

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM GREENVILLE COUNTY  
The Honorable Robin B. Stilwell, Circuit Court Judge  
S.C. Supreme Court

Appellate Case No. 2012-208587

THE STATE

RESPONDENT,

V.

TERRY DEAN GREGORY,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in its interpretation of S.C. Code § 16-11-450(A) when it determined that the phrase "or another applicable provision of law" does not include the common law provisions justifying the use of deadly force?
2. Did the trial court err in failing to analyze the common law "defense of another" from the standpoint of the person being defended?
3. Did the trial court err in concluding that the Appellant did not prove by a preponderance of the evidence that he was not at fault in bringing on the difficulty?
4. Did the trial court err in its interpretation of the phrase "not engaged in unlawful activity" contained in S.C. Code §§ 16-11-440(B) and 440(C)?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether the trial court erred in finding Appellant was not entitled to immunity when Appellant was not acting in self-defense because he was not without fault in bringing on the difficulty?
2. Whether the trial court erred in denying Appellant's request for immunity when Appellant could not establish that he was acting in defense of his wife because he was not without fault in bringing on the difficulty?
3. Whether the trial court erred in finding that Appellant was not entitled to immunity because he was engaged in unlawful activity when he shot the victim?
4. Whether Appellant was entitled to immunity in light of the trial court's determination that S.C. Code Ann. §16-11-450(A) did not apply to the common law defense of self-defense or defense of others?

## STATEMENT OF THE CASE

On October 19, 2010, Appellant Terry Dean Gregory ("Appellant") was indicted for Murder (2010-GS-23-6119), Possession of a Weapon during the Commission of a Violent Crime (2010-GS-23-6119), and Pointing and Presenting a Firearm (2010-GS-23-6118). On February 24, 2011, Appellant filed a Motion Asserting Statutory Immunity from Prosecution S.C. Code § 16-11-450 and Demand for Pre-Trial Hearing. (Motion, R. pp. ). The State filed its Response to Defendant's Motion Demanding Pre-Trial Hearing for Statutory Immunity pursuant to S.C. Code § 16-11-450 on March 11, 2011. (Response, R. pp. ).

An evidentiary hearing on the Motion was held before the Honorable Robin B. Stilwell, Circuit Court Judge, on November 7-8, 2011. Appellant was present and was represented by James W. Bannister, Esquire. The State was represented by Assistant Solicitor Mark Moyer, Esquire, of the Thirteenth Judicial Circuit. At the conclusion of the evidentiary hearing, the trial court requested proposed orders from both parties.

On January 30, 2012, the trial court filed an Order denying Appellant's Motion Asserting Statutory Immunity from Prosecution S.C. Code § 16-11-450 and Demand for Pre-Trial Hearing. (Order, R. pp. ). Appellant subsequently filed a Motion for Reconsideration and Memorandum in Support on February 7, 2012. (Motion, R. pp. ). On February 17, 2012, the trial court filed an Order denying the Motion for Reconsideration. (Order, R. pp. ).

Appellant then filed a Notice of Appeal. Appellant now requests this Court reverse the trial court's Order denying the Motion Asserting Statutory Immunity

from Prosecution and dismiss the indictments now pending against Appellant. The State respectfully requests this Court deny Appellant's appeal and affirm the trial court's denial of Appellant's Motion for Immunity.

## STATEMENT OF FACTS

On October 10, 2009, Appellant Terry Dean Gregory shot the victim, Roger White, Jr., in the neck. (Tr. 52-3, 186, 221, 266). The victim died as a result of a contact penetrating wound to the neck. (Tr. 470). According to the pathologist, the bullet transected the victim's spinal cord and destroyed several large vessels in the victim's neck. (Tr. 471, 472). Specifically, the projectile damaged the victim's left subclavian and internal jugular veins. (Tr. 482, 489-90). The victim died instantaneously. (Tr. 472).

### **General Background**

Appellant is married to Louanne Gregory. (Tr. 9). Prior to marrying Louanne, he was married to Lisa Brashier. (Tr. 9-10, 205). Appellant had two sons with Brazier, Kellett Gregory and Steven Gregory. (Tr. 9-10). Appellant and Brazier divorced when Kellett was one and before Steven was born. (Tr. 10). At the time of the shooting, Kellett was 20, and Steven was 18. (See Tr. 303, 339). Kellett and Steven lived with their mother, Lisa, and her boyfriend for five years, Roger White Sr. (Tr. 205, 255, 302, 339). Roger White, Sr. had a son, the victim of the shooting, Roger White, Jr. (Tr. 256). Roger White, Jr. had a baby daughter named Candace. (Tr. 212).

By all accounts, Appellant's relationship with Kellett and Steven was strained at the time of the confrontation. According to Louanne and Appellant, Appellant's relationship with Steven started to break down as a result of Steven's alleged drug use, the fact that Steven did not graduate from high school on time,

and because of Appellant's and Louanne's belief that Steven was not on the right track. (Tr. 11-2, 397).

Both Appellant and Louanne maintained they did have a good relationship with Kellett until after a party they held for him in honor of his decision to join the Army National Guard Reserves. (Tr. 10-11, 396-98). Both Appellant and Louanne indicated that they continued to attempt to stay in contact with Kellett after he left for basic training in May/June of 2009, but Kellett did not reciprocate in the communication. (Tr. 15-7, 399-401).

#### **October 10, 2009**

On October 10, 2009, Appellant and Louanne ran into Steven at Fall for Greenville. (Tr. 17-9, 404). Appellant and Louanne were there with members of Louanne's family, and Steven was passing out flyers for a restaurant where he worked. (Tr. 404-05, 303, 322). Appellant and Steven talked, and during that conversation Appellant learned that Kellett had returned from basic training. (Tr. 20, 405). Appellant also told Steven to apologize to Louanne for cursing at her over the telephone. (Tr. 21, 304, 405). Appellant also asked Steven to tell Kellett to call him. (Tr. 22, 405).

Steven noted that during the conversation he had with Appellant, Appellant talked about laying Steven out on the street at Fall for Greenville. (Tr. 305). Shortly after that conversation, both Appellant and Steven separately called Kellett. (Tr. 305, 347-48, 406-07). Steven testified that he told Kellett that Appellant made him apologize to Louanne. (Tr. 306). Steven also told Kellett about Appellant's threat to lay Steven out. (Tr. 305). Appellant initially left a

message for Kellett. (Tr. 348-49, 406-07). In that message, Appellant stated, "I just had a little discussion with your brother. And, you need to call me. How come y'all ain't got no fucking balls, neither one of you? And us three need to sit down and talk. Or better yet, we probably gone stand up and talk. So one day if you grow some balls, you call me, alright, you little chicken shit bastard." (State's Exhibit 48; see Tr. 348-49, 407). Appellant indicated that he used that language to convince Kellett to call him back. (Tr. 407). Kellett testified that he believed that on that message, Appellant wanted to fight. (Tr. 350, 353).

The message prompted Kellett to return Appellant's call. (Tr. 23, 349). The two then discussed where to meet. Initially, Appellant and Louanne suggested meeting either downtown Greenville or at Shane's Restaurant, where Steven worked. (Tr. 26-7, 349-51, 409-10). Both of those locations were not accepted by Kellett. (Tr. 26-7, 351-52). Eventually, Kellett suggested they meet at a Spinx gas station that was near a party he was attending that night. (Tr. 28, 352-53, 409-10). At some point, the meeting place was changed from the Spinx station to the area on McKelvey Road and Shirley Road where the shooting occurred. (Tr. 410). The meeting was set for around 11p.m. so that Steven could be there after he got off work. (Tr. 28, 448).

#### **Steven gets off from work**

Steven got off from work around 10 p.m. that night. (Tr. 258, 306, 518-19). When Steven got home from work that evening, Lisa, Roger White Sr., the victim, Candace (Roger White Jr.'s daughter), Dustin L., Justin D., and Ralph P. were all at the house. (Tr. 152-53, 174-75, 257, 306-07, 518-19). Steven asked

for directions to the Spinx station. (Tr. 211, 232, 327, 519). He was going to meet with Kellett at the station, and then head on to the meeting with Appellant. (Tr. 175, 260, see Tr. 519). Lisa testified that she then offered to go with Steven. (Tr. 211). She noted that she knew that Kellett had a temper, and she wanted to make sure that everything was ok. (Tr. 211). Once she decided to go, everyone else at the house decided to go too. (Tr. 211, 311, see Tr. 520). Roger White Sr. indicated that he also told Steven that he would go with him. (Tr. 260).

The group left in two trucks. (Tr. 156, 163, 520). Steven drove his truck; Dustin and Ralph rode with him. (Tr. 155, 178, 214, 310, 520). Roger White Sr. also drove his truck; Lisa, the victim, Candace, and Justin rode with them. (Tr. 156, 214, 311, 520). The two trucks drove to the Spinx station and met with Kellett shortly before driving over to the location where Steven and Kellett were to meet Appellant. (Tr. 156, 214, 311, 520-21; see Tr. 179). Kellett also had a passenger, Brent Hanvey, in his truck.<sup>1</sup> (Tr. 499-500; see Tr. 522).

Brent Hanvey testified that he was with Kellett on the evening of October 10, 2009. (Tr. 497). Hanvey indicated that he and Kellett attended a bon fire and party at Hanvey's grandmother's house that night. (Tr. 498). Hanvey and Kellett talked about the voicemail that Appellant had left. (Tr. 499). Hanvey went with Kellett to the Spinx station. (Tr. 499). When they arrived, Kellett went inside the station to get beer; Hanvey remained in Kellett's truck. (Tr. 500). Hanvey testified that he thought they were going to meet with Appellant to fight. (Tr. 501). Neither Kellett nor Hanvey had any weapons. (Tr. 502). When then the

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<sup>1</sup> Most of the witnesses, including Kellett, did not recall Brent Hanvey being in Kellett's truck at the Spinx station, or at the scene where the shooting occurred. (Tr. 157, 180, 192, 214-15, 223, 311-12, 336).

trucks arrived at the confrontation location, Hanvey remained in Kellett's truck. (Tr. 504).

The three trucks then drove over to McKelvey Road and South Shirley Road to the meeting location. (Tr. 164,191, 233-34, 521). Both Kellett and Roger Sr. parked their trucks facing the road. (Tr. 262-63, 504, 521). Steven somehow got his truck stuck while he was attempting to park at the scene. (Tr. 157, 179, 263, 504, 521-22). The witnesses who arrived in those three trucks indicated that no other vehicles were at the scene with them prior to the shooting other than Appellant's truck.<sup>2</sup> (Tr. 165, 522-23). They also indicated that no one within the group had a weapon. (Tr. 170, 194, 198, 233, 524). After the three trucks parked, Dustin, Justin, and Ralph went towards the back of Roger Sr.'s truck. (Tr. 158, 165, 168, 179-80, 181, 192, 524-25).

While at the meeting spot, the group saw Appellant pass by in his truck. (See Tr. 503). Kellett called Appellant and told him that he had just passed the meeting location. Appellant turned around and came back to the location. When he arrived, he pulled in facing Kellett and Roger's trucks. At this point, Kellett, Steven, and Brazier are in front of Roger Sr.'s truck on the passenger side, facing the driver's side of Appellant's truck. (See Tr. 525, 526). Both trucks had their headlights on. (Tr. 202, 507). Appellant jumped out of the driver's side of the truck. He had a large flashlight in his hand. (Tr. 181, 195, 235, 277, 314, 526). A few witnesses indicated that at the time, it was not clear that it was a flashlight. (Tr. 166, 181, 217, 314, 329; See Tr. 525). Several witnesses testified

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<sup>2</sup> Justin Davis testified that a car pulled up after the shot was fired to ask what was going on. (Tr. 523). Justin noted that he told the driver that he did not want to know, and instructed the driver to turn around. (Tr. 523).

that the flashlight was not on. (Tr. 196, 235, 277). None of the members of Kellett and Steven's group had weapons.<sup>3</sup> (Tr. 170, 194, 198, 233, 238, 276, 331, 502, 508, 524; see Tr. 253, 536).

Appellant asked Kellett and Steven to come closer to Appellant's truck so they could talk. (Tr. 158, 525). Kellett and Steven asked Appellant about the item in his hand. (Tr. 158, 159, 167, 525). Kellett then told Appellant that they would not come closer to talk until after Appellant dropped the object he had in his hand. (Tr. 158, 159, 167, 181-82, 198, 525). Appellant refused to do so. An argument ensued. (Tr. 159, 534). While the argument about the flashlight continued, Louanne presented the pistol in the cab of Appellant's truck. (Tr. 526; see Tr. 183-84, 265, 360, 378). Louanne eventually transferred the pistol to Appellant. (Tr. 183-84, 198, 199, 378, 526). Once Appellant had the pistol, he pointed it at Kellett, Steven, and Lisa. Lisa stepped in front of her two sons. (Tr. 218, 266; see Tr. 184-85). Appellant then pointed the gun at Lisa and stated "I'll get you, or shut you up for good." (Tr. 527, ll 3-4).

All of the witnesses with the group of three trucks indicated that prior to Appellant pointing the pistol at Lisa, no one had either hit or attacked Appellant. (Tr. 198, 508, 527). After Appellant pointed the gun at Lisa and his sons, Lisa did kick and hit the open driver's side door of Appellant's truck. (Tr. 203, 527; see Tr. 184-85). Ralph testified that when Appellant pulled the gun, Lisa, moved and stood face to face with Appellant, and both Steven and Kelly were right behind her. (Tr. 185). The driver's side door of Appellant's truck was in between the two. (Tr. 185). Lisa stated that she did so in an attempt to convince Appellant to

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<sup>3</sup> Appellant did claim that he saw someone with a stick at the scene. (Tr. 415-16).

put down the pistol. (see Tr. 203). All maintained that no one ran at, attacked, or hit Appellant during the entire confrontation. (See Tr. 508, 527). Dustin L. and Ralph P. testified that they heard no sounds that would indicate that someone was being attacked. (Tr. 172, 200).

While Appellant was pointing the gun at Lisa, the victim, Roger Jr., ran to the passenger side and then around the back of Appellant's truck. (Tr. 185-86, 318; see Tr. 201). As Roger Jr. came around to the driver's side where Appellant was standing, Roger Jr. reached for Appellant's gun. (Tr. 186, 201-02, 527-28, 529). Appellant then shot the victim in the neck. (Tr. 186, 528). The victim fell in the spot where he was shot. (Tr. 186). Roger White Sr. caught him. (Tr. 186).

Several witnesses denied that any one made threats against Louanne. (Tr. 531). Justin testified that he did not hear anyone say that they were going to get Appellant or "his bitch." (Tr. 531). Justin also indicated that no one was even paying attention to Louanne. (Tr. 532).

#### **Appellant and Louanne Gregory's Version of the Confrontation**

According to Appellant and Louanne, after they last spoke with Kellett regarding where to meet, they continued their day with Louanne's family at Fall for Greenville. (Tr. 30). After spending some time at their hotel room and packing, the two left for the meeting with Kellett and Steven at approximately 10:30 p.m. to meet the two at 11 p.m. (Tr. 30, 448; State's Exhibits 1, 49).

Louanne testified that they received a telephone call from Kellett at around 10:49 p.m. (Tr. 36). She noted that Kellett asked where they were and indicated that he saw them drive past the meeting location. (Tr. 36). Appellant

and Louanne turned around; as they drove back they saw vehicles flashing their headlights. (Tr. 36, 411). Louanne testified that when they pulled into the meeting location, there were four vehicles parked in a row; Kellett's truck, Roger White Sr.'s truck, a white car that looked like a Ford Taurus, and a black SUV. She also stated that Steven's truck was parked off to the side. (Tr. 39). She noted that all four vehicles had their headlights on. (Tr. 39). Appellant also recalled there were five vehicles at the scene; however, he indicated the white car and the black SUV were parked off to the side. (Tr. 414). Appellant indicated the trucks did not have their headlights on when he pulled in, but they turned the lights on after he turned his bright lights on. (Tr. 412).

Louanne testified that when they arrived, she saw between fifteen and twenty people at the scene. (Tr. 44). Appellant indicated he saw at least ten to twelve people there. (Tr. 415). Both testified that they recalled Kellett was not wearing a shirt when they arrived. (Tr. 40, 412). Both Appellant and Louanne testified they were concerned about the crowd and its behavior at the scene when they arrived. (Tr. 45, 413). Appellant pulled out a flashlight to take with him when he exited the truck; when he pulled out the flashlight, he also pulled out his gun from the console and placed the gun on top of the console. (Tr. 45, 412). Appellant then stepped out of the truck with the flashlight in hand. (Tr. 45-6, 413). Appellant indicated that he turned the light on and shined it in the woods on the other side of the truck to see who was parked over there. (Tr. 413). He then carried the flashlight and stood between the car and his truck. (Tr. 413). Louanne indicated he stood behind the open driver's side door of the truck. (Tr.

46). Appellant testified that he then asked Kellett what was going on. (Tr. 413). Appellant denied he asked Kellett to come over to the truck and talk. (Tr. 413).

Both Appellant and Louanne testified that they heard Lisa tell Kellett to go get Appellant. (Tr. 46, 414). Appellant stated that Kellett said he could not do it because Appellant had something in his hand. (Tr. 414). Appellant also stated that he heard the victim yell that Kellett was going to beat on Appellant first, and then they would all get him. (Tr. 414). Appellant testified that at that point, he turned to back into his truck. (Tr. 414). According to Appellant, at that time, the victim rushed the truck, and the others moved towards the truck. (Tr. 414-15, 416).

Louanne then picked up the gun. (Tr. 416). Both she and Appellant testified that she presented the gun and yelled for the others to get back. (Tr. 47, 416-17). Louanne testified that the victim stated "F you and your gun" after she presented it. (Tr. 47). Appellant testified that he told Louanne to put the gun down. (Tr. 417). As he made that statement, the other group was at his truck door and they were pushing the door on Appellant. (Tr. 47, 417). Appellant asserted they were reaching through the window and grabbing at him, but they were not connecting with any good blows. (Tr. 417).

Appellant testified that the victim came through the opening at the door of the truck. (Tr. 418). At that point, Appellant was in between the door and the cab of the truck, and he was the only thing keeping the door from closing. (Tr. 419). Appellant and Louanne both stated that Appellant was being pushed back into the truck. (Tr. 49, 419). Appellant testified that he then reached over his left

shoulder and grabbed the gun. (Tr. 419). He then shoved the victim back, came up with the gun straight up in the air, and presented the gun to the crowd. (Tr. 420). He also told the victim to get back. (Tr. 420). Appellant testified that the victim responded by stating "I ain't afraid of no fucking gun; I'm going to kill you and your bitch; and you're a big pussy for bringing a gun to a fight" (Tr. 420, ll 21-23). Appellant testified that the victim then lunged at Appellant. (Tr. 420). There was no question the victim was reaching for the gun. (Tr. 421). Appellant indicated that the victim was on top of Appellant. (Tr. 386-87). Appellant then pulled the trigger and shot the victim. (App. 387-88, 421). The victim then collapsed and fell backwards.<sup>4</sup> (Tr. 422).

Both Louanne and Lisa called 911 after the shooting. (Defense Exhibit 2).

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<sup>4</sup> Louanne's testimony slightly differed from Appellant's in that she indicated Appellant picked up the gun after he fell into the truck near her lap. (Tr. 51-2). She indicated that Appellant pushed back against the door, and Appellant asked the others to let Appellant and Louanne leave. (Tr. 52). Louanne also indicated that the victim was on top of Appellant when he fired the shot, and Appellant pushed the victim out of the truck after he shot him. (Tr. 52-3).

## ARGUMENT

I. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR IMMUNITY SHOULD BE AFFIRMED; THE TRIAL COURT'S FINDING THAT APPELLANT WAS AT FAULT IN BRINGING ON THE DIFFICULTY IS SUPPORTED BY THE RECORD.

Much of Appellant's argument for relief in this appeal stems from the trial court's determination that Appellant was not without fault in bringing on the difficulty that led to the shooting. The trial court's determination that Appellant was not without fault in bringing on the difficulty was supported by the record.

### Standard of Review

Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973)). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at

6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is "any evidence" to support its findings.").

**The trial court found Appellant was not without fault in bringing on the difficulty.**

In its statement of facts, the trial court stated as follows:

The Defendant arrived at the scene with his wife expecting to have a confrontation with his two sons, Steven and Kellett. Contrary to his expectation, he was met by a group of no less than nine people and three vehicles. Upon arrival, the Defendant elected to confront the group of people by stopping his vehicle, exiting the vehicle and standing in the roadway between his open truck door and the automobile. It is also undisputed that he had a large flashlight in his hand. He then invited the two young sons to approach and talk. The Defendant and his wife Louanne testified that they saw one of the members of the opposing group carrying a large and intimidating stick. Regardless of whether anyone possessed a stick, the unexpected number of people present and the posture of the vehicles were a foreboding and threatening sign.

After having heard his father summon the boys to approach, Kellett offered that he would approach when and if the flashlight were dropped, as he perceived the same to be a weapon. The exact precipitating event is unclear; however, at that point, led by Lisa Brashier, the opposing group rushed the Defendant and his vehicle. During the rush of people, Louanne Gregory passed to her husband a handgun that had been in the center console of his truck.<sup>5</sup> Heated words were exchanged one to the other. The Defendant and his wife heard the threat, "We're going to kill you and your bitch." The Defendant responded and reacted by pointing and presenting the firearm and exclaiming to his former wife Lisa, "I'll shut you up for good." The victim then approached the Defendant from the rear of the vehicle and made an attempt to grab and take the firearm. At that point, the Defendant discharged the pistol and terminally wounded the victim.

(Order at pp. 3-4, R. pp. xxx-xxx).

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<sup>5</sup> It is undisputed that the Defendant possessed a valid Concealed Weapon permit issued by the South Carolina Law Enforcement Division.

In addressing whether Appellant engaged in unlawful activity in relation to the application of S.C. Code Ann. § 16-11-440(C), the trial court determined that Appellant intended for a fight to occur at the meeting and was complicit in the altercation. (Order at p 7, R. p. xxx). Ultimately, the trial court found “the Defendant was not without fault in bringing on the difficulty.” (Order at p. 9, R. p. xxx).

**A. The trial court’s finding that Appellant was at fault in bringing on the difficulty is supported by the record.**

As can be seen by the trial court’s statement of facts, Appellant failed to show by a preponderance of the evidence that he was not at fault in bringing on the difficulty. Several of Appellant’s actions on the day of shooting, including his pointing of the handgun at Lisa Brashier, contributed to the escalation of the altercation that led to the fatal shooting.

First, as was noted by the trial court, Appellant was responsible for setting up the confrontation that evening. Appellant initiated the conflict when, in the voice mail message he left for Kellett, Appellant challenged Kellett to “stand up and talk.” (Tr. 214, 348, 439; State’s Exhibit 48). At the scene of the shooting, Appellant further contributed to the conflict. By several witnesses’ accounts, Appellant initially exited his truck holding a large object, a flashlight; it appeared he was intending to use it as a weapon. (See Tr. 159, 166, 181, 195, 217, 235-36, 277, 314, 526). Kellett and Steven repeatedly asked Appellant what he had in his hand, and they further requested Appellant put down the item before they would approach to talk with them. (158, 159, 167, 181-82, 198, 525). Instead of

attempting to diffuse the situation by putting down the flashlight, Appellant refused to set down the flashlight.

Appellant further escalated the situation by retrieving the handgun from the truck. Appellant then pointed the gun at Lisa and made statements indicating that he was going to shut her up for good. (Tr. 237, 276, 331, 527). According to most of the witnesses in the victim's group, no one advanced towards Appellant until he pointed the gun at Lisa. (Tr. 220, 276, 331-33, 335, 360-61, 527-28). Lisa recalled that Appellant said something to her as he pointed the gun directly at her; however, she could not recall exactly what Appellant said. (Tr. 237). Roger White Sr. testified that when Appellant pointed the gun at Lisa, Appellant stated something like "I'll shut your f'ing mouth permanently." (Tr. 276, ll 23-4). Steven recalled Appellant pointed the gun right in Lisa's face and stated "I will shut you up once for good." (Tr. 331, ll 3-9). Kellett also recalled Appellant making a statement about silencing Lisa forever as he pointed the gun at her face. (Tr. 380-81).

Altogether, these actions by Appellant significantly contributed to bringing on the difficulty in this case. By most accounts, when the victim jumped at Appellant, the victim was only reaching for the handgun. (Tr. 186, 201-02, 222, 240, 267, 363, 386, 527-29). Several witnesses also indicated the victim was yelling to Appellant that he was not going to kill his[the victim's] mother. (Tr. 221, 316, 381). Their testimony also indicated that the victim did not make his attempt until after Appellant pointed the gun. In light of this testimony, Respondent submits the trial court's finding that Appellant had failed to show that he was not

at fault in bringing on the difficulty is supported by the record. See State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct.App.2006).

Furthermore, Appellant's claim that he was physically attacked by the group through his truck door was not supported by the evidence presented at the hearing. While Appellant claimed he was attacked by several individuals at the scene, and that they were pushing the driver's side door into him, photographs taken of Appellant within hours of the shooting showed that Appellant had no bruises or marks consistent with being involved in a physical confrontation. (Tr. 467, 468; State's Exhibits 14, 15, 20-8, 30-6).

Appellant's contention that the trial court incorrectly considered Appellant's role in setting up the confrontation is without merit. As noted by the trial court in the Order, Appellant's interaction with his sons earlier in the day provides the context for the development of the confrontation that ended in the shooting. Even though the victim was not part of the interaction between Appellant and his sons earlier in the day, those interactions provide insight into Appellant's frame of mind leading into the confrontation as well as why the victim and others were at the scene for the confrontation between Appellant and his sons.

**B. The trial court implicitly rejected Appellant's claim that he attempted to withdraw from the confrontation.**

Appellant contends the trial court erred in not addressing his assertion that he attempted to withdraw from the confrontation before he fired the fatal shot. This claim is not supported by a review of the trial court Order. Respondent submits that in its Order, the trial court implicitly found Appellant did not attempt to withdraw from the conflict. As such, Appellant was not entitled to the benefit of

invoking self-defense after effectuating a withdrawal from the conflict. That finding is supported by the record.

“[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self defense ....” Ferdinand S. Tinio, Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense, 55 A.L.R.3d 1000, 1003 (1974). Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide. 40 Am.Jur.2d Homicide § 149 (1999).

State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); see State v. Wigington, 375 S.C. 25, 32, 649 S.E.2d 185, 188 (Ct.App.2007).

“[I]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self defense ....” 55 A.L.R.3d at 1003. One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act. State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

Bryant, 336 S.C. at 345, 520 S.E.2d at 322; see State v. Jackson, 384 S.C. 29, 36, 681 S.E.2d 17, 21 (Ct.App.2009).

Appellant is correct that there is no dispute as to whether Appellant's sons and several of the other individuals at the scene saw both Louanne and Appellant present the handgun that was used in the shooting. (Tr. 526; see Tr. 183-84, 265, 360, 378). However, there was dispute regarding whether Appellant communicated that he wanted to withdraw from the conflict. Outside of Appellant and Louanne, none of the other witnesses indicated Appellant told them to step back or requested that the group standing outside Appellant's truck leave Appellant and Louanne alone. To the contrary, much of the testimony indicated that Appellant's presenting and pointing the handgun further escalated

the conflict. As already noted several witnesses testified that Appellant pointed the handgun at Lisa and made a verbal threat indicating he would shoot her. (Tr. 237, 276, 331, 527). Furthermore, several of the witnesses also testified that after Appellant pointed the gun, Lisa attempted to convince him to lower the weapon. (Tr. 203, 237, 239, 335). Thus, it was reasonable for the trial court to find that Appellant did not tell those at the scene to step back, or request that they be allowed to leave.

Appellant's reliance upon State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), is misplaced. In Hendrix, the appellant and the deceased had been involved in a prior altercation on the appellant's land on the day of the shooting. Id. at 655, 244 S.E.2d at 504. At some point after that confrontation, the deceased left the appellant's property. Id. Sometime thereafter, the appellant had his grandson go to his house and get a shotgun. Id. When the deceased return to the appellant's land, he jumped out of his truck and advanced towards the appellant. Id. At 656, 244 S.E.2d at 505. The appellant, who was standing next to his truck, pulled out his shotgun, pointed it at the deceased, and told him three times to "back off." Id. The deceased proceeded to return to his truck, drew his own shotgun, and then returned to where the appellant was standing. The appellant shot the deceased shortly thereafter. Id. at 656-57, 244 S.E.2d at 505-06.

In reversing the trial court's denial of a directed verdict motion for acquittal based upon self-defense, this Court found that the appellant had established he was not at fault in bringing on the difficulty. Hendrix, 270 S.C. at 659, 244 S.E.2d

at 506 (1978). Specifically, this Court determined that the pointing of the shotgun and telling the deceased to “back off” three times was an attempt to avoid a fight. Id. As a result, the pointing of the shotgun did not constitute evidence of provocation. Id. This Court also stated, “[w]hile it is not necessary to our position, even if any of Hendrix's prior actions had constituted provocation, the appellant's act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored appellant's right of self-defense.” Id. at 660, n.3, 244 S.E.2d at 506 n.3.

Appellant’s case is clearly distinguishable from Hendrix. Here, the trial court did not find that Appellant made any statements to any of the other individuals at the scene to “back off,” as was done by the appellant in Hendrix. To the contrary, there was testimony here that Appellant pointed the firearm and threatened others at the scene. Altogether, Appellant did not establish by a preponderance of the evidence that he effectuated a withdrawal from the conflict at the scene. As a result, the trial court’s determination that Appellant was not without fault in bringing on the difficulty is supported by the record, and this claim for relief should be denied.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS NOT ENTITLED TO IMMUNITY UNDER THE THEORY THAT APPELLANT WAS ACTING IN DEFENSE OF HIS WIFE.

Appellant next contends the trial court erred in not properly considering whether Appellant was entitled to immunity under a defense of others analysis. Respondent submits this claim of error is without merit.

**A. The trial court correctly found Appellant was not entitled to immunity because he was at fault in bringing on the difficulty.**

“Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.” State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997).

“The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of them; and generally speaking a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong.”

State v. Cook, 78 S.C. 253, 257, 59 S.E. 862, 863 (1907)(quoting Wharton on Homicide § 332 (3d Ed. 1907)).

In such case the right to take the life of such assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with the apparent malicious intention to take the life of the person assailed and thereby commit murder, then, where the danger of the commission of such murder is imminent, any relative, friend, or bystander would

have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and **provided both the person assailed and the person coming to his defense were without legal fault in bringing on the difficulty.**

State v. Hays, 121 S.C. 163, 168, 113 S.E. 362, 363 (1922)(emphasis added).

As already discussed in Section I above, the trial court's determination that Appellant was not without fault in bringing on the difficulty is supported by the record. In light of that finding, and in light of the requirement under Hays that both the defendant and the person he is defending must both be without fault in bringing on the difficulty for the defense of others to apply, Appellant was not entitled to immunity under a theory he was acting in defense of Louanne Gregory when he shot and killed Roger White Jr.

This conclusion is consistent with the general principles underlying self-defense and defense of others. Both defenses recognize that a defendant is justified in killing another when the defendant was not responsible for creating the circumstances that led to the killing. To follow Appellant's logic in this case, a defendant would be allowed to kill another with no repercussions by coming to the defense of a loved one the defendant put in harm's way.

**B. If the trial court erred in not making specific findings regarding the application of the defense of others, this case should be remanded to the trial court for such a determination.**

Even if the trial court erred in not fully assessing Appellant's claim that he was acting in defense of Louanne when he shot the victim, Appellant is not necessarily entitled to immunity. Instead, it would appear that a necessary

factual determination would be needed, and the case should be remanded back to the trial court for such a determination.

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997).

To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007).

If Appellant is correct that the trial court made a legal error in not making specific factual findings regarding whether Appellant acted in defense of his wife, Louanne, this case should be remanded to the trial court with instructions to make such specific factual determinations regarding whether Appellant was acting in her defense. In light of the conflicting testimony presented regarding what occurred on the night of the shooting, such a determination would require a weighing of the testimony and assessment of the credibility of the witnesses. Thus, a remand to the trial court to make the required determinations would be proper if such findings are necessary to resolve this claim. See, e.g., State v.

Primus, 312 S.C. 256, 258, 440 S.E.2d 128, 129 (1994)(remanding case back to trial court to resolve factual issue because Supreme Court has no jurisdiction to weigh evidence in a law case).

III. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT ENGAGED IN UNLAWFUL ACTIVITY, THUS RENDERING IMMUNITY UNDER S.C. CODE ANN. §§ 16-11-440(B) AND 16-11-440(C) INAPPLICABLE.

The trial court did not abuse its discretion in finding Appellant was engaged in unlawful activity for the purposes of S.C. Code Ann. §§ 16-11-440(B) and 16-11-440(C). The trial court's Order clearly reject's Appellant's position that he pointed and presented his handgun at the scene as an act of self-defense. This was based upon the trial court's determination that Appellant's interpretation of the facts was untenable. As a result, Appellant was engaged in unlawful activity when he pointed his handgun at Lisa Brashier and his sons at the scene of the confrontation that ended in the victim's death.

#### **Trial Court's Ruling**

Specifically, the Defendant argues that he was in a place where he had a right to be, was not engaged in any unlawful activity and met deadly force with force. This Court respectfully disagrees that he was engaged in lawful activity.

In the statute, the Legislature specifically excludes a person from immunity under the Act if he or she "is engaged in an unlawful activity or is using the dwelling, residence or occupied vehicle to further an unlawful activity." While not precisely the same, this proposition is very closely akin to the common law notion that one must be without fault in bringing about the difficulty in a case of Self-Defense.

The Defendant would argue that simply arriving at a predetermined meeting place, lawfully armed with a firearm, and exiting his vehicle to talk would not amount to unlawful activity. Those facts, in and of themselves, would be indeed persuasive that the Defendant was not engaged in any unlawful activity. However, taking those facts in context with the precipitating events and the clear intent to engage in an altercation, the Defendant's assertion of peaceful purpose and lawful conduct fails closer inspection.

It is clear that the Defendant agreed to meet his sons for the purposes of an altercation. The Defendant's claim that the purpose for the meeting was to simply talk is without credibility, particularly in context with the Defendant's aggressive posture toward Steven and his threatening phone message to Kellett. The Defendant knew and, in fact, intended that the heated arguments begun earlier that day with his sons would continue. Furthermore, it is disingenuous to suggest that the possibility of a physical altercation was not considered by the Defendant. The Defendant's comments to Kellett that he "had no balls" and that he was "a little chicken shit bastard" can be viewed as nothing other than a calculated strategy of stirring up aggressive feelings and goading the boys to fight. In fact, the comment "better yet we're going to stand up and talk" appears to be an outright invitation to fight. The Court construes this conduct as contrary to notions of law and order and, thus, unlawful. Therefore, based on the Defendant's unlawful conduct and complicity in the altercation, this Court finds that the Defendant has failed to prove by a preponderance of the evidence that he is entitled to immunity under Subsection (C) of the Act.

(Order at pp. 6-7, R. pp. xxx-xxx).

**The trial court's determination that Appellant was engaged in unlawful activity was reasonable.**

Appellant was not engaged in a lawful activity just prior to the shooting. In pointing and presenting his firearm at the scene, Appellant was engaged in an unlawful activity. As a result, Appellant was not entitled to stand his ground under S.C. Code Ann. 16-11-440(C).

S.C. Code Ann. 16-11-440(C) states:

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.

At issue here is whether Appellant was engaged in an unlawful activity when he pointed and presented his firearm at Lisa and his sons at the scene. Appellant contended that he was acting lawfully because he was acting in self-defense. Pointing and presenting a firearm is an unlawful activity. S.C. Code Ann. 16-23-410; see generally State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009)(finding pointing and presenting a firearm an unlawful activity in context of involuntary manslaughter).

Here, the trial court specifically found that after hearing threats and after exchanging heated words with the victim's group, Appellant pointed and presented his pistol at Lisa and threatened to kill her. (Order at pp. 3-4, R. pp. xx-xx). It was not until after those actions were taken that the victim approached Appellant from behind and attempted to grab the firearm. (Order at p. 4, R. pp. xx-xx). The trial court's findings are supported by the record. (Tr. 183-86, 198, 199-201, 218, 265-66, 318, 360, 378, 526-29). In light of those facts, the trial court reasonably found Appellant was engaged in an unlawful activity when the victim attempted to take the gun from Appellant. As a result, this claim should be denied and dismissed.

Contrary to Appellant's contention, the trial court did not improperly conflate "engaged in unlawful activity" with the concept of bringing on the difficulty. While the trial court did note that the two concepts were very similar, its explanation as to why it found Appellant was engaged in unlawful activity was not based solely upon the fact Appellant was at fault in bringing on the difficulty. Instead, the trial court's discussion about the background of the development of

the confrontation merely explained why the trial court rejected Appellant's contention that the presentation of the firearm was lawful. This discussion was warranted, especially in light of the fact that one can invoke self-defense as a defense to pointing and presenting a firearm. See generally State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992). Altogether, the trial court's finding was reasonable and should be affirmed.

IV. APPELLANT WAS NOT ENTITLED TO IMMUNITY UNDER S.C. CODE ANN. § 16-11-450(A), AND ANY ERROR BY THE TRIAL COURT IN NOTING THAT THE STATUTE DID NOT INCLUDE SELF-DEFENSE OR DEFENSE OF OTHERS WAS HARMLESS.

The trial court did not commit reversible error in denying Appellant's request for immunity under S.C. Code Ann. § 16-11-450(A). As noted by the trial court, Appellant failed to establish by a preponderance of the evidence that he killed Roger White Jr. in self-defense.

**The Ruling Below**

In finding Appellant was not entitled to immunity under S.C. Code Ann. § 16-11-450(A), the trial court noted that Appellant argued that under this subsection, Appellant was entitled to immunity under the common law doctrines of self-defense and defense of others. (Order at pp. , R. p. xxx).

This Court disagrees and sees no evidence that the Legislature intended for the Trial Judge to usurp the jury's role in making a factual determination regarding Self-Defense. However, for the sake of argument and for the purpose of a factual finding, this Court finds that the Defendant has not proven by the preponderance of the evidence that he is entitled to immunity under the common law doctrine of Self-Defense.

(Order, R. p. xxx). The trial court went on to define the elements of self-defense and noted that self-defense is extended for the defense of others. Ultimately, the trial court found that Appellant was not entitled to immunity under self-defense and defense of others because he failed to satisfy every prong of the self-defense standard. Specifically, the trial court found that Appellant was not without fault in bringing on the difficulty.

**Appellant is not entitled to immunity if the trial court erred in holding that S.C. Code Ann. § 16-11-450(A) does not include self-defense or defense of others.**

S.C. Code Ann. § 16-11-450(A) states:

A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

Whether the trial court erred in finding the statute does not apply to either self-defense or defense of others is of no consequence. The trial court went on to find that Appellant was not entitled to a finding that he was either acting in self-defense or defense of others when he shot the victim. (Order at pp. 8-9, R. pp. xxx-xxx). In regards to both defenses, the trial court noted that Appellant failed to establish he was without fault in bringing on the difficulty. As already noted in Sections I and II above, the trial court's findings that Appellant was not acting in self-defense or in the defense of his wife are supported by the record. Thus, Appellant is not entitled to immunity because the trial court correctly found that Appellant failed to establish by a preponderance of the evidence that he was acting in either self-defense or in the defense of another when he shot Roger White, Jr. As a result, any error by the trial court in its interpretation in regards to S.C. Code Ann. § 16-11-450(A) was harmless.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the trial court's Order denying Appellant's Motion for Immunity and deny Petitioner's appeal.

Respectfully submitted,

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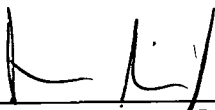
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