STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maité Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT

APPELLATE CASE NO. 2017-000870

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in finding that Appellant was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act?

II.

Whether, in the interest of judicial economy, this Court should vacate the five year sentence imposed for possession of a firearm during the commission of a violent crime where S.C. Code Ann. § 16-23-490 expressly provides that the five-year sentence for such an offense "does not apply in cases where . . . a life sentence without parole is imposed for the violent crime" and Appellant was sentenced to life imprisonment without parole for the murder offense?

STATEMENT OF THE CASE

On September 1, 2016, the Dorchester County Grand Jury returned indictments against Appellant Christian Himes for murder and for possession of a weapon during the commission of a violent crime. R.* (indictments).

On April 3-6, 2017, Himes proceeded to trial before the Honorable Maité Murphy and a jury. Himes was represented by Michelle Williams and Pierce Wehman, and the State was represented by Donald Sorenson and Ryan Templeton of the Dorchester County Solicitor's Office. Tr. 1. Judge Murphy denied Himes' motion for immunity from prosecution following a pre-trial hearing and her ruling remained unchanged when the motion was renewed during the trial. Tr. 226, l. 21 – 230, l. 3; Tr. 486, l. 18 – 487, l. 6; Tr. 577, ll. 14-21.

The jury convicted Himes of both indicted offenses. Tr. 630. Judge Murhpy sentenced Himes to life imprisonment without parole for murder and to a concurrent term of five years for the weapons offense. Tr. 640; R.* (sentencing sheets).

This appeal follows.

ARGUMENT

I.

The trial court erred in finding that Appellant was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act.

Introduction

Appellant Christian Himes was involved in a romantic relationship with decedent David Ham's estranged wife, Heather Ham. Tr. 53, ll. 3-24, Tr. 158, l. 23 – 161, l. 22; Tr. 299, l. 2 – 301, l. 7; Tr. 473, l. 19 – 474, l. 8; Tr. 512, ll. 7-22; Tr. 535, l. 21 – 536, l. 16. During their eighteen month separation, David and Heather's two minor children spent the week with Heather and weekends with David. Tr. 91, l. 19 – 92, l. 9; Tr. 107, l. 15 – 108, l. 14; Tr. 296, l. 23 – 298, l. 10. On Friday, October 30, 2015, two nights prior to the shooting incident, David learned of the relationship between Heather and Himes and sent a text message to Heather to tell her boyfriend "don't let me catch him slipping." Tr. 54, l. 7 – 55, l. 2; Tr. 92, l. 10 – 94, l. 2; Tr. 113, l. 11 – 115, l. 12; Tr. 167, l. 7 – 168, l. 4; Tr. 301, l. 8 – 304, l. 15; Tr. 306, l. 6 – 307, l. 17; Tr. 365, l. 22 – 366, l. 10; Tr.. 521, l. 8 – 522, l. 22; R.* (State's Ex. 6, text message). On Sunday, November 1, 2015, Himes arrived back at the apartment while David was dropping the children off. Heather, who was not ready for the two men to meet and feared a confrontation, caught Himes outside and asked him to leave because David was still there. Himes complied and let what he thought was more than enough time pass before returning to the apartment. Tr. 55, l. 3 – 59, l. 6; Tr. 62, l. 17 – 65, l. 7; Tr. 94, 24 – 95, l. 23; Tr. 169, l. 18 – 173, l. 7; Tr. 191, l. 10 – 192, l. 16; Tr. 313, l. 20 – 320, l. 2; Tr. 519, l. 20 – 520, l. 16; Tr. 524, l. 24 – 525, l. 25.

As Himes entered the covered breezeway between the apartments at approximately 10:00 p.m., he saw David leaving the apartment. David, who had a blood alcohol content of 0.19, blocked Himes' path into the apartment and told Himes that he was not going inside and would

not be the person to raise his kids. Himes backed down the steps and into the grassy area between the apartment building and the parking lot. The two men argued and David began reaching in his pockets. Himes was unsure if David was reaching for a weapon, having been told by Heather that she had seen David with a gun in the past, so Himes drew his own loaded pistol from his pocket. David responded: "Come on homeboy. Oh, you think you're bad because you got a gun. Come on." Himes told David to "back up" three times but instead David lunged toward him. Himes fired a single shot, which struck David in the neck. Tr. 59, ll. 7- 62, l. 16; Tr. 66, ll. 5-6; Tr. 67, ll. 7-14; Tr. 70, l. 25 – 72, l. 16; Tr. 81, ll. 19-21; Tr. 97, l. 24 – 100, l. 13; Tr. 127, l. 9 – 129, l. 19; Tr. 163, l. 16 – 164, l. 11; Tr. 173, l. 8 – 178, l. 12; Tr. 193, l. 15 – 201, l. 24; Tr. 320, l. 3 – 324, l. 16; Tr. 519, ll. 8-19; Tr. 526, l. 1 – 532, l. 22.

As will be discussed more fully *infra*, Judge Murphy erred in ruling that Himes was not entitled to immunity under subsection (C) of the Protection of Persons and Property Act because the altercation with David began outside of the apartment where Himes was an invited guest and continued into a grassy area. Tr. 227, ll. 5-11; see 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 . . . ." (emphasis added)). Judge Murphy further erred in determining that even if the Act was applicable, Himes failed to prove a valid case of self-defense. She found that Himes was at fault in bringing on the difficulty because he was in a relationship with a married woman and because he was late returning Heather's car, neither of which are the type of conduct that makes one lose their right to self-defense. Additionally, her findings regarding both what Himes subjectively believed and what a reasonable person would have believed, ignored

Himes' right to act on appearances and misstated Himes' testimony. Further, she erred in considering whether Himes had the ability to retreat, as the duty to retreat element of self-defense is not applicable in an immunity hearing. Tr. 227, l. 11 – 230, l. 3. Lastly, Judge Murphy erred in sentencing Himes to a concurrent five year term for the weapons offense when she had already sentenced him to life without parole for murder. Tr. 640; R.* (sentencing sheets); see S.C. Code Ann. § 16-23-490(A).

Standard of Review

A claim of immunity under the Protection of Persons and Property 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. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). 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. Id.

Relevant Facts

Evidence Presented

The trial court denied the defense's motion for immunity from prosecution following a pre-trial hearing. Tr. 226, l. 21 – 230, l. 3. Judge Murphy heard from six witnesses, all called by the defense, including: the chief investigating officer, detective Mike Weaver; estranged wife of decedent and girlfriend of Himes, Heather Ham; police officer and neighbor, Matthew Brooks; crime scene technician, Wade Rollings; forensic toxicologist, Tim Grambow; and Christian Himes. Tr. 51 – 204.

In August 2015, Christian Himes called his prior counselor, Heather Ham (hereinafter "Heather"), in hopes of getting her assistance following his recent release from the Youthful Offender Division of the Department of Corrections. Heather was Himes' lead counselor at New

Beginnings, a residential group home where Himes was placed in 2008 when he was fourteen or fifteen years old. Tr. 157, l. 1 – 159, l. 8; Tr. 298, l. 21 – 299, l. 15; Tr. 329, l. 18 – 331, l. 9; Tr. 510, l. 13 – 514, l. 20; Tr. 533, ll. 15-23; Tr. 534, l. 10 – 535, l. 3; Tr. 635, ll. 11-16. On or about September 20, 2015, twenty years old Himes and Heather met in person. Heather began helping Himes look for better employment than the fast food job he had in Columbia, and their relationship quickly became romantic. When he was in Summerville, Himes resided with Heather and her two children, who were eight and four years old, in apartment 12-D. He would return to Columbia periodically for work and to report to his probation agent. Tr. 83, l. 20 – 84, l. 9; Tr. 123, ll. 2-13; Tr. 159, l. 9 – 161, l. 22; Tr. 299, l. 16 – 301, l. 7; Tr. 338, l. 7 – 339, l. 15; Tr. 512, ll. 7-22; Tr. 514, l. 21 – 516, l. 6; Tr. 535, l. 4 – 536, l. 16.

Heather had been living separate and apart from her husband, David Ham (hereinafter "David") for eighteen months. There was no formal custody order, but Heather kept their sons during the week and David would keep them for most or all of the weekend. According to Heather, they discussed the potential for a reconciliation at various times. Tr. 84, ll. 10-24; Tr. 91, l. 19 – 92, l. 9; Tr. 107, l. 15 – 110, l. 2; Tr. 296, l. 23 – 298, l. 10; Tr. 318, ll. 10-18; Tr. 473, l. 19 – 474, l. 1. Himes would stay hidden in the back bedroom or bathroom when David would pick up and drop off the children at the apartment. That process usually only lasted five to fifteen minutes. Tr. 171, l. 23 – 172, l. 6; Tr. 519, l. 10 – 520, l. 16. Heather was afraid of how David would react if and when he learned about Himes. Tr. 94, ll. 3-12; Tr. 164, ll. 1-11.

On Friday, October 30, 2015, David was already at the apartment waiting on them, so Heather dropped Himes off at a nearby bank before returning to the apartment to meet David. Soon after, Heather began receiving angry text messages from David, including one that said: "Sweet. I care, you don't. What I needed to hear. Tell your BF don't let me catch him slipping."

Tr. 54, l. 7 – 55, l. 2; Tr. 92, l. 10 – 94, l. 2; Tr. 111, l. 2 – 115, l. 12; Tr. 167, l. 7 – 168, l. 4; Tr. 301, l. 8 – 304, l. 15; R.* (State's Ex. 6, text message). Though David claimed that he saw Heather drop Himes at the bank, Heather thought it was more likely that her oldest son told David about Himes. Tr. 365, l. 22 – 366, l. 10.

Heather was sitting in Himes' lap on the porch when she received the text message. Himes thought that the message was a threat, meaning that David was going to "come at [him]" and "attack him." Himes asked Heather if David could fight and if he needed a gun.[1] Heather told him that David could fight, and claimed that she did not take seriously the discussion of whether he needed a gun. Tr. 94, ll. 13-18; Tr. 167, ll. 7-24; Tr. 306, l. 6 – 307, l. 17; Tr.. 521, l. 8 – 522, l. 22. Heather had previously shared with Himes that David once punched her in the mouth so hard that it left a permanent scar on her lip. Additionally, David had tried to drag her out of the house in front of their children, which she told Himes was the incident that precipitated their separation. She also mentioned that David had a gun in the past. Tr. 70, l. 25 – 72, l. 16; Tr. 85, l. 2 – 88, l. 2; Tr. 161, l. 23 – 164, l. 11; Tr. 180, l. 9 – 181, l. 19; Tr. 518, l. 6 – 519, l. 19. Nevertheless, Heather kept her plans to go with David to take the children trick-or-treating on Saturday, October 31, 2015. Himes was admittedly disappointed that he was not able to join them but denied being angry over it. Tr. 110, l. 11 – 111, l. 1; Tr. 116, ll. 3-14; Tr. 185, l. 22 – 186, l. 15; Tr. 308, l. 2 – 309, l. 6; Tr. 537, ll. 17-25.

On Sunday, November 1, 2015, Himes borrowed Heather's car to give his friend, Akmir, a ride to West Ashley in Charleston. Himes knew that Heather was supposed to pick her children up from David that night such that he needed to have the car back by 8:00 p.m. Instead

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[1] Heather Ham was the alleged victim of an unrelated sexual assault the weekend prior. Himes purchased a gun off of the street the following Tuesday but did not tell Heather about it. It was that gun that he ultimately used to fire the single shot at David Ham. Tr. 67, l. 15 – 69, l. 4; Tr. 168, l. 5 – 169, l. 17; Tr. 182, l. 12 – 185, l. 6; Tr. 192, l. 22 – 193, l. 14; Tr. 516, l. 7 – 517, l. 22.

Himes was just leaving West Ashley to return to Summerville at that time and did not return to the apartment until between 9:00 and 9:30 p.m. Tr. 55, l. 3 – 56, l. 22; Tr. 78, l. 24 – 79, l. 10; Tr. 119, l. 5 – 121, l. 4; Tr. 169, l. 18 – 170, l. 9; Tr. 186, l. 16 – 191, l. 15; Tr. 313, l. 20 – 315, l. 24; Tr. 523, l. 4 – 524, l. 9; Tr. 544, l. 11 – 551, l. 25. Himes had borrowed Heather's car and been late returning it in the past, so he anticipated that she would be upset that he did not come back on time. Tr. 524, ll. 10-15; Tr. 552, ll. 1-15.

Because Heather was unable to pick them up without her car, David brought the children to Heather's apartment between 9:00 and 9:30 p.m. Tr. 79, ll. 11-17; Tr. 94, l. 24 – 95, l. 10; Tr. 121, l. 5 – 122, l. 20; Tr. 316, l. 15 – 317, l. 21. Though Heather claimed that David did not appear intoxicated, forensic toxicologist Tim Grambow determined that David's blood alcohol content at time of his death was 0.19%. That level of alcohol consumption can lead to increased aggression. Tr. 67, ll. 7-14; Tr. 104, ll. 9-15; Tr. 148, l. 25 – 153, l. 14; Tr. 365, ll. 14-16.

As Himes was walking up to the apartment door, Heather came outside and told him that David was there and Himes needed to leave. Himes complied and went to a nearby gas station. He estimated that he spent thirty to forty-five minutes there. Tr. 56, l. 23 – 57, l. 18; Tr. 58, l. 24 – 59, l. 6; Tr. 64, l. 19 – 65, l. 2; Tr. 96, l. 11 – 97, l. 23; Tr. 170, l. 10 – 171, l. 14; Tr. 192, ll. 5-16; Tr. 319, l. 2 – 320, l. 2; Tr. 524, l. 24 – 525, l. 21. Himes asked the police to obtain the surveillance footage from the gas station, which would have confirmed the exact times, but after two attempts officers abandoned any efforts to obtain the recording. Tr. 57, l. 19 – 58, l. 13; Tr. 477, l. 11 – 479, l. 1.

David stayed at the apartment an unusually long time that night and returned back inside after purportedly leaving his keys behind. Tr. 62, l. 17 – 63, l. 10; Tr. 95, l. 11 – 96, l. 10; Tr. 97, l. 24 – 98, l. 13; Tr. 123, l. 23 – 125, l. 5; Tr. 317, l. 22 – 318, l. 18; Tr. 320, l. 6 – 321, l. 7; Tr.

364, l. 10 – 365, l. 13; Tr. 519, l. 20 – 520, l. 16. Himes returned to the apartment complex around 10:00 p.m., thinking that would surely have been enough time for David to be gone. Neither Heather nor Himes knew what kind of car David drove. Tr. 123, ll. 17-22; Tr. 171, l. 15 – 173, l. 7; Tr. 526, ll. 1-9; Tr. 528, l. 25 – 529, l. 9. As Himes entered the breezeway between the apartments he saw David, who he recognized from photographs, leaving Heather's apartment. Himes was immediately scared when he saw him. Tr. 59, l. 7 – 60, l. 11; Tr. 173, l. 8-25; Tr. 193, l. 15 – 194, l. 2; Tr. 328, l. 17 – 329, l. 1; Tr. 527, l. 15 – 528, l. 16. David asked Himes: "Are you Chris?" Himes responded "yeah," but thinking a confrontation was about to begin, he told David that he did not want to do this because the kids were in the house. David used his body to block Himes from going in the apartment and told Himes to leave. Himes backed down the steps from the breezeway, off of the walkway, and into the grassy area. David continued to yell at Himes while moving toward him and reaching into his pocket. Himes did not know what David might have been reaching for, so Himes drew his own pistol from his pocket. Tr. 60, ll. 13-21; Tr. 81, ll. 19-21; Tr. 174, l. 1 – 176, l. 7; Tr. 177, l. 6 – 178, l. 12; Tr. 194, l. 3 – 199, l. 22; Tr. 321, l. 8 – 323, l. 11; Tr. 528, ll. 17-24; Tr. 529, l. 10 – 531, l. 10. David and Himes were approximately the same weight, but Himes was only 5 feet and 7 inches tall and David was 6 feet tall. Tr. 69, l. 15-21; Tr. 70, ll. 14-19.

Undeterred at the sight of the weapon, David responded: "Come on homeboy. Oh, you think you're bad because you got a gun. Come on." Tr. 61, ll. 9-16; Tr. 62, ll. 4-6; Tr. 98, ll. 17-24; Tr. 127, l. 9 – 128, l. 25; Tr. 323, ll. 12 -22; Tr. 560, ll. 17-24. Himes told David to "back up" three times but instead David lunged toward him. Tr. 61, l. 17-23; Tr. 62, ll. 7-14; Tr. 98, l. 25 – 99, l. 2; Tr. 129, ll. 1-5; Tr. 176, ll. 8-24; Tr. 199, l. 23 – 201, l. 22; Tr. 323, ll. 22-23; Tr. 531, l. 11 – 532, l. 6. Himes fired a single shot from his fully loaded weapon. Tr. 62, ll. 15-16;

Tr. 129, ll. 6-7; Tr. 176, l. 25 – 177, l. 2; Tr. 200, ll. 23-25; Tr. 323, ll. 24-25; Tr. 422, l. 4 – 423, l. 3; Tr. 530, l. 11 – 531, l. 10; Tr. 532, ll. 7-18; Tr. 561, ll. 3-17. The bullet struck David in the neck at a slightly downward angle. Tr. 391, l. 1 – 392, l. 6. Himes left in Heather's car but was soon stopped by police. Himes was cooperative with police, telling them that he was involved in the shooting and that the gun was in the passenger seat. Himes was emotional and crying but gave a statement to police that was consistent with his testimony at the immunity hearing and trial. Tr. 65, l. 15 – 21; Tr. 66, ll. 5-6; Tr. 70, ll. 14-19; Tr. 324, ll. 3-16; Tr. 409, l. 24 – 415, l. 13; Tr. 480, l. 13 – 485, l. 4; Tr. 532, ll. 19-25; R. * (State's Ex. 2, Himes' Statement).

Matthew Brooks, a police officer who lived in the apartment building next to Heather, overheard the arguing between David and Himes. He reported hearing a male voice say "you're not going back in that apartment," followed by a single gunshot. Tr. 134, l. 3 – 135, l. 10; Tr. 136, l. 7 – 137, l. 3. By the time that crime scene technician Wade Rollings arrived, David had been taken to the hospital. Two piles of clothing were left behind to mark where David was found, measuring approximately thirty-three to thirty-nine feet from the bottom step to the breezeway of Heather's apartment building. Tr. 139, l. 21 – 141, l. 11.

For the first few months that Himes was in jail following his arrest, Heather maintained communication with him. The defense confronted her with one letter to Himes, dated December 7, 2015. Heather claimed that she was "confused" at the time that she wrote the letter, but admitted writing:

> But I feel responsible in some ways for what has happened. Only because I knew the way he would become enraged and how he reacts when he's angry. He has hurt many people physically, even other family members of his. I should have told him to leave sooner. But many people are afraid of him and I am one of those people. So I try to keep peace to prevent verbal, emotional, and physical abuse by him.

Tr. 89, l. 24 – 90, l. 18; Tr. 164, l. 20 – 167, l. 2; Tr. 333, l. 19 – 337, l. 8; Tr. 355, l. 4 – 360, l. 1; R. * (Defense Ex. 6, Letter from Heather to Himes).

Arguments of Counsel

The defense argued that Himes met his burden of showing that he was entitled to immunity under the Act. Regarding the statutory factors, Himes was in a place where he had a right to be because he was staying with Heather at her apartment. He had borrowed her car and come back to return it and eat dinner. When he returned and Heather asked him to leave because David was there, it was only a temporary request, as she intended for Himes to return again with her car. Tr. 205, ll. 7-21. While Himes would not have been in lawful possession of a weapon otherwise, the defense contended that he was lawfully armed in self-defense. The defense noted that neither Heather nor Himes knew what car David drove that night, Himes left when requested, and that it was David who ultimately approached Himes and blocked his entry into the apartment. Himes backed up into the grass and only took out his gun because David was being so aggressive. Upon seeing the weapon, David stated that he was not in fear and, despite being told to back up three times, instead pursued Himes. It was only then that Himes fired a single shot. Thus, counsel argued that Himes' actions aimed at preventing the conflict rather than leading to it. Tr. 205, l. 7 – 207, l. 22; Tr. 210, ll. 11-17. Himes testified that he was in fear of serious bodily injury, taking into account his knowledge of David's past behavior, David reaching for something in his pockets, and the threatening text message sent just two days prior, essentially conveying that Himes needed to watch his back. Tr. 207, l. 23 – 208, l. 15.

Regarding whether a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, defense counsel noted that a person is not required to wait until his adversary is on equal footing to act in self-defense and is entitled to act on appearances.

Thus, he argued that the fact that no weapon was actually seen by Himes or recovered from David's person is immaterial. Tr. 208, l. 16 – 210, l. 1. With respect to the final element of the Act – that Himes reasonably believed that the use of deadly force was necessary to prevent death, great bodily injury, or the commission of a violent crime – counsel again argued that Himes had a right to act on appearances even if his believe was ultimately mistaken. Tr. 210, ll. 2-11. While there was no eyewitness who saw and heard the entirety of the confrontation, counsel noted that the various witnesses corroborated portions of Himes' statement and testimony and that there was no contrary evidence. Tr. 210, l. 18 – 211, l. 11.

The solicitor argued that the Act was inapplicable in the present case because they were in "the common areas of an apartment that neither one of them are residing in." He contended that the Act only applies to invited guests who are inside of an apartment, but not if they are outside of it such that Himes had a duty and opportunity to retreat. Tr. 211, l. 14 – 212, l. 11; Tr. 217, l. 23 – 218, l. 6. He argued that if the Act were applicable, Himes failed to prove a valid case of self-defense. He argued that Himes was at fault in bringing on the difficulty because, if Himes were not late returning Heather's car, David would not have been at the apartment to facilitate the children's return in an intoxicated state. He further argued that there was no overt threatening action made by David until after Himes introduced a gun into the situation. Tr. 212, l. 12 – 213, l. 10; Tr. 215, ll. 14-20. The solicitor then discussed the second and third elements of self-defense regarding the belief that there was imminent danger of death or serious bodily injury. He noted that none of the violence committed by David against Heather was recent and that David was taller than Himes but of a similar build. He claimed that the text message was innocuous and expected in light of David's discovery that "some guy that he doesn't know is basically shacking up with his wife around his two small children." Tr. 213, l. 11 – 215, l. 13. He further

contended that the victim acted reasonably in blocking Himes from entering the apartment and that the two men were equally "involved" in the altercation when Himes pulled out his gun. He cited Himes' statement to detective Weaver that he did not think David had a gun because he would have pulled it if he had one, and argued that even if David did put his hands in his pocket, he never pulled anything out. Thus, he averred that Himes became "at fault" when he was the first to pull out a gun. The solicitor contended that David was forced to lunge at Himes or risk getting shot in the back. Tr. 215, l. 14 – 217, l. 23; Tr. 218, ll. 4-15. Finally, the solicitor contended that Himes also failed to meet the elements required under subsection (C) of the Act. Tr. 218, l. 15 – 219, l. 3.

In response, defense counsel argued that the Act was not limited to a building and applied to a place where Himes was an invited guest, noting that he was mere feet from the front door of the apartment when the altercation began. Tr. 219, ll. 6-19; Tr. 224, l. 13 – 225, l. 21. He balked at the solicitor's contention that Himes' late return of Heather's car could possibly make Himes legally at fault in bringing on the difficulty with David. He cited Heather's letter to Himes after the shooting, in which she said that she was worried that David would become enraged if he ever met Himes. This was the very reason that Himes had hidden in a back room when David had come by the apartment in the past and the reason that he left when he learned that David was there on November 1. Himes reasonably believed that David would be gone by the time that he returned from the gas station because he had never stayed so long in the past. When Himes did return, he was "faced with a drunk" and "aggressive" David, who prevented Himes from walking past him into the apartment and then followed Himes into the grass when Himes backed away and yielded the walkway. In addition to that, there was the threatening text message that David had sent regarding Himes just two nights prior. Tr. 219, l. 20 – 222, l. 4. Thus, he argued that

Himes acted reasonably, pursuant to the Act, in drawing his weapon, instructing David three times to back up, and firing a single shot only after David charged at him. Tr. 222, ll. 4-9.

Trial Judge's Ruling

Judge Murphy took the matter under advisement overnight so that she could review the applicable case law and Himes' statement. Tr. 226, ll. 2-8. The following morning, she issued her ruling denying immunity, summarizing the applicable law: "Under the Castle Doctrine, one which is attack[ed] without qualm upon his part on his own premises has a right in establishing self-defense, to claim immunity from the law of the retreat which ordinarily is an essential element of that defense." Tr. 226, l. 22 – 227, l. 5. Judge Murphy found Himes ineligible for immunity because, even if Himes had a right to be in the apartment, the altercation itself occurred outside. Further, to the extent Himes were eligible for immunity, she found that Himes did not prove the elements of self-defense by a preponderance of the evidence. Tr. 227, ll. 5-13.

Judge Murphy found that Himes was at fault in bringing on the difficulty for two reasons. First, he "was sleeping with the victim's spouse and was around his minor children" and "[a]lthough they were separated, they were still legally married and he knew that." Under those circumstances, she reasoned that Himes knew, and been warned, that there would be a potential conflict if he and David ever met. Tr. 227, ll. 14-21; Tr. 228, ll. 7-11. Second, she found that Himes showed a "complete disregard of the victim's car and her timing and her requirement that she pick up her children on time," which resulted in the victim bringing the children home. Tr. 227, l. 22 – 228, l. 9. Judge Murphy found that Himes failed to prove he actually believed he was in imminent danger of sustaining serious bodily injury, noting that David never said to Himes: "I'm going to shoot you. I'm going to stab you. I'm going to kill you." Tr. 228, ll. 11-17. She further noted Himes's testimony "that he did not think that the victim was armed with a

weapon, that he never saw a weapon, and had he had a weapon, he would've had enough time to pull it out." Tr. 228, 11. 18-22. In finding that the circumstances were not such that a reasonably prudent man of ordinary firmness and courage would have been warranted in striking the fatal blow, Judge Murphy noted the similarity in size between the men, that David was not armed, and that it was Himes who pointed a gun at David. With respect to the text message, she found that it could be viewed and interpreted "in many different ways," including the view taken by Heather, which was that it was not a threat. Tr. 228, l. 23 – 229, l. 17.

Inexplicably, Judge Murphy then discussed the duty to retreat, finding that Himes did not prove that he had no other probable means of avoiding the danger. Tr. 229, l. 17 – 230, l. 2; see State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) ("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*." (emphasis added)). She found that "as soon [as Himes] saw the victim, he could have just turned around and walked away." Alternatively, he could have said "sure, I'm not going there" instead of "insisting that he go into the residence." Tr. 229, l. 21 – 230, l. 2. Accordingly, Judge Murphy denied the motion for immunity. Tr. 230, l. 2-3. She maintained her ruling upon renewal of the motion. Tr. 486, l. 18 – 487, l. 6; Tr. 577, ll. 14-21.

Discussion

The intent of the General Assembly in enacting the Protection of Persons and Property Act ("the Act") was to codify and extend the common law Castle Doctrine. S.C. Code Ann. § 16-11-420(A). The General Assembly also listed four findings in support of the Act, including "that it is proper for law-abiding citizens to protect themselves, their families, and others from

intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). Additionally, "Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." S.C. Code Ann. § 16-11-420(C). Further, "persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Lastly, "no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

Subsection (A) of section 16-11-440 provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "Residence" is defined within the Act as "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." S.C. Code Ann. § 16-11-430(3). Here, defense counsel argued that Himes fell under subsection (C) of the Act, which deals with the use of force by one who is attacked in another place where he has a right to be. "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 . . . ." S.C. Code Ann. § 16-11-440(C). "Great bodily injury" is a "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).

Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must also prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. Id. at 371–72, 752 S.E.2d at 266–67; State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). 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). Thus, the defense was also required to prove: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant was in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if the defense is based upon the belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013); S.C. Code Ann. §§ 16-11-440 and -450.

A. Appellant was eligible for immunity under the Act and proved the elements required under subsection (C).

1. *Himes was not engaged in unlawful activity.*

The solicitor argued, without any specificity, "it's my position he's [Himes is] engaged in an unlawful activity." Tr. 218, ll. 16-18. The trial judge never specifically made a finding regarding this element of the Act, instead focusing upon the location of the incident and the elements of self-defense. Tr. 226, l. 21 – 227, l. 13. To the extent that the solicitor was contending that Himes was acting unlawfully because he was not in lawful possession of the gun he ultimately pulled out and fired, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Himes was

returning back to his girlfriend Heather's apartment, where he had stayed for at least the prior three nights. Himes was not expecting to see David there and Heather confirmed that David stayed an inordinately long time that night compared to the five to fifteen minutes their exchanges usually lasted. Further, the gun remained in Himes' pocket until after David followed him into the grassy area and began reaching into his own pockets. Himes did not discharge the gun until David lunged toward him.

2. *Himes was attacked in another place where he had a right to be.*

With respect to whether Himes was attacked in another place where he had the right to be, the prosecutor argued that the Act was inapplicable because "they are out in . . . the common areas of an apartment that neither one of them are residing in." Tr. 211, ll. 14-18. He continued: "This isn't something that occurred were he's a visitor actually in the apartment and an intruder comes in." Tr. 211, ll. 18-20. He contended that the Act was not meant to remove the duty to retreat "basically anywhere you are that you just have a right to be." Tr. 211, l. 20 – 212, l. 5. Later, he argued: "Yet again, I just can't fathom that, I mean, a parking lot or outside, the sidewalk outside of the apartment complex where neither one of them are living as their residence that that would negate their duty to retreat." Tr. 218, ll. 18-23. The defense relied upon Himes' status as, at the very least, an invited guest and our court's past application of the Castle Doctrine to outdoor areas. Tr. 219, ll. 6-19. In finding that the Act was inapplicable, Judge Murphy found that there was a question as to whether Himes "had to be there" since the apartment was not leased to him and the altercation occurred outside. Tr. 227, ll. 5-11.

In State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016), our Supreme Court clarified the scope of subsection (C) of the Act, finding that it is "broadly worded" and that the Legislature intended its protection "to apply to incidents, provided the other requirements are

met, **without a geographical restriction.**" (emphasis added). In reaching its conclusion, the Jones Court approved the statutory interpretation of "another" made by this Court in State v. Douglas, 411 S.C. 307, 330-31, 768 S.E.2d 232, 245 (Ct. App. 2014). Jones, 416 S.C. at 293-95, 786 S.E.2d at 137-38. The Douglas Court noted the varying definitions of "another," which include: (1) "different or distinct from the one first considered;" (2) "some other;" and (3) "being one more in addition to one or more of the same kind." 411 S.C. at 330, 768 S.E.2d at 245. Douglas held that "the more inclusive definition of 'another' is the proper definition to employ in interpreting section 16-11-440(C)." Id. at 331, 768 S.E.2d at 245; see Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). The Jones Court further found that a contrary interpretation of the Act would not only be in direct contravention of the provisions of the Act, "but would undoubtedly infringe on the person's Second Amendment right to bear arms, which was specifically identified in section 16–11–420(C) as a foundational basis for the Act." 416 S.C. at 297-98, 786 S.E.2d at 140; see District of Columbia v. Heller, 554 U.S. 570, 628 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

In the present case, Himes had been temporarily "residing" in the apartment with Heather and had his belongings inside. Tr. 111, ll. 13-16; Tr. 161, ll. 3-22; Tr. 311, ll. 2-5; Tr. 360, ll. 8-17. Nonetheless, because the David was arguably an invited guest to the apartment that night, Himes claimed immunity under subsection (C) of the Act rather than under subsection (A). See State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139-40 (2016) (reasoning that the elimination of the presumption of reasonable fear from subsection (C) was meant to "differentiate between an intruder, who is presumably a violent stranger intent on harming the residents, versus a

'household member' or a cotenant, who is presumably a welcome member of the home."); State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("Because Collins was a social guest and rightfully in the apartment, subsection (A) is inapplicable to Appellant, and he is therefore defaulted into subsection (C), which deals with the use of force by one who is attacked in another place where he has a right to be.").

The fact that Himes was walking up to the apartment rather than inside of it does not render the Act inapplicable. Our Courts "have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home." State v. Wiggins, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998) (clarifying that, consistent with the "curtilage rule," the absence of a duty to retreat on one's place of business applies to the business parking lot); State v. Quick, 138 S.C. 147, 135 S.E. 800, 800–01 (1926) ("If one is violently attacked at some other place outside of his home or beyond the curtilage on his premises, he has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which, ordinarily, is an essential element of that defense."). "Curtilage" includes outbuildings, yard around dwelling, garden. Id. (citing 40 Am.Jur.2d Homicide § 168 (1968)). Thus, Judge Murphy erred in finding that Himes was not eligible for immunity under subsection (C) of the Act.

3. *Himes reasonably believed that the use of deadly force was necessary to prevent great bodily injury.*

There is some overlap between the third element of the Act and the second and third elements of self-defense, the latter of which were the focus of the trial court's ruling. Judge Murphy ruled that Himes failed to prove that he actually believed he was in imminent danger of sustaining serious bodily injury. She found that David never said to Himes that he was going to shoot, stab, or kill him. Thus, she erroneously imposed a requirement, which is not found

anywhere in our jurisprudence, that the assailant must contemporaneously verbalize his intent to kill or seriously injure. R. 228, ll. 11-17. She further mischaracterized Himes' testimony as having been: "[H]e did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would've had enough time to pull it out." R. 228, ll. 18-22. Not surprisingly, Judge Murphy also ruled that a reasonable person would not have struck the fatal blow. Tr. 228, l. 23 – 229, l. 17.

As will be discussed more fully *infra*, Judge Murphy's rulings are inconsistent with our case law. "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.

Though Himes did not see a weapon in David's hand, he saw David reach into his pocket and was concerned that he may have had a gun at the time. Contrary to the trial court's finding,

it was only upon further reflection after the event that Himes reasoned that David probably did not have a gun at the time because he would have pulled it out. Tr. 80, l. 9 – 81, l. 21; Tr. 177, l. 3 – 178, l. 12; Tr. 197, l. 4 – 198, l. 15; Tr. 482, l. 19 – 484, l. 4; Tr. 573, l. 25 – 574, l. 7; R. * (State's Ex. 2, Himes' statement). Further, David'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"). Thus, Himes reasonably believed that deadly force was necessary to prevent great bodily injury to himself.

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

1. *Himes was not at fault in bringing on the difficulty.*

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, Himes 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.

In State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999), our Supreme Court stated, "any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense." The defendant in Bryant admitted that he was attempting to break into the victim's car when he

alleged that the victim jumped on him such that he was at fault in the bringing on the difficulty. 336 S.C. at 345, 520 S.E.2d at 322.

Here, Judge Murphy found that Himes' was at fault in brining on the difficulty because he was in a romantic relationship with Heather, who was a married woman and mother, and knew that there would be a potential conflict if he ever met David. Tr. 227, ll. 14-21; Tr. 228, ll. 7-11. Additionally, she found that Himes was at fault because if he had returned Heather's car in a timely fashion so that she could pick up the children, David would not have been at the apartment that night. Tr. 227, l. 22 – 228, l. 9.

Heather and Himes' relationship was described as "romantic" and he spent the night in her apartment on numerous occasions, leading to a reasonable inference that their relationship was sexual. While spousal adultery may, in some instances, serve as sufficient legal provocation for the purpose of voluntary manslaughter, it is not a license to kill. State v. Gadsden, 314 S.C. 229, 233, 442 S.E.2d, 594, 597 (1994). Further, a killer lying in wait or searching for the guilty embrace is not one involving sufficient legal provocation. Id. This was not a circumstance where David caught Heather and Himes in a comprising position and was unable to control his reaction.

Heather and David had been separated for eighteen months, the cause of which was David's own violent conduct toward Heather. Though there may have been talks of reconciliation, David learned about Himes two nights prior to the shooting incident. Notably, David spent an inordinately long time in Heather's apartment that night and even returned, purportedly to find his keys, entering the room where Himes was known to hide during past custody exchanges. Additionally, David's blood alcohol content was nearly two and a half time the legal limit to drive. Further, it was David who initiated contact with Himes in the walkway,

blocked his entry into the apartment, and was acting both angry and aggressive. See State v. Chiles, 58 S.C. 47, 36 S.E. 496 (1900) (one who goes in search of another, believing him guilty of criminal intimacy with his wife, has no right to shoot him, though finding him holding his wife in his guilty embrace). Under these circumstances, Himes relationship with Heather did not warrant a physical attack from David that made him legally at fault in bringing on the difficulty.

In regards to Himes' having been late returning Heather's car, tardiness is not a violation of the law and was not reasonably calculated to provoke an assault. When Himes returned, he knew that Heather would be upset that he was late with her car. Tr. 524, ll. 10-15; Tr. 552, ll. 1-15. When she came out of the apartment and told him that David was there and he needed to go, "[h]e looked surprised," turned around, and left. Tr. 319, l. 9 – 320, l. 2. Himes stayed away for at least twenty minutes, but perhaps for as long as forty-five minutes. Both Himes and Heather acknowledged that all other custody exchanges had been five to fifteen minutes, such that Himes' belief that David would have left by the time he returned was not unreasonable. Tr. 62, l. 17 – 63, l. 10; Tr. 95, l. 11 – 96, l. 10; Tr. 171, l. 9 – 173, l. 7; Tr. 320, l. 6 – 321, l. 7; Tr. 364, l. 10 – 365, l. 13; Tr. 519, l. 20 – 520, l. 16; Tr. 528, l. 25 – 529, l. 9. While Himes' failure to return Heather's car on time was inconsiderate, it did not make him legally at fault in bringing on the difficulty.

Assuming *arguendo* that Himes was at fault in bringing on the difficulty, "[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)).

While all of the events occurred within a very short time span, Himes' conduct in backing away from the apartment communicated his intent to retreat and restored his right to self-defense when David continued to pursue him.

2. *Himes believed that he was in imminent danger of sustaining serious bodily injury.*

Judge Murphy ruled that Himes failed to prove that he actually believed he was in imminent danger of sustaining serious bodily injury because David never specifically threatened to shoot, stab, or kill Himes and because Himes admitted that David did not have a weapon. R. 228, ll. 11-22. No such verbal threat is required to establish this element of self-defense, nor is the actual possession of a weapon by the decedent.

"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)).

Here, Heather had shared with Himes a text message that David send two days prior, which read: "Tell your BF don't let me catch him slipping." Tr. 54, l. 7 – 55, l. 2; Tr. 92, l. 10 – 94, l. 2; Tr. 111, l. 2 – 115, l. 12; Tr. 167, l. 7 – 168, l. 4; Tr. 301, l. 8 – 304, l. 15; R.* (State's Ex. 6, text message). Himes took the message as a threat, meaning that David was going to "come at [him]" and "attack him." Tr. 94, ll. 13-18; Tr. 167, ll. 7-24; Tr. 306, l. 6 – 307, l. 17; Tr.. 521, l. 8 – 522, l. 22. Urban dictionary provides several definitions of "slippin," including: "off guard, not paying attention to your surroundings and not putting in the right effort;" "being off guard and careless on the streets; puttin yourself in a position where you're vulnerable;" and "being caught off guard." See Urban Dictionary, *available at* http://www.urbandictionary.com; see also People v. Arellano, 23 Cal. Rptr. 3d 172, 174 (Cal. Ct. App. 2004) (citing numerous threatening messages, including "I am going to catch you slipping when your [*sic*] not with the kids.... I'll catch you slipping, I'll catch you slipping when you by yourself, I am not stupid."); Boddie v. State, 494 S.E.2d 651, 652 (Ga. 1998) (citing as a threating statement: "[I]t ain't over between me and you. You just better not let me catch you slipping."). Thus, Himes' interpretation of the text message as a threat was not unreasonable.

Himes was aware of some past aggressive behavior that David displayed toward Heather, the mother of his own children, such that is was not difficult to believe that he would be violent toward Himes. When David came out of the apartment, he was drunk and aggressive, blocking Himes from going inside. While the men were of similar thin builds, David was five inches taller than Himes. Himes backed away and even moved into the grass, yielding the walkway to David. David continued to insult Himes and reached into his pocket. Himes was unsure at the time whether David had a weapon in his pocket, so Himes drew (but did not yet fire) his own weapon. David said that he was not scared of Himes' gun and then lunged at him. Given their

height difference, the downward path of the bullet was consistent with Himes' testimony. Tr. 59, l. 7 – 62, l. 16; Tr. 69, l. 15-21; Tr. 70, ll. 14-19; Tr. 81, ll. 19-21; Tr. 98, l. 17 – 99, l. 2; Tr. 127, l. 9 – 129, l. 7; Tr. 173, l. 8 – 178, l. 12; Tr. 194, l. 3 – 201, l. 22; Tr. 321, l. 8 – 323, l. 25; Tr. 328, l. 17 – 329, l. 1; Tr. 391, l. 1 – 392, l. 6; Tr. 422, l. 4 – 423, l. 3; Tr. 527, l. 15 – 532, l. 18; Tr. 560, l. 17 – 561, l. 17. It was for those reasons that Himes believed it necessary to defend himself by firing his gun after David did not heed his warnings to "get back." 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.").

3. *A reasonably prudent man of ordinary firmness and courage would have entertained the same belief as Himes.*

In addition to Himes' subjective belief, he was also required to prove that "a reasonable prudent man of ordinary firmness and courage would have entertained the same belief." Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting Jackson, *supra*). In ruling the Himes failed to establish this element of self-defense, Judge Murphy noted the similarity in size between the men, that David was not armed, that it was Himes who pointed a gun at David, and what she perceived as an ambiguity in the language of the text message. Tr. 228, l. 23 – 229, l. 17. Many of these factors were discussed *supra* in part I.B.2.

Though no weapon was discovered, David was reaching for something in his pockets, which Himes reasonably feared may have been a weapon. Contrary to the trial judge's finding, it was only upon further reflection that Himes stated he did not think that David had a weapon because he would have had time to pull it out. Himes did not draw his own weapon until after he saw David reaching into his own pockets.

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 and continued advancing toward the defendant after defendant pulled the gun. Dickey, 394 S.C. at 501, 716 S.E.2d at 102. Like Dickey, David "was undeterred at the sight of [the] gun" and advanced toward Himes. 394 S.C. at 502, 716 S.E.2d at 103; cf. State v. Oates, 421 S.C. 1, 16-17, 803 S.E.2d 911, 919-20 (Ct. App. 2017), *cert. denied* (Mar. 7, 2018) (holding defendant was not entitled to immunity where there was evidence that the argument had ended when defendant fired six shots at the victim, one of which struck him in the side and five of which struck him in the back). It was only then that Himes fired his gun a single time. In light of the text message received two nights prior, David's history of aggression, and his aggressive behavior at the time, a reasonable man would have acted as Himes did under the circumstances.

4. *In order to prove immunity, Himes was not required to show that he had no other probable means of avoiding the danger of sustaining serious bodily injury than to act as he did in this particular instance.*

"[T]he duty to retreat, need not be shown when seeking immunity under the Act." State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014) (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266)). Nevertheless, Judge Murphy ruled that Himes failed to prove the final element of self-defense, finding that Himes could have turned and walked away as soon as he saw David or agreed that he would not go inside of the apartment. Tr. 229, l. 21 – 230, l. 2. This

ruling was error, as Himes was under no obligation to prove that he no other probable means of avoiding the danger.

In summary, Judge Murphy's ruling that Himes was not eligible for immunity under the Act and did not prove a valid claim to self-defense by a preponderance of the evidence was premised upon numerous errors of law, which she misapplied to the actual evidence presented. The denial of Himes' motion for immunity should accordingly by reversed.

II.

In the interest of judicial economy, this Court should vacate the five year sentence imposed for possession of a firearm during the commission of a violent crime where S.C. Code Ann. § 16-23-490 expressly provides that the five-year sentence for such an offense "does not apply in cases where . . . a life sentence without parole is imposed for the violent crime" and Appellant was sentenced to life imprisonment without parole for the murder offense.

Himes was sentenced to a term of life for the offense of murder and to a term of five years for possession of a firearm during the commission of a violent crime. Tr. 640; R.* (sentencing sheets). Life imprisonment for murder "means until the death of the offender without the possibility of parole . . . ." S.C. Code Ann. § 16-3-20(A). Therefore, Himes' life sentence is without parole.

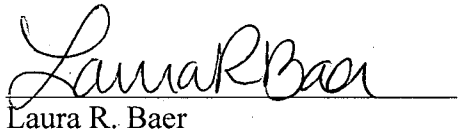
"If a person is in possession of a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime . . . he must be imprisoned for five years, in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490(A). However, the statute expressly provides: "This five-year sentence **does not apply** in cases where . . . a life sentence without parole is imposed for the violent crime" Id. (emphasis added). Thus, under the plain language of the statute, Himes should not have been sentenced to five years for possession of weapon during the commission of a violent crime. See State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense).

The trial judge erred as a matter of law in sentencing Himes, and the five year sentence for possession of weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490 should be vacated. Though defense counsel did not raise an objection to the improper imposition of this sentence during Himes' sentencing hearing, this Court can address this issue in

the interest of judicial economy. See, e.g., State v. Vick, 384 S.C. 189, 201-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009).

CONCLUSION

Based on the foregoing, Appellant Christian Himes respectfully requests that this Court vacate his convictions and reverse the trial court's denial of immunity under the Protection of Persons and Property Act (Issue I) and vacate his five year sentence for the weapons offense (Issue II).



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Maité Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Christian Anthony Himes, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 3rd day of April, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of April, 2018.

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