeal addressing the denial of immunity and trial issues follows.

STATEMENT OF FACTS

Appellant owned PRO Tow, a tow truck company authorized by the Edgefield Subdivision Homeowners Association to tow vehicles that are improperly parked in the neighborhood. (R. p. 16, line 13 – p. 17, lines 1-20). The Edgefield Subdivision prohibits on street parking. (R. p. 17, line 21 – p. 18, lines 1-23). On the evening of December 24, 2010, Appellant noticed a minivan improperly parked on the street in the neighborhood. Appellant first placed a disabling boot on the minivan and then moved the tow truck in position to tow the minivan.

The minivan belonged to Carlos Olivera. Carlos Olivera and his family were visiting his brother Nelson Olivera who lived in the neighborhood. A neighbor, Steve Varedi, warned the Oliveras that the van was about to be towed. (R. p. 483, Court's Exhibit #4, Statement of Steve Varedi). Home surveillance camera from Varedi's home captured the incident and were introduced at trial as State's Exhibit #2. (R. p. 611, lines 16-17 – State's Exhibit #2, home surveillance CD to be transported to the Court). Carlos and Nelson Olivera approached Appellant and they argued with Appellant about towing the car. On the night of the incident Nelson Olivera told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (R. p. 27, lines 1-6). Nelson Olivera provided a written statement on December 28, 2010, and stated:

> The guy was ignoring us when we were trying to bring him to a common sense and even other people driving by were saying its Christmas don't do that but the guy was walking away toward his truck cabin, then he said if you don't have the money go away and went inside his truck and show us my

> brother and I a semi auto pistol and said if you don't have the money go away.
>
> Shortly after that, my brother Carlos who have a permit to carry a conceal weapon, flex his shirt and shows that guy that he also have a pistol, then Carlos said you think that you going to scare me?

(R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera).

Appellant stated that after he booted the minivan he saw three men come running out of a house. (R. p. 292, lines 1-12; State's Exhibit #16, interview CD to be transported to the Court). Appellant stated he got in the cab of his truck, locked the door and rolled down the window. (R. p. 292, lines 12-15; State's Exhibit #16, interview CD to be transported to the Court). Two of the men stepped up on the running board of the tow truck and one of these two men told the third man to go get his shotgun. (R. p. 292, lines 16-23; State's Exhibit #16, interview CD to be transported to the Court). Appellant told officers that, as he was stalling for time, he heard a round being chambered. (R. p. 293, line 1 – p. 294, lines 1-23; State's Exhibit #16, interview CD to be transported to the Court). Appellant also told the officers that one of the men grabbed his keys and a tool to attempt to remove the boot. (R. p. 299, lines 1-17; State's Exhibit #16, interview CD to be transported to the Court). The other man remained at the truck window and asked about paperwork in connection with the minivan. (R. p. 299, lines 18-23; State's Exhibit #16, interview CD to be transported to the Court). Appellant assured the man that he had no paperwork on the minivan but at the same time discreetly got his gun out of his glove compartment. (R. p. 301, lines 1-11; State's Exhibit #16, interview CD to be transported to the Court).

Nelson Olivera stated that after his brother showed the pistol, Appellant gave Nelson the keys and a tool to remove the boot. (R. p. 493, Court's Exhibit #9, Statement of Nelson

Olivera). Nelson Olivera, however, was unable to remove the boot. Appellant told officers:

> And he [the man who remained at the truck window] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16, interview CD to be transported to the Court). Appellant then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16, interview CD to be transported to the Court). Appellant played along as if he was going to exit the tow truck and unlock the boot. Appellant told officers that he "evacked' out of his truck and said, "It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any paperwork on his vehicle and . . . ah, Bye, Bye, Preston . . .Regardless, he was in motion, he was in draw and I reacted. I know ...I remember the very first shot. I caught him on the left side. (R. p. 306, line 12 – p. 307, lines 1-7; State's Exhibit #16, interview CD to be transported to the Court). Carlos Olivera was fatally wounded by six gun shots. A Glock model 22, .40 caliber pistol with a fifteen round magazine with one in the chamber belonging to Carlos Olivera was found at the scene of the shooting. (R. p. 734, line 21 – p. 735, lines 1-13). Appellant had a Glock model 27, .40 caliber pistol with an eight round magazine. (R. p. 736, lines 6-11).

After the shooting Appellant remained at the scene and called 911. Appellant told the 911 operator:

> I put the boot on the vehicle and I was pulling my truck around. He jumped on the driver's side window, told me to unlock the vehicle, "Unlock it now, unlock it now!" So I opened the door and I stepped out of my truck. When I stepped out of my truck, he pulled a handgun on me, stuck it in my face and

said "unhook my vehicle or I will kill you." I pulled mine out and shot him -- I don't know how many times. I just shot him.

(R. p. 80, line 23 – p. 81, lines 1-8; State's Exhibit #1, CD of 911 tape to be transported to the Court).

ARGUMENTS

1. The lower court erred in denying Appellant's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act.

Appellant was initially indicted for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1110). On July 28, 2011, Appellant filed a petition for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410-450. [the Act]. (R. p. 1, Petition for Immunity). On November 17, 2011, the Honorable R. Markley Dennis, Jr. held an immunity hearing. In a written order signed March 1, 2012, Judge Dennis denied Appellant's motion for immunity from prosecution.

S.C. Code §16-11-440 provides:

> (A) 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.

Judge Dennis found that Appellant was not immune from prosecution pursuant to section (A) because, "The facts presented do not show that at the time of the shooting Carlos was unlawfully or forcibly entering or had entered, Oates' vehicle. Carlos was walking away from Oates' tow truck at the time Oates got out of the vehicle and shot Carlos.

Statements from witnesses as well as the video of the incident support these findings " (R. p. 235, Order Denying Immunity). The judge erred.

While there may not have been evidence that Carlos Olivera was unlawfully or forcibly entering Oates' vehicle, as found by Judge Dennis, there is evidence that Carlos Olivera was attempting to remove Oates from his occupied vehicle. On the night of the incident Nelson Olivera told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (R. p 27, lines 1-6; R. p. 500, Court's Exhibit #12, Supplemental Incident Report). Investigator Biens testified that Nelson Olivera provided a written statement on the night of the incident indicating, "My brother pull his gun and toll (sic) him to release the car." (R. p. 34, lines 15-16). Nelson Olivera also stated in the written statement given the night of the incident, "The guy said $400, then when the guy saw my brother with the gun in hand, the guy handed the keys and said, 'Do it. Unlock the padlock.'" (R. p. 34, lines 20-23). Additionally, Nelson Olivera stated, "After that, my brother calmed down and put the gun in his waist. My brother turned around and the guy shot my brother." (R, p. 34, line 25 – p. 35 lines 1-3).

Nelson Olivera provided an additional written statement on December 28, 2010 and stated:

> The guy was ignoring us when we were trying to bring him to a common sense and even other people driving by were saying its Christmas don't do that but the guy was walking away toward his truck cabin, then he said if you don't have the money go away and went inside his truck and show us my brother and I a semi auto pistol and said if you don't have the money go away.

> Shortly after that, my brother Carlos who have a permit to carry a conceal weapon, flex his shirt and shows that guy that he also have a pistol, then Carlos said you think that you going to scare me?

(R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera).

After his brother showed the pistol, Appellant gave Nelson the keys and a tool to remove the boot. (R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera). When Nelson Olivera was unable to remove the boot, Appellant told officers:

> And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16, interview CD to be transported to the Court). Appellant then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16, interview CD to be transported to the Court).

Nelson Olivera obtained the keys and tool from Appellant after Carlos Olivera either brandished or pointed a pistol at Appellant. When Nelson Olivera was unable to remove the boot with the keys and tool, the next step was for Carlos Olivera to force Appellant out of his truck and force him to remove the boot. At the time Carlos Olivera was shot by Appellant, Carlos was attempting to remove Appellant against his will from his vehicle in order to remove the boot. Pursuant to the statute it does not matter that Carlos Olivera may have been walking away from Appellant when he was shot because Carlos Olivera was still in the process of attempting to remove Appellant from his tow truck and force him to remove the boot when Appellant shot him. Appellant is entitled to the presumption of having a reasonable fear of imminent peril or death or great bodily injury to himself when he

used deadly force and shot Olivera provided by S.C. Code §16-11-440(A). The judge erred in finding that Appellant was not entitled to immunity from prosecution pursuant to S.C. Code §16-11-450.

Judge Dennis additionally found that Appellant was not entitled to immunity pursuant to §16-11-440(C). S.C. Code §(C) 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.

In the order denying immunity Judge Dennis wrote, "Assuming that there was an 'attack' previously, there was no such event at the time of the shooting. In short, there was no force to be met. Carlos was walking away from Oates when he was shot five times in the back and once in the side. Other evidence presented supports the Court's finding that the argument had ended at the time Oates fired the fatal shots. The Court will not interpret the language of the statute to mean that a person may shoot and kill another when a perceived attack has ended." (R. p. 235, Order Denying Immunity p. 6). The record does not support the judge's conclusion that the attack had ended.

At the time of the shooting the Olivera brothers still had keys and a tool belonging to Appellant. The minivan belonging to Carlos Olivera was still demobilized by the boot. Carlos Olivera was not simply walking away from Appellant when he was shot. As discussed above, at the time Carlos Olivera was shot, he was attempting to force Appellant out of his tow truck in order to force Appellant to unlock the boot and release the minivan. Even if Appellant was not forced from his tow truck, he would still be

entitled to immunity pursuant to §16-11-440(C) because at the time of the shooting Appellant was in a place where he had a right to be, as found by Judge Dennis in his order (R. p. 235, Order Denying Immunity p. 3), and Appellant had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force because he reasonably believed that it was necessary to prevent death or great bodily injury.

The confrontation between the Olivera brothers and Appellant had not ended at the time of the shooting. Carlos Olivera intended to force Appellant to unlock the boot and had already made his intentions clear by either brandishing or pointing a firearm at Appellant. The record does not support the judge's finding that the argument had ended at the time of the shooting. While there is testimony that Claudia Olivera and Dhyan Olivera, wives of the Olivera brothers who were present at the time of the shooting, indicated that the arguing ended after Carlos Olivera obtained the keys from Appellant (R. p 143, line 20 – p. 144, lines 1-25), this does not support a finding that conflict had been resolved. While Nelson Olivera told Investigator Bien that his brother calmed down and put the gun back in his waist band after Appellant handed over the keys, this also does not support a finding that the conflict had been resolved. The arguing had stopped momentarily because the Olivera brothers got what they wanted, the keys to unlock the boot. Appellant handed over the keys, at gun point, in order to prevent being shot in the cab of his tow truck. At the time of the shooting Appellant knew Carlos Olivera was still armed. This is not a situation where Carlos Olivera had given up on trying to convince Appellant not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. Carlos Olivera was determined to prevent his van from being towed and threatened Appellant with a gun. Appellant stood his ground and met force

with force, as provided by the statute. The judge erred in refusing to grant Appellant immunity from prosecution pursuant to §16-11-440(C).

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) reh'g denied (Feb. 19, 2015). "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, 570, 647 S.E.2d 144, 166–67 (2007). The lower court committed an error of law in failing to find that Appellant was entitled to immunity pursuant to S.C. Code §16-11-440(A) when there was evidence that Carlos Olivera was attempting to remove Oates from his occupied vehicle. Additionally, the lower court abused its discretion in failing to find that Appellant was entitled to immunity pursuant to S.C. Code §16-11-440(C) when the record fails to support the lower court's finding that the conflict had resolved at the time of the shooting.

In State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014), reh'g denied (Feb. 19, 2015) the South Carolina Court of Appeals wrote:

> Our supreme court has recently emphasized that immunity under the Act "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. "[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." Id. at 371, 752 S.E.2d at 266.

There are four elements required by law to establish a case 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). The fourth element—the duty to retreat— is excused under the Protection of Persons and Property Act. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). As discussed in issue two, Appellant in this case can also meet the fourth element.

Appellant demonstrated the first three elements of self defense. Appellant was without fault in bringing on the difficulty. As noted by the lower court in the order denying immunity, Appellant, a tow truck operator working in the Edgefield neighborhood in Beaufort County, located an illegally parked car belonging to Carlos Olivera. Appellant placed a boot on the vehicle in preparation to tow. The Olivera brothers confronted Appellant and an argument ensued. By his own brother's statement, Carlos Olivera brandished a weapon. Appellant was without fault in bringing on the difficulty.

Appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Appellant was outnumbered, Carlos Olivera had brandished a pistol and there was talk of another

person going to get a shotgun. Appellant's fear was reasonable under the circumstances. Appellant acted in self defense. The lower court abused its discretion in refusing to find that Appellant was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act.

2. The lower court erred in refusing to direct a verdict of acquittal when the State failed to disprove that Appellant acted in self defense.

At the time of the immunity hearing held on November 17, 2011, Appellant had been indicted for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1108). On February 20, 2014, the Beaufort County Grand Jury indicted Appellant for murder, indictment #2014-GS-07-00359. (R. p. 1112). On June 16, 2014, Appellant proceeded to jury trial for murder and possession of a weapon during the commission of a violent crime before the Honorable Brooks P. Goldsmith. At the close of the State's case, Appellant moved to dismiss the murder charge because the State failed to disprove that the Appellant acted in self defense. (R. pp. 891-896). The judge denied the motion stating, "And I think this is for the jury, and for those reasons, deny the motion." The trial judge erred.

In State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) the South Carolina Supreme Court wrote:

> A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury." *Id.* at 292–93, 25 S.E.2d at 648. However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense

> beyond a reasonable doubt. Wiggins, 330 S.C. at 544–45, 500 S.E.2d at 492–93.

In Dickey the Court found that the State failed to meet its burden of disproving self defense. As in Dickey, the State in the present case failed to disprove self defense.

In opposition to Appellant's motion for a directed verdict of acquittal of murder based on the fact that the State failed to disprove self defense, the State argued that Appellant "advanced on Carlos Olivera as he was walking away, and shot him." (R. p. 897, lines 8-9). If Appellant shot Carlos Olivera as he was walking away, it was after Carlos Olivera brandished a weapon and demanded that Appellant exit the cabin of his tow truck and unlock the boot demobilizing Olivera's minivan. Under the specific facts of this case, shooting as the deceased was walking away, while still armed and waiting for Appellant to do as the deceased instructed, does not disprove self defense.

At trial Nelson Olivera testified, "When I was talking to the tow truck driver I was standing on the board, in the step. And he got the window up and I told him, you know, roll the window down. Which he did it. And I almost beg him again, you know, let my brother go. At that moment my brother standing behind , and my brother say, he yelled, not yelled, but he say, Release my car. And my brother, at that moment he – I noted that he have a pistol." (R. p. 622, lines 11-18). Nelson Olivera also testified that he noticed that his brother had a gun after hearing a ratchet like noise. (R. p. 635, line 15 – p. 636, lines 1-4). This is consistent with Appellant's statement to Detective John Adams that as he was sitting in the cab of his tow truck talking to the Olivera brothers, he heard a round being chambered. (R. pp. 292-294; State's Exhibit #16 CD to be transported to the Court).

Nelson Olivera also testified that his brother stated, "Nobody gonna take my car." (R. p. 635, line 20-21). Nelson Olivera testified, "Yeah. That noise caught my attention. And my brother said, nobody's going to take my car. So, I turned real quick to him and I say, No Carlos, don't do that. Put that away. Which he listen to me, he did it real quick." (R,. p. 636, lines 1-4). The State's witness establishes that the deceased brandished a pistol, chambered a round and stated, "Nobody's going to take my car." While Nelson Olivera testified that the Carlos Olivera put the gun away, Nelson Olivera confirmed that it was after Carlos brandished the gun when Appellant relinquished the keys to Nelson. (R. p. 623, line 18 – p. 624, lines 1-15). Nelson Olivera also testified that, after getting the keys from Appellant, he was unable to unlock the boot on his brother's minivan. (R, p. 625, line 1 – p. 626, lines 1-4).

Detective John Adams with the Beaufort County Sheriff's Department interviewed Appellant the night of the shooting. The interview was video recorded, introduced as State's exhibit #16 at trial and played for the jury. (R. p. 713, lines 7-19). A transcript of the audio portion was transcribed and introduced in evidence during the immunity hearing. (R. p. 285; State's Exhibit #16 CD to be transported to the Court). When Nelson Olivera was unable to remove the boot, Appellant told officers:

> And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16 CD to be transported to the Court). Appellant then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16 CD to be transported to the Court). Appellant played along as if he

was going to exit the tow truck and unlock the boot. Appellant told officers that he "evacked' out of his truck and said, "It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any paperwork on his vehicle and . . . ah, Bye, Bye, Preston . . .Regardless, he was in motion, he was in draw and I reacted. I know ...I remember the very first shot. I caught him on the left side. (R. p. 306, line 12 – p. 307, lines 1-7; State's Exhibit #16 CD to be transported to the Court).

As discussed in issue one, there are four elements required by law to establish a case 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).

Appellant was without fault in bringing on the difficulty. Appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Appellant and the Olivera brothers were involved in a heated argument. Appellant was outnumbered, Carlos Olivera had

brandished a pistol and there was talk of another person going to get a shotgun. . (R. p. 285, Transcript of 12/24/10 Oates interview, p. 292, lines 16-23; State's Exhibit #16, interview CD to be transported to Court). Appellant's fear was reasonable under the circumstances. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)).

As to the duty to retreat, "A defendant is not required to retreat if he has "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 [the] particular instance." Wiggins, 330 S.C. at 545, 500 S.E.2d at 493. If, after relinquishing the keys to Nelson Olivera, Appellant had driven off in his tow truck with the minivan still demobilized by the boot, he risked being shot and killed by Carlos Olivera who he knew was armed, or by others who may have retrieved a shotgun. Carlos Olivera told Appellant he would kill him if he did not unhook the minivan. (Nov. 17, 2011, R. p. 80, line 23 – p. 81, lines 1-8; State's Exhibit #1, CD of 911 tape to be transported to the Court). The State failed to disprove that Appellant had no other probable means of avoiding the danger. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to disprove that Appellant acted in self defense.

3. The lower court erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter.

At the close of the case the State requested a charge on the lesser included offense of voluntary manslaughter. (R. p. 904, lines 7-9). The State argued that Appellant's statements that he was scared, freaking out, nervous and that it happened in a snap and was

panic fire collectively constitute sudden heat of passion. (R. p. 914, lines 5- p .915, lines 1-25). Appellant objected citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). (R. pp. 916 – 924). The judge overruled the objection and charged the jury with the lesser included offense of voluntary manslaughter. ((June 2014, R. p. 924, lines 12-16; p. 1006, line 4 – p. 1007, lines 1-20). Appellant renewed the objection at the close of the charge. (R. p. 1014, lines 19-21).

"Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). Both heat of passion and sufficient legal provocation must be present at the time of the killing. Id. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence. See id." State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). In State v. Starnes, 388 S.C. 590, 596-97, 698 S.E.2d 604, 608 (2010), the South Carolina Supreme court wrote:

> We have consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. Wharton, 381 S.C. at 215, 672 S.E.2d at 788. A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. See id. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. See State v. Pittman, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

In Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010), the Court also wrote:

> We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Pittman, 373 S.C. at 572, 647 S.E.2d at 167. While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," it must cause a person to lose control. *Id.*
>
> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence. (Emphasis in original).

In the present case the judge erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence that Appellant was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Appellant's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire do not constitute evidence that appellant was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Based on the facts of this case, Appellant either shot in self defense or he acted with malice. This factual determination was to be made by the jury. Instead, finding the

Appellant guilty of voluntary manslaughter, the jury found that while Appellant did not act with malice, he did not shoot in self defense. The error in charging the jury with voluntary manslaughter requires reversal.

Appellant's fear does not rise to the level of heat of passion required in order to charge voluntary manslaughter. In Starnes, the Court found no error in the trial judge refusing to charge voluntary manslaughter although Starnes testified that prior to the shooting one of the decedents came up behind him in the restroom of a bar, grabbed his throat, put a metal object to the back of his head, and began yelling about money which Starnes allegedly stole from him. Starnes also testified that later the decedent remarked to one of the bar's employees that she "better call the police because he was going to take [Starnes] up on Platt Springs Road and blow his F'in brains out." Additionally Starnes testified that before he fired the fatal shot, the decedent pointed a gun at him. Starnes testified that he was scared and frightened. The Court held, "While this testimony is evidence that Appellant was in fear, there is no evidence Appellant [Starnes] was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." State v. Starnes, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010).

As in Starnes, while there is testimony that Appellant in the present case was in fear, there is no evidence that Appellant was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), the South Carolina Supreme wrote:

> In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Pittman, 373 S.C. at 572, 647 S.E.2d at 168.

Taking into consideration all of the surrounding circumstances and conditions, there is no evidence tending to reduce the charge from murder to manslaughter.

In State v. Niles, 412 S.C. 515, 522-523, 772 S.E.2d 877, 880-881 the South Carolina Supreme Court wrote:

> Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence.* Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. See Cole, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in Cole, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense.
>
> In State v. Childers, we explained:
>
> Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever. If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court.... Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury. 373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a

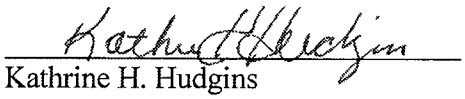
> voluntary manslaughter charge would have been appropriate under these facts.(footnote omitted).

Appellant's testimony, as Niles' testimony, goes to self defense not voluntary manslaughter. Appellant assessed his situation and made the decision to defend himself from the Olivera brothers. There is no evidence that Appellant fired the fatal shots while under an uncontrollable impulse to do violence. The trial court erred in charging the jury with the law of voluntary manslaughter.

CONCLUSION

Based on the argument presented in issue one, this Court should find that Appellant was immune from prosecution pursuant to the Protection of Persons and Property Act. Alternatively, based on issue two, this Court should reverse the convictions as Appellant acted in self defense. As a third alternative, based on issue three, this Court should reverse the convictions and sentence.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 15th day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

March 15, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

APPELLANT

APPELLATE CASE NO. 2014-001404

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of March, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2016.

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