STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO 2014-001497

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327

PETITION FOR REHEARING AND REQUEST FOR HOLDING ON FINAL ISSUE

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding on appeal that appellant failed to prove immunity under the Protection of Persons and Property Act by a preponderance of the evidence because the record showed that immunity was established, **and** counsel would request a holding on the issue of the solicitor's impermissible closing comments on appellant's right not to testify, which caused a shift in the burden of proof at trial **because the trial judge's December 8, 2011 Order, which this Court adopted as its holding in the case, did not address appellant's closing argument issue.** In support of this motion, counsel would submit the following information.

1.) FACTS & RELEVANT PROCEDURAL HISTORY

In the case at bar, appellant was convicted of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. Appellant stepped onto his balcony at around 4:00 a.m. on November 15, 2009, to find a man standing underneath it pointing a gun in his direction. Appellant responded by firing his weapon at this man who was acting on behalf of the McCormick County Sheriff's Department. The man, Bobby Ruston, whom the state claimed was a legitimate police officer, was struck by gunfire from appellant's rifle. Previously, appellant's neighbor called the police on that morning to report that appellant was in effect randomly firing gunshots from his balcony. Appellant explained that he was firing at a fox that had been fighting with his beloved cat. When police arrived at appellant's residence, he woke from his sleep and stepped onto his balcony to see who was ringing his doorbell and fired a shot after seeing a man in plain clothing (Rushton) pointing a weapon at him.

On appeal, appellant argued the following:

> The trial court erred in ruling that appellant was not entitled to immunity from prosecution under the Protection of Persons and Property Act
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> The trial court erred in ruling that appellant was not entitled to immunity from prosecution for the charges under the Protection of Persons and Property Act with respect to its findings on proof of entry or attempted entry into a dwelling and on being without fault in bringing on the difficulty.
>
> The trial court erred in finding no error regarding the solicitor's comments on appellant's failure to testify.

On July 18, 2018, this Court affirmed appellant's convictions and sentences in State v. Worley, Unpublished Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018), and **held that it adopted the rulings in the trial judge's Order filed on December 8, 2011, (signed on December 6, 2011), which including findings that appellant did not establish by a**

preponderance of the evidence that he was immune from prosecution under the Act, but note that there was no ruling by the trial judge in the Order that addressed the issue of the solicitor's impermissible remarks in effect on appellant's failure to testify at trial and how the same resulted in a shift of the burden of proof in the case at trial.

2.) **LAW ENFORCEMENT EXCEPTION UNDER THE ACT**

This Court adopted the trial court's ruling that the law enforcement exception under the Act precluded the grant of immunity to appellant because Rushton was a law enforcement officer at time of the shooting; and therefore, appellant could not claim the presumption under the Act that he acted in fear of death or great bodily injury. Relevant portions of S.C. Code. Ann. § 16-11-450 (A) and 16-11-440(B)(4), respectively, follow:

> 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, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.
>
> [A] law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

Appellant's position addressed the **inapplicability** of the law enforcement exception in the case based on the following reasons:

A.) **RUSHTON NEVER RECEIVED JUDICIAL APPROVAL**

At the immunity hearing, Rushton testified that his appointment had never been approved by a circuit court judge as required by S.C. Code Ann. § 23-23-10. R. 103, ll. 4-16; *Id.* at p. 210, l.

5 – 220, l. 21; R. 727 - 756. Nevertheless, the trial court denied immunity to appellant because, among other reasons, the court believed that Rushton was a "law enforcement officer" within the meaning of the Act. R. 1762 – 1767.

Section 23-13-10 states: that "the sheriff may appoint one or more deputies **to be approved by** the judge of the circuit court or any circuit judge presiding therein." (*emphasis added*). The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.*

The language of § 23-13-10 makes clear that the legislature intended that any deputies a sheriff wished to appoint be subject to the approval of the resident circuit court judges. By contrast, § 23-13-40 allows "**the sheriff, without seeking the approval of the circuit judge, may appoint special deputies** as the exigency of his business may require for the service of process in civil and criminal proceedings only." Thus, one class of deputies act as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies would not be subject to circuit court approval, but whose appointment is limited in scope and circumstance. Section 23-13-10 was violated and this Court erred in adopting the trial court's reasoning that no violation of section 23-13-10 occurred and in denying relief to appellant under the Act per this reasoning.

B.) **RUSHTON NIETHER TOOK THE OATH NOR POSTED BOND/SURETY**

At the immunity hearing, Rushton testified that he did not recall taking any oath prior to being re-hired by the McCormick County Sheriff's Department on November 1, 2009. R. 6, l. 24 – 18, l. 24; *Id.* at p. 103, ll. 4-21. Rushton also stated that he did not know if there was a bond on file with the McCormick County Clerk of Court so as to insure "the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion." *Id.* at p. 210, l. 5 – 211, l. 18; *see also* § 23-13-20.

In response the State produced a piece of paper signed by Rushton that they claimed satisfied the requirement under S.C. Const. Art. VI, § 5 that Rushton take an oath to the state constitution. *Id.* at p. 107, l. 9 – 109, l. 3; *see also* R. 232 - 235. The piece of paper did not include the second oath specifically required of sheriff's deputies by § 23-13-20. The State produced no evidence that any bond or surety was on file with the Clerk of Court. *Id.*

In denying appellant immunity by concluding that Rushton was a law enforcement officer within the meaning of the Act, the court ruled that the statutory oath was merely "an additional or supplementary oath" to the constitutional oath. R. 1767. Without elaboration, the court reasoned that Rushton's failure to take the oath required by law of sheriff's deputies, "does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive [Rushton] from asserting that he is law enforcement for purposes of the Act" *Id.*

Despite the state having earlier produced Rushton's signed constitutional oath from the Clerk of Court's Office while simultaneously failing to produce any documentation that the bond existed, the court held that the defense failed to prove that a bond did not exist. *Id.* Accordingly, the court determined that appellant could not claim immunity from prosecution because Rushton

was a law enforcement officer and, thus, exempt. *Id.*

Section 23-13-20 requires that all deputy sheriffs:

> **[S]hall before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county,** conditioned for the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion. **He shall, in addition to the oath of office now prescribed by Section 26, of Article III, of the Constitution, take the following oath (or affirmation) to wit:** "I further solemnly swear (or affirm) that during my term of office as county deputy, I will study the act prescribing my duties, will be alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them, will conduct myself at all times with due consideration to all persons and will not be influenced in any matter on account of personal bias or prejudice. So help me, God." **The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county.**
>
> A blanket bond may be used in any county to fulfill the bond requirement of this section upon approval of the County Council and the County Attorney.

(*emphasis added*). There is little case law regarding the impact of the failure to take either of the two required oaths on the authority of a purported sheriff's deputy.

In *Town of Denmark v. Corley*, the Supreme Court affirmed the grant of a new trial for the defendant, in part, because arresting officers "had not qualified or taken the constitutional oath" in S.C. Const. Art. III, § 26. 100 S.C. 433, 433, 84 S.E. 884, 884 (1915):

> The court is of the opinion that **the record having disclosed the fact that the officers of the town not having taken the constitutional oath, as required by the Constitution**, as aforesaid, and **not holding over, having been just elected, they are not officers *de facto***, and this exception is sustained.

Id. at 433, 84 S.E. at 885 (*emphasis added*). By contrast, in *State v. McGraw*, the Supreme Court held that a sheriff's deputy, who had never taken the oath of office and never had his

appointment approved by the circuit court, was "at least a *de facto* officer" for the limited purpose of summoning jurors. 35 S.C. 283, 283, 35 S.C. 630, 631 (1892); *see also* § 23-13-40 (statute authorizing special deputies).

More recently, this Court decided in *State v. Griffin*, that the failure of the Georgetown Sheriff's deputy hiring process to follow any of the requirements of § 23-13-10 and § 23-13-20 did not render a traffic stop unlawful. 413 S.C. 258, 776 S.E.2d 87 (Ct. App. 2015) *affirmed as modified* 413 S.C. 258, 776 S.E.2d 87 (2016). Relying on *McGraw*, this Court concluded that the deputies conducting the traffic stop was a *de-facto* officers as they had all been employed with the department for a significant amount of time ranging from eight to twenty-eight years. *Id.* at 264, 776 S.E.2d at 90. However, the Supreme Court modified this opinion in *State v. Griffin*, 416 S.C. 266, 785 S.E.2d 786 (2016). The Supreme Court excised the portions of this Court's opinion addressing the failure to comply with the statutory requirements, determining "such an analysis unnecessary" in light of well-established precedence holding that the illegality of an initial arrest does not bar later prosecution. *Id.* at 268, 785 S.E.2d at 787.

Here, the trial court erred, as a matter of law, in ruling that the statutory oath is merely "additional or supplemental" to the constitutional oath and had no impact on whether Rushton qualified as a law enforcement officer under the Act. Appellant's case is procedurally distinguishable from the *Griffin* cases. *Griffin* dealt with the impact of a potentially illegal arrest on the defendant's later prosecution. As the Supreme Court noted, "it is well established that 'the illegality of an initial arrest [does] not bar the accused person's subsequent prosecution and conviction for the offense charged.'" *Griffin*, 416 S.C. 266, 267, 785 S.E.2d 786, 786. In addition, the deputies in *Griffin* had all been working for the department for a significant period of time, a key factor in determining whether an individual qualifies as a *de facto* officer. *Corley,* 100 S.C. at 433,

84 S.E. at 884.

Here, appellant moved to bar prosecution under the Act. Appellant was not challenging the legality of his arrest. He was asserting that he was entitled to immunity from prosecution. As discussed at length *supra*, the Act is a penal statute. As such, the term "law enforcement officer" should be construed in appellant's favor and against state. Hence, the failure to follow the statutory requirements surrounding the appointment and approval of sheriff's deputies should have precluded the law enforcement officer exception under the Act to deny relief. R. 1767. This Court erred in adopting the trial court's finding of no error under the oath and bond/surety requirements.

C.) **RUSHTON'S RE-CERTIFICATION WAS NOT COMPLETE**

Rushton was re-hired by the McCormick County Sheriff's Department on November 1, 2009. Prior to re-joining the department, Rushton worked for DynCorp as a private military contractor and police trainer for four years. R. 6, l. 24 – 16, l. 6. This was not military service. Rushton was an employee of a government contractor. During his time as a private military contractor, Rushton allowed his law enforcement certification to lapse. Upon being rehired, he "had to catch up all the training hours I had missed for the previous four years." *Id.* at p. 9, ll. 11-12. Rushton alleged that he had "requalified" with his pistol and had taken "legal updates" and "criminal domestic violence updates." *Id.* at p. 13, ll. 1-22. However, no record of any such training is listed on Rushton's training report that the defense entered into the record at the immunity hearing. R. 757 - 794. The training report states that Rushton was certified as a Class I officer on June 26, 2010, nearly seven months after the incident. *Id.*

Investigator Joseph Collier, the officer responsible for training, testified that Rushton's hiring date was November 1, 2009 and that he submitted all of Rushton's paperwork to the South Carolina Criminal Justice Academy on November 5, 2009. R. 1146, l. 2 – 1147, l. 25. Collier also

claimed that the Academy notified him that Rushton's time working for DynCorp could qualify as a military service. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

The South Carolina Law Enforcement Training Council has the authority to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the [C]ouncil." S.C. Code Ann. § 23-23-80(6). A law enforcement department is not allowed to hire an officer unless that officer has been certified by the Council. S.C. Code Ann. § 23-23-40; *see also* SC. Code Ann. § 23-23-10(E) (defining "law enforcement officer" as an "appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed.").

South Carolina law requires all law enforcement officers be certified prior to an employee having the authority to "perform any of the duties of a law enforcement officer" with respect to the general public:

> No law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this State is authorized to enforce the laws or ordinances of this State or any political subdivision thereof **unless he has been certified as**

> **qualified by the council**, except that any public law enforcement agency in this State may appoint or employ as a law enforcement officer, a person who is not certified if, within one year after the date of employment or appointment, the person secures certification from the council; provided, **that if any public law enforcement agency employs or appoints as a law enforcement officer a person who is not certified, the person shall not perform any of the duties of a law enforcement officer involving the control or direction of members of the public or exercising the power of arrest until he has successfully completed a firearms qualification program** approved by the council; and provided, further, **that within three working days of employment, the academy must be notified by a public law enforcement agency that a person has been employed by that agency as a law enforcement officer, and within three working days of the notice the firearms qualification program** as approved by the director must be provided to the newly hired personnel.
>
> Notwithstanding another provision of law, **in the case of a candidate for certification who begins one or more periods of state or federal military service within one year after his date of employment or appointment, the period of time within which he must obtain the certification required to become a law enforcement officer is automatically extended for an additional period equal to the aggregate period of time the candidate performed active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States, plus ninety days.**

S.C. Code Ann. § 23-23-43 (*emphasis added*). In addition, officers must be re-certified every three years. § 23-23-60(C); *see also* S.C. Code Ann. Regs. 37-006(D)(4) (requiring a law enforcement candidate with a break in service of three years or more to complete all the requirements of § 23-23-60).

Investigator Collier's testimony makes clear that Rushton's hiring date was November 1, 2009. Rushton's first three working days were November 2-4, 2009. Collier did not submit Rushton's application to the Academy and Council until November 5, 2009. R. 1146, l. 2 – 1147, l. 25. This was beyond the three-day statutory window that allows a non-certified officer to exercise the authority of a certified law enforcement officer during his first year of employment. § 23-23-43.

Nor does Rushton's four-year employment with DynCorp somehow "froze" his certification status as the State contended at trial. R. 6, l. 20 – 20, l. 22. A plain reading of the law enforcement certification statutes only allows an officer's certification requirements to be suspended in the event that they are called to "active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States." S.C. Code Ann. § 23-23-43. DynCorp is not a branch or component of the Armed Forces of the United States. It is a privately owned military contractor. Rushton quit the McCormick County Sheriff's Department and went into private employment for four years. On his return to public employment, he was required to be completely recertified.

Even if the Council approved Rushton's time with DynCorp as equivalent to military service, the clear, unambiguous terms of the certification statutes do not give the Council authority to do so. *See Triska v. Dept. of Health & Environmental Control,* 292 S.C. 190, 355 S.E.2d 531 (1987) (holding that an administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.). Rushton's certification as a Class I law enforcement officer had lapsed and thus the McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to be renewed an officer. This Court erred in adopting the trial court's ruling that no error in concluding that Rushton was a law enforcement officer within the meaning of the Act.

D.) **UNLAWFUL ENTRY WAS ESTABLISHED UNDER THE STATUTE**

Appellant proved that unlawful entry was attempted in his case; and thus, he was entitled to immunity as a result. S.C. Code Ann. § 16-11-440 (A) reads as follows:

> § 16-11-440. Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence occupied vehicle or place of business.

> (A) A person is presumed to have a reasonable fear of imminent danger of death or great bodily injury to himself or another person when issuing 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 had unlawfully and forcibly entered a dwelling, residence...; 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.

The Act provides that "[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 and forcibly entered a dwelling . . . (2) [and the person]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." § 16-11-440(A)(1)-(2).

This Court erred in adopting the trial court's ruling that appellant failed to prove entry or attempt at entry into appellant's dwelling. Section 16-11-430 defines "dwelling." The Worley residence was, without any dispute, appellant's dwelling. Under common law, the protected area where a dwelling's resident has no duty to retreat extends to the dwelling's curtilage. *State v. Sampson*, 12 S.C. 567, 1880 WL 5588 (1880) (an outhouse is considered part of a dwelling); *see also State v. Osbourne*, 200 S.C. 504, 21 S.E.2d 178 (1942) (resident "may repel trespassers in or upon the house . . . as if he were under his own doors.").

Rushton had entered or attempting to enter the dwelling, given that he was standing in the middle of the night under the balcony roof of the house. This is very type of place "where the property owner alone has the right to be, to the exclusion of the general public" at 4:30 a.m. By contrast, in *Duncan*, the deceased was only on the porch of the shooter's residence, which the

Court determined to have been within the scope of the Act's definition of dwelling. 392 S.C. at 407, 709 S.E.2d at 663.

As detailed *supra,* Ruston's entrance was unlawful because he was not a law enforcement officer and thus could not have been acting within the proper scope of his duties while on appellant's premises at 4:30 a.m. Accordingly, this Court erred in adopting the trial judge's conclusion that there was no unlawful or attempted unlawful entry of Appellant's residence.

E) **APPELLANT DID NOT BRING ON THE DIFFICULTY**

In order to be granted immunity under the Act, a defendant must prove all elements of self-defense except the duty to retreat by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Id.*

Here, appellant was without fault in bringing on the difficulty and this Court erred in adopting the ruling of the trial court to the contrary. The Act provides 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" and that "persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes." § 16-11-420(B) and (D).

Appellant stated, in testimony corroborated by Sheffield, that he was attempting to shoot at a fox that had injured his cat. The Worley residence is located in a rural, unincorporated part of McCormick County. Sheffield further testified that he regularly heard gun shots. Even Rushton

admitted that when he first received the 911 call, he believed that someone was likely poaching deer. R. 36, l. 2-23. It simply cannot be said that, as a matter of law, firing a gun at night in a rural part of a South Carolina is reasonably calculated to bring on a violent confrontation with law enforcement. *See State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232, n. 8 (2014) ("[o]ne who merely does an action that affords an opportunity for conflict is not thereby precluded from claiming self-defense.").

It was undisputed that the layout of the Worley residence was such that, in addition to being highly insulated, there was no way to definitively ascertain the identity of the individuals knocking at the ground level door without walking out onto the balcony. Dr. Kirkham's testimony makes clear that Rushton and Deputies Moore and McAllister did not follow proper police procedure and needlessly risked themselves and appellant. Crucially, they did not activate their blue lights. Rushton was not in uniform and had no apparel identifying him as law enforcement.

Appellant has no criminal record and there was no evidence of any motive for the shooting. *Cf: State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) (holding that defendant not without fault when he entered an on-going fight he was previously not involved in with a loaded weapon). Appellant simply attempted to visually identify the individuals ringing his doorbell at 4:30 a.m. *State v. Wiggins,* 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998) (holding the absence of a duty to retreat also extends to the curtilage of one's home, which includes the dwelling's yard).

He was not armed in anticipation of a confrontation. He was armed out of a sense of self-preservation. *See State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." (*citing State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)) .

Even in a light most favorable to the State, all appellant could determine from looking through his house's window was that one or more people were claiming to be law enforcement. He saw no blue lights. He knew that he had not called the police. His neighbors had never before called the police about his shooting a gun. He knew that that there had been burglaries in the area. There was nothing to suggest that appellant, a man with no criminal record, had a reason to suspect his neighbors had decided to notify law enforcement.

Appellant had no duty to retreat in his own house in the face of an unlawful attempted entry and did not "bring on the difficulty". § 16-11-440(A)(2). This Court erred in adopting the trial judge's ruling appellant brought the difficulty as this was unsupported by the evidence and constituted an abuse of discretion.

F.) THE SOLICITOR'S REMARKS SHIFTED THE BURDEN OF PROOF

With respect to appellant's argument that the solicitor's comments were burden shifting in the case, this Court **in effect has not ruled on this issue as the trial court's order dated December 8, 2011, which was adopted by this Court as its holding, included no finding on this question.**

As at the immunity hearing, Dr. Kirkham stated that, based on his expertise and experiments conducted at the house, appellant likely would have been unable to see the police cars on the night of the shooting and that it was reasonable for Appellant to believe Rushton and the deputies were burglars. *Id.* at p. 1323, l. 10 – 1350, l. 9. Dr. Kirkham further testified that he could not hear anything from the outside when he went to the house. *Id.* As at the immunity hearing, he explained the numerous ways in which Rushton and the deputies failed to follow proper police procedure and how those failures were primarily responsible for the incident. *Id.* Petitioner did not testify. *Id.* at p. 1471, l. 8 – 1472, l. 21. Note that he house was well-insulated. R. 1229, l. 17 – 1248, l. 10.

Appellant's brother outlined for the jury in great detail how insulated and sound proof the house was in this case.

Circuit Solicitor Donnie Myers gave the final closing arguments for the State. From the onset, Solicitor Myers heaped insults on the defense's case. "Oh, what a tangled web we weave when first we begin to deceive." *Id.* at p. 1555, ll. 12-17. He called Dr. Kirkham a "traveling medicine man" from Florida and then asked jurors:

> And what did [Kirkham] tell you? Well, what about this? Well, what about that?
>
> **Well, let's look at what's not here.** First of all, didn't that medicine man -- **that traveling medicine man talk about a fox? There's a fox out there.** There's an old country and western song, A fox on the run. **Who saw a fox? Who got on that stand and said, on November the 15th of 2009,between two o'clock in the morning and four o'clock there was a fox out there?**
>
> Well, **the brother testified**, and he's in Florida. The traveling medicine man is in Palm Beach in that big ol' house down there. **[Police Officer] Bo Willis testified. That's their three witnesses. Who said there was a fox out there?**
>
> If y'all heard it, disregard what I say and hold it against me. I'm bad, too; I'm the Solicitor. **But who said there was a fox out there? I'm half deaf, but I swear I didn't hear it.**
>
> Oh, but the fox been out there before, the fox on the run. **I just didn't hear anybody say there was a fox out there that night.**
>
> You know, they said at the beginning, Mr. Worley had only shot one other time, in September. Well, that ain't right.
>
> Mr. Sheffield right here, what did he say? He started coming out, cussing, yelling, shooting around the lake. They didn't want to confront Joe Worley because he said Joe Worley's eccentric. We'll talk to the reasonable person. We'll talk with Mrs. Worley. . . .
>
> November the 15th, here we go again: Cussing, yelling, shooting. And I think -- and y'all take this right -- I think, from what I heard Mr. Sheffield say, it started about 2:30, three o'clock in the morning. You take what he heard.

> Here we go again. Light's on. Twenty minutes later, shooting again, cussing again. I ain't going to wait for the third shot. We have filed a report with the sheriff and said, don't do anything, we just want y'all to know what hell we're living under out there in our neighborhood on the weekends. The rest of the time, everything's nice, but on the weekends, we just want to let you know what's going on.
>
> Well, he ain't going to wait for the third shot. And you know what? Alan Sheffield, what a scoundrel he is, because he didn't go over there and talk with Joe Worley. What good would it have done? Already talked with mama. Already begged and pleaded.
>
> So they call the sheriff's department. The light's still on. **When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that.**

Id. at p. 1556, l. 23 – 1559, l. 21. Defense counsel immediately objected and moved for a mistrial, noting that Solicitor Myers had just repeatedly mentioned appellant's failure to testify. *Id.* at p. 1559, l. 22 – 842, l. 3.

The trial court took the motion under advisement and allowed the parties to finish closing arguments. *Id.* The trial court continued to delay its ruling on the mistrial motion while the jury deliberated. Appellant renewed his motion for a mistrial prior to the jury returning its verdict. *Id.* at p. 1636, l. 22 – 1637, l. 19. Forced to rule, the Court denied the motion for a mistrial. The court found that "in no way was [the comment] burden-shifting nor did it suggest or infer that the defendant is guilty because he failed to testify." *Id.* at p. 1637, ll. 8-19. In so ruling, the court specifically cited *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 516 (Ct. App. 2012) for the proposition that the solicitor's comments were simply addressed to the lack of evidence that there was a fox on the night in question. *Id.*

The State's closing argument constituted a direct comment on appellant's right to not to testify. Generally, "the State may not comment on a defendant's exercise of a constitutional right."

McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). (citing *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000)). The propriety of a solicitor's closing argument is left to the trial court's discretion, including the decision of whether to grant a defendant's motion for mistrial. *State v. Copeland,* 321 S.C. 318, 468 S.E.2d 620 (1996).

However, prosecutorial comment, whether direct or indirect, on the defendant's failure to testify is impermissible. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). "Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." *State v. Sweet,* 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct.App.2000).

Here, the State both indirectly and directly commented on precisely what it was forbidden to address: appellant's exercise of his right not to testify. *See Id.*; *see also Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

This trial tactic by the State was an impermissible comment on the defense's failure to testify because only appellant could have supplied the information necessary to rebut the State's straw man argument. *See McFadden*, 342 S.C. at 640, 539 S.E.2d 391, 393. Unlike, in *Meggett*, where presumably others could have testified that the victim was a prostitute, if she in fact was; appellant was truly the only one who could have given first-hand testimony as to whether or not he shot at a fox on the night in question. 398 S.C. 516, 523, 728 S.E.2d 492, 497.

Appellant was denied a fair trial by the State's impermissible comments and, thus, prejudiced. *State v. Brown,* 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct.App.1998) (holding that, "any alleged impropriety must be examined on appeal in light of the entire record."). The State directly

referenced appellant's failure to testify multiple times before concluding with "**I don't know because there ain't no testimony to that.**" R. 1559, ll. 16-21. Solicitor Myers tied Appellant's failure to testify directly and inexorably to appellant's self-defense, mistake, and accident theories. Appellant's theory of the case was plausible and was supported by defense witnesses. *See Sweet*, 342 S.C. at 348-349, 536 S.E.2d at 94.

The solicitor making the closing arguments deliberately chose to reference appellant's failure to testify despite having had several cases overturned on appeal because of his conduct, including during closing arguments. *Kelly v. State*, 534 U.S. 246, 122 S .Ct. 726, 151 L. Ed. 2d 670 (2002) (reversing conviction on the failure to give a jury instruction on parole ineligibility where Solicitor Myers placed defendant's future dangerousness at issue during penalty phase, including when he called defendant "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid" in closing); *Bennett v. Stirling*, 170 F. Supp. 3d 851, 862 (D.S.C. 2016) (granting federal habeas relief where Solicitor Myers referred to black defendant as "King Kong," a "monster," a "cave man," and a "beast of burden" in during closing arguments front of an all-white jury, in addition to several other racially charged remarks); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (reversing death penalty where Solicitor Myers' declared in closing arguments that it would be "open season on babies in Lexington County if death penalty was not returned, repeatedly told jurors he "expects" the death penalty, and where he produced a large black shroud and draped it over victim's crib and wheeled crib from the courtroom in a staged funeral procession); *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (reversing conviction and disqualifying Solicitor Myers' officer where senior deputy solicitor participated in clandestine videotaping of defendant's conversations with his attorney); *see also In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003) (Solicitor Myers issued a letter of

caution for failing to supervise senior deputy that engaged in clandestine videotaping of defendant's conversation with attorneys and for failing to alert defendant's attorneys of videotaping).

The State's comments regarding jurors having not "heard" from appellant, despite having heard from his brother and Dr. Kirkham were totally improper. The solicitor deliberately reference to appellant's failure to testify was a calculated trial tactic that transformed Appellant's exercise of a constitutional right into a weapon for the State. Such comments improperly injected fact and opinion to the jury not arising from testimony or other evidence presented in the current trial. *See Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75 ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

Finally, comments on appellant's failure to testify, were made in the context of an appeal to the jury's emotions and attempt to induce the jury to identify with Rushton. The inflammatory comments on appellant's reliance on a constitutional right rendered that appeal improper. *See Liberte*, 336 S.C. at 654 n.2, 521 S.E.2d at 747 n.2 (Ct. App. 1999) (noting a closing argument by the solicitor improperly appealed to the jury's emotions and attempted to induce the jury to identify with the law enforcement officers in the case).

As previously indicated, the evidence was less than overwhelming in this case which, at bottom, was founded upon the credibility of Rushton and Moore, both of whom had made inconsistent statements and failed to follow police procedure. Ultimately, whether the State intended to inflame the jury's passions or prejudices by its comments is irrelevant. *Id.* 336 S.C. at 657, 521 S.E.2d at 749.

What is relevant is that the comments encouraged the jury to believe that appellant's defense was not credible defense because appellant did not personally explain his actions to them. *State v. Brown*, 289 S.C. 581, 589-90, 347 S.E.2d 882, 887 (1986). The trial court's general charge to the

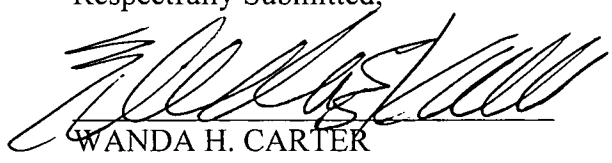
jury did not likely cure the error as the case was a credibility battle. *See, e.g. Id.*; *McFadden*, 342 S.C. at 642, 539 S.E.2d 394; *Sweet*, 342 S.C. at 349, 536 S.E.2d at 95 (holding the trial court's general jury charge on defendant's right not to testify was insufficient to cure the error when the evidence in the case was less than overwhelming). Thus, the State's closing argument prejudiced appellant by "so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process." *Liberte,* 336 S.C. at 658, 521 S.E.2d at 749.

The State attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument exist and must be enforced. *Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 747 ("In this case, however, the prosecutor's argument went far beyond the outer boundaries of proper closing argument.").

Accordingly, under the particular circumstances of this case, the trial court abused its discretion by refusing to grant a mistrial. R. 1634, l. 12 – 1638, l. 19.

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the issue of whether this Court erred in upholding the trial judge's denial of relief on appellant's immunity request under the Protection of Persons and Property Act, and a ruling from this Court on the burden shifting and inflammatory closing remarks made by the solicitor at trial.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

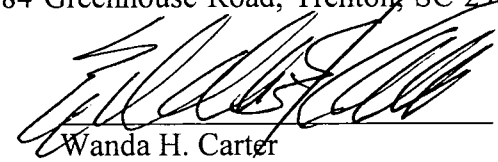
V.

JOE ROSS WORLEY,

APPELLANT

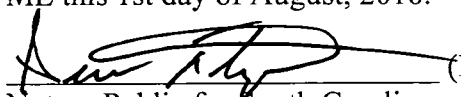
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joe Ross Worley, #360529, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 1st day of August, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of August, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022