THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

Roger E. Henderson, Circuit Court Judge
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-000779

The State, Respondent,

v.

Gary Moore, Appellant.

FINAL BRIEF OF APPELLANT

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266

Attorney for Appellant

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STATEMENT OF THE CASE

During the December 2015 term of the Chesterfield County Grand Jury, Appellant was indicted for attempted murder (Indictment No.: 2015-GS-13-0398). On February 17, 2016, the Honorable Roger E. Henderson conducted a Duncan[1] hearing under the Protection of Persons and Property Act (S.C. Code Ann. 15-11-410) at the Chesterfield County Courthouse. Appellant was present and represented by the Larry W. Knox, Esquire. The State was represented by Kenard Redmond, Deputy Solicitor, and Mary T. Johnson-Lee, Deputy Solicitor. At the conclusion of the hearing, Judge Henderson took the matter under advisement. Immunity Hearing p. 120. As is addressed in the trial record, Judge Henderson found Appellant was not entitled to immunity from prosecution.

On April 5, 2016, Applicant was called to trial at the Chesterfield County Courthouse in front of the Honorable Paul M. Burch and a jury. Appellant was present and represented by the Larry W. Knox, Esquire. The State was represented by Kenard Redmond, Deputy Solicitor, and Mary T. Johnson-Lee, Deputy Solicitor. On April 6, 2016, the jury returned a guilty verdict, and the Honorable Paul M. Burch asked for a pre-sentence investigation report. R. pp. 231, 241.

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

On April 11, 2016, the Honorable Paul M. Burch conducted a sentencing hearing. Appellant was sentenced to a term of eighteen (18) years for attempted murder. Sentencing R. p. 248.

A timely direct appeal was filed, from which this Brief follows.

ARGUMENT

I. Statement of the Facts

A. Immunity Hearing

On February 17, 2016, the Honorable Roger E. Henderson conducted a Duncan hearing under the Protection of Persons and Property Act (S.C. Code Ann. 15-11-410) at the Chesterfield County Courthouse. Appellant was present and represented by the Larry W. Knox, Esquire. The State was represented by Kenard Redmond, Deputy Solicitor, and Mary T. Johnson-Lee, Deputy Solicitor.

At the beginning of the hearing, Mr. Knox informed the court that he had filed a discovery request on July 21, 2015, but he had just received a disc with a witness statement on it. R. p. 260. In response, Ms. Johnson-Lee explained that the discovery referred to a witness by the name of Steven, with his last name unknown, since he had left the scene prior to being interviewed by law enforcement. R. pp. 260-261. She further explained that Steven Hooks had been located by law enforcement in the last couple weeks, a subpoena had been issued, and she had interviewed him at the courthouse yesterday. R. p. 261. During that interview, she discovered he had previously been interviewed by law enforcement. R. p. 261. She agreed that she had just provided defense counsel the disc containing his interview, but she had turned it over within thirty minutes of receiving it. R. p. 261. After informing the court Mr. Hooks was present to testify, Mr. Knox withdrew his objection. R. p. 262.

Thereafter, Appellant took the stand and testified as follows. On July 14, 2015, he went to the convenience store at issue since he needed fuel and it was about three miles from his job site and three miles from his residence. R. p. 263. He had to go into the store to get a drink, cigarettes and pay for his gas. R. pp. 262-263. He spoke to the kid running the produce stand on his way into the dimly lit store. R. p. 263. He indicated that his eyes were having a hard time adjusting from the outside light, and he did not see anyone upon entering. R. pp. 265-266.

After entering, he was headed to get a drink and about three feet away from the cooler when he heard a voice behind him state: "I told you I was going to kill you. I told you I was going to catch you somewhere you little b****."[2] R. pp. 264-265. He identified the voice as belonging to Mr. Wallace, and he turned around to locate him. R. pp. 266-267. He testified:

> I said, Mr. Wallace. And I think the other fellow was coming down the aisle with him. Mr. Wallace had already come about four feet down that aisle or so, blocking my only route for escape. I went back towards him. He slaps me upside the head. I attempted to push him off the aisle. He grabbed me by the hair of my head and snatched me down to the ground with him and the good Samaritan proceeded to choke me around my neck, yanking around my throat and choking me.

R. p. 267, lns. 7-18.

He further explained that he had much longer hair at the time, and Mr. Wallace grabbed both sides of his hair as Mr. Wallace pulled him to the ground. R. p. 269. He hit his "head pretty decent." R. p. 269, ln. 18. He realized there was another person, whom he had never seen before, with both hands around his neck choking him. R. pp. 269-270. He began to black out, could not get his arms up, but he could reach his sheath holding his knife. Immunity Hearing pp. 270, 299-300. He recalled: "I couldn't see where I was getting or who I was getting, but, you know, I

[2] Due to the nature of the legal arguments in this Brief, Appellant's counsel finds it necessary to include quotes of strong/offensive language that she would typically omit. In line with a quote from an appellate case herein, asterisks will be used in quoting such language.

repeatedly stabbed trying to get these people off me." R. p. 270, lns. 17-20. When asked if it appeared that the second person was trying to come to his aid, he responded: "Hey, there was no way possible. I mean, if that person was helping me, then that was – that was about the least help I have ever received in my life." R. p. 287, lns. 11-16.

He further explained how he was pinned and could not get away, as follows:

> Yes, sir, I couldn't move; they had me pinned down. He had me by the hair of the head down, the other fellow had more than --- I mean, I think there was a video. The fellow back there, he had me around the neck choking me. I couldn't go towards him or away from him because they were both on me.

R. p. 271, ln. 20 – p. 18, ln. 1.

When asked why he felt he needed to use his knife, he responded:

> Well, I didn't know what they were going to do after that fellow choked me out. I mean, honestly, this fellow, he tried to attack me with an axe handle. He tried to kill me that one time. I mean, the fellow jumped on me in a magistrate's office in front of Officer Hutchinson back there. You know, I mean, this fellow is --- something's not right. Do you understand? I'm scared of that fellow. I don't know what he's going to do to me when I'm unconscious.

R. p. 272, lns. 4-13. He explained that Mr. Wallace had informed Appellant and law enforcement that Mr. Wallace intended to kill him, so he was "without a doubt" – in fear for his life. R. p. 272, lns. 17 – 25, p. 281, ln. 20 – p. 282, ln. 1.

After getting out of the store, he called 911, and deputies responded. R. p. 283. He flagged down Officer Hutchinson and told him he had been attacked. R. p. 284. He was placed in handcuffs and provided Officer Hutchinson his knife. R. pp. 284-285. He understood that he was being placed in the officer's car for his protection since Mr. Wallace's friends and family were congregating at the store. R. p. 284.

Appellant did not receive EMS treatment, but he got medical treatment at the jail. R. pp. 285, 289. He recounted going to his doctor (Dr. David Brock) after being released. R pp. 285,

288. His injuries included signs of a concussion and swelling around his neck. R. p. 285. His doctor recommended an MRI, but he could not afford to get one. R. p. 288.

Previously, Mr. Wallace had gotten into an argument with Appellant's fiancé's mother at Appellant's residence, which resulted in Mr. Wallace appearing to leave in his truck. R. p. 273. While Appellant was on the porch with his young son, Mr. Wallace pulled up, appeared to attempt to pull a weapon, but he was kept from firing by the passenger. R. p. 274. Then, Mr. Wallace got out, grabbed an axe handle, chased Appellant with it and damaged Appellant's property and vehicle when he could not get to Appellant. R. pp. 274-275.

Appellant detailed his attempt to file charges, which resulted in an appearance in magistrate court. R. pp. 276-277. He also detailed Mr. Wallace's attempt to attack him in magistrate court. R. pp. 277-278. He recalled receiving a judgement of five hundred dollars in magistrate's court, but not being able to secure a restraining order against Mr. Wallace. R. p. 279. Thereafter, he took a job out of state, to avoid being in the area and around Mr. Wallace. R. p. 280. He recalled being at the convenience store four to five times in the prior year and never seeing Mr. Wallace at the store. R. p. 281.

Appellant acknowledged that he had the knife at issue with him during the incident at his residence and in magistrate court. R. p. 278. He explained he solely intended to get fuel and cigarettes at the store and he did not intend to harm anyone. R. p. 280. He understood that he had a right to be at the convenience store, but he would have left and risked running out of gas if his way out had not been blocked by Mr. Wallace. R. p. 282.

Following Appellant, Mr. Wallace took the stand. Mr. Knox asked him where he was living on July 14, and he responded that he was living with Appellant's mother-in-law. Thereafter, a rather unresponsive period of questioning followed, as reported:

Mr. Knox: Okay. Now you heard Mr. Moore testify about –

Mr. Wallace: All he –

Court: Sir. Sir, let's get something straight before we start. Let him ask the question completely before you to answer.

Mr. Wallace: Yes.

Court: And he'll let you answer before he asks another one.

Mr. Wallace: Okay. Okay.

Mr. Knox: Thank you, Your Honor. Mr. Wallace, you heard Mr. Moore testify about an incident that happened at your [his] mother-in-law's?

Mr. Wallace: Yes, sir.

Mr. Knox: Can you tell the Court what happened with that incident from your point of view?

Mr. Wallace: Why don't we subpoena his mother-in-law –

The Court: Answer his question. Answer his question. He asked you what your perspective of the incident was, your side of the story is with that.

Mr. Wallace: He's the one that pulled the stick. So I just reached back and got an axe handle and he run with the stick. He ain't nothing but a coward. It takes a coward man to stab a man in the back.

Mr. Knox: Okay. You still haven't answered the question. What did you do with the axe handle?

Mr. Wallace: What do you mean, what did I do with it? I put it back on the back of my truck.

Mr. Knox: What did you do with it before you put it on the back of your truck?

Mr. Wallace: I tried to – I was going to knock his brains out if I had caught him.

Mr. Knox: Instead of knocking his brains out, what did you do with the axe handle?

Mr. Wallace: Well, ask him what did he not have ---

The Court: No, sir. No, sir. No, sir. You answer his question. Answer his question.

Mr. Knox: When you decided to knock his brains out ---

Mr. Wallace: What does this got to do with this here stabbing?

The Court: Sir, let's get something straight right now. He has the right to ask questions. You have to respond to them; whether you like the questions or not, you give an answer. Do you understand?

Mr. Wallace: Okay. Okay.

The Court: You don't do it with an attitude. Do you understand? Is that clear?

Mr. Wallace: Yes, sir.

Mr. Knox: Okay. Before you decided to knock his brains out but you didn't, what did you do with the axe handle after that, sir?

Mr. Wallace: I knocked his windshield out.

R. p. 303, ln. 20 – p. 306, ln. 7.

When asked about the incident at the magistrate's office, he admitted that he tried to approach Appellant and the judge ordered that the "officer back yonder" put him in a cell. R. p. 307, lns. 5-13. He explained that he tried to approach Appellant because "I can't stand him." R. p. 307, lns. 14-15.

Turning to the July 14, 2015 encounter, he testified that he could not stand Appellant then and "can't stand him today." R. p. 308, lns. 8-16. Thereafter, he testified, as follows:

Mr. Knox: Did you attack him in that store?

Mr. Wallace: Yeah, we went at it in the store.

Mr. Knox: No. I didn't ask you did we go at it, I said, did you attack him at the store, sir.

Mr. Wallace: Yes.

Mr. Knox: You slapped him?

Mr. Wallace: Yeah.

Mr. Knox: Did you have reason to slap him?

Mr. Wallace: I thought I did.

Mr. Knox: Why? Because you couldn't stand him?

Mr. Wallace: That might have been what it was.

Mr. Knox: Okay. So you slapped him without provocation or cause; is that correct, sir?

Mr. Wallace: No. He come in running his mouth to me.

R. p. 308, ln. 17 – p. 309, ln. 6.

When asked about slapping Appellant, he shared the following opinion: "It takes a coward man to stab a man in the back." R. p. 312, lns. 23-24. He further responded: "To me, if you're man enough to run your mouth, then you're man enough to tote an a** whipping." R. p. 313, lns. 2-4. He affirmed his intent to give Appellant an a** whipping. Immunity Hearing p. 313, lns. 5-7.

On cross-examination, he answered that he did not recall punching Appellant repeatedly before getting stabbed four times, yet later he agreed they were engaged in a tussle. R p. 315, lns. 17-25, p. 319, lns. 21-25. When asked to go through his memory of the fight, Mr. Wallace responded:

> Well, we fell to the ground and – and the young man came in, and Mr. Moore told him to get me off of him, you know. And so the boy broke us up. I told the boy not let him up because I knowed he had that knife on his side.
>
> Just as soon as he comes up, he went to stabbing. He even stabbed the little boy in the arm.

R. p. 316, ln. 19 – p. 37, ln. 3. On redirect, he testified that he saw Appellant's knife when he came in the store and prior to slapping him. R. p. 321.

When Steven Hooks was called to the stand, he indicated the he had forgotten about the incident on July 14, 2015, and he had been in the courtroom listening to the testimony. He provided the following recollection of the events in question:

> Mr. Hooks: Well, every day I come in that store to get my afternoon stuff... The next thing I know – I'm leaning down because what I needed to get was on the bottom. I'm 5, 5, I can't hardly see over the racks, and I hear something. And I kind of looked up and the Lance cracker rack was pulled over. And I thought some kid had pulled over, you know, no big deal. As I started walking up the aisle I see two fellows on the ground. By the time I get closer and closer, I see blood. And I think his name is Gary –
>
> Mr. Redmond: Gary and Charles. Mr. Wallace.
>
> Mr. Hooks: And I thought they was just tussling, you know. I was like, let's break it up, because the lady at the cash register, she was screaming. So I reached down and I think grabbed Gary, and finally got them broke up. The next thing I know, blood was everywhere. That's about as far as I can remember.
>
> Mr. Redmond: Did you get nicked or anything?
>
> Mr. Hooks: Yeah, just a little.

R. p. 324, ln. 25 – p. 325, ln. 23.

In clarification, he indicated that he saw blood on the ground before he broke up the fight and was concerned with the amount of blood on the ground. R. p. 328, ln. 19-23, pp. 335-338. He recalled that they were both engaged in the fight when he pulled them apart, and he did not "know what blood it was or whose blood it was." R. pp. 328, 329, lns. 4-13. He testified that he did not see anyone stab anyone after they were disengaged and off the floor. R. p. 337, lns. 3-6.

Thereafter, Melissa Griffin testified that she had worked at McCormick's Grill and Grocery for about five years, and she was working on July 14, 2015. She was running the register and described the incident as follows:

> Ms. Griffin: It all happened so fast Mr. Charles was already in the store. Mr. Gary come in and they made eye contact, that's all I seen because I have to answer phones and do lottery also. And I didn't hear anybody say anything to anybody, it was just on.
>
> Ms. J-L: Describe what you mean by, it was on.
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> Ms. Griffin: They was fighting. They was on the floor and by the time I got around – I had grabbed the phone to call 911, thinking if I threatened, you know, to call the police, they would stop fighting. Well, they kept fighting.

R. p. 340, ln. 23- p. 341, ln. 9.

She did not know who was bleeding until after the fight concluded. She believed the fighting stopped because Steven was pulling them apart. R. pp. 342-343. She recalled telling Appellant not to go anywhere, and he said he was not going anywhere. R. p. 343, lns. 9-15.

Officer Tim Hutchinson of the Chesterfield County Sheriff's Office was called to the stand. R. p. 346. He recalled being dispatched to the scene for a "fight call inside a store." R. p. 347, lns. 15-22. Upon arrival, he was flagged down by Appellant who stated that he was the victim. R. p. 349, lns. 16-23. While talking to Appellant, a woman hollered out from the store that he was the "one that stabbed him, or something of that nature." R. p. 350, lns. 1-9. He cuffed and detained Appellant for investigative purposes, and Appellant told him where his knife was located. R. p. 350. After securing Appellant and his knife, he entered the store and encountered a spot of blood near the front of the register area. R. p. 351. He located Mr. Wallace in the bathroom and recalled seeing two stab wounds and a laceration to his back. R. pp. 352-353. He then explained the photographs he took at the scene. R. pp. 353-356.

When asked if he recalled being involved in a prior matter with Appellant and Mr. Wallace in the magistrate court, he responded that he could not recall. R. p. 357.

Investigator Greg Burns of the Chesterfield County Sheriff's Department testified about responding to the scene and taking photographs. R. pp. 360-361. He explained that the store video system would not allow a download, so he used the Sheriff's Department cell phone to record the in store video. R. p. 362. He identified the disc made from the cell phone video. R. p. 362.

Over Defendant's objection, the video was admitted and played. When asked about the voices heard discussing the video, he answered that the voices were myself, Investigator Tim Perry and the store owner Keith McCormick. R. p. 365. On cross-examination, he identified Investigator Perry as the voice saying that the old man had hit or slapped him. R. p. 367, lns. 1-8. He identified his voice as the one saying, "He got stabbed already." R. p. 366, lns. 19-21.

Pursuant to South Carolina Code 16-11-440(c), Appellant's counsel argued that the testimony, video and evidence established that Appellant was entitled to immunity from prosecution. R. p. 368. Counsel referenced the two prior incidents when Mr. Wallace attacked Appellant and argued that Mr. Wallace saw an opportunity on July 14, 2015 to exercise his pent up rage and anger against Appellant. R. p. 369.

In response, the State argued that Appellant's case fell squarely within the confines of State v. Curry, 405 S.C. 364, 752 S.E.2d 263 (2013). R. pp. 370-371. The State further argued that the testimony and video established a question for the jury that would not entitle Appellant to immunity. R. pp. 372-373.

At the conclusion of the hearing, Judge Henderson took the matter under advisement. R. p. 374. He indicated that he would decide the matter within the week and bring counsel over to put his decision on the record. R. p. 375.

B. Jury Trial

On April 5, 2016, Applicant was called to trial at the Chesterfield County Courthouse in front of the Honorable Paul M. Burch and a jury. After jury selection, Mr. Knox informed the Court that there was a Duncan hearing in February, and the motion was denied. R. p. 29.[3] He renewed his "objection to the Court's decision" for preservation purposes. R. p. 29.

During opening, defense counsel argued: "This case is not about attempted murder. This case is about self-defense, the God-given right that each of us have. So I would like for you to find a verdict of not guilty." R. p. 34, lns. 17-20.

To open the State's case, Charles Wallace was called to the stand. R. p. 37. He explained how he knew Appellant for about five years from living with his future mother-in-law. R. pp. 37-8. He testified about the incident on July 14, 2005. R. pp. 38-45. He explained that Appellant was "running his mouth so I reached and grabbed him." R. p. 39, lns. 19-20. He further explained that they mutually fell to the floor. R. p. 41. He testified that he had a pocketknife, but he did not take it out. R. p. 42. He recalled an unknown "little boy" braking them up and Appellant stabbing the "little boy" after the fight was broken up.[4] R. p. 43.

When asked to tell the jury about the "bad blood," Mr. Wallace testified about a prior incident at Appellant's "ma-in-law's" house where Appellant "run his mouth and then pulled a

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[3] Based upon the pre-trial and trial transcript, appellate counsel checked the online calendar and requested the transcript of Judge Henderson's ruling from Lisa Carter, court reporter. In response, Ms. Carter indicated to counsel that she did not have a record of Appellant's case.

[4] When Steven Hooks was called to the stand, he testified about pulling Mr. Wallace and Appellant apart. It appears from his testimony that his fourteen year old stepdaughter was in the store briefly, but Mr. Hooks was not a little boy. R. p. 111.

stick and then the chicken sh** bastard run." R. p. 46, ln. 23 – p. 47, ln. 2, ln. 13. He recalled grabbing an axe handle out of his truck and damaging Appellant's vehicle, which resulted in a civil court appearance in April 2014. R. pp. 48-49.

On cross-examination, he would not acknowledge previously testifying that he hated Appellant and stated he did not "like" him. R. pp. 50-51. Regarding the axe handle incident, he explained he would have hit Appellant with it if he had caught him, and he knocked out his windshield instead. R. pp. 51-53. He further acknowledged his prior testimony that he slapped Appellant and justified the slapping since Appellant was calling him names. R. pp. 54-55. He conceded that Appellant did not touch him prior the slapping and was walking to the beverage cooler. R. pp. 56-58. He further conceded that "I assaulted him," as he detailed grabbing Appellant and taking him to the floor. R. pp. 60-61. He also acknowledged that he was aware that Appellant had a knife on him. R. pp. 63.

On re-cross examination, Mr. Wallace justified initiating the fight by slapping Appellant by stating: "Well, he run his mouth like he wanted some so I gave him some." R. p. 72, lns. 21-22. He further answered that he would have shot Appellant and dropped him, referencing the undertaker when asked if he would have killed Appellant. R. p. 73.

When Mellissa Griffin was called to the stand, she testified that she was working the register when she saw the fight between Appellant and Mr. Wallace. R. p. 77. She testified that she did not hear anything said between Appellant and Mr. Wallace prior to the fight, but she also stated she could not remember. R. pp. 82-83. She recounted threatening to and then calling 911. R. pp. 77-78. She recalled Steven, a regular customer, breaking up the fight. R. p. 79, lns. 1-5. After it was broken up, she recalled shoving Appellant out the door and telling him the cops were

en route, to which he responded that "he wasn't going nowhere." R. p. 79, lns. 7-12. She later added that Appellant stated that Mr. Wallace "got what he deserved." R. p. 81, ln. 19.

Marie Kay Deese testified that she was working as cook on the day in question, heard Mellissa Griffin, and looked and saw Appellant and Mr. Wallace on the floor. R. p. 87. She explained that she saw "Stevie" pull Appellant up by his arm and then Stevie said: "Man you just cut me!" R. p. 88, lns. 5-9. She recounted seeing Appellant with a knife and helping Mr. Wallace to the bathroom. R. p. 89. When asked if she heard Appellant say anything, she responded: "Not one word." Trial Transcript p. 89.

Steven Hooks testified that he went to McCormick's every evening on his way home from work, but he did not know Mr. Wallace or Appellant prior to July 14, 2015. R. pp. 108-109. When asked what he witnessed, he recounted going into the store, picking up his "stuff," and seeing the cracker stand fall over. R. p. 109, lns. 10-17. He then noticed two men on the ground and blood. R. p. 109. He grabbed Appellant to pull them apart. R. p. 109, lns. 17-19. Quickly, Appellant was out the door, and he helped Mr. Wallace to the bathroom. R. p. 109, lns. 21-23. When asked if he saw either man with a weapon, he responded: "Not to my knowledge. Like I said, it was going so fast and when it was about over with I just happened to look down and I got me a nick." R. p. 110, lns. 16-19.

Turning to law enforcement witnesses, Sergeant Tim Hutchinson recounted arriving as the first officer at the scene and Appellant flagging him down while standing near a gas pump. R. pp. 92-93. He testified that Appellant was on the phone, informed him he was the victim, and showed him where his knife was located.[5] R. pp. 94-95. He retrieved Appellant's knife after

[5] On cross-examination, defense counsel asked extensive questions about how he determined that Mr. Wallace was the victim in the case, which culminated in a response that if Mr. Wallace slapped Appellant, Appellant would be a "victim." R. pp. 103-106. On redirect, Sergeant Hutchinson was asked who was the "victim in this case," and he responded: "In my opinion, would be Mr. Wallace." R. pp. 15-17.

placing him in handcuffs for investigative detention. R. pp. 94-95. He took pictures of the scene and stated that his body camera was on from the time of his arrival until his departure.[6] R. p. 96, lns. 15-17, pp. 98-100.

Also from the Chesterfield County Sheriff's Department, James Perry testified about serving as an investigator on the case.[7] R. p. 121. Upon arrival at the scene, he noticed the employees were cleaning up, and he asked them to stop.[8] R. p. 124. He also was informed by Sergeant Hutchinson that no one had been interviewed, so he began interviews. R. p. 124. He learned there was a video system, and he detailed what he saw on the video. R. pp. 124-126. He explained that he was unable to download the video, so it was recorded from the viewing screen in Mr. McCormick's office by Investigator Burns via cell phone. R. pp. 126-127.

On cross-examination, he explained that the video did not have audio, and he acknowledged that Detective Burns and himself provided "some commentaries." R. pp. 133-134. Regarding those commentaries, the following testimony was elicited:

Mr. Knox: So on your video that you all supplied the voice to, you were saying, "see, he hit him," meaning that Mr. Wallace hit Mr. Moore?

Inv. Perry: Yes. We saw that something took place because it immediately got the attention of Mr. Moore because then you see his response.

Mr. Knox: Otherwise, Mr. Moore was minding his business until that incident happened?

Inv. Perry: Yes. Based on watching the video you would see Mr. Moore, yeah, just basically, come in and walk and then go down the aisle and then you'd see Mr. Wallace come up and then the action take place.

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[6] Sergeant Tim Hutchinson's body camera video was not introduced at trial.

[7] Since July 2015, Mr. Perry "tried to be a schoolteacher" and took a position performing the civil process papers for Chesterfield County. R. p. 121.

[8] Per his testimony, the employees informed him they were told it was "okay to clean up." R. p. 124, lns. 2-3.

R. p. 135, ln. 17- p. 136, ln. 3. Thereafter, extensive questions by both parties ensued regarding whether a "battery" took place against Appellant and the rights of Appellant in responding to the actions of Mr. Wallace.

Thereafter, Investigator Burns explained that he arrived on scene after Mr. Wallace had been transported and assisted with evidence collection and photography. R. pp. 150-155. While Investigator Burns was on the stand, the video was played, and he provided narration. Trial R. pp. 157-160. On cross-examination, he testified that the video and audio had not been altered.[9] R. pp. 163, 164.

Investigator Burns recounted his interview of Appellant the next morning as follows:

> Inv. Burns: One of the things that Mr. Moore stated was that he pulled up there to get gas because he says he goes to that store a lot to purchase fuel, he said he was working in the area. He said that when he came into the store he spoke to someone, he spoke to the cashier and the people inside the store. He said he went down the aisle to get him a Red Bull, a drink, and he said that he heard this voice behind him, he knew who it was and when he turned around he saw Mr. Wallace standing there, had his pathway blocked. He said then Mr. Wallace – he felt it was time for him to leave but he said something came over him and he said the next think that he know, that he's on the floor and licks are being passed between him and Mr. Wallace. Mr. Wallace pulled his hair and he showed me a spot on the right side of his temple where he said the hair was pulled out of his head. But I had the nurse at the jail to look at his head and they said there were no hair particles pulled from his head.
>
> Ms. J-L: Did he say anything about the stabbing?
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> Inv. Burns: He said – I asked him did he know he stabbed Mr. Wallace. He stated, "yes." I asked him how many times? He said, he can't – he don't know but he know it was more than once.

[9] He further stated that the video played at the discovery hearing and turned over in discovery was the same video played in trial. R. pp. 164-167. On redirect, it was clarified that there were four separate videos on the disc that was played in trial. R. p. 173. The following morning, the matter was addressed with the Court outside the presence of the jury. The parties agreed for the court to give the jury a clarifying instruction and to reopen the testimony of Investigator Burns to address the four versions of the video. R. pp. 176-186.

Ms. J-L: Did he tell you where the knife come from?

Inv. Burns: He said he had it on his – he carries it all the time on his pouch on his right hand side.

Ms. J-L: Did he tell you how he opened it?

Inv. Burns: Yes, ma'am. He said he took it out and put it on his right pants leg and open the knife.

Ms. J-L: Did he say what point he did that?

Inv. Burns: He didn't say what point he did that but he did make mentioned he said the he felt like Mr. Wallace was attempting to hurt him.

Ms. J-L: And did he give you any reason why he felt that way?

Inv. Burns: He said they had a long-running fuel[feud] between him and Mr. Wallace that took place over the past year or two.

R. p. 160, ln. 16 – p. 162, ln. 2.

After the State rested, defense counsel made a "motion to have this matter dismissed." R. pp. 186-7. Counsel argued that the State had failed to prove the elements of attempted murder nor did they disprove self-defense. R. p. 187, lns. 9-18. In response, the State argued that the defense proffered self-defense in their opening, but "as it relates to evidence there is nothing in the record." R. p. 187, lns. 19-23. Regarding the attempted murder charge, the State argued there was testimony and evidence to establish that the case should go forward to the jury. R. p. 188, lns. 1-9.

Thereafter, the court ruled as follows:

> Well, certainly with the evidence that's been presented I really believe this issue is for the jury decision. I'd be abusing my discretion if I stepped in this matter, you know, from what is before the Court. Certainly, I'll entertain the appropriate charges when the time comes. I don't have any choice in this. I'll just have to deny the motion.

R. p. 188, lns. 10-16.

After the court questioned Appellant regarding his right to testify, Appellant entered his decision not to testify. R. pp. 189-190. Then, the court discussed the order of closing argument in light of the rule change. After the State made a call, it was determined that the rule had not been changed and closing argument would proceed with the State opening on the law and closing on the facts. R. pp. 191-193.

Turning to the charge, the defense requested "a charge for standing your ground." R. p. 194, lns. 3-7. In response, the court ruled:

> Based upon the previous hearing and what ya'all have advised me about it would be improper for me to do that. That would be, in effect, possibly altering previous traditional decision so I'm going to take the safe route on that one. Your motion is noted but I would deny that request.

R. p. 194, lns. 8-13. After the court's ruling, defense counsel entered a "strong objection" to the court's ruling. R. p. 194, lns. 14-16.

Following closing arguments and charge to the jury, the jury was sent out for deliberations. The jury sent out a note asking the following: "What is the attempted murder statute? What qualifies a person to be charged with attempted murder? What is the difference between premeditation intent?" R. p. 225, lns. 11-20. After a discussion on the record, defense counsel objected to the jury being instructed further on the definition of malice aforethought. R. pp. 226-267. Over counsel's objection, the court brought the jury back in and reinstructed the jury an instruction defining premeditation. R. pp. 228-230. When the jury was sent out, defense counsel objected "to the part of you giving the jury the definition of premeditation for the record." R. p. 230, lns. 18-21. In response the court stated: "So noted. And, I guess, to make the record straight, I'm going to deny the motion on that based on my explanation that, that is not a term used within the statute." R. p. 230, lns. 21-24.

Following twenty additional minutes of deliberation, the jury returned a guilty verdict. R. p. 231. After hearing from both sides, the trial court requested a pre-sentencing investigation report and indicated that a sentencing hearing would take place the following week. R. p. 241.

C. Sentencing Hearing

On April 11, 2016, a sentencing hearing was conducted at the Chesterfield County Courthouse. At the beginning of the hearing, the court thanked Agent in Charge Hamberas for preparing a pre-sentence investigation, but no report was marked or admitted. R. p. 246. The State entered a recommendation of twenty years. R. p. 246, lns. 20-21.

The court noted that the term, "culmination of a perfect storm," described the matter before him. R. p. 247, lns. 11-13. He further described the situation and stated: "It's not a situation that involved any calculated premeditation that was planned out way ahead of time." R. p. 247, ln. 15 – p. 248, ln. 19. Thereafter, the trial court sentenced Appellant to a term of eighteen years. R. p. 248, lns. 21-23.

II. Argument

A. The Lower Court Erred in Finding that Appellant Was Not Entitled to Immunity from Prosecution.

1. Standard of Review

A claim of immunity 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). "A preponderance of the evidence stated simply is that evidence which convinces as to its truth." Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008).

The appellate court reviews immunity determinations under an abuse of discretion standard. Curry, 406 S.C. at 370, 752 S.E.2d at 266. "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of

law." Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016); see also State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007))).

2. Argument

Based upon the Protection of Person and Property Act, within Sections 16-11-410 *et seq.* of the South Carolina Code, Appellant moved for and was denied immunity from prosecution. Appellant contends that the lower court committed an abuse of discretion in denying immunity since Appellant was acting lawfully, was in a place where he had a right to be, was being attacked, and was acting in compliance with established principles of self-defense.

Section 16-11-440(c), of the South Carolina Code provides as follows:

> 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.

Section 16-11-450 of the South Carolina Code provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. Simply put, Section 16-11-440(c) provides immunity to someone who uses deadly force when he is acting lawfully and is being attacked in a place where he has a right to be, which exactly defines Appellant in the case at bar.

In State v. Curry, 406 S.C. at 372, 752 S.E.2d at 267, the South Carolina Supreme Court explained:

> As the General Assembly stated its intent to codify the common law Castle Doctrine, we believe it appropriate to consider case law in the area. In State v. Grantham, we stated that "the [Castle Doctrine] rule is predicated on the absence

> of aggression or fault on [the defendant's part in bringing on the difficulty; the doctrine is for defensive, and not offensive purposes." 224 S.C. 41, 45, 77 S.C. 291, 292 (1953). While the Act may be considered "offensive" in the sense that the immunity operates as a bar to prosecution, such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.

Additionally in Curry, the Court noted: "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." 406 S.C. at 371, 752 S.E.2d at 266. Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. Id.

In order to establish a case of self-defense, Appellant must demonstrate the following elements:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (quoting State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Here, the lower court abused his discretion and committed reversible error when he failed to find by a preponderance of the evidence that Appellant readily met the elements of self-defense, even including but not required - the duty to retreat.

First, there is nothing in the record to suggest Appellant was at fault in bringing on the difficulty. It is undisputed that Appellant was in a place where he had a right to be and was

attempting to make a purchase in that place when he was physically attacked by Mr. Wallace. The State attempted to show that Appellant knew Mr. Wallace frequented McCormick's, and Appellant would have readily identified his vehicle out front. The State also attempted to show Appellant was "running his mouth" prior to Mr. Wallace slapping him, but only Mr. Wallace testified to Appellant even acknowledging his presence in the store prior to initiating an attack on Appellant. None of the State's attempts to shift fault to Appellant were established by a preponderance of the evidence, but Mr. Wallace did admit fault, slapping Appellant, which brought on the difficulty.

While on the stand, Appellant explained that he only stopped at the convenience store because he needed gas and cigarettes. R. pp. 263, 280, 282. He also explained that he was not aware that Mr. Wallace was in the store until he heard him make a threat, was hit and forced to the ground by Mr. Wallace. R. pp. 266-269.

More importantly, Mr. Wallace testified that Appellant was running his mouth, but did not threaten him, when he slapped Appellant and began the physical fight with Appellant. He also readily admitted his hatred and ill will for Appellant. R. pp. 308-309. The record shows that Mr. Wallace, not Appellant, harbored an intense hatred for the other individual, which was evidenced by his prior attempt to kill Appellant with an axe handle. R. pp. 303-306.

Secondly, through Appellant's testimony and the testimony of Mr. Wallace, Appellant established by a preponderance of the evidence that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. As the record establishes, Mr. Wallace initiated the physical attack and harbored a

known hatred for Appellant.[10] Mr. Wallace admitted he was armed with a knife when he engaged Appellant in a physical altercation. Beyond Mr. Wallace's admission, Appellant clearly testified that he believed he was in imminent danger of harm or losing his life as he was being attacked by Mr. Wallace.[11]

Thirdly, Appellant actually was in imminent danger, and the circumstances also 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. As the testimony of Appellant and Mr. Hooks established, Appellant stabbed Mr. Wallace while engaged in the physical altercation and before Mr. Wallace and he were separated. Appellant explained how he was pinned and could not get away, as follows:

> Yes, sir, I couldn't move; they had me pinned down. He had me by the hair of the head down, the other fellow had more than --- I mean, I think there was a video. The fellow back there, he had me around the neck choking me. I couldn't go towards him or away from him because they were both on me.

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[10] Both Appellant and Mr. Wallace testified in detail about the prior incident during which Mr. Wallace intended to knock Appellant's brains out with an axe handle and about the encounter that landed Mr. Wallace in a holding cell to restrain him at the magistrate's office. R. pp. 273-280, 303-308.

In State v. Douglas, 411 S.C. 307, 320-21, 768 S.E.2d 232, 240 (Ct. App. 2014), the this Court addressed a similar situation of a prior attack as follows:

> The court also took into account Smith's previous attack of Respondent in the summer of 2006. This attack occurred in Smith's home—Respondent "uttered the expletive 'G** d***,' upon which Smith 'snapped' and became violent, slamming [Respondent] against the pantry door" while choking him. Smith's mother and sister had to pull Smith off of Respondent. The circuit court noted that Respondent's testimony regarding this attack was not disputed by Smith's mother or sister, who were present in the courtroom during the hearing but not called by the State to testify. Curiously, the State argues there was "no indication based upon the prior interaction between Respondent and Smith that Smith would inflict great bodily injury." Smith's choking of Respondent and the need for Smith's mother and sister to pull Smith off of Respondent refute this argument.

[11] The attack was captured and narrated by law enforcement on the videos admitted at trial. State's Pre-Trial Exhibit 5, Trial Exhibit 13. As was discussed at trial, the cd contained four separate videos. R. pp. 164-180. Each of these videos depict Mr. Wallace initiating the physical attack and fully engaging Appellant. The videos lend credibility to the testimony of Appellant and are at times inconsistent with the testimony of Mr. Wallace, which further demonstrates the abuse of discretion committed by the lower court. Officer Tim Hutchinson testified that he had his body camera on the entire time he was at the scene, but it appears this video was not introduced at trial. R. p. 96, lns. 15-17.

R. p. 271, ln. 20 – p. 272, ln. 1.

Based upon Mr. Wallace's known hatred and desire to kill Appellant, Appellant was acting to save his own life, which Mr. Wallace was knowingly willing to take. Specifically, when asked why he felt he needed to use his knife, he responded:

> Well, I didn't know that they were going to do after that fellow choked me out. I mean, honestly, this fellow, he tried to attack me with an axe handle. He tried to kill me that one time. I mean, the fellow jumped on me in a magistrate's office in front of Officer Hutchinson back there. You know, I mean, this fellow is --- something's not right. Do you understand? I'm scared of that fellow. I don't know what he's going to do to me when I'm unconscious.

R. p. 272, ln. 4-13. Appellant further explained that Mr. Wallace had informed Appellant and law enforcement that Mr. Wallace intended to kill him, and Appellant was "without a doubt" – in fear of Mr. Wallace taking his life. R. p. 272, ln. 17 – p. 273, ln. 2, p. 281, ln. 20 – p. 282, ln. 1.

Finally, Appellant does not need to address the duty to retreat, but it is clear from the attack he suffered from Mr. Wallace that Appellant was without an option to retreat until Mr. Wallace was stabbed and rendered unable to further attack Appellant. Appellant testified that Mr. Wallace blocked his only route to escape before initiating the attack. R. p. 267, lns. 7-11. As is addressed above, Appellant explained how he was pinned and could not get away from Mr. Wallace's assault. R. p. 271, ln. 20 – p. 272, ln. 1.

As a result of the record and foregoing arguments, Appellant urges this Court to find the lower court committed an error of law when he determined that Appellant had not established that he was entitled to immunity under the preponderance of the evidence standard. Appellant is not asking this Court to abandon the standard of review and conduct a *de novo* review, but merely examine the record before the lower court and determine that the lower court's factual conclusions were without evidentiary support.

B. The Lower Court Erred by Failing to Grant a Directed Verdict.

1. Standard of Review

In criminal cases, the appellate court only reviews errors of law and is clearly bound by the trial court's factual findings unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

2. Argument

In State v. Dickey, 394 S.C. 491, 498-99, 716 S.E.2d 97, 100-01 (2011), the Court addressed the granting of a directed verdict in light of self-defense, as follows:

> "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury." Id. at 292—93, 625 S.E.2d at 648. However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. Wiggins, 330 S.C. at 544—45, 500 S.E.2d at 492—93. We find the State did not carry that burden.

Following Dickey, confusion ensued over whether the State was required to disprove self-defense at the directed verdict stage. In State v. Butler, 407 S.C. 376, 380, 755 S.E.2d 457, 460 (2014), Butler raised the following issue on appeal: "Whether the trial court erred in refusing to apply a standard requiring the State to disprove self-defense beyond a reasonable doubt at the directed verdict stage?" In addressing the issue raised by Butler the Court reasoned:

> We disagree with Petitioner's reliance on State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), to support her contention that the trial court applied an incorrect standard at the directed verdict stage. In Dickey, the Court held that the defendant was entitled to a directed verdict on the issue of self-defense because the *uncontroverted* facts established self-defense *as a matter of law.* Id. at 501, 716 S.E.2d at 102. Therefore, even viewing the facts in a light most favorable to the State, the Court found that the evidence established that the defendant acted in self-defense. Id. at 503, 716 S.E.2d at 103.

State v. Butler, 407 S.C. at 381-82, 755 S.E.2d at 460.

Here, after the State rested, defense counsel made a "motion to have this matter dismissed." Trial Transcript pp. 186-187. Counsel argued that the State had failed to prove the elements of attempted murder nor did they disprove self-defense. R. p. 187, lns. 9-18. In response, the State argued that the defense proffered self-defense in their opening, but "as it relates to evidence there is nothing in the record." R. p. 187, lns. 19-23.

Thereafter, the court ruled as follows:

> Well, certainly with the evidence that's been presented I really believe this issue is for the jury decision. I'd be abusing my discretion if I stepped in this matter, you know, from what is before the Court. Certainly, I'll entertain the appropriate charges when the time comes. I don't have any choice in this. I'll just have to deny the motion.

R. p. 188, lns. 10-16.

As addressed above, in order to establish a case of self-defense, Appellant must demonstrate the following elements:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (quoting State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

As is also addressed above, the record establishes that Appellant met the elements of self-defense through the testimony and evidence offered at the immunity hearing, and the record also establishes that Appellant met the elements of self-defense at trial and should have been granted

a directed verdict. Furthermore, the State was incorrect in arguing that Appellant only addressed self-defense in their opening argument as the testimony of the State's witnesses, specifically Mr. Wallace and the recounting of Appellant's interview by Investigator Burns, along with the video evidence, addressed self-defense, which the State failed to disprove while also failing to prove the elements of attempted murder.

First, the testimony and evidence establish that Appellant was not at fault in bringing on the physical attack of Mr. Wallace. Even though Mr. Wallace attempted to justify his slapping of Appellant by saying he was calling him names, he conceded that Appellant did not touch him when he was simply walking to the beverage cooler. R. pp. 54-58. None of the State's witnesses heard Appellant's alleged "name calling" nor does the video support Mr. Wallace's blame placement.[12] It is unrefuted that Appellant was not at fault when Mr. Wallace chose to once again attack Appellant as he had done twice before.

Secondly, the record establishes that Appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or he actually was in such imminent danger. Appellant's belief is apparent from his interview with Investigator Burns, and his belief is substantiated by Mr. Wallace's own testimony. Additionally, as is addressed above, Appellant

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[12] During the testimony of Investigator Perry, the following was elicited regarding the video:

Mr. Knox:	So on your video that you all supplied the voice to, you were saying, "see, he hit him," meaning that Mr. Wallace hit Mr. Moore?
Inv. Perry:	Yes. We saw that something took place because it immediately got the attention of Mr. Moore because then you see his response.
Mr. Knox:	Otherwise, Mr. Moore was minding his business until that incident happened?
Inv. Perry:	Yes. Based on watching the video you would see Mr. Moore, yeah, just basically, come in and walk and then go down the aisle and then you'd see Mr. Wallace come up and then the action take place.

R. p. 135, ln. 17- p. 136, ln. 3.

had suffered two prior violent attacks from Mr. Wallace, which clearly attributing to his justified fear of Mr. Wallace.

Turning to Mr. Wallace's testimony, he stated that he knew that Appellant had a knife on him when he chose to physically attack him and start the altercation, which left Appellant with no option but to defend himself. On re-cross examination, Mr. Wallace stated: "Well, he run his mouth like he wanted some so I gave him some." R. p. 72, lns. 21-22. He further answered that he would have shot Appellant and dropped him, referencing the undertaker when asked if he would have killed Appellant. R. p. 73. Mr. Wallace's testimony established that Appellant was justified in believing that he was in imminent danger of losing his life or sustaining serious bodily injury.

Next, the record establishes that Appellant was in imminent danger, but it also establishes that that 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. As the testimony of Mr. Hooks established, Appellant stabbed Mr. Wallace while engaged in the physical altercation and before Mr. Wallace and he were separated. As the testimony of the State's witnesses also established, Mr. Wallace was armed and harbored an intense desire to harm Appellant. Clearly, Appellant acted as in accordance with the third element of self-defense in response to Mr. Wallace's attack that was captured and narrated by the officers on the video(s) introduced by the State.

Finally, the record establishes that Appellant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. Appellant told law enforcement that Mr. Wallace blocked his pathway in the store before taking him to the ground. R. p. 160, ln. 24. As the testimony of the State's witnesses,

recounting of Appellant's statement to law enforcement and the video establishes, Applicant had no way of avoiding Mr. Wallace's attack once it was initiated and Mr. Wallace had the intent to kill him that day. R. p. 73. Only after, Mr. Wallace was stabbed by Appellant was Appellant able to remove himself from the situation with Mr. Wallace and exit the store.

In conclusion, as defense counsel argued, the State failed to disprove self-defense and establish that the charge of attempted murder should survive the directed verdict stage. In contrast to the State's argument that the record contained no evidence of self-defense, the record establishes that Appellant met the elements of self-defense at trial and should have been granted a directed verdict.

C. The Lower Court Committed Reversible Error in the Response Provided to the Jury Questions Over Appellant's Objection.

1. Standard of Review

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. Id. "A jury charge that is substantially correct and covers the law does not require reversal." Id. (citing State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)). Errors, including erroneous jury instructions, are subject to harmless error analysis. See Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008).

2. Argument

About two hours in to deliberations, the jury sent out a note asking the following: "What is the attempted murder statute? What qualifies a person to be charged with attempted murder? What is the difference between premeditation intent?" R. p. 225, lns. 11-20. After a discussion on the record, defense counsel objected to the jury being instructed further on the definition of

malice aforethought. R. pp. 226-227. Over counsel's objection, the court brought the jury back in and reinstructed the jury. R. pp. 228-230. Specifically, the Court stated:

> What is the difference between premeditation and intent? Well, I just defined intent for you. But nowhere in the statute does it mention premeditation but, I certainly do not mind giving you a standard definition of premeditated or premeditation since you inquired about the difference. Premeditation is defined as think out or plan. But once again that is not, that term is not in that statute.

R. p. 229, ln. 20 – p. 230, ln. 2.

When the jury was sent back out, defense counsel objected "to the part of you giving the jury the definition of premeditation for the record." R. p. 230, lns. 18-21. In response the court stated: "So noted. And, I guess, to make the record straight, I'm going to deny the motion on that based on my explanation that, that is not a term used within the statute." R. p. 230, lns. 21-24.

S.C. Const. art. V, § 21 states judges shall not charge juries in respect to matters of fact, but shall declare the law. Here, the trial court's error was twofold. First, the lower court erred by instructing jury on the definition of premeditation, which as he conceded, was not the proper law to be charged in the case. Secondly, the definition he provided was improper and incomplete. In State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013), the South Carolina Supreme Court noted:

> Premeditation connotes "willful deliberation and planning" or "conscious consideration" preceding a particular act. Black's Law Dictionary 1199 (7th ed. 1999); see also Webster's New World College Dictionary 1134 (4th ed. 1999) (defining legal definition of premeditation as "a degree of planning and forethought sufficient to show intent to commit an act").

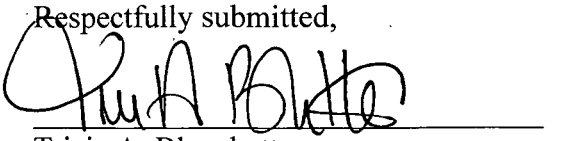
Appellant urges this Court to find that the lower court's error is obvious, so the only remaining question was whether it was harmless. After receiving the improper and erroneous instruction, the jury only spent twenty additional minutes of deliberation before returning a guilty verdict. R. p. 231. Clearly, the erroneous instruction had a direct impact on the jury's ability to

render a guilty verdict after considering the harmful instruction that contradicted the court's own finding at the sentencing hearing, which he stated as follows: "It's not a situation that involved any calculated premeditation that was planned out way ahead of time." R. p. 248, lns. 21-23. Nevertheless, the lower court erroneously injected the consideration of premeditation into the jury's deliberations. As a result, a new trial is warranted.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the lower court and find that immunity is warranted or grant a new trial.

Respectfully submitted,



Tricia A. Blanchette
Bar No. 74904
Post Office Box 2147
Leesville, South Carolina 29070
(803) 908-3266
Attorney for Appellant

March 13, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Roger E. Henderson, Circuit Court Judge
Paul M. Burch, Circuit Court Judge

Appellate Case No: 2016-000779

THE STATE,

RESPONDENT,

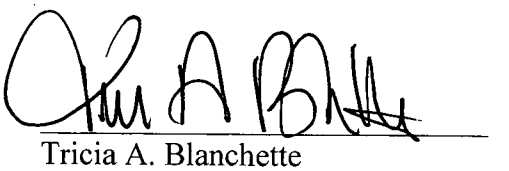
v.

GARY MOORE,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Appellant

March 13, 2018