STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON RASHAD MARSHALL,

APPELLANT

APPELLATE CASE NO 2016-000870

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?

STATEMENT OF THE CASE

On September 2, 2014, a Charleston County grand jury indicted Appellant for murder (2014-GS-10-5261) and possession of a weapon during a crime of violence (2014-GS-10-5262). R. 778-789; R. 781-782. The state, represented by David L. Osborne and Mark J. Bourdon, called the case to trial on April 4, 2016, before the Honorable R. Markley Dennis Jr., and a jury. R. 1. Melisa W. Gay and Robert Blanchard represented Appellant. R. 1.

Prior to trial, the judge presided over a hearing on Appellant's motion that he was entitled to immunity pursuant to the Protection of Persons and Property Act. R. 88, l. 21 – R. 208, l. 16; Supp. R. 1; See S.C. Code Ann. § 16-11-410, et al. Appellant made clear his request for immunity was under section 16-11-410(C), which covers conduct in a "place where [the actor] has a right to be." R. 200, ll. 8-13. At the conclusion of the evidentiary presentation, Judge Dennis denied the request for immunity. R. 203, l. 14; R. 205, ll. 11-12; Supp. R. 1. Regarding the elements of self-defense, save the duty to retreat, Judge Dennis stated he could not find by a preponderance of the evidence the elements existed. R. 203, ll. 23-24. He based his ruling on the "suspect" "credibility" of Appellant "due to the inconsistent statements throughout even today." R. 202, l. 24 – R. 203, l. 1; R. 203, ll. 7-9; R. 206, ll. 12-13; R. 207, ll. 3-5. The judge also considered "the scientific evidence," which he found did not support Appellant's factual recitation. R. 203, ll. 1-3.

After the parties addressed several other preliminary matters, the state moved into the presentation of its case-in-chief. At the conclusion of the case, the jury found Appellant guilty as charged. R. 761, ll. 17-25. Judge Dennis sentenced Appellant to forty years' imprisonment for murder and five years' imprisonment for the weapon. R. 771, l. 24 – R. 772, l. 1; R. 772, ll. 8-9; R. 780; 783. He ordered the sentences to be served concurrently. R. 772, l. 9; R. 780; R. 783.

On April 14, 2016, Appellant filed and served his notice of appeal. Thereafter, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on behalf of Appellant and moved to be relieved as part of that briefing process. By an order filed on November 13, 2017, this Court denied the motion to be relieved and ordered briefing on the following issue: Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?

This brief of Appellant follows.

ARGUMENT

The trial court erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act.[2]

Relevant facts

Prior to trial, Appellant moved for the court to grant him immunity from prosecution pursuant to the Protection of Persons and Property Act. Supp. R. 1. In the motion, Appellant explained the facts and circumstances established that Appellant "was engaged in a lawful activity and was attacked by Anthony Williams." Supp. R. 1. Further, the motion provided that Appellant "had no duty to retreat and had the right to stand his ground with deadly force in that he reasonably believed that the use of deadly force was necessary to prevent great bodily harm to himself." Supp. R. 1. The motion also explained Appellant "reasonably believed that great bodily harm would have come to Ms. Ashley Butler and possible a burglary of her house if he had not intervened to prevent Anthony Williams from trying to get inside the apartment also under 16-11-440(C)." Supp. R. 1.

Immunity Hearing - Testimony of Appellant

Appellant met Anthony Williams in February of 2014. R. 90, ll. 7-17. The two hit it off and became romantically involved, but their relationship was a secret. R. 90, ll. 21-24; Tr. 91, ll. 14-17; R. 99, l. 25 – R. 100, l. 2. Williams was also romantically involved with Ashley Butler, with whom he lived and had a child. R. 96, ll. 15-18.

Appellant and Williams spent a romantic weekend in Myrtle Beach in mid-May. R. 92, ll. 19-21. On May 22, 2014, Williams invited Appellant to his home. R. 95, ll. 15-23. Appellant arrived with two bottles of tequila. R. 97, ll. 11-13. Appellant wanted orange juice as a mixer,

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[2] S.C. Code Ann. § 16-11-410 to -450 (2015).

but Williams and Butler did not have any. R. 97, ll. 17-20. Appellant drove to a store, bought the orange juice and some chicken, and returned to the home. R. 97, ll. 20-23; R. 99, ll. 6-11.

While Appellant, Williams, and Butler sat in the living room drinking, Appellant received messages via Facebook from Williams' brother. R. 99, ll. 16-17. Upon learning this, Butler called Williams' brother "gay" in a derogatory sense. R. 100, l. 15. Williams was upset with Butler for speaking of his brother disrespectfully. R. 100, ll. 15-19. Williams and Butler began arguing. R. 100, ll. 15-22; R. 101, ll. 15-17. During the argument, Butler also referred to Appellant as Williams' boyfriend. R. 101, ll. 18-20.

Appellant went into the living room. R. 101, ll. 22-23. Appellant then heard Butler begging Williams to get off of her and that he was hurting her. R. 101, ll. 23-25. He even heard her say that Williams was always putting his hands on her. R. 101, l. 25 – R. 102, l. 1. Appellant saw Williams leave Butler, but then Butler said something else. R. 102, ll. 3-6. Williams "charged off and took back off into the living room." R. 102, ll. 6-8. Appellant heard Butler repeat that Williams was always putting his hands on her and her pleading with him to get off of her. R. 102, ll. 8-10. He heard her say she could not breathe. R. 102, l. 11.

Appellant looked toward where Butler and Williams were. R. 102, ll. 13-14. He saw Williams on top of Butler with one hand around her neck and one hand cocked back ready to punch her. R. 102, ll. 13-17. Butler was flat against the floor. R. 102, l. 17. While holding his gun, Appellant told Williams to stop, and Williams complied. R. 102, l. 24 – R. 103, l. 2.[3] Williams pushed past Appellant and walked out of the back door. R. 103, ll. 2-4. Appellant

[3] Appellant had recently purchased the gun for protection, but he had never fired the gun prior to the night of the shooting. R. 103, ll. 22-25; R. 104, ll. 6-8; R. 144, ll. 23-24. Appellant had witnessed one of Williams' neighbors beat a guy "to a pulp," fracturing his face. R. 104, ll. 20-24. So alarmed by the vicious attack, Appellant had called the police and provided a written statement. R. 104, l. 25 – R. 105, l. 2. Additionally, Appellant was especially apprehensive when visiting Williams because he and Williams' neighbor had argued. R. 105, ll. 4-5.

believed Butler would have been dead if he had not stopped Williams from choking her. R. 122, ll. 20-25.

After ensuring Butler was safe and unharmed, Appellant followed Williams out the back door. R. 106, ll. 6-11. Butler locked it. R. 106, l. 12. Williams walked toward his car. R. 106, l. 13. Appellant knocked on Butler's door because he forgot his bag. R. 106, ll. 15-17. Butler placed his things on the front porch and Appellant got his items. R. 107, ll. 16-23. Appellant then walked back around – his bag in one hand and his gun in the other. R. 108, l. 19 – R. 109, l. 4.

Appellant saw Williams get out of his car and charge toward Butler's backdoor. R. 109, ll. 9-13; R. 109, ll. 19-22. Appellant put his things in his car. R. 109, ll. 13-16. Appellant then rushed to where Williams was. R. 109, ll. 23-25. Appellant wanted to calm him down and "avoid something worse from happening." R. 110, ll. 20-22. Appellant feared "something worse" might happen to Butler. R. 150, ll. 1-5. Appellant heard Williams kicking the door. R. 111, ll. 2-3; R. 128, ll. 5-18. Appellant reminded Williams that he was not supposed to be there and could get into trouble if he were caught. R. 111, ll. 10-17. Williams had been placed on a no trespass order shortly before the shooting. R. 111, l. 18 – R. 112, l. 7. According to Appellant, it "appeared" Williams "was trying to kill" Butler. R. 129, ll. 16-17.

Williams stopped kicking the door and turned to face Appellant. R. 113, ll. 3-4. Williams told Appellant to look at what Butler had done to him – a scratch on his face or chest. R. 113, ll. 4-8; R. 130, ll. 2-7. When Appellant continued trying to convince Williams to leave, Williams shoved Appellant to the ground. R. 113, ll. 10-12; R. 130, l. 18 – R. 131, l. 1. Appellant, who was weak from a couple of car accidents, stood up. R. 113, ll. 13-15. He could

not see well because his glasses had been knocked off by the force of Williams' shove. R. 113, ll. 16-17.

Appellant was approximately ten feet away from Williams. R. 115, ll. 2-4. Appellant walked back to Williams, "still trying to calm him down." R. 115, ll. 12-18. Williams was approximately two feet from the back door then. R. 115, ll. 19-22. Appellant grabbed Williams' wrist, but Williams snatched away and started kicking and punching on the door again. R. 115, l. 25 – R. 116, l. 3; R. 132, ll. 12-16. Appellant tried to grab Williams' hand and tried to pull him from the door. R. 116, ll. 4-7. Williams turned around and shoved Appellant again. R. 116, l. 8. When Appellant did not fall down immediately, Williams rushed him and shoved him even harder. R. 116, ll. 8-10. Appellant flew backwards into a big tree near the apartment. R. 116, ll. 10-11. There was a big tree "about 15 to 20 feet away" from the backdoor of the apartment. R. 107, ll. 10-12; State's Exhibit #6.

When Appellant tried to stand, Williams pushed him against the tree causing him to fall down to the base of the tree. R. 117, ll. 11-14. Then, Williams was on top of him. R. 117, l. 14. "The next parts" were "kind of like foggy." R. 117, l. 15. Appellant remembered being hit at least once in the face, and he remembered trying to get out of Williams' grasp. R. 117, ll. 15-18. Appellant repeatedly told Williams to leave him alone and to get off of him, but Williams did not respond. R. 118, ll. 6-13; R. 124, ll. 14-16. Appellant "was not physically strong enough to get" Williams off of him. R. 124, ll. 4-5. Not only did he have nerve damage in his arms and tendonitis in his back, he was overweight. R. 124, ll. 5-7.

Appellant swung his arms – he thought this was when he shot. R. 118, ll. 14-16; R. 148, ll. 20-23.[4] He was not sure where the bullets went. R. 118, ll. 17-20; R. 149, ll. 10-12. Appellant remembered "firing until it stopped." R. 119, l. 14. He explained there was no pause between the shots. R. 148, ll. 5-12. During this altercation, Williams "was in an uncontrollable rage." R. 122, ll. 7-15; R. 131, l. 3. Appellant pulled the trigger to get Williams off of him. R. 124, ll. 17-22. He had no intent to kill Williams. R. 124, ll. 23-24. Based on Williams' conduct, Appellant believed Williams was trying to kill him or that he would kill him. R. 122, ll. 16-19. Appellant shot Williams "hoping" Appellant "would live." R. 125, l. 1.

He "freaked out and tried to run away." R. 119, ll. 14-15. Appellant drove a short distance away. R. 120, ll. 8-21. He stopped, turned around, and returned to the apartment complex. R. 120, l. 18 – R. 121, l. 3. When he got back, a police officer was present and began asking him questions. R. 121, ll. 6-13. Appellant told the officer he was the shooter. R. 121, ll. 15-16.

Appellant acknowledged that his testimony differed from the statement he gave to the police on the night of the shooting, but he explained his memory was "much better" at the time of trial "than immediately after the traumatizing incident." R. 126, ll. 9-15; R. 130, ll. 8-11. Appellant explained that "[a] lot of what [he] said [to police] didn't even make sense nor was it in order that would make sense." R. 133, ll. 12-17. Due to the loss of someone he loved at his own hands, Appellant "was completely incoherent at the time" he spoke to police. R. 135, ll. 16-19. Appellant told the judge that he did not even remember most of what he told the police due to the trauma. R. 138, l. 18 – R. 139, l. 4. The intervening time between the tragic shooting

[4] It was stipulated that Appellant fired seven shots at Williams hitting him four times. Supp. R. 2. It was also stipulated that Appellant "fired the shots with his Hi-Point 9 mm handgun." Supp. R. 2.

death of Williams and the trial permitted Appellant to have time to reflect and remember most of what happened that night. R. 147, l. 13 – R. 148, l. 4.

Immunity Hearing - Testimony of Ashley Butler

On May 21, 2014, Williams was placed on a trespass notice not to visit the apartment[5] where he and Butler lived. R. 155, ll. 3-25; R. 167, ll. 6-24.[6] However, on the evening of May 22, 2014, Butler and Williams went on a date to the Golden Corral in North Charleston and returned to their apartment. R. 153, ll. 4-5; R. 153, ll. 21-25. Butler explained that Williams was not on the lease, but that she had approved of Appellant visiting them that night. R. 154, ll. 11-25. She recalled that Appellant arrived with liquor, and that all three of them were drinking. R. 157, ll. 12-24. When Appellant returned from the store where he purchased juice, he entered the apartment with a gun. R. 158, l. 13 – R. 159, l. 4.

Around 2 a.m., the threesome discussed Appellant spending the night because he was intoxicated. R. 159, ll. 12-23. Initially, Butler consented to Appellant staying. R. 160, ll. 2-3. However, she subsequently wanted Appellant to leave. R. 160, ll. 4-10. When she expressed this desire to Williams, the two began to argue. R. 161, ll. 12-16. She noted that Williams was sitting with Appellant like he was his girlfriend. R. 161, ll. 16-18. She reminded Williams that she was his girlfriend and that he should be in bed with her. R. 161, ll. 18-20. When she spit at Williams, he grabbed her and held her down on the couch. R. 161, ll. 24-25; R. 168, l. 25 – R. 169, l. 3. She could not breathe. R. 161, l. 25; R. 169, ll. 15-17. Despite the aggression and physical altercation, Butler claimed she never thought Williams was going to kill her or seriously

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[5] It was stipulated that Williams was on trespass notice for the entire apartment complex. Supp. R. 2-3.

[6] In light of the trespass notice, Williams would have been arrested if the police were called and alerted to his presence at the apartment on May 22. R. 156, ll. 7-17. Additionally, Butler would have been evicted. R. 156, l. 22 – R. 157, l. 11; R. 172, ll. 21-25.

hurt her. R. 169, ll. 18-22. However, she admitted he could have if he wanted to. R. 169, ll. 23-24.

According to Butler, Appellant grabbed Williams, telling him to leave Butler alone. R. 162, ll. 5-6; R. 170, ll. 10-11. Williams and Appellant left out the back door. R. 162, ll. 6-7; R. 162, l. 11. Butler immediately locked the door. R. 162, ll. 8-9.

Appellant knocked on the door asking for his bag, and Butler placed it outside the front door. R. 162, ll. 13-17; R. 170, ll. 18-23. Then, Williams knocked on the backdoor, asking for clothes. R. 163, ll. 19-25. Williams also sent Butler a text message asking for his clothes. R. 171, l. 5 – R. 172, l. 1; State's Exhibit #42. She agreed to give him some clothes and began packing a bag for him. R. 164, ll. 1-4. Butler admitted Williams was knocking very loudly on the back door.

While walking down the stairs with the packed bag, Butler heard four gunshots "right after each other." R. 164, l. 19 – R. 165, l. 5. Later, Butler claimed she heard gunshots, a slight pause, and then more gunshots. R. 174, ll. 16-24.Upon hearing the gunshots, Butler looked out the backdoor and saw Williams lying on the ground. R. 165, ll. 6-10. She then called 911. R. 165, ll. 10-13.

Butler explained that Williams kept a gun in his glove compartment of his car. R. 177, ll. 3-8.

Immunity Hearing - Testimony of Lanette Smalls

Lanette Smalls leaved next door to Williams and Butler. R. 179, ll. 3-11. Around 11pm, she woke to the sounds of gunshots and someone talking. R. 179, ll. 12-16. After the gunshots, she heard a male say, "You are messing with the wrong one, mother fucker." R. 179, l. 25 – R.

180, l. 1; R. 183, ll. 18-21; R. 185, ll. 1-2; R. 186, ll. 16-17.[7] Smalls discerned no pause between the gunshots. R. 184, ll. 3-18. She also heard a car "squeaking trying to leave." R. 180, ll. 16-17. Smalls ran downstairs to see what kind of car it was and to get the license plate. R. 180, ll. 18-20. She "got there too late" and was only able to say she saw a light-colored car. R. 180, ll. 19-24. Smalls claimed she saw and heard Williams hit the ground. R. 182, ll. 8-13; R. 185, ll. 3-4; R. 185, ll. 18-21. The only other person she saw around Williams was Butler. R. 182, ll. 14-25.

Immunity Hearing - Testimony of Nicholas Batalis

There was no dispute that Williams died as a proximate result of gunshots fired by Appellant. Supp. R. 2. The pathologist explained Williams was shot four times. R. 187, ll. 23-25; Supp. R. 2. He found no stippling or soot present. R. 188, ll. 16-18. According to the pathologist, one gunshot entered the left side of the chest near the collarbone and exited through the upper right side of the back. R. 189, ll. 9-20. This wound went "from left to right, front to back, and just a little bit of a downward angle." R. 189, ll. 21-22. A second shot entered on the upper, right side of the abdomen and exited on the right side of the back. R. 190, ll. 13-18. It travelled from front to back. R. 190, l. 17. The third bullet entered on the right side of the groin and became embedded in the left side of the pelvis. R. 191, ll. 7-13. This bullet moved "from right to left, a little bit front to back, and a little bit downward." R. 191, ll. 14-16. The final bullet made a very superficial wound. R. 191, ll. 21-24. It entered the front outer part of the thigh. R. 191, ll. 24-25. Its trajectory was "from front to back and a little bit upward and a little bit left to right." R. 192, ll. 1-2.

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[7] The solicitor asked Appellant if he said, "You just fucked with the wrong mother fucker, nigger." R. 142, ll. 17-21. Appellant denied making such a statement and further explained that he does not use the n-word. R. 142, l. 21 – R. 143, l. 8.

Additionally, the toxicology results indicated Williams had a blood alcohol concentration of 0.131 percent. R. 192, ll. 9-12; Supp. R. 3. The pathologist was unable to testify as to what effect the blood alcohol concentration would have had on Williams, however. R. 192, ll. 13-17. Nevertheless, he made clear that it was "a significant amount." R. 192, ll. 16-17. The toxicology analysis also detected "3.4 delta-9 THC." Supp. R. 3. Regarding the THC, the pathologist explained that finding the parent drug of marijuana in Williams' system indicated Williams had "ingested the THC within hours before he died." R. 192, l. 18 – R. 193, l. 2; R. 196, ll. 2-3. Again, though, the pathologist was unable to say how the drug would have affected Williams. R. 193, ll. 4-6. He allowed that Williams "would have been under the influence." R. 193, l. 3. According to the pathologist's report, the intoxicants in Williams' body were "a depressant" and had "reality distorting effects." R. 450, l. 19 – R. 451, l. 2.

Argument on the Immunity Motion

At the conclusion of the hearing, defense counsel argued Appellant was entitled to immunity from prosecution pursuant to section 16-11-440(C) of the South Carolina Code. R. 197, l. 24 – R. 198, l. 5; R. 200, ll. 8-9. Defense counsel anticipated the state would argue that Appellant was the guest of Williams, who was not on the lease and was on trespass notice for the apartment complex. R. 200, ll. 19-25. Additionally, defense counsel anticipated the state would argue that Butler had asked Appellant to leave. R. 200, ll. 18-19. In response to these anticipated arguments, defense counsel argued Appellant was in a place where he had a right to be, and therefore, he had no duty to retreat and could meet force with force, including deadly force. R. 201, ll. 1-5.

Ruling on the Immunity Motion

Relying on State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013), Judge Dennis agreed that Appellant had a right to be where he was. R. 201, ll. 6-15. However, he could not find that Appellant had satisfied the elements of self-defense. R. 202, ll. 18-21. He determined the matter was "clearly a jury issue" because he could not "find by a preponderance of the evidence" that the elements of self-defense existed. R. 202, ll. 22-24. He further explained he found "the credibility of [Appellant] is suspect, due to the inconsistent statements throughout and even today." R. 202, l. 24 – R. 203, l. 1. Additionally, Judge Dennis stated the "scientific evidence just simply doesn't support his theory." R. 203, ll. 1-3. Specifically, Judge Dennis found "the distance in where he was and where the body is and where the tree is, according to his testimony, those are inconsistent." R. 203, ll. 4-6. He concluded there were "just too many inconsistencies" for him to "conclude that his testimony is reliable." R. 203, ll. 7-9.

Judge Dennis continued, explaining that Appellant's "persistent" insistence that Williams leave "aggravated the situation," and that Appellant "really didn't have any right or duty to do that in the first place." R. 204, ll. 15-18. According to the judge, this meant Appellant may have been at fault in bringing on the difficulty, the first element of self-defense. R. 204, ll. 19-20.

Turning to the second element of self-defense, Judge Dennis was aware of Appellant's "medical problems" and agreed those created a perception of real danger, but he noted he was not made aware of the weight and size of Williams during the hearing. R. 204, ll. 20-24. Judge Dennis found Butler "very credible," and agreed there was a disagreement between Butler and Williams and possibly even between Butler and Appellant. R. 206, ll. 2-6.

The judge found by a preponderance of the evidence that "it was more of a continuous shooting than it was a pause and then shooting." R. 207, ll. 6-11. However, he determined this

fact did not "really make any difference." R. 207, l. 11. Judge Dennis was most concerned by the fact that Appellant was "the only person brandishing a gun" and he never put the gun up after removing it from the table inside the home. R. 207, ll. 12-14. This fact, according to Judge Dennis, could permit a jury to "easily determine that ... he got mad too and he took his anger out on somebody." R. 207, ll. 15-17.

Judge Dennis continued, by explaining a jury could conclude "he was angry and there was a fight" or a jury could conclude "this is murder very easily based on this evidence and based on the inconsistencies of the testimony of the defendant." R. 205, ll. 5-10. In light of the forgoing findings, Judge Dennis concluded the case presented a jury question and Appellant "certainly [was] not entitled to immunity and protection." R. 205, ll. 11-12.

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this

article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). One of the provisions of the Act provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "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.

To establish self-defense, 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, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually 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; and (4) 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 the particular instance. State v. Hendrix, 270

S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Supreme Court recently affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[8] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to this Court,

[8] The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In light of the immunity statute's incorporation of the elements of self-defense save the retreat prong, an examination of South Carolina's self-defense jurisprudence is necessary and helpful. An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "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." Id. "[T]he mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). In Slater, the Court determined the defendant was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty where the defendant was "in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The South Carolina Supreme Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

The trial judge erred in failing to grant Appellant immunity from prosecution under the statute. Appellant satisfied the Act and the elements of self-defense save the duty to retreat.

Turning first to the Act, Appellant was not engaged in an unlawful activity and was attacked in a place where he had a right to be. There was not even a suggestion that Appellant was engaged in an unlawful activity. He had been visiting was friends, was in legal possession of a gun, and was trying to calm his friend while protecting himself and Butler. He was in a place where he had a right to be in light of the invitation to the apartment and his compliance when Butler asked him to leave. The shooting occurred in a public area of the apartment complex. There was no evidence that Appellant was not permitted to be in the area. Finally, he was attacked by Williams. According to Appellant's un-contradicted testimony, Williams shoved him multiple times, jumped on him, and punched him. Appellant satisfied all elements of the Act. Therefore, by the terms of the Act, he had the right to stand his ground and meet force with force. In short, Appellant was not required to retreat, as would be required in a typical self-defense case, because he satisfied the requirements of the Act.

Turning next to self-defense, Appellant satisfied the three elements necessary in order to ensure his conduct was immune from prosecution. Appellant was not at fault for bringing on the difficulty. It was undisputed he had been invited to the apartment and left when requested. It was also undisputed that Williams was banging on Butler's back door despite being asked to leave and being on trespass notice for the apartment complex. Appellant testified, and no one contradicted him, that he was trying to calm Williams and protect Butler. Butler admitted that Williams had attacked her in the apartment and only stopped his assault when Appellant intervened. Seeing Williams in a rage and aggressively trying to enter Butler's apartment, Appellant intervened yet again in an effort to save Butler and to help his friend, Williams, avoid a criminal charge. In other words, Appellant's initial conduct of trying to calm Williams was the direct result of his attempt to

save Butler from further harm and to avoid Williams being arrested for violation of the no trespass order.

Williams attacked Appellant – he shoved Appellant multiple times and he jumped on top him as he punched him. Appellant was in actual imminent danger of losing his life or sustaining serious bodily injury due to this vicious attack. Even if this Court were to determine the danger was not actual, Appellant testified he actually believed he was in imminent danger. Nothing contradicted this. Further, a reasonably prudent person would have entertained the same belief. Appellant had just witnessed Williams viciously attack Butler in the apartment. He saw Williams repeatedly strike the door in an effort to get back to Butler and resume his assault. Williams then began his assault on Appellant – shoving and punching. If the imminent danger were based only on Appellant's belief, then a reasonably prudent person would have entertained the same belief in those circumstances. In light of the actual danger Appellant was in, a person of ordinary prudence, firmness and courage would strike the fatal blow, just as Appellant did.

Based on the foregoing, Appellant satisfied the elements of the Act and the elements of self-defense. Therefore, he was entitled to immunity from prosecution under the Protection of Persons and Property Act. The judge erred in denying his motion.

CONCLUSION

Appellant respectfully requests this Court reverse the trial judge and grant him immunity from prosecution.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December, 2017.