

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327 (S.C.Ct. App. Filed September 26, 2018)

2010-GS-35-049; 052

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

PETITIONER

APPELLATE CASE NO 2014-001497

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE 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
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2018-UP-327
Heard June 20, 2018 – Filed July 18, 2018

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia, and Solicitor Samuel R. Hubbard, III,
of Lexington, all for Respondent.

PER CURIAM: Joe Ross Worley appeals his convictions for assault and battery with intent to kill (ABWIK) and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) ruling Worley was not entitled

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APPELLATE DEFENSE

to immunity from prosecution for ABWIK under the Protection of Persons and Property Act¹ and (2) not granting a mistrial when the solicitor made comments in his closing argument that constituted improper comments on Worley's right not to testify and impermissibly shifted the State's burden of proof to Worley.

We affirm and adopt the trial court's December 8, 2011 order pertaining to the court's determination that (1) Worley had the burden of proving his claim of immunity by the preponderance of the evidence, which he failed to do, and (2) the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

SHORT, THOMAS, and HILL, JJ., concur.

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

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

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, I. 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* S.C. 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, 1. 20 – 20, 1. 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

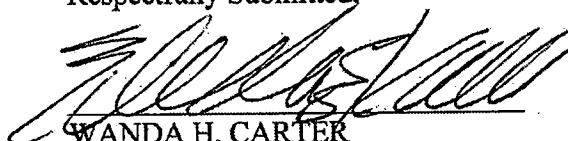
jury did not likely cure the error as the case was a credibility battle. *See, e.g. Id.; McFadden*, 342 S.C. at 642, 539 S.E.2d 394; *Sweet*, 342 S.C. at 349, 536 S.E.2d at 95 (holding the trial court's general jury charge on defendant's right not to testify was insufficient to cure the error when the 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,

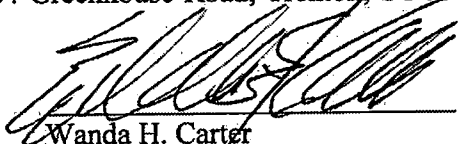
V.

JOE ROSS WORLEY,

APPELLANT

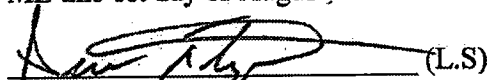
CERTIFICATE OF SERVICE

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

**RETURN TO PETITION FOR REHEARING AND
REQUEST FOR HOLDING ON FINAL ISSUE**

On July 18, 2018, this Court issued an unpublished opinion that affirmed Appellant Joe Ross Worley's convictions for assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). On August 1, 2018, Appellant submitted a "Petition for Rehearing and Request for Holding on Final Issue" pursuant to Rule 221(a), SCACR. By letter dated August 14, 2018, this Court asked Respondent (the State) to file a return to the motion. This "Return to Petition for Rehearing and Request for Holding on Final Issue" now follows. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. First, in regard to the lower court's denial of immunity under the "Protection of Persons and Property Act" (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007), this Court affirmed and adopted the lower court's December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Appellant at the immunity hearing before concluding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Appellant did not carry his burden of proof. Appellant's arguments simply could not prevail under this Court's standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant's claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court's findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court's December 8, 2011 order analyzed and rejected Appellant's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the lower court

held: "Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers." (R. p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." (R. p.1774). These individual findings supported the lower court's ultimate conclusion that "Appellant has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R. p.1773-p.1774). For all of these reasons, the lower court's denial of immunity and Appellant's convictions were properly affirmed by this Court. Rehearing should be denied.

Second, in regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, this Court adopted the trial court's finding that: "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify." That finding was supported by evidence in the record and was properly affirmed by this Court.

In his petition for rehearing, Appellant contends 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." However, the State submits Appellant reads this

Court's opinion too narrowly. While this Court's opinion could be read to indicate it was adopting the trial court's written December 8, 2011 order as to both issues, this cannot be what was intended where that written order was issued well before closing arguments were ever made at the conclusion of trial. Instead, a reasonable reading of this Court's opinion is that the adoption of the written December 8, 2011 order only pertains to the immunity issue, while the trial court's oral ruling at the end of trial was adopted by this Court in regard to the mistrial issues. Consideration of the trial court's oral ruling confirms this more broad and reasonable interpretation.

Indeed, at the conclusion of trial, the trial court ruled as follows:

I had told counsel I was denying the motion [for a mistrial]. I want to put my grounds on the record. And the basis for me denying it is the *Meggett* case. I thought it was in line with what we had here. But I can tell you what I do recall, and I'll double check it, is, number one, **the comment was in response to information or issues that were placed in the record by defense in this matter. So it was commenting on the evidence or the lack of evidence.**

In no way was it burden-shifting commentary nor did it suggest or infer that the defendant is guilty because he failed to testify, and no comment on the defendant's failing to testify whatsoever. It was just simply commenting on the lack of evidence or - - that was raised by the defendant. And, as such, to the extent I have to do this, I find that the comment was harmless beyond a reasonable doubt, if that is, in fact, required. It's supposed to be an appellate court standard. If I need to make that finding, I've made it based on the fact that it is as I've stated.

(R.p.1636, line 23-p.1637, line 19) (emphasis added). The emphasized language is perfectly in line with the language used in this Court's unpublished opinion, clearly indicating it constitutes the findings that were actually adopted by this Court. Thus, this Court appropriately adopted the lower court's conclusions as to both issues, one by way of the written December 8, 2011 order, and the other by way of the oral ruling at trial. There is no basis for granting rehearing for purposes of obtaining any further ruling from this Court.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's petition for rehearing, deny Appellant's request for making an additional holding on his final issue, and let stand the unpublished opinion affirming Appellant's convictions and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

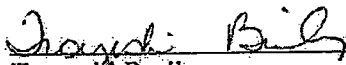
JOE ROSS WORLEY, ...APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return To Petition For Rehearing And Request For Holding On Final Issue*, dated August 24, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 24th day of August, 2018.


Troyeshi Brailey
Legal Coordinator

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The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

ORDER

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

Paul E. Short, Jr. J.

Paul D. Thomas J.

Man /i J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 John Benjamin Aplin, Esquire
 Samuel R. Hubbard, III, Esquire
 Wanda H. Carter, Esquire

RECEIVED
 SEP 26 2018
 APPELLATE DEFENCE

FILED

Sept. 26, 2018

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE 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
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2018-UP-327
Heard June 20, 2018 – Filed July 18, 2018
Withdrawn, Substituted and Refiled September 26, 2018

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia, and Solicitor Samuel R. Hubbard, III,
of Lexington, all for Respondent.

PER CURIAM: Joe Ross Worley appeals his convictions for assault and battery
with intent to kill (ABWIK) and possession of a weapon during the commission of

a violent crime, arguing the trial court erred in (1) ruling Worley was not entitled to immunity from prosecution for ABWIK under the Protection of Persons and Property Act¹ and (2) not granting a mistrial when the solicitor made comments in his closing argument that constituted improper comments on Worley's right not to testify and impermissibly shifted the State's burden of proof to Worley.

We affirm and adopt the trial court's December 8, 2011 order pertaining to the court's determination that Worley had the burden of proving his claim of immunity by the preponderance of the evidence, which he failed to do. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

We also affirm the trial court's denial of Worley's motion for mistrial. The court found at trial that the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) ("[T]he comment was simply a statement of the evidence which was before the jury, rather than a comment on [the defendant's] failure to testify."). Therefore, the court found the comment was harmless beyond a reasonable doubt. "The decision to grant or deny a mistrial is within the sound discretion of the trial court" and "will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.* When a violation is alleged, this court must apply a harmless error analysis as set forth in *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." *Id.* at 531, 466 S.E.2d at 366. "[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *Id.*

AFFIRMED.

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

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

2nd PETITION FOR REHEARING

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 on this Court's upholding of the denial of a mistrial after the solicitor made impermissible closing comments on appellant's failure to testify because this resulted in a shift in the burden of proof at trial. In support of this petition, 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

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 included findings that appellant did not establish by a preponderance

of the evidence that he was immune from prosecution under the Act, and further upheld the denial of a mistrial after the solicitor made impermissible comments on appellant's failure to testify at trial, which in turn shifted the burden of proof in the case.

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* S.C. 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.

2.) 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 upheld held the trial judge's denial of a mistrial despite the solicitor's comments on appellant's failure to testify which in turn shifted the burden of proof at trial.

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. The Court of Appeals affirmed and addressed the issue on appeal as follows:

We also affirm the trial court's denial of Worley's motion for mistrial. The court found at trial that the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by

Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“[T]he comment was simply a statement of the evidence which was before the jury, rather than a comment on [the defendant’s] failure to testify.”). Therefore, the court found the comment was harmless beyond a reasonable doubt. “The decision to grant or deny a mistrial is within the sound discretion of the trial court” and “will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). “The granting of a motion for mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.* When a violation is alleged, this court must apply a harmless error analysis as set forth in *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). “To be harmless, the record must establish the reference to the defendant’s right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant’s silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming.” *Id.* At 531, 466 S.E.2d at 366. “[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” *Id.*

To the contrary, 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.

With respect to the showing under Pickens as cited to by this Court, there is no doubt that the showing was satisfied and 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. Also, the state’s case against appellant was **not overwhelming** and appellant’s theory of the case was **clearly 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.

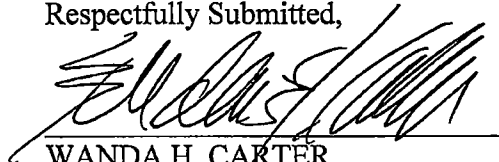
The state attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument 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 the denial of a mistrial after the solicitor commented on appellant's failure to testify at trial and thereafter shifted the burden of proof in the case.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

WANDA H. CARTER

Deputy Chief Appellate Defender

This 12th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

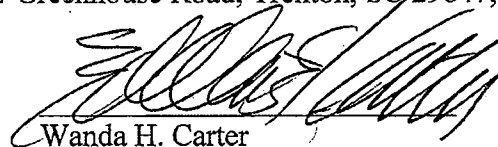
V.

JOE ROSS WORLEY,

APPELLANT

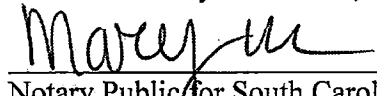
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the 2nd 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 12th day of October, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 12th day of October, 2018.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

RETURN TO 2nd PETITION FOR REHEARING

On July 18, 2018, this Court issued an unpublished opinion that affirmed Appellant Joe Ross Worley's convictions for assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). On August 1, 2018, Appellant submitted a "Petition for Rehearing and Request for Holding on Final Issue" pursuant to Rule 221(a), SCACR. On August 24, 2018, Respondent (the State) filed a "Return to Petition for Rehearing and Request for Holding on Final Issue." On September 26, 2018, this Court withdrew, substituted, and refiled an unpublished opinion that again affirmed Appellant's convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018). On October 12, 2018, Appellant filed a "2nd Petition for Rehearing" pursuant to Rule 221(a), SCACR. By letter dated October 16, 2018, this

Court asked the State to file a return to the motion. This “Return to 2nd Petition for Rehearing” now follows. The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The Protection of Persons and Property Act

In regard to the lower court’s denial of immunity under the “Protection of Persons and Property Act” (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007), this Court affirmed and adopted the lower court’s December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Appellant at the immunity hearing before concluding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Appellant did not carry his burden of proof. Appellant’s arguments simply could not prevail under this Court’s standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant’s claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court’s findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court’s December 8, 2011 order analyzed and rejected Appellant’s myriad grounds for claiming Deputy Rushton was not a “law enforcement officer” within the

meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the lower court held: "Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers." (R.p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." (R.p.1774). These individual findings supported the lower court's ultimate conclusion that "Appellant has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R.p.1773-p.1774). For all of these reasons, the lower court's denial of immunity and Appellant's convictions were properly affirmed by this Court. Rehearing should be denied.

Mistrial – Solicitor's Closing Argument

In regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, this Court affirmed, noting the trial court: (1) found "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was

guilty because he failed to testify,” and (2) “[t]herefore the court found the comment was harmless beyond a reasonable doubt.” These findings were supported by evidence in the record and therefore were properly affirmed by this Court.

In his petition for rehearing, Appellant contends this Court should have reversed the convictions because the State’s closing argument “constituted a direct comment” on Appellant’s right to not testify. He argues that, with respect to the showing that must be made under the harmless error analysis set forth by this Court in *Pickens*, “there is no doubt that the showing was satisfied and appellant was denied a fair trial by the state’s impermissible comments and, thus, prejudiced.” Appellant claims the State “directly referenced appellant’s failure to testify multiple times” and that the solicitor “tied appellant’s failure to testify directly and inexorably to appellant’s self-defense, mistake, and accident theories. (Petition for Rehearing, p.19). The State disagrees and maintains its position that Appellant’s argument is entirely without merit. The State’s closing argument was in direct response to comments made during Appellant’s opening statement, Appellant’s attempts to substantiate those comments through the examination of other witnesses, the resulting lack of evidence to support the comments in the opening statement, and Appellant’s closing argument. The State’s argument did not shift the burden onto Appellant, but instead merely made note of the lack of evidence as a whole in the record, despite Appellant’s opening statement suggesting such evidence would be forthcoming at trial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme

measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524, 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

Relevant Facts

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Appellant stated:

... [There is] no evidence whatsoever that [Appellant] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.

He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.

And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Appellant's counsel said in part:

Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it

had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.

And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.

This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.

Well, in September, when the Sheffields complained the first time, *there's a fox* - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - *and that fox had injured this cat*, had injured it to the point they had to take it to the vet.

Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. *He flips on his light, and he sees movement out there, and he said, The dadgum fox again. So he's out there hollering at it and trying to get rid of it.* He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. *And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.*

(R.p.833-p.834) (emphasis added).

Subsequently, during Appellant's cross-examination of Deputy Moore, counsel asked: "Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Appellant would be allowed to cross-examine other witnesses in regard to Appellant's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Appellant to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court

ruled it would not allow the defense to use Appellant's pretrial testimony during the examination of other witnesses, but that if Appellant chose to testify, the prior testimony might be admissible in cross-examination. Appellant said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Appellant's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After the State rested, during arguments on Appellant's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Appellant then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Appellant later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching

deer, "or somebody shooting at foxes or whatever." (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Appellant's situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Appellant to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: "No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone." Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Appellant was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Appellant also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and ammunition used by Appellant, Willis said the bullet used by Appellant was "not a round you would shoot foxes with." (R.p.1457, lines 3-7). Before the defense rested, Appellant advised the court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties' requests to charge. (R.p.1477-p.1484). In regard to a particular request from Appellant in regard to night hunting, the trial judge commented: "I'm not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it's night hunting, even if he was shooting at a fox, he can't use a .30-06; he's got to use a .22 or less." Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on

habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Appellant. (R.p.1513-p.1516). During Appellant's close, counsel said: "Unfortunately, for the Worley family, they had problems with a fox bothering their cat." (R.p.1518, lines 4-6). He later said: "Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells." (R.p.1520, lines 2-4). The solicitor objected, complaining that Appellant was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Appellant making a statement from facts that were not in the record. He pointed out that Appellant did not testify and there was no trial testimony a fox was out there on the night of the incident or that Appellant shot at a fox. The trial court agreed, sustained the objection, and directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521). Appellant completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.

And what did he 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. 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, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.
....

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.

(R.p.1556-p.1559).

Discussion / Analysis

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. *See* U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself."); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Accordingly, this right forbids both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965).

“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” *State v. Weaver*, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor’s statements that there was no testimony or evidence about a fox or Appellant going back to bed were simply comments on the evidence presented during trial in response to Appellant’s counsel’s argument. It was not a comment on Appellant’s constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion that the solicitor made a “direct comment” on his right to not testify, no such comment appears. (See Brief of Appellant, p.39-p.41; Petition for Rehearing, p.19). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect

right to state his version of the testimony and to comment on the weight that should be given to such.”). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, did not shift the burden of proof onto Appellant, and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson’s failure to testify.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on Appellant’s counsel’s false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or suggest Appellant’s guilt could be inferred from his failure to testify or present a defense. *See State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) (“In any event, the solicitor’s statement did not refer to appellant’s decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]”). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor’s closing argument did not infringe upon Appellant’s constitutional rights or render his trial fundamentally unfair.

In addition, Appellant’s opening statement and closing argument injected the extraneous considerations of whether Appellant was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. *See*

State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (“Once the defendant opens the door, the solicitor’s invited response is appropriate so long as it does not unfairly prejudice the defendant.”); *see also Patterson*, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor’s closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor’s statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant’s guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor’s remarks during his closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). Appellant’s counsel first claimed there would be evidence about Appellant shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Appellant’s presumption of innocence. It also specifically charged that Appellant’s failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Appellant’s motion for a mistrial. The comments

did not unfairly shift the burden and Appellant was not prejudiced by the comments so as to receive an unfair trial.

This Court appropriately affirmed and adopted the lower court's conclusions as to Appellant's failure to carry his burden of proving his claim of immunity by the preponderance of the evidence, and it appropriately affirmed the trial court's denial of Appellant's motion for a mistrial in regard to the solicitor's closing argument. There is no basis for granting rehearing.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's second petition for rehearing and let stand the substituted and refiled unpublished opinion affirming Appellant's convictions and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
October 25, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return To 2nd Petition For Rehearing*, dated October 25, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 25th day of October, 2018.


Troyeshi Brailey
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The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

ORDER

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

<u>Paul E. Shortz Jr.</u>	J.
<u>Paul W. Roman</u>	J.
<u>Man 1-</u>	J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 John Benjamin Aplin, Esquire
 Samuel R. Hubbard, III, Esquire
 Wanda H. Carter, Esquire

FILED

December 13, 2018