STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 2017-UP-440 (S.C. Ct. App. filed Nov. 22, 2017)
Appellate Case No. 2016-000475

THE STATE,

RESPONDENT,

V.

RICHARD A. CAPELL,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard A. Capell, Appellant.

Appellate Case No. 2016-000475

Appeal From Richland County
Clifton B. Newman, Circuit Court Judge

Unpublished Opinion No. 2017-UP-440
Submitted October 1, 2017 – Filed November 22, 2017

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Vann Henry Gunter, Jr., and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: Richard Capell appeals his conviction for pointing a firearm, arguing the circuit court erred by finding he was not immune from prosecution

pursuant to the Protection of Persons and Property Act (the Act).[1] We affirm pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 16-11-440(C) ("A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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 . . . ."); *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review."); *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) ("An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."(quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007))); *id.* at 316, 768 S.E.2d at 238 (recognizing the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the [circuit] court's ruling is supported by any evidence" (quoting *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009))); *State v. Scott*, 420 S.C. 108, 114, 800 S.E.2d 793, 796 (Ct. App. 2017) (stating the clear language of section 16-11-440(C) requires the defendant to be attacked), *cert. pending*; *Douglas*, 411 S.C. at 320 n.7, 768 S.E.2d at 239-40 n.7 ("[T]he standard [under the Act] for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective.").

AFFIRMED.[2]

SHORT, KONDUROS, and GEATHERS, JJ., concur.

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

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICHARD A. CAPELL,

APPELLANT

APPELLATE CASE NO 2016-000475

Appeal from Richland County
Honorable Clifton B. Newman, Circuit Court Judge

Opinion No. 2017-UP-440

PETITION FOR REHEARING

On November 24, 2017, this Court affirmed Appellant Richard Capell's convictions for pointing a firearm in an unpublished, per curiam opinion. Pursuant to Rule 221(a), SCACR, Capell respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

The issue before this Court was whether the trial court erred in ruling that Appellant was not immune from prosecution for pointing and presenting a firearm pursuant to the Protection of Persons and Property Act. Appellant Capell had a verbal dispute with John Bunucci, the manager of the condominium complex where Capell owned a unit and resided. Capell left Bunucci's officer after slamming his hand on the desk, telling Bunucci that he would see him in

court and slamming the office door. Bunucci, who was eight inches taller and outweighed Capell by at least one hundred pounds, then swung the office door open, rushed toward Capell, and yelled "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down." Capell, who was licensed to carry a concealed weapon, drew his gun. He did not pull the trigger on his firearm because its display, coupled with his order to "get the fuck back," were successful in dispelling the threat. All of these events were captured on an audio and video recording. At the immunity hearing Judge Newman properly found that Capell was not engaged in unlawful activity, but the remainder of his findings were not supported by the evidence or applicable precedent. Capell should have been found immune from prosecution under section 16-11-440(C) of the Protection of Persons and Property Act ("the Act").

As discussed more fully in the brief and reply brief of Appellant, Capell established all of the elements required to claim immunity from prosecution as required by the Act and a valid case of self-defense. The Act provides that a person has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if (1) he was not engaged in an unlawful activity; (2) he was attacked in another place where he had a right to be; and (3) he reasonably believed the use of force was necessary to prevent death or great bodily injury to himself. S.C. CODE ANN. § 16-11-440(C). "Great bodily injury" is statutorily defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. CODE ANN. § 16-11-430(2).

In State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013), our Supreme Court ruled: "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in

determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." Thus, Capell was required to show by a preponderance of the evidence that (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. See Curry, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4. The applicability of self-defense to immunity under the Act was reiterated by this Court in State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238-39 (Ct. App. 2014), *cert. dismissed as improvidently granted* (July 13, 2016).

This Court's opinion cited Douglas for the proposition that "[a]n abuse of discretion occurs when the circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support" and that "the appellate court 'does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence." State v. Capell, No. 2017-UP-440 (S.C. Ct. App. filed Nov. 24, 2017). Respectfully, the trial judge in this case misstated and misapplied the relevant law. Judge Newman failed to recognize the applicability of self-defense law to the determination of immunity, stating: "Well, if you're talking self-defense then you're -- then we're not talking stand your ground. We're talking you're convincing the jury about self-defense, not me." R. 69, ll. 3-6. Further, unlike other cases where the witness testimony "varied substantially" or where "the accused presented various inconsistent accounts" of the events that were "not consistent" with the victim's injuries, the events in this case were captured by the make-shift body camera Capell was wearing. See Douglas, 411 S.C. at 318-19, 768 S.E.2d at 239 (2014) (distinguishing the facts of the case from those of State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), and State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014)).

A. Appellant established the elements required under S.C. CODE ANN. § 16-11-440(C).

Subsection (c) of the Act requires that the accused show (1) he was not engaged in an unlawful activity; (2) he was attacked in another place where he had a right to be; and (3) he reasonably believed the use of force was necessary to prevent death or great bodily injury to himself. S.C. CODE ANN. § 16-11-440(C). The cases cited in this Court's opinion focused upon the Act's requirements that the accused have been attacked and the objective nature of the standard for evaluating whether an accused had a reasonable belief that the force exerted was necessary to prevent great bodily injury. State v. Capell, No. 2017-UP-440 (S.C. Ct. App. filed Nov. 24, 2017). There was no dispute in this case that Capell was not engaged in an unlawful activity. R. 59, l. 14 – 60, l. 8; R. 66, ll. 18-21; R. 77, ll. 9-14; Brief of Appellant, pp. 12-13.

Meaning of "Attacked" and
Applicability of Right to "Act on Appearances"

This Court cited State v. Scott, 420 S.C. 108, 114, 800 S.E.2d 793, 796 (Ct. App. 2017), *cert. pending*, for the proposition that "the clear language of section 16-11-440(C) requires the defendant to be attacked." In Scott, this Court distinguished between whether a reasonable belief of death or serious bodily injury existed so as to justify a claim of self-defense and whether there was an "attack" so as to excuse the duty to retreat under the Act. 420 S.C. at 114-15, 800 S.E.2d at 796-97. In a footnote, the Scott Court went on to provide:

> We agree with the concurrence that a defendant must establish the elements of self-defense in order to prevail on a claim for immunity. The clear language of section 16-11-440(C), however, also requires that the defendant be actually attacked. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). While we acknowledge the facts of this case are unique, and the question of a perceived threat and an attack may sometimes overlap, absent a showing that a defendant has been attacked, a request for immunity, pursuant to subsection (C), which would excuse the duty to retreat, must fail, and a defendant must present his evidence of self-defense to a jury.

Id. at 115 n. 8, 800 S.E.2d at 797 n. 8.

To the extent that Scott construes the Act to require that the accused have been *physically* attacked, such is inconsistent with both the plain language of the statutory text itself and the plain and ordinary meaning of the word "attack." The word "attack" was not defined in Section 16-11-430 which provided the definitions for words in the Act. Nor was "attack" defined in any other section of the statute from 16-11-410 through 16-11-450. The Merriam-Webster Dictionary defines "attack" as "to set upon or work against forcefully; to assail with unfriendly or bitter words; to begin to affect or to act on injuriously; to set to work on." *Definition of Attack*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/attack (last visited Dec. 1, 2017). Thus, to require that the accused have been *physically* attacked would read into the statute a word that is markedly absent from the Act. Admittedly, words alone would likely not be enough to constitute an "attack" for the purposes of immunity or to present a valid claim of self-defense. See State v. Locklair, 341 S.C. 352, 361, 535 S.E.2d 420, 424 (2000) ("[W]ords alone, no matter how opprobrious, are not sufficient to prove legal provocation when a deadly weapon is used."). However, "words accompanied by hostile acts may, according to circumstances, not only reduce a killing from murder to manslaughter, but may establish the 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)).

To the extent that Scott implies that the self-defense concept of the right to "act on appearances" is inapplicable to the elements required to establish immunity, its analysis is flawed. "A defendant, in a self-defense case, has the right to act on appearances." State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). "The right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in

the victim's hand. While an appearance charge is appropriate when the defendant erroneously believes he sees the victim with a weapon, it has been applied elsewhere." State v. Starnes, 340 S.C. 312, 321, 531 S.E.2d 907, 912 (2000). Further, "[o]nce the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." Id. at 322, 531 S.E.2d at 913 (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

It is unreasonable to believe that the General Assembly meant for a person to wait until he was physically attacked to defend himself in order to be immune from prosecution, as the first blow could be fatal. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). "The Legislature explicitly codified the Castle Doctrine when it promulgated the Act and extended its protection, when applicable, to include an occupied vehicle and a person's place of business." State v. Jones, 416 S.C. 283, 291, 786 S.E.2d 132, 136 (2016). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). Here, the purpose of the Act is to allow the accused to "prevent death or great bodily injury to

himself or another person or to prevent the commission of a violent crime" where it is reasonably believed to be necessary. S.C. CODE ANN. § 16-11-440(C). Thus, it is logical that the accused would potentially exercise force to repel the attack before any physically contact – from fist, knife, bullet, or otherwise – was actually made with him or another person.

In this case, though Bunucci never made physical contact with Capell, the video of the incident reflected the quick change in Bunucci's tone and demeanor. He stormed out of his office toward Capell, yelling: "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down" while taking several large steps and rapidly decreasing the distance between them. Capell had never seen Bunucci so enraged. Bunucci was not a small man, outweighing Capell by at least one hundred pounds and standing eight inches taller. R. 30, l. 16 – 31, l. 3; R. 3 (noting that Capell weighed one-hundred fifty pounds). Capell further explained:

> I chose to do what I did because of the short distance between us. You don't sit there when somebody is holding a knife in their hands at 10 feet away from you and think that, oh, it's just a knife, it's not gonna harm me. They can close that distance and stab you before you can blink your eye.

R. 25, ll. 1-7. Capell appeared to be referring to "the twenty-one foot rule," a standard that "is based on studies which have shown that an armed individual within twenty-one feet of an officer still has time to get to the officer and stab and fatally wound the officer even if the officer has his weapon brandished and is prepared to or has fired a shot." Sigman v. Town of Chapel Hill, 161 F.3d 782, 785 (4th Cir. 1998). Though Capell did not see a weapon in Bunucci's hand, he aptly noted that Bunucci's bare hands could have been used as a weapon. See State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997) (finding that "a hand or fist may be considered a deadly weapon depending on the factual circumstances"). Capell was not required to wait for Bunucci to punch him in the head or gut before pulling his weapon in self-defense. Once Bunicci saw the gun and stopped advancing upon Capell, Capell acted reasonably in holstering

his weapon and leaving. To the extent that Judge Newman and this Court found that Bunucci was required to strike Capell in order for Capell to be immune pursuant to the Act, such a finding is an error of law.

Reasonableness of Belief

This Court cited State v. Douglas, 411 S.C. 307, 320 n.7, 768 S.E.2d 232, 239-40 n.7 (Ct. App. 2014), for the proposition that "the standard [under the Act] for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective." In Douglas, it was undisputed that both Douglas and the deceased, Smith, had been drinking alcohol heavily throughout the day leading up to the fatal incident. 411 S.C. at 313, 768 S.E.2d at 236. Noting that Douglas' intoxication was generally relevant but that the "reasonable belief" required under the Act was an objective standard, the Douglas Court found: "The circuit court implicitly found that a reasonable, sober person facing the circumstances Respondent faced would have believed shooting Smith was necessary to prevent great bodily harm to himself and, thus, Respondent's belief that deadly force was necessary was reasonable." Id. at 320 n.7, 328, 768 S.E.2d at 239-40 n.7, 244.

In the present case, there was some discussion of Capell's specific physical disabilities because it was both generally relevant to the case and specifically relevant to establish a valid a claim of self-defense. See Douglas, 411 S.C. at 318, 768 S.E.2d at 238 (reiterating 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"); id. (to satisfy the second element of self-defense, "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"). Capell was born a twin, with multiple birth defects.

His abdomen was exposed in the front and he had severe bilateral club feet, with his toes up against the calves of each leg. Despite a series of procedures to close the abdominal area at age ten, Capell continued to have problems and mesh was used to cover the abdominal wall. Over the years, the mesh began to erode and Capell suffered a series of hernias. R. 14, l. 7 – 15, l. 24; R. 17, ll. 1-7. A few years prior to the hearing, doctors determined that he needed a total abdominal wall reconstruction which had not yet been performed. R. 15, l. 24 – 16, l. 5; R. 19, l. 8 – 20, l. 15. Capell also suffered from lung problems, bone loss, and arthritis. R. 16, l. 8 – 17, l. 7; R. 17, ll. 8-23. As a result, Capell had to be very careful about lifting and carrying things or getting in a position where he would have a direct blow to his abdomen. R. 18, ll. 17-24.

For purposes of the Act, Capell was also required to show that he "reasonably believed" that the force exerted was "necessary to prevent death or great bodily injury to himself." S.C. CODE ANN. § 16-11-440(C). Relatedly, the third element of self-defense requires that the accused prove "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." 411 S.C. at 318, 768 S.E.2d at 238. These both require the application of an objective standard of reasonableness. In denying Capell's claim of immunity, Judge Newman found that there was "nothing in the contact . . . that demonstrates any reasonable action by the defendant and any basis for having any belief that he needed to use death, great bodily injury or pull a weapon on the victim." R. 77, l. 24 – 78, l. 4.

It is important to note that the force exerted in the present case was the pointing and presenting of a firearm, which Capell holstered when Bunucci stopped advancing upon him. The video of the incident shows Capell make a lawful threat to sue, stating "I'll see you in court." Bunucci became enraged, jumping up out of his office chair, throwing open the door, and

screaming: "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down." Bunucci took several large steps toward Capell, rapidly decreasing the distance between them. The question for the immunity judge was whether, a reasonable person in Capell's position would have believed he was in imminent danger of serious bodily injury, keeping in mind that Bunucci was 6'2" and weighed over two-hundred and fifty pounds. Putting aside Capell's abdominal sensitivity, any common man would be vulnerable to a serious bodily injury or even death from a physical assault by a man of that stature. Had Capell shot Bunucci as soon as he opened the office door, such action would not likely have been reasonable. But the question for the immunity court was whether Capell's restrained response of pointing and presenting his firearm was reasonable. Under the facts of this case, especially in light of the video evidence, it was.

B. **Appellant established a valid case of self-defense.**

Neither the immunity judge nor this Court referenced the elements of self-defense in their ruling or decision. See R. 69, ll. 3-6. Nonetheless, the case law establishes that "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." State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). "This includes all elements of self-defense, save the duty to retreat." Id.

Capell established the first element of self-defense that he was not at fault in bringing on the difficulty. "[A]ny 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." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (defendant was at fault in bringing on the difficulty where he admitted that he was attempting to break into the victim's car when the

victim allegedly jumped on him). Here, while Capell entered Bunucci's office without knocking and began enumerating a laundry list of grievances against the condo manager, Capell ended the conversation by saying that he would see Bunucci in court, indicating his intention to deal with their dispute in a legal forum. Capell's tone was condescending and far from an effective way of dealing with his problems with Bunucci, but it did not constitute "aggression" to the point that he forfeited his right to self-defense. Thus, Judge Newman properly found that Capell did not act unlawfully in his interaction with Bunucci. R. 77, ll. 9-14.

As discussed more fully in the Brief of Appellant, the solicitor argued that Capell was still at fault in bringing on the difficulty because "self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on the physical encounter, and which did actually contribute to bringing it on." State v. Strickland, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010) (quoting State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931)). In State v. Rowell, 75 S.C. 494, 56 S.E. 23, 27 (1906), relied upon in Woodham, the Court found that a proper "opprobrious language" charge would be:

> [A] person is not deprived of the right of self-defense because he uses insulting language. [O]ne who insults another by opprobrious words may be bound to anticipate that the insulted person will repel the insult to the extent the law allows, but he is not bound to anticipate that he will go to the extent of attempting to take his life.

Here, a review of the video reveals that Capell did not use any profanity until after Bunucci charged toward him. Even then, he used the same vulgar word first uttered by Bunucci. Neither his "threats" to contact police and sue Bunucci, nor his use of the words "criminal" and "ignorant" were of such an "opprobrious" nature "that a reasonable man would expect it to bring on the physical encounter." Strickland, 389 S.C. at 215, 697 S.E.2d at 684.

Assuming *arguendo* that Capell was at fault, "[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." Bryant, 336 S.C. at 345, 520 S.E.2d at 322. "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." Id. (citing State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)). Here, Capell said "I'll see you in court" and left the office, slamming the door shut behind him. The solicitor's contention that the door was slammed in Bunucci's face, representing a continuation of hostilities, was refuted by the video of the incident, which shows that Bunucci was getting up from his desk when the door was closed. While all of the events occurred within a very short time span, Capell's conduct communicated his intent to retreat and restored his right to self-defense.

Capell also established the second element of self-defense that he believed that he was in imminent danger of sustaining serious bodily injury. "A person has the right to act on appearances, even if the person's belief is ultimately mistaken." State v. Dickey, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011); see also State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919). Thus, in establishing the second prong of self-defense, "[a] defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger . . . ." State v. Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting State v. Jackson, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955)) (emphasis added). "The test is not whether there was testimony of an *intended* attack [upon the defendant]." Jackson, 227 S.C. at 278, 87 S.E.2d at 684 (emphasis in original). Importantly, once the right to fire in self-defense arises, a person is not required to wait until his adversary "on equal terms"

with him or "gets the drop on him." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); State v. Hendrix, 270 S.C. 653, 660–61, 244 S.E.2d 503, 507 (1978); State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)).

"[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." Fuller, 297 S.C. at 444, 377 S.E.2d at 331. Here, Bunucci's words and actions, as discussed *supra*, led Capell to believe that he was going to be physically attacked. Physically, Bunucci had eight inches and one hundred pounds on Capell, who was 5'6" and 150 pounds. Additionally, Capell's disability made him particularly vulnerable to physical attack. See State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) ("The difference in age; the fact of the prior bad blood between the two men; the heavy consumption of alcohol by Cherry; and the prior threat of the deceased are all factors which would give appellant the right to judge the conduct of his adversary more harshly than otherwise."). It was for those reasons that Capell believed it necessary to defend himself by pulling his gun and demanding the Bunucci get back. Capell made no additional threats and left once Bunucci calmed down and returned into his office.

Lastly, Capell established the third element of self-defense that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief as Capell. On this point, the video is the best evidence. While Capell's statements were rude, the dynamic of their interaction changed when Bunucci got up from his chair and began yelling at and pursuing Capell. In State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), our Supreme Court held that the defendant, a security guard, was entitled to a directed verdict on self-defense when he fatally shot a man he was lawfully ejecting from an apartment building. The Court determined that the defendant reasonably believed he was in actual danger of death or serious bodily injury because

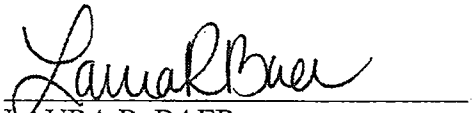
the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him, continued advancing toward the defendant after defendant pulled the gun, and there was great disparity in their physical stature and capabilities. Dickey, 394 S.C. at 501, 716 S.E.2d at 102. The Court found it reasonable that Dickey believed he was in danger of death or serious bodily harm and ruled "that a person of Petitioner's stature and limited agility would entertain the same fear when faced with an attack by a belligerent, intoxicated, more agile, and younger male, who appeared to be reaching for a weapon." Id. at 502, 716 S.E.2d at 102.

As discussed more fully *supra*, Capell made no allegation that he could see a weapon but testified that he was intimidated and fearful due to Bunucci's large size, aggressive charge towards him, and threatening words. Unlike the defendant in Dickey, Capell did not shoot Bunucci because he was successful in neutralizing the threat. However, his failure to shoot did not lessen the reasonableness of his fear.

CONCLUSION

For the reasons set forth herein, Appellant Richard Capell respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed, and that his case be remanded for a new trial.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD A. CAPELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Richard A. Capell, at 6905 Cleaton Rd., Condo I149, Columbia, SC 29206, this 5th day of December, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of December, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .

The South Carolina Court of Appeals

The State, Respondent,

v.

Richard A. Capell, Appellant.

Appellate Case No. 2016-000475

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Laura Ruth Baer, Esquire
Vann Henry Gunter, Jr., Esquire
Daniel Edward Johnson, Esquire