STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2018-000136

THE STATE,

Appellant,

vs.

ADAM KEITH LUNSFORD,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge commit a clear error of law by granting immunity to Lunsford pursuant to the South Carolina Protection of Persons and Property Act where, as a matter of law, Lunsford was not entitled to immunity because he acted unlawfully by threateningly brandishing a pistol at his victim during the course of the incident, he was not actually under attack at the time he shot his victim, and he could not validly raise a claim of self-defense since he was not without fault for the difficulty and did not reasonably need to use deadly force against his victim at the time he did so?

STATEMENT OF THE CASE

In September of 2016, Respondent Adam Keith Lunsford shot a fellow motorist multiple times during the course of a "road rage" incident. In October of 2016, the Spartanburg County Grand Jury indicted Lunsford for one count of attempted murder and one count of assault and battery of a high and aggravated nature. Prior to trial, Lunsford sought immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. On July 17, 2017, a pre-trial hearing was conducted in the Spartanburg County Court of General Sessions with the Honorable J. Mark Hayes, II, circuit court judge, presiding. At the conclusion of the hearing, the circuit court judge took the matter under advisement. A few days later, the Spartanburg County Grand Jury additionally indicted Lunsford for one count of pointing or presenting a firearm. Thereafter, on September 28, 2017, the circuit court judge issued an order granting Lunsford's request for immunity on the attempted murder and assault and battery of a high and aggravated nature charges. Subsequently, the State moved for reconsideration of the decision, and Lunsford sought immunity from prosecution on the pointing or presenting a firearm charge. On November 9, 2017, another hearing was conducted in the Spartanburg County Court of General Sessions with Judge Hayes again presiding. At the conclusion of the hearing, the circuit court judge once again took the matter under advisement. Thereafter, on January 16, 2018, the circuit court judge issued orders denying the State's motion for reconsideration and granting Lunsford's request for immunity on the pointing or presenting a firearm charge. The State then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of September 22, 2016, Daniel Hull ("Victim") was driving to his home in Spartanburg, South Carolina, after leaving his job at a local university. (Im. Tr. pp. 6-7). Meanwhile, Lunsford was driving himself home from a night class. (Im. Tr. pp. 24-25; p. 62). At that time, neither of the men knew the other, and they had never met. (Im. Tr. pp. 6-7; pp. 24-25). However, the men did live in close proximity to one another even though they did not yet know it. (Im. Tr. pp. 24-25).

Shortly after 7:00 p.m., Victim encountered Lunsford's vehicle on Union Street, and he followed behind it when Lunsford turned onto Lucerne Drive as they both headed to their respective homes. (Im. Tr. pp. 7-8; p. 57; p. 63; pp. 66-68; p. 88). While following Lunsford's vehicle, Victim observed Lunsford messing with something inside, and he thought Lunsford might have been sending a text message on his phone while driving. (Im. Tr. p. 31). He also noticed Lunsford, who admittedly drove "like a grandmother," was driving at a "very, very slow" rate of speed.[1] (Im. Tr. p. 12; p. 32; p. 63; p. 66). Believing Lunsford's actions to be unsafe, Victim decided to drive around Lunsford's vehicle and pass him despite the fact they were travelling on a two-lane road where passing was not permitted. (Im. Tr. p. 8; p. 12; p. 31).

Thereafter, Victim attempted to drive past Lunsford's vehicle, and, in the unfortunate sequence of events that ensued, Lunsford shot Victim three times with a pistol along the side of the road. (Im. Tr. p. 8; p. 10; p. 26; p. 70; p. 73). As a result of the shooting, Victim was left paralyzed from the waist down with a bullet lodged in his spine while Lunsford was criminally indicted for a variety of offenses. (Im. Tr. pp. 26-27; pp. 58-59; Indictments (#16-GS-42-5238 & #16-GS-42-5239)).

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[1] According to the testimony presented during the immunity hearing, the speed limit on Lucerne Drive was around fifteen or twenty miles per hour. (Im. Tr. p. 32; p. 41).

Before Lunsford's case was brought to trial, defense counsel filed a motion seeking immunity from prosecution on the charged offenses pursuant to the South Carolina Protection of Persons and Property Act, and the circuit court judge conducted a hearing on the motion. (Im. Tr. p. 1; p. 5; May Motion for Immunity, p. 1). During the hearing, Victim and Lunsford offered their accounts of the shooting and the events that preceded it. (Im. Tr. pp. 6-37; pp. 61-85).

Specifically, regarding Victim's account, Victim indicated Lunsford brandished and waved a gun at him and began "cussing [him] out" when he attempted to pass Lunsford's vehicle on the night of the incident. (Im. Tr. pp. 7-8; p. 19). Upon seeing the gun, Victim stated he became irritated and angry, pulled over in front of Lunsford's vehicle, exited his vehicle, walked a few steps, and profanely tried to ask Lunsford to fight with him in the roadway.[2] [3] (Im. Tr. pp. 8-10; pp. 13-16; p. 27; p. 34; p. 36). However, before he could finish posing his challenge, Victim reported Lunsford shot him multiple times with a firearm while he was standing with his hands "completely open" and empty in close proximity to his own vehicle.[4] (Im. Tr. pp. 9-10; p. 15; p. 17; p. 28; p. 33). Victim stated he then struggled to get back into his vehicle, was stopped by a bystander who rushed to his aid, and was subsequently taken to a hospital for treatment. (Im. Tr. pp. 21-22; p. 30; p. 34). Furthermore, in discussing his actions that evening, Victim

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[2] As to why he stopped his vehicle, Victim asserted he could see his residence from the location where the incident occurred and did not want to continue driving towards it after Lunsford brandished the gun because he did not want an armed man following him home. (Im. Tr. p. 11; p. 25; p. 33).

[3] Specifically, after exiting his vehicle, Victim recounted he first asked Lunsford what he thought was a "good question" for a person brandishing a gun, which was, "What the fuck?" (Im. Tr. p. 10; p. 19). After that, Victim stated he questioned whether Lunsford was going to "fucking" shoot him over being passed on the roadway and began to ask Lunsford whether he wanted to fight. (Im. Tr. pp. 9-10).

[4] When the first shot was fired, Victim indicated Lunsford was partially inside his vehicle, but he stated Lunsford was out of his vehicle and walking towards him when he fired the rest of the shots. (Im. Tr. p. 18; p. 29).

readily acknowledged it was unsafe to pass Lunsford's vehicle when he did so, but he steadfastly asserted he did not attempt to remove Lunsford from his vehicle, did not touch Lunsford, did not try to get into Lunsford's vehicle, and did not attack Lunsford during the course of the incident. (Im. Tr. p. 11; p. 28; p. 34).

Meanwhile, in Lunsford's version of events, Lunsford claimed Victim began driving close to his vehicle's bumper prior to the shooting at a time when he was driving "a little" slower than the speed limit. (Im. Tr. pp. 66-67). As they continued driving along, Lunsford asserted Victim began flashing his vehicle's lights at him, motioned at him, and appeared visibly irritated. (Im. Tr. pp. 67-68). Lunsford stated Victim then accelerated past his vehicle and he responded by extending his middle finger at Victim. (Im. Tr. p. 68; p. 84). Lunsford asserted he was then able to "evade and maneuver" around Victim's vehicle and get back in front of him, Victim passed him once again, and he again drove back in front of Victim's vehicle. (Im. Tr. p. 80; pp. 84-85). At that point, Lunsford stated Victim passed him on a third occasion and, when Victim did so, he brandished a pistol at Victim in order to scare Victim away. (Im. Tr. p. 69-70). However, instead of fleeing at the sight of his pistol, Lunsford indicated Victim swerved in front of his vehicle and "made [him] stop." (Im. Tr. p. 68). After that, Lunsford asserted Victim rapidly exited his vehicle, Victim began advancing towards him, he yelled for Victim to get back into his vehicle several times, and he deliberately shot Victim three times from inside his own vehicle when Victim continued to advance. (Im. Tr. pp. 69-71; p. 73; p. 76; p. 81; p. 83). At the time he fired the shots, Lunsford acknowledged he saw Victim's hands before the shooting but asserted he did not have time to register if he had anything in them before firing his pistol. (Im. Tr. p. 79). Additionally, Lunsford claimed he believed he was in imminent danger when he fired the shots, was scared of Victim, and assumed Victim must have been armed even though he

actually was not. (Im. Tr. pp. 74-77; pp. 81-82). However, he admitted Victim never touched his vehicle, never rammed his vehicle, and never touched him. (Im. Tr. p. 79; pp. 83-84). Furthermore, he conceded he could have rolled his vehicle's window up and locked his doors but insisted doing so would not have been helpful if he had, in fact, been facing an armed attacker as opposed to the unarmed victim actually before him. (Im. Tr. pp. 82-83).

In addition to that testimony, Investigator Chris Taylor and Investigator Louis Nelson of the Spartanburg Police Department discussed their investigation into the shooting. (Im. Tr. p. 38; p. 47). During his testimony, Investigator Taylor indicated they interviewed Victim after the shooting and Victim acknowledged he illegally passed Lunsford's vehicle before the shooting occurred. (Im. Tr. pp. 38-39; p. 42). He further indicated Victim expressed being upset about Lunsford brandishing a gun at him, initially reported all the shots were fired while Lunsford was out of his vehicle, and then clarified Lunsford was inside his vehicle at the time the first shot was fired. (Im. Tr. pp. 40-42). Similarly, during his testimony, Investigator Nelson noted the distance between the driver doors of the two vehicles at the time of the shooting was approximately seventeen feet. (Im. Tr. p. 48). Furthermore, he pointed out Lunsford easily could have driven around Victim's vehicle at the time of the incident based on the vehicles' positioning. (Im. Tr. p. 52).

Beyond that testimony, Jennifer Sevick, an eyewitness to the shooting, offered her account of the incident. (Im. Tr. pp. 86-87). Specifically, Sevick indicated she was driving down Lucerne Drive when she observed two vehicles parked on the roadway roughly seventy-five to one-hundred yards away from her position with two men standing outside the vehicles. (Im. Tr. p. 87; p. 90; p. 92). As she looked on, Sevick noticed one of the men had his hands in the air, and then she suddenly heard a pop followed by three more pops. (Im. Tr. pp. 87-88).

After that, she saw Victim, whom she believed had been killed, fall to the ground and then observed Lunsford looking in her direction, which made her fear for her life. (Im. Tr. p. 89).

Following the presentation of that testimony, the circuit court judge took the matter under advisement. (Im. Tr. p. 93). Thereafter, the circuit court judge issued an order granting immunity on the attempted murder and assault and battery of a high and aggravated nature charges. (Sept. Order Granting Immunity, pp. 1-3). In granting immunity, the circuit court judge initially found Lunsford was not engaged in unlawful activity because he was lawfully driving down the roadway and was in a place that he had a right to be in since he was on a public roadway. (Sept. Order Granting Immunity, p. 1). Additionally, he found Lunsford reasonably believed the use of deadly force was necessary "to prevent an attack on himself" in light of the fact Victim drove erratically, illegally "pass[ed]" Lunsford's vehicle, suddenly stopped, and advanced towards Lunsford even after Lunsford, who possessed a concealed weapons permit, had brandished a gun at him. (Sept. Order Granting Immunity, p. 2). Furthermore, he found Lunsford was under attack at the time he fired his weapon because Victim abruptly stopped his vehicle and advanced on Lunsford with the intent of engaging in a physical altercation with him. (Sept. Order Granting Immunity, p. 2). Similarly, he concluded "there is no fathomable reason for a person who knows another driver has a firearm to block the firearm carrier's vehicle other than to engage in an altercation with the firearm carrier" and "a person in possession of a firearm could only presume that the person stopping him wants to cause him harm by confrontation." (Sept. Order Granting Immunity, p. 3). Based on all those reasons, the circuit court judge determined Lunsford was entitled to statutory immunity. (Sept. Order Granting Immunity, p. 3).

Subsequently, the solicitor moved for reconsideration of the circuit court judge's ruling while defense counsel moved for immunity on a newly-indicted charge of pointing or presenting

a firearm. (Motion for Reconsideration, pp. 1-3; Oct. Motion for Immunity, p. 1; Indictment (#17-GS-42-3432)). Specifically, in seeking reconsideration, the solicitor contended Lunsford was not acting lawfully at the time of the shooting because he unlawfully brandished a weapon at Victim prior to the shooting. (Motion for Reconsideration, pp. 1-2). Additionally, the solicitor argued Lunsford could not claim immunity unless he was actually attacked, which he was not since Victim had not used any force against him. (Motion for Reconsideration, p. 2). Furthermore, the solicitor argued Lunsford could not satisfy the elements of self-defense necessary to support a claim of immunity because he was not without fault for the difficulty and did not act reasonably under the circumstances. (Motion for Reconsideration, pp. 2-3).

In response to the motions, the circuit court judge conducted another hearing on the matter. (Reh. Tr. p. 1; p. 4). At the outset of the hearing, the solicitor reiterated his argument Lunsford was not acting lawfully prior to the shooting and noted Lunsford readily admitted he brandished a firearm at Victim. (Reh. Tr. p. 7; p. 10). Moreover, the solicitor again argued Lunsford was not acting in self-defense because his actions were not reasonable in light of the fact Lunsford could have rolled up his vehicle's window, locked his vehicle's door, or simply driven around Victim's vehicle before shooting the unarmed man. (Reh. Tr. p. 10; pp. 12-15). In rebuttal, defense counsel maintained Lunsford had a concealed weapons permit when he showed his firearm to Victim and was purportedly doing so in an effort to make Victim go away. (Reh. Tr. p. 17). Defense counsel further maintained the attack was a "process" that began when Lunsford was passed and "blocked in" by Victim, and he asserted Lunsford did not have to wait for something to happen before he could act. (Reh. Tr. p. 19).

Following the discussion on the solicitor's motion for reconsideration, the circuit court judge asked the parties to address defense counsel's motion for immunity on the charge of

pointing or presenting a firearm. (Reh. Tr. p. 23). In arguing against immunity on that particular charge, the solicitor asserted a motorist has no right to brandish a pistol at a fellow motorist merely driving past the motorist's vehicle and would not be entitled to immunity upon doing so because such an act would not be a response to an attack since passing another vehicle on a roadway is simply not an actual attack. (Reh. Tr. pp. 24-25). Conversely, in arguing immunity should be granted, defense counsel again asserted the attack was a "process" and contended Lunsford was allowed to brandish his firearm at Victim because he possessed a concealed weapons permit and was in fear at the time he did so. (Reh. Tr. p. 25). At that point, the circuit court judge again took the matter under advisement. (Reh. Tr. p. 26).

Subsequently, the circuit court judge granted defense counsel's motion for immunity on the pointing or presenting a firearm charge and denied the solicitor's motion for reconsideration. (Order Denying Motion for Reconsideration, pp. 1-2; Jan. Order Granting Immunity, pp. 1-3). In denying reconsideration, the circuit court judge found Lunsford's act of brandishing the firearm at Victim was "part of the sequence of events" that led to and ended with Lunsford shooting Victim and, therefore, should be included as a part of the grant of immunity. (Order Denying Motion for Reconsideration, p. 1). Furthermore, the circuit court judge reiterated he believed Lunsford met his burden of proof of establishing he was entitled to immunity. (Order Denying Motion for Reconsideration, p. 2). Meanwhile, in granting immunity for pointing or presenting a firearm, the circuit court judge simply issued an order with identical findings to his original order granting Lunsford's request for immunity without any specific discussion as to what legally justified Lunsford act of brandishing a firearm at Victim when Victim was "passing" his vehicle. (Jan. Order Granting Immunity, pp. 1-3).

STANDARD OF REVIEW

In an appeal from a circuit court judge's pre-trial determination regarding a claim of statutory immunity, an appellate court reviews the circuit court judge's ruling for an abuse of discretion. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2015); see State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review."). Pursuant to the abuse of discretion standard, the appellate court must affirm the circuit court judge's immunity determination if it is supported by any evidence and not controlled by an error of law. Curry, 406 S.C. at 372, 752 S.E.2d at 267; see Douglas, 411 S.C. at 316, 768 S.E.2d at 237 ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility."). However, the appellate court is not barred from conducting its own review of the record to determine whether the circuit court judge's decision is supported by the evidence and will reverse when the decision is controlled by a legal error or lacking in evidentiary support. See State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010) ("An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " (citation omitted)); cf. Narcisco v. State, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

ARGUMENT

Did the circuit court judge commit a clear error of law by granting immunity to Lunsford pursuant to the South Carolina Protection of Persons and Property Act where, as a matter of law, Lunsford was not entitled to immunity because he acted unlawfully by threateningly brandishing a pistol at his victim during the course of the incident, he was not actually under attack at the time he shot his victim, and he could not validly raise a claim of self-defense since he was not without fault for the difficulty and did not reasonably need to use deadly force against his victim at the time he did so?

Following an immunity hearing, the circuit court judge ruled Lunsford was entitled to immunity on all three indicted charges pursuant to the South Carolina Protection of Persons and Property Act ("the Act") after concluding Lunsford was not acting unlawfully, was under attack, and reasonably believed deadly force was necessary at the time he shot his victim during the course of a "road rage" incident. Contrary to the circuit court judge's ruling, Lunsford was not entitled to immunity as a matter of law for several different reasons. First, Lunsford was not, in fact, acting lawfully at the time he shot Victim because he threateningly brandished a firearm at Victim when Victim attempted to drive past his vehicle and, thus, unlawfully presented a firearm in violation of South Carolina law. Second, Lunsford was not actually under attack at the time he shot Victim and, instead, fired the shots in anticipation of an attack not yet occurring, which meant the Act was not applicable to his actions. Third and finally, Lunsford was not acting in self-defense as a matter of law because he was not without fault for the difficulty based on his actions, which included his act of threateningly brandishing a firearm at Victim, and because it was not reasonably necessary for him to use deadly force against Victim by repeatedly shooting him. Under those circumstances, Lunsford was not entitled to immunity as a matter of law, and the circuit court judge committed a clear error of law by granting Lunsford's motions for immunity on the indicted charges. Accordingly, the circuit court judge's ruling should be reversed, and Lunsford's case should be remanded for trial.

Under the mandates of the Act, any law-abiding person who uses deadly force in a manner permitted by the provisions of the Act is immune from criminal prosecution for the use of deadly force.[5] S.C. Code Ann. § 16-11-450(A); see S.C. Code Ann. § 16-11-420(B) ("[I]t 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." (emphasis added)). The intent of the legislature in implementing the Act was to "codify the common law Castle Doctrine" and "to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). In carrying out that intention, the legislature instructed:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully or forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A). Additionally, the legislature further instructed:

> 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

[5] Specifically, Section 16-11-450(A) reads: "A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]" S.C. Code Ann. § 16-11-450(A).

> prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (emphasis added).

Pursuant to the Act, the burden is on the defendant to establish his entitlement to immunity by a preponderance of the evidence, which is accomplished by demonstrating the existence of all the elements of self-defense aside from the duty to the retreat. See State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 141 (2016) (recognizing "the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence" in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)). However, if the statutory presumptions of Section 16-11-440(A) are applicable to the case, "there is no requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury[.]" Id.

Regarding self-defense, the following four elements must be present in order for that particular defense to be established in South Carolina:

> 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 (quoting State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)). Thus, in cases involving claims of immunity, the first three elements must be established by the defendant, including the elements regarding the lack of fault on the part of the

defendant in bringing on the difficulty and the reasonableness and necessity of the defendant's actions. Jones, 416 S.C. at 301, 786 S.E.2d at 141; see State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse[.]"); State v. Osborne, 202 S.C. 473, 478, 25 S.E.2d 561, 563 (1943) ("The defense of self-defense is based upon necessity[.]"); State v. Council, 129 S.C. 116, 120, 123 S.E. 788, 789 (1924) (instructing a defendant can deprive himself of the right of self-defense through either actions or words); State v. Harvey, 110 S.C. 274, 277, 96 S.E. 399, 400 (1918) (instructing a person may not employ deadly force in self-defense unless there is a reasonable necessity to kill even if the other elements of self-defense are present). Significantly, "[i]t is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

During proceedings regarding an immunity claim, the question of whether a defendant is entitled to immunity under the Act must be decided prior to trial if either party moves for a determination regarding the Act's applicability to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). In resolving such a claim, "the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. Stated plainly, a preponderance of the evidence means evidence which convinces of its truth and is more convincing than the evidence to the contrary. State v. Scott, 420 S.C. 108, 113, 800 S.E.2d 793, 796 (Ct. App. 2017); see BLACK'S LAW DICTIONARY 1301 (9th ed. 2009) (defining "preponderance of the evidence" as "[t]he greater weight of the evidence, not necessarily established by the greatest number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not

sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other").

In the case sub judice, Victim drove by Lunsford's vehicle in an admittedly illegal fashion based on his concerns over Lunsford's driving behavior, and Lunsford responded to Victim's passing attempts by both extending his middle finger and threateningly brandishing a firearm. Then, when Victim responded to Lunsford threatening and provocative actions by stopping and attempting to confront him, Lunsford repeatedly shot Victim, leaving him paralyzed from the waist down. Upon being presented with those facts, the circuit court judge concluded Lunsford was entitled to statutory immunity pursuant to the Act on each of the indicted charges. As a matter of law, the circuit court judge's conclusion in that regard was clearly erroneous for three distinct reasons.

Initially, the circuit court judge erred by finding Lunsford was entitled to immunity pursuant to the Act because Lunsford was *not* acting lawfully at the time of the incident. Instead, by his own admission, Lunsford brandished a firearm at Victim in a threatening manner when Victim was merely driving past his vehicle. See S.C. Code Ann. § 16-23-410 ("It is unlawful for a person to present or point at another person a loaded or unloaded firearm."); see also In re Spencer R., 387 S.C. 517, 522-523, 692 S.E.2d 569, 572 (Ct. App. 2010) ("[W]e define the phrase 'to present' a firearm in section 16-23-410 as: to offer to view in a threatening manner, or to show in a threatening manner."). At the time Lunsford brandished his pistol, Victim was not threatening harm to Lunsford or attempting to doing anything other than drive his own vehicle by Lunsford's vehicle, and the circuit court judge specifically found Victim was merely "passing" Lunsford at the time Lunsford brandished the gun at him as opposed to attempting to

ram Lunsford's vehicle or otherwise harm him.[6] Therefore, regardless of whether Lunsford possessed a permit authorizing him to carry a *concealed* weapon on his person, Lunsford had no lawful right to threateningly brandish a firearm at Victim for simply driving past his vehicle even though Victim was doing so in an unlawful fashion. See State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003) (recognizing it is unlawful in South Carolina to point or present a loaded or unloaded firearm at another person). As a result, Lunsford was precluded from claiming immunity pursuant to the Act because he was engaged in unlawful activity, and the circuit court judge erred as a matter of law by finding otherwise. See S.C. Code Ann. § 16-11-440(C) (only authorizing a person who is expressly "not engaged in unlawful activity" to meet force with force and raise a claim of immunity); see also S.C. Code Ann. § 16-11-420(B) (recognizing it is proper for "law-abiding" citizens to protect themselves without fear of prosecution).

Moreover, beyond the fact Lunsford was not entitled to immunity based on his unlawful actions, the circuit court judge erred by finding Lunsford was entitled to immunity pursuant to the Act because Lunsford was *not* actually under attack at the time he employed deadly force. That is true because, by Lunsford's own admissions, Lunsford shot Victim *in anticipation of a potential attack* and was never touched by Victim in any manner prior to the shooting. In light of that testimony, Lunsford was not meeting any actual force with force when he shot Victim and had not yet been attacked by Victim. Critically though, based on the plain and unambiguous language of the Act, an individual must actually be *attacked* in order to raise a claim of

[6] During the immunity hearing, Lunsford initially testified Victim accelerated past his vehicle and drove in front of him but later claimed Victim "attempt[ed] to run [him] off the road[.]" (Im. Tr. pp. 68-70; p. 79). However, Lunsford conceded Victim never touched or rammed his vehicle, and the circuit court judge specifically found Victim made "passing attempts" as opposed to attempts to run Lunsford off the road in his orders granting immunity. (Im. Tr. p. 79; Sept. Order Granting Immunity, p. 2; Jan. Order Granting Immunity, p. 2).

immunity.[7] See S.C. Code Ann. § 16-11-440(C) (authorizing an individual "who is attacked" to "meet force with force, including deadly force"); see also Scott, 420 S.C. at 115, n. 8, 800 S.E.2d at 797 ("The clear language of section 16-11-440(C) . . . requires that the defendant be actually attacked."); see generally State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("[A] court must abide by the plain meaning of the words of a statute."); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning."). Since Lunsford was not, in fact, attacked and, instead, used deadly force against Victim in anticipation of a perceived *threat of attack*, Lunsford was not entitled to immunity pursuant to the Act, and the circuit court judge erred as a matter of law by concluding to the contrary.[8] See Scott, 420 S.C. at 115, n. 8, 800 S.E.2d at 797 ("While we acknowledge . . . the question of a perceived threat and

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[7] Significantly, the fact the Act requires an actual attack before a claim of immunity can be validly raised in no way impairs a defendant's ability to raise a claim of self-defense *during trial* based on actions taken in response to a perceived threat of attack. See Scott, 420 S.C. at 115, n. 8, 800 S.E.2d at 797 (instructing "a defendant must present his evidence of self-defense to a jury" unless a showing is made the defendant was actually attacked); see also State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989) ("[A] defendant, in a self-defense case, has the right to act on appearances."); State v. Jackson, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) (recognizing for purposes of self-defense an individual has "a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief").

[8] In the order granting immunity, the circuit court judge expressly found Lunsford "was under attack at the time he defended himself." (Sept. Order Granting Immunity, p. 2; Jan. Order Granting Immunity, p. 2). Importantly though, the circuit court judge did not support that finding by identifying any testimony or evidence establishing Victim had assaulted, touched, or otherwise applied force to Lunsford such that an attack was occurring or had actually occurred. (Sept. Order Granting Immunity, p. 2; Jan. Order Granting Immunity, p. 2). Instead, the circuit court judge pointed to evidence supporting a conclusion Victim *intended to attack* Lunsford, and he specifically determined Lunsford believed he was using deadly force "to prevent an attack" instead of to respond to one. (Sept. Order Granting Immunity, p. 2; Jan. Order Granting Immunity, p. 2). Under those circumstances, it is clear the circuit court judge's order was predicated on a finding Lunsford was responding to a perceived threat of attack instead of an actual attack at the time Lunsford used deadly force against Victim. (Sept. Order Granting Immunity, p. 2; Jan. Order Granting Immunity, p. 2).

an attack may sometimes overlap, absent a showing that a defendant has been attacked, a request for immunity pursuant to subsection (C), which would excuse the duty to retreat, must fail[.]").

Finally, notwithstanding those clear legal errors, the circuit court judge erred by finding Lunsford was entitled to immunity pursuant to the Act because Lunsford's actions could not as a matter of law satisfy the elements of self-defense necessary for a valid claim of immunity. That is true because Lunsford was not free from fault for the difficulty with Victim in light of the fact he threateningly brandished a firearm at Victim, which was a highly provocative act that could naturally be expected to bring about a confrontation. See Johnson v. State, 743 N.E.2d 755, 756 (Ind. 2001) ("[W]e observe that introducing a handgun into an emotionally charged environment can easily lead to a physical confrontation with tragic consequences. Indeed, as the Court of Appeals' majority observed in this case, 'By revealing his weapon to [the victim] and suggesting his willingness to use it as needed, Johnson engaged in a brinkmanship style of street diplomacy that can only escalate to actual violence. His actions were both foolish and dangerous[.]' " (citation omitted)); cf. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (finding the act of approaching an altercation with a visible loaded weapon was an act that "could be reasonably calculated to bring the difficulty that arose" and precluded Slater from asserting self-defense as a matter of law and rendered it appropriate not to even submit the issue of self-defense to the jury). In fact, Lunsford's act of brandishing a firearm was the direct catalyst that led to Victim stopping his vehicle and attempting to confront Lunsford *about the brandishing of the firearm*. See Council, 129 S.C. at 120, 123 S.E. at 789 ("A man may deprive himself of the right to self-defense by words as well as by acts[.]"). Likewise, Lunsford admittedly could have rolled up his vehicle's windows and locked his vehicle's door to prevent any attack from Victim, and no testimony was presented suggesting Victim, who—unlike Lunsford—was totally unarmed at the

time of the shooting, did anything that could have reasonably suggested he was armed, was carrying a weapon or anything else, or was making any type of movement that could have been construed as an attempt to reach for or draw a weapon. See Harvey, 110 S.C. at 277, 96 S.E. at 400 ("Tillman Harvey might have been without fault in provoking the difficulty, and still there might have been no necessity to kill. . . . While a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but *there must be a necessity to kill.*" (emphasis added)); cf. State v. Coleman, 949 S.W.2d 137, 144 (Mo. Ct. App. 1997) ("No evidence was presented that [the victim] attempted to run down Mr. Coleman with his car or that he threatened Mr. Coleman with a weapon when the shot was fired. Mr. Coleman's belief that he was in immediate danger of serious injury or death was, therefore, unreasonable, and the evidence was insufficient to support a self-defense instruction."); State v. Walker, 136 Wash. 2d 767, 779, 966 P.2d 883, 889 (Wash. 1998) ("Any reasonable person standing in [Walker]'s shoes would have perceived that only 'an ordinary battery is all that was intended,' in which case the use of deadly force was unjustified." (citation and brackets omitted)). Under those circumstances, Lunsford could not possibly establish it was reasonably necessary for him to shoot Victim in order to defend himself from death or great bodily harm and, thus, could not validly claim his use of deadly force was justified and proper.[9] See United States v. Peterson, 483 F.2d 1222, 1231 (D.C. Cir. 1973) ("It

[9] Notably, the circuit court judge did *not* make any findings supporting a conclusion Victim was in the process of unlawfully or forcefully entering Lunsford's vehicle, had unlawfully or forcibly entered Lunsford's vehicle, or removed or was attempting to remove Lunsford from his vehicle. (Sept. Order Granting Immunity, pp. 1-3; Jan. Order Granting Immunity, pp. 1-3). Therefore, Lunsford could not avail himself of the statutory presumption of reasonable fear. See 16-11-440(A) (permitting a statutory presumption of "reasonable fear of imminent peril of death or great bodily injury" only in certain specified circumstances, including when the person upon whom the deadly force is used "is in the process of unlawfully and forcefully entering, or has unlawfully or forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is

has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. . . . This body of doctrine traces its origin to the fundamental principle that a killing in self-defense is excusable only as a matter of *genuine necessity*." (emphasis added and footnotes omitted)); cf. Canipe v. Commonwealth, 25 Va. App. 629, 641, 491 S.E.2d 747, 752-753 (Va. Ct. App. 1997) (concluding in a case involving a "road rage" incident Canipe was precluded from asserting self-defense as a matter of law and finding Canipe's victim committed "no overt act" that would have justified the assertion of such a defense when the evidence presented established Canipe abruptly pulled in front of the victim while driving down a roadway, the victim responded by illegally passing Canipe on a two-lane roadway, Canipe drove back by the victim, the two engaged in a "cat and mouse" game in which Canipe blocked the victim's attempts to pass him, the two stopped at an intersection, Canipe got out of his car and confronted the victim, the victim motioned to a nearby parking lot, Canipe drove into it, the victim followed behind, the victim rapidly exited his car and began approaching Canipe's vehicle, and Canipe responded to the victim's approach by becoming frightened and driving into the victim). Therefore, because Lunsford could not legally establish the required elements of self-defense as a matter of law, Lunsford was not entitled to immunity pursuant to the Act, and the circuit court judge committed a clear legal error by reaching a contrary conclusion. See Jones, 416 S.C. at 301, 786 S.E.2d at 141 ("[T]he defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence.").

For all the foregoing reasons, the circuit court judge abused his discretion and committed

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attempting to remove another person against his will from the dwelling, residence, or occupied vehicle").

a clear error of law by finding Lunsford was entitled to immunity on the indicted charges of attempted murder, assault and battery of a high and aggravated nature, and pointing or presenting a firearm. See State v. Oates, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017) (recognizing an abuse of discretion occurs when a circuit court judge's immunity ruling is based on an error of law). Accordingly, the circuit court judge's legally-erroneous ruling must be reversed, and Lunsford's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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July 9, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2018-000136

THE STATE,

Appellant,

vs.

ADAM KEITH LUNSFORD,

Respondent.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by sending two copies of the same to:

N. Douglas Brannon & Christopher David Kennedy, Esquires
Kennedy & Brannon, P.A.
Post Office Box 3254
Spartanburg, SC 29304

I further certify that all parties required by Rule to be served have been served.
This 9th day of July, 2018.

Destiny Blue

DESTINY BLUE
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SC Court of Appeals

July 9, 2018

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RE: State v. Adam Keith Lunsford – Appellate Case No. 2018-000136

Dear Mr. Brannon and Mr. Kennedy:

I am enclosing two copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division