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.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court properly denied Appellant's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs where: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation.

2. Whether this Court must affirm the lower court's denial of Appellant's request for immunity from criminal prosecution under the Act because Appellant failed to challenge all of the court's reasons for finding he failed to carry his burden of proof, and whether the trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Appellant has challenged in this Appeal.

3. Whether the trial court properly denied Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify where those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.

STATEMENT OF THE CASE

Appellant was indicted at the February 22, 2010 term of the grand jury for McCormick County for Assault and Battery with Intent to Kill (2010-GS-35-052) and Possession of a Weapon during a Violent Crime (2010-GS-35-049). He was represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire, all of the Greenwood County Bar. Respondent (the State) was represented by Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, all of the Eleventh Circuit Solicitor's Office.

The case was set for trial for May 31, 2011, at the McCormick County Courthouse before the Honorable William P. Keesley. (R.p.1). Prior to the start of trial, Appellant made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). On May 31-June 1, 2011, the circuit court conducted a pretrial immunity hearing. (R.p.1-p.231). At the close of that hearing, after taking testimony and hearing arguments from both sides, Judge Keesley took Appellant's motion under advisement and told the parties he would notify them of a decision in writing. (R.p.228). In an order dated July 5, 2011, Judge Keesley denied Appellant's request for immunity and recused himself from further participation in the case. Appellant promptly moved for reconsideration of Judge Keesley's ruling. In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley affirmed his earlier ruling and denied Appellant's motion for reconsideration. In that order he found that Appellant had failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court: (1) summarized Appellant's testimony from the immunity hearing (R.p.1755-p.1757); repeatedly found that testimony was not credible

(R.p.1756 & p.1760); found "[Appellant had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home." (R.p.1759); noted: "The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so." (R.1760); and found: "The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer." (R.p.1762). (R.p.1754-1777).

On January 18, 2012, Appellant served and filed a Notice of Appeal from Judge Keesley's Order denying immunity, and on January 8, 2013, he filed an initial brief and designation of matter in support of his appeal. That initial brief focused in part on the fact that portions of the immunity hearing could not be transcribed, including the entirety of Appellant's own testimony.[1] Appellant framed his first issue as follows: "Because an agent of the State failed to preserve evidence of critical testimony from the hearing regarding immunity, does appellate court lack sufficient record to conduct meaningful appellate review." He argued that partial reconstruction was disfavored and that rather than remanding for an entirely new immunity hearing, he should instead receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. (R.p.757-794).

On February 7, 2013, the State submitted a motion to remand for reconstruction of the record and a motion to strike improperly designated matter from Appellant's amended designation of matter. On February 15, 2013, Appellant filed a return and on February 20, 2013,

[1] Appellant testified on his own behalf at the immunity hearing; however, a transcript of his testimony was and still is unavailable due to a theft from the court reporter's car. As explained by Judge Keesley in his report to this Court, the court reporter used an outside typist to assist in preparing transcripts. She followed her standard practice of putting all of the materials to prepare the transcript into a briefcase and box that were inside her vehicle. A thief stole almost all of the materials, including the trial log, the stenograph notes and disk, and some backup tapes. From the backup tapes that were left, she created the transcript that has been filed, and she noted it was incomplete. She filed a statement about this, notifying Court Administration of the theft and the resulting gap. Judge Keesley found absolutely no wrongdoing on the part of anyone other than the thief who stole the items from the court reporter's vehicle. (R.p.1852-p.1853).

the State filed a reply. On March 6, 2013, Appellant then filed a motion to remand for a de novo immunity hearing. On March 18, 2013, the State filed a return to Appellant's motion and on March 25, 2013, Appellant filed a reply. In an Order filed March 28, 2013, this Court granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript and denied Appellant's motion for a de novo hearing. The appeal was held in abeyance pending reconstruction.

On June 14, 2013, a reconstruction hearing was convened at the McCormick County Courthouse before Judge Keesley. Appellant was present and was represented by Desa A. Ballard, Esquire, Carson M. Henderson, Esquire, and Billy J. Garrett, Jr., Esquire. The State was again represented by Solicitor Myers and Assistant Solicitors Maye and Young. Assistant Attorney General J.C. Nicholson, III, Esquire, appeared on behalf of court reporter Rema Thomas and the Director of the Office of Court Administration, Desiree Rutledge Allen, both of whom were appearing as witnesses. The reconstruction court took testimony from Thomas, Allen, and the Honorable Gwendolyn Dorn Chiles, Clerk of Court for McCormick County. It was also provided with: (1) a copy of a September 7, 2013 affidavit from Appellant's immunity hearing attorneys, Garrett and Henderson, which gave a summary of the testimony given by Appellant at the May 31, 2011 immunity hearing; (2) Court's Exhibit #1 - notes from Assistant Solicitor Ervin Maye; (3) notes from Judge Keesley; (4) notes from the Deputy Clerk of Court regarding the order and time of witnesses; and (5) a copy of Judge Keesley's December 6, 2011 Amended Order, which included a factual summary of the immunity hearing. (R.p.1655-1777).

On August 21, 2013, the State filed a "Motion to Dismiss Appeal" with this Court arguing that our supreme court's published opinion in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), mandated dismissal of Appellant's appeal as an improper interlocutory appeal from

an order that is not immediately appealable. On the same date, this Court issued an Order finding the appeal should be dismissed because: "Appellant had filed a notice of appeal from the denial of his motion for immunity pursuant to the Protection of Persons and Property Act (S.C. Code §§ 16-11-410 to -450) and the denial of a request for immunity under the Act is not immediately appealable. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013)." This Court further noted that the appeal had been remanded for the reconstruction of the missing portions of the immunity hearing transcript but that since reconstruction would no longer be necessary, the previous remand order was rescinded. The Court ordered: "At trial, the parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." (R.p.795-796). On August 23, 2013, Appellant petitioned for rehearing and in an Order from this Court filed October 21, 2013, rehearing was denied.

On December 16-19, 2013, the case proceeded to trial before the Honorable R. Lawton McIntosh. (SROA. p.1-14; R.p.797-p.1654). At the beginning of the proceeding, Appellant was given the opportunity to do more "reconstruction"; however, his attorney advised Judge McIntosh that reconstruction seemed to be done and instead simply introduced the transcript of the June 14, 2013 reconstruction hearing and the exhibits into the record as a Court's Exhibit at trial. (R.p.797-p.798; R.p.1688-1777).

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Appellant was on his own premises, as well as a charge on the defense of habitation—the jury found Appellant guilty of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (R.p.1598-p.1640). The trial court delayed sentencing pending a presentencing investigation including a psychological evaluation. (R.p.1640-p.1653).

On June 30, 2014, Judge McIntosh reconvened the case to impose a sentence. The Court offered to allow the parties to present testimony and then heard arguments from both sides before sentencing Appellant to twenty (20) years' imprisonment for assault and battery with intent to kill and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (R.p.1778-p.1798; SROA.p.15-16). On July 1, 2014, Appellant timely filed a notice of intent to appeal his conviction and sentence.

On May 4, 2016, Appellant filed a "Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Pre-Trial Hearing on Appellant's Motion for Immunity from Prosecution Pursuant to the Protection of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.)." (R.p.1799-1807). On May 6, 2016, the State filed a letter in lieu of a Return consenting to a remand to take the steps necessary, as determined by the lower court, to complete the reconstruction hearing that was held before Judge Keesley on June 14, 2013. On June 17, 2016, this Court filed an Order granting Appellant's motion and remanding the appeal to the McCormick County Court of General Sessions. The Court ordered: "Counsel for Appellant is ordered to contact counsel for Respondent and the circuit court judge, the Honroable William P. Keesley, within fifteen days of this order to determine if any additional hearings are necessary and whether the transcript can be reconstructed." (R.p.1808-1809).

Based on a review of the Order and an exchange of letters between the parties, Judge Keesley elected to re-convene the reconstruction hearing at the McCormick County Courthouse on October 25, 2016. Appellant was present and was represented by Assistant Appellate Defender John H. Strom, Esquire, and the State was represented by Senior Assistant Deputy Attorney General J. Benjamin Aplin, Esquire. The State raised several objections to the court taking any additional testimony or evidence in regard to reconstruction; however, those

objections were overruled and Appellant was allowed to present testimony from trial counsel Carson Henderson, Esquire. Reserving its objections to the proceeding, the State then elicited brief testimony from Assistant Solicitor Young before Judge Keesley took the matter under advisement and concluded the hearing. (R.p.1810-p.1846).

On December 30, 2016, Judge Keesley issued a fourteen page "Report Regarding Reconstruction of the Record." That report included a procedural background, the standard for record reconstruction, a discussion of why the record was incomplete, a discussion of the missing sections of the record, a description of the materials obtained for the purpose of reconstruction, and ultimately a reconstruction of the missing sections. Judge Keesley concluded the report was submitted "in order for the appellate court to assess whether it constitutes a meaningful reconstruction of the sections of the transcript that are missing and whether Mr. Worley suffers any prejudice in his appellate rights caused by the absence of these parts of the record." (R.p.1847-1860). This Court allowed the appeal to proceed and Appellant has now submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Summary: State's Opening Statement

In his opening statement at trial, the solicitor gave a succinct factual summary of the incident which led to the charges against Appellant. He explained that in the early morning hours of Sunday, November 15, 2009, Alan and Gayle Sheffield, who lived on Thurmond Lake in the Little River subdivision in McCormick County, were awoken by the sound of gunshots in close proximity to their house. The Sheffields lived next door to Mary Worley and on many weekends during the fall of 2009 Worley's son, Appellant, would come out to her house. He would occasionally be outside in the middle of the night "cussing," talking loudly, and shooting a gun. The solicitor said the Sheffields had been down to the Sheriff's Department in September

to complain and had also talked to Mary Worley about their concerns; however, when it happened again on November 15, 2009, they had enough and decided to call 9-1-1. They told the operator they had complained about Appellant shooting a gun from the Worley residence before and that he was at it again. (R.p.844-p.849).

At approximately 4 a.m., three officers from the McCormick County Sheriff's Department, Bobby Rushton, Nick Moore, and Melissa McAlister, were dispatched to investigate the call. The officers were in separate vehicles but showed up at nearly the same time. While Rushton walked over to talk to the Sheffields, Moore and McAllister walked around to the "back" of the Worley residence.[2] The solicitor explained it was a two-story structure in the back, with a garage door and an entry door below, and windows and a sliding glass door that opened onto a deck above. As Rushton was talking to the Sheffields, Moore began beating on the lower door, ringing the doorbell, and hollering "Sheriff's Office" but got no response. Rushton was still talking to the Sheffields when he noticed a floodlight come on at the Worley residence, lighting up the back yard all the way down to the lake, and then go back off. Assuming this meant someone was awake at the Worley residence, he walked back over and joined Moore where they resumed knocking on the door, ringing the doorbell, announcing "Sheriff's Office," and trying to get someone to respond. (R.p.849-p.852).

At that point, Rushton and Moore heard the sliding glass door opening from above. Rushton stepped back out from under the deck and peered up into the darkness where he saw a figure standing at the sliding door. After the incident, the figure was identified as Appellant. Rushton identified himself by saying "Sheriff's Office" while Moore was hollering "Sheriff's Office" from under the deck, to which Appellant responded: "I don't give a fuck." Rushton

[2] The house predominantly faced the lake, away from the road, so while the "front" of the house was on the road, the "back" of the house was where the doors, windows, and deck are located.

noticed Appellant was holding some kind of rifle or long gun so he hollered to Moore and McAlister, "Gun!" Rushton and Moore said "Drop the gun" and as Rushton began drawing his service weapon, the floodlight suddenly came on, blinding him. Appellant then fired his rifle at Rushton, hitting the Glock pistol in Rushton's hand. The single shot blew the Glock to pieces, shattered Rushton's hand, and knocked him flat on the ground. (R.p.529-p.854).

The solicitor explained that as Moore called out to Rushton to see if he was alive, Rushton came to and began crawling towards him. Moore then heard a second shot from the rifle. As Moore and McAlister assisted Rushton and all three officers began to flee, they heard Appellant say: "Where are you, you son of a bitch?" The officers got into one of the service vehicles, left the property, and radioed for help. A short time later, Sheriff Reid and Moore returned to the Worley property where they encountered Appellant and his mother walking around the yard with flashlights. Appellant told the Sheriff he had put his deputy's gun in his patrol car and admitted to the Sheriff that he was the one who had done the shooting. When the Sheriff told Appellant he shot a deputy, Appellant responded: "He didn't have any business ringing my damn doorbell." (R.p.854-p.862).

Pretrial Immunity Hearing

On May 31-June 1, 2011, the trial court conducted a pretrial immunity hearing. Appellant testified on his own behalf; however, as noted in the procedural history, a transcript of his testimony is unavailable due to a theft from the court reporter's car. Appellant's testimony was subsequently reconstructed by Judge Keesley as follows:

> 1) Mr. Worley was at his home/residence. 2) The residence is heavily insulated, making it almost soundproof. 3) It was a pitch-black night. 4) He was awakened by the repeated ringing of the doorbell for the entrance door on the first floor. 5) He was in a bedroom on the second floor. 6) He decided not to go downstairs to the door. 7) There had been previous burglaries and/or incidents in the neighborhood that caused Mr. Worley to have concern. 8) There is no peep hole or window near that entrance door. 9) He did not turn on the lights initially (there was uncertainty about when lights were turned on), but the appellate review may take whatever version is most favorable to Mr. Worley. 10) He did not see any blue lights or car lights. 11) No one called the residence to alert him to the officers coming over. 12) He did not call 911 to report someone at his door. 13) He had fired a weapon earlier trying to scare a fox that had injured the family cat. 14) He loaded the gun upon hearing the commotion of ringing the doorbell. 15) He put on his clothes. 16) He went out of the sliding glass door off his bedroom onto a deck above where the entrance door is located. 17) He saw the "burglar" running out with "a dinky" flashlight. 18) He told the "burglar" to freeze. 19) He saw the "burglar" aim a gun at him, and he fired a shot that turned the person around. 20) The person then ran toward an embankment (the lake), turned, and ran back toward him. 21) Mr. Worley then fired a warning shot into the trees. 22) Mr. Worley went into the yard after the shooting and after the officers had fled. He yelled, "Where are you, you son of a b*tch," or "Where are you, you sons of b*tches." He shouted some kind of warning to the person or persons. 23) There were no visible police cars or identifying insignia observable that would put him on notice that these were law enforcement officers. 24) He thought the home was being burglarized (he repeatedly and consistently referred to the person or people outside as being a burglar or burglars). 25) He never heard anyone identified as a law enforcement officer before, during, or immediately after the shooting. 26) He never had a verbal exchange with the people during which he asked who they were, and he never heard anyone say that they were law enforcement officers prior to or during the incident. 27) He never said to the people outside that he did not give a f___k [that they were law enforcement officers]. 28) He denies that he was ever instructed to put his weapon down by law enforcement officers. 29) He acted instinctively for his own protection and fired in the direction of the "burglar" who was pointing a gun at him. 30) He went out into the yard later and picked up the pistol and flashlight that the person had. 31) He eventually saw a Sheriff's vehicle at his neighbor's house, and he went up there and put the pistol

> into a patrol car. 32) He was in fear for his life before and at the time of the shooting, and immediately thereafter, and he fired to protect himself and his property.

(R. p.1857-p.1858). In a footnote Judge Keesley noted he was accepting the assertion by trial counsel Henderson in the October 2016 reconstruction hearing that the events happened rather instantaneously once Mr. Worley opened the sliding glass door and stepped outside with the rifle. The court accepeted that the evidence indicates that Deputy Rushton spun out from underneath the deck area with his gun drawn, pointing it at Mr. Worley on the elevated deck, and Mr. Worley fired the first shot immediately upon seeing Deputy Rushton with the gun drawn. The first bullet was the only one that struck Deputy Rushton, blowing part of the deputy's hand off. (R. p.1858).

After offering his own version of events, Appellant elicited testimony from Deputy Robert "Bobby" Rushton, both about his qualifications as a law enforcement officer and about the incident. Rushton explained he had been a Sheriff's Deputy for about six years before resigning to take a job as an international police advisor in Iraq for four years, after which he returned to McCormick County and was rehired as a deputy. He identified the oath of office he took at his initial hire but testified he did not take a new oath when rehired after his return from Iraq. Rushton testified he had to update his training with the Criminal Justice Academy when he returned and that he did this in the two weeks between his rehire and the shooting incident. He then described the police issued clothing he was wearing the night of the shooting and acknowledged his polo shirt did not have an emblem of a badge; however, he explained he was wearing an actual badge on his belt. (R.p.6-p.30).

Rushton then gave detailed testimony about being dispatched to the Worley residence in response to the 9-1-1 call of shots being fired, including who responded, who arrived first, and

where each car parked. He described walking over to the Sheffields' residence to talk to the complainant while Moore went to the Worley residence and McAlister positioned herself in between. Rushton heard Moore knocking on the Worley's door and announcing "Sheriff's Office." As Moore was then walking towards McAlister and Rushton after getting no response, Rushton saw the Worleys' outdoor light come on. He told the Sheffields to go inside and the three officers walked back towards the Worley residence, at which point the light went out. Rushton and Moore resumed knocking on the door and ringing the doorbell when they heard a voice yell: "Who is it?" The officers said, "Sheriff's Department" and the person responded, "I don't give a fuck." Rushton heard the sliding glass door over the deck opening, so he started walking backwards and looking up and saw Appellant standing in front of the upstairs windows. He recognized a weapon in Appellant's hands and yelled "Gun!" Rushton pulled his service weapon as he and Moore started yelling "Drop the gun!" He testified the lights then came on and he suddenly was face-first on the ground. Rushton testified he did not see or hear the flash from Appellant's gun but soon realized he had been shot in the hand. Rushton then described Moore's efforts to get him to come towards him, under the Worleys' deck, and how he heard Appellant fire a second shot as he was running for cover. (R.p.30-p.103). On cross-examination, Rushton testified that neither he nor Moore tried to forcefully enter the Worley residence at any time. He also identified his signature on an oath of office form and acknowledged he must have taken an oath upon his return to duty after his employment in Iraq. (R.p.103-p.109).

Appellant then called criminologist Dr. George Kirkham to the stand to offer expert testimony about the police response to the 9-1-1 call and the shooting incident. Kirkman was admitted as an expert in the area of criminology without objection. Based on his review of

statements given by the three responding officers, Kirkman opined they had made a number of mistakes including failing to get more detailed information from the Sheffields, failing to try to contact the Worleys by telephone, and failing to follow a number of fundamental principles of cover and contact. He testified that under the circumstances presented, it would be eminently reasonable for Appellant to not realize these were law enforcement officers outside of his house. (R.p.111-p.142).

Next, Appellant called Alan Sheffield to the stand. A portion of Sheffield's direct testimony and all of his testimony on cross-examination is also unavailable due to the theft. In the portion of his testimony that was transcribed, Sheffield described his relationship with the Worleys, the complaint his wife made to the Sheriff's Department about shots being fired at the Worley residence, and the talk he had with Mary Worley in which he asked her to share his concerns with Appellant. He said he has seen foxes out near the lake and had heard about the Worleys' cat, Sweet Pea, being hurt but had no recollection about how it happened. Sheffield then began describing the events of the night of November 15, 2009. He testified he heard the officers knock and announce their presence before hearing a gunshot and seeing Rushton go down. He said it all happened so quickly that he could not tell if Rushton pulled his weapon out or not. (R.p.148-p.159).

Although the remainder of Sheffield's testimony is omitted, Judge Keesley reconstructed it as follows:

> 1) Mr. Sheffield testified that Mr. Worley's mother came over after the shooting of Deputy Rushton and appeared to be confused. [She was inside the home during the incident. She did not testify or present affidavits on the immunity issue in any of the proceedings before this court.] 2) Mr. Sheffield testified that he does not know if any shots were ever fired at his house or at him or his wife. 3) When Mr. Sheffield was being examined by the Solicitor's office, he testified that shots were fired around Labor Day. Then, a set of shots were fired each weekend until Deputy Rushton was shot in November. When re-examined by Mr. Garrett on

> reply, Mr. Sheffield stated that the shots may not have been every weekend, but on a lot of weekends between Labor Day and the date of the incident. 4) He testified that he discussed Mr. Worley's firing shots in the neighborhood with Mr. Worley's mother in an attempt to resolve it, and Mr. Sheffield and his wife were just hoping that Mr. Worley would stop shooting the rifle in the neighborhood.

(R. p.1859-p.1860). Judge Keesley further noted: Except for the reference to Mr. Worley's mother coming to the Sheffield home after the incident and appearing confused, none of the notes taken during the period of the missing gap in Mr. Sheffield's transcript appear to be describing what took place on the night of the shooting. (R. p.1860).

Appellant then called Deputy Nicholas Moore to the stand. On direct examination, Appellant used a written statement Moore had given to an Officer Stallo on Wednesday, July 21, 2010, to explore alleged discrepancies in the deputies' descriptions of the shooting incident. (R.p.160-p.173). On cross-examination, Moore explained he repeatedly beat on the downstairs door and called "Sheriff's Office" throughout the incident, before the floodlight came on the first time, after it came on and went out again, and after hearing the sliding door above the deck open. Moore heard Appellant respond, "I don't give a fuck," before Rushton stepped back, was blinded by the lights coming back on, and was shot in the hand. He also heard a second shot fired by Appellant and heard him say: "Where you at, you son of a bitch?" (R.p.173-p.177).

Finally, Appellant called Deputy Sara Melissa McAlister to the stand. Consistent with the testimony from Rushton and Moore, she testified that Moore and Rushton repeatedly announced their identity as law enforcement officers while knocking on the exterior door and ringing the doorbell. McAlister testified Appellant said, "I don't give a fuck," after Moore stated "Sheriff's Office" and that the light then came on and Rushton was shot. She testified she heard Moore and Rushton both tell Appellant to put his gun down before Rushton was shot. (R.p.188-p.209).

The hearing broke for the day and the following morning the parties made arguments about whether Appellant should be entitled to immunity under the Act. Appellant argued he had made a prima facie showing that Rushton was not a "qualified deputy" of McCormick County at the time of the incident, and that as a result Rushton could not be considered a "law enforcement officer" for purposes of the Act. First, he claimed Rushton was not qualified because he had not been approved by a circuit judge pursuant to section 23-13-10. Next, he claimed Rushton was not qualified because he had not taken the oath of office required by section 23-13-20. Appellant acknowledged Rushton had taken a constitutional oath but argued there was a second, statutory oath he had not taken. Finally, Appellant argued Rushton was not qualified because he had not provided a bond as required by section 23-13-20. Appellant argued that pursuant to section 16-11-440 of the Act and his own testimony, he should be "presumed to have a reasonable fear of imminent peril of death or great bodily injury" because Rushton, Moore, and McAlister were in the process of unlawfully and forcefully entering his residence. S. C. Code Ann. § 16-11-440(A) (Supp. 2009). He contended he should not be subject to the "law enforcement officer" exception to this statutory presumption because: (1) Rushton was not a qualified "law enforcement officer;" (2) Rushton was "entering or attempting to enter" his residence at the time of the incicent; (3) as an unqualified officer, Rushton could not have been acting "in the performance of his official duties;" and (4) Rushton did not "identif[y] himself in accordance with applicable law." S.C. Code Ann. § 16-11-440(B)(4) (Supp. 2009). Continuing to rely heavily on his own testimony, Appellant claimed he only heard the doorbell ringing prior to opening the door but never heard any knocking or voices announcing the people outside his home were officers. He complained Rushton was not wearing a hat or other clothing with either a badge or clear markings indicating he was law enforcement, and that none of the officers activated their blue

lights during the incident. Appellant noted the expert testimony from Dr. Kirkham about the officers' failure to follow fundamental principles of cover and contact and argued a reasonable homeowner in Appellant's position would not have known Rushton was a law enforcement officer and therefore Appellant was justified in doing what he did. He asked Judge Keesley to dismiss the indictments against him pursuant to the Act. (R.p.209-p.220).

In response, the solicitor argued Appellant had failed to present any evidence whatsoever that the three officers were acting unlawfully or were forcibly entering his residence. He also argued that even if the court construed the actions as a forcible entry, Appellant was not entitled to the presumption of reasonable fear in the statute because the "law enforcement officer" exception applied to eliminate such a presumption. The State argued the officers were acting lawfully and performing their official duties in responding to a 9-1-1 call and that Appellant had failed to prove otherwise. The solicitor noted the issue of whether the officers sufficiently identified themselves was a question to be answered by the jury and asked that immunity be denied. Judge Keesley took the matter under advisement. (R.p.220-p.228).

In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley concluded Appellant failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court summarized Appellant's testimony from the immunity hearing and specifically found that testimony was not credible. It found "[Appellant had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home" and that "The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer." The court ultimately held: "The

defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so." (R.p.1754-1777).

Trial

At trial, the State presented testimony from the witnesses described below.[3] First, Deputy Nicholas "Nick" Moore described the November 15, 2009, incident which resulted in Appellant shooting Deputy Rushton in the hand. His testimony was consistent with the testimony he previously gave at the immunity hearing, with additional details. (R.p.872-p.921). Moore was cross-examined extensively by Appellant. (R.p.921-p.984). Next, the State called Donald Garman, the EMT who responded to the incident and treated Deputy Rushton's after he was shot. (R.p.985-p.988). The State then called Dr. Robert Charles Densmore to the stand. He is a plastic and reconstructive surgeon who conducted four reconstructive surgeries attempting to repair Deputy Rushton's severely injured right hand. (R.p.989-p.1008). Next, the State called the victim of the shooting, Deputy Bobby Rushton, to the stand. Rushton described the incident as he did at the immunity hearing, with additional details. (R.p.1008-p.1035). Rushton was then cross-examined by Appellant, with a significant number of questions directed at whether he had met various statutory qualifications for becoming a duly qualified sheriff's deputy prior to the incident, including whether his appointment had been approved by a circuit court judge, whether he had posted a bond, whether he had taken a statutory oath, and whether he had completed the required course at the South Carolina Criminal Justice Academy to be recertified when he returned to the Sheriff's Department following a break in service. (R.p.1036-p.1094).

After Rushton finished testifying, the State called Alan Sheffield to the stand. Sheffield was Appellant's next door neighbor at the time of the incident and made the original 9-1-1 call to

[3] Additional relevant details from the trial are described in Argument III below, as they relate to Appellant's motion for a mistrial based on the solicitor's allegedly improper closing argument.

report gunshots being fired from Appellant's house in the middle of the night. He provided details about the events leading up to his 9-1-1 call, as well as the events that transpired after the law enforcement officers arrived on the scene. Significantly, he corroborated the deputies' testimony about Appellant's outdoor light coming on and off during the encounter, as well as the fact that they were repeatedly knocking on Appellant's door and announcing their identity as deputies prior to the shooting. (R.p.1094-p.1121). Next, the State called Investigator Joseph E. Collier, Jr., of the McCormick County Sheriff's Department and offered him as an expert in small arms and ammunition. He was admitted without objection and offered testimony about his role in investigating the incident, with particular focus on examining Appellant's rifle and ammunition and the damage they could cause. (R.p.1121-p.1153; p.1170-p.1172). Collier was cross-examined about a variety of issues including his department issued law enforcement clothing. (R.p.1153-p.1170). The State then called agent Kenneth H. Whitler from the SLED Forensic Services Division to the stand. He was admitted without objection as an expert in firearms identification and described the testing he did on Appellant's gun and ammunition. (R.p.1172-p.1181).

Next, the State called McCormick County Sheriff George H. Reid to the stand. He identified Moore, Rushton, and Melissa McAlister, as deputies working for him at the Sheriff's Department at the time of the incident. (R.p.1182-p.1190). Sheriff Reid described responding to the Worley residence after the shooting incident, accompanied by Moore and McAlister. He encountered Appellant and his mother in the yard with flashlights and after identifying himself and determining who they were, talked to Appellant about the incident. Sheriff Reid testified Appellant said he put Rushton's gun in his car and then admitted he was the one who had been doing the shooting that night. When asked if he knew who shot Rushton, Appellant responded:

"He didn't have no business ringing my damn doorbell." (R.p.1182-p.1190). After Sheriff Reid was cross-examined, the State rested. (R.p.1190-p.1195).

Appellant was then sworn and questioned by the court to ensure he understood his right not to testify. The trial judge explained that if Appellant chose not to testify the court would instruct the jurors that they cannot consider his failure to testify, whatsoever. (R.p.1198-p.1200). Appellant then moved for a directed verdict and made a detailed argument focusing on a claim that where the State failed to show Rushton had met the statutory qualifications for becoming a duly qualified and certified deputy, the State had not presented sufficient evidence to take the case to the jury. The trial judge disagreed and denied the motion. (R.p.1200-p.1223).

Next, Appellant presented his defense. He first called his brother Robert Worley to the stand to offer testimony about the house where the incident took place. (R.p.1224-p.1286). Appellant then introduced the recording of the 9-1-1 call into evidence and it was played for the jury. (R.p.1291-p.1292). Appellant sought to recall Deputy Moore to the stand in regard to whether he was duly qualified as a deputy sheriff. The court allowed Appellant to proffer the testimony as it related to his directed verdict argument, and the State stipulated essentially the same testimony would be given by McAlister. (R.p.1293-p.1305).

Appellant then called criminologist Dr. George Kirkham to the stand. As at the immunity hearing, he was admitted as an expert without objection. Kirkham proceeded to offer similar testimony to what he gave at the immunity hearing, critiquing the police response to the 9-1-1 call and the procedures employed at the scene. He gave an opinion that Deputy Rushton's actions were the significant and proximate cause of his getting shot by Appellant. (R.p.1305-p.1351; p.1424-p.1431). Dr. Kirkham was extensively cross-examined by the State in regard to his opinions and credibility as an expert. (R.p.1352-p.1423). Finally, Appellant called Bo Willis

in his defense. Willis is a City of McCormick police officer who assisted in the investigation, took photos of the scene, and drew a diagram of the house. (R.p.1433-p.1470). Appellant advised the trial court he would not testify in his own defense and the trial moved on to a charge conference and closing arguments. (R.p.1472-p.1578). As described in greater detail below, Appellant objected to a portion of the State's closing argument and moved for a mistrial; however, after hearing extensive arguments both at the time of the objection and before the jury charge, the trial court denied the motion. (R.p.1559-p.1561; p.1579-p.1598; p.1634-p.1637). The trial court gave a jury charge covering the State's burden of proof, the presumption of innocence, evidence, credibility of witnesses, reasonable doubt, the elements of the crimes and each of Appellant's defenses. (R.p.1598-p.1634). In regard to Appellant's decision not to testify the court charged: "Ladies and gentlemen, I'll also instruct you and tell you that - - and emphasize to you the fact that the defendant in this case did not testify is not and shall not be a factor that may be considered by you in any manner whatsoever in your deliberations." (R.p.1612, line23-p.1613, line 3).

ARGUMENT

I.

The lower court properly denied Appellant's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs because: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation.

Appellant argues the trial court committed an error of law by ruling he was not entitled to immunity from prosecution under the Act on the grounds that Rushton was a "law enforcement officer" within the meaning of the Act because: (1) Rushton's appointment as a deputy was never approved by a circuit court judge as required under § 23-13-10; (2) Rushton admitted he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and the State failed to present evidence of a bond or surety being on file with the clerk of court as required by § 23-13-20; and (3) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident. The State disagrees and submits Appellant's arguments in this regard should be denied and dismissed for a host of reasons.

Findings not Necessary to the Ultimate Conclusion

First and foremost, this Court should decline to engage in any consideration or discussion of Appellant's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act because the lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and 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 trial judge 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 State v. Curry, 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013) (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). This ultimate conclusion is discussed in more detail in Argument II below, but for purposes of Appellant's complaints about Deputy Rushton and his lack of statutory qualification, it serves to exenterate the viability of those complaints. If this Court disagrees and chooses to engage Appellant's claims, the State submits the lower court's overall rejection of those complaints was proper for several reasons.

Standard of Review

This Court reviews the trial court's pretrial determination of immunity for an abuse of discretion. Curry, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

The Protection of Persons and Property Act

A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The Act provides that:

> 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.

S.C. Code Ann. § 16-11-450 (Supp. 2009) (emphasis added). Thus, in the same provision the Act both creates immunity and carves out an exception so that immunity may be completely barred when the person against whom deadly force was used is a "law enforcement officer" and certain other circumstances are present. Our supreme court has further held that, consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence."). One of the three remaining elements of self-defense is the requirement that the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Id.

The Act creates a presumption that a person has proven this element of self-defense if certain conditions are met. It provides in part:

> (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, residence, or occupied vehicle . . . and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

. . . .

(4) against whom the deadly force is used is 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.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added). Thus, in addition to the overall bar in section 16-11-450, the Act also eliminates the presumption of reasonable fear of imminent peril when the person against whom deadly force was used is a "law enforcement officer."[4] In the immunity hearing Appellant's argument hinged on his contention that Deputy Rushton was not a "law enforcement officer" for purposes of the Act at the time of the incident, and therefore Appellant should not have been subject to the exception to immunity in section 16-11-450 or the exception to the statutory presumption in section 16-11-440. The State disagrees and contends that regardless of whether Deputy Rushton complied with every technical statutory requirement to become "duly qualified," the lower court properly found he was a "law enforcement officer" for purposes of the Act.

Statutory Construction

The lower court's overall rejection of Appellant's claims was well-reasoned, supported by the evidence, and supported by established principles of statutory construction. Judge Keesley examined the specific statutes raised by Appellant in the context of the overall purpose and language of the Act to conclude that despite any technical statutory failures regarding circuit

[4] It is unclear what purpose is served by the narrow section 16-11-440(B) exception to the statutory presumption when an officer is entering or attempting to enter a residence, where the broader language in section 16-11-450 completely bars immunity from prosecution for any action taken in the performance of the officer's official duties.

court approval, oaths, or bonds, Deputy Rushton was a "law enforcement officer" for purposes of the Act.[5] The court found: "The General Assembly recognized that exceptions [to the Act] had to be made for law enforcement personnel . . . [and] did not intend for the protections and restrictions related to using deadly force against law enforcement officers to be subject to the strict, technical evaluations argued by the defendant." (R. p.1766).

The elementary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Branch v. City of Myrtle Beach, 340 S.C. 405, 409, 532 S.E.2d 289, 292 (2000); State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Prince, 335 S.C. at 472, 517 S.E.2d at 232; Hay v. S.C. Tax Comm'n, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979). The purpose of enactment always takes precedence over the language employed, and a court will not read into a statute something that is not within the manifest intention of the General Assembly. Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 549 (1956); Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964). The Courts are permitted to look to existing circumstances at the time of enactment. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, 845 (1938). Moreover, the meaning of a statute is not to be deemed to depend upon a single part or an isolated sentence. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409, 414 (1938). Legislative intent must always be gathered from the statute as a whole, read in light of all circumstances. Crescent Mfg. Co. v. S.C. Tax Comm'n, 129 S.C. 490, 124 S.E. 761, 765 (1924). An absurd result not possibly intended by the Legislature will be rejected. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Hamm v. S.C. Pub.

[5] Judge Keesley did not rule on Appellant's claim on appeal that Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident because that argument was not specifically raised at the immunity hearing. Consequently, it is not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Serv. Comm'n, 287 S.C. 180, 182, 336 S.E.2d 470, 470 (1985). Thus, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the interpreters in their endeavor to ascertain that intent. Id.

Here, Judge Keesley thoughtfully considered and construed the different statutes regarding the appointment and qualification of deputy sheriffs in the context of the legislative intent behind the Act and concluded the result sought by Appellant would be absurd. The plain language of the Act does not impose technical qualification requirements on who is considered a "law enforcement officer" for purposes of determining immunity. The lower court's conclusion was reasonable, practical, and consistent with the purpose and policy of the Act. It was not controlled by an error of law; therefore, the denial of immunity, and Appellant's convictions, should be affirmed.

Terms of the Act

Additionally, the lower court's overall rejection of Appellant's claims was proper where those claims were premised on the statutory requirements for a deputy to become "duly qualified," but the actual terms of the Act do not use the phrase "duly qualified" or otherwise equate a "law enforcement officer" with a "duly qualified" deputy sheriff.

In regard to the appointment of deputies, the South Carolina Code provides:

> The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall

be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. The sheriff shall in all cases be answerable for neglect of duty or misconduct in office of any deputy.

S.C. Code Ann. § 23-13-10 (2007). In regard to those deputies becoming "duly qualified" after appointment it then provides:

> Each deputy sheriff shall, 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.

S.C. Code Ann. § 23-13-20 (2007) (emphasis added).

The Code goes on to explain: "When duly qualified a deputy sheriff may perform any and all of the duties appertaining to the office of his principal." S.C. Code Ann. § 23-13-50 (2007) (emphasis added). By comparison, the terms of the very next statute do not require a sheriff's deputy to be "duly qualified" to exercise the power of arrest. S.C. Code Ann. § 23-13-60 (2007). Thus, where the Legislature intended a particular duty to be valid only for a "duly qualified" deputy, it explicitly said so. As in the statute about the power to arrest, the phrase "duly qualified" is conspicuously absent from the Act, which instead simply used the broad term "law enforcement officer." The State submits that by failing to specifically tie a deputy's statutory qualifications to his being considered a "law enforcement officer" under the Act, the

Legislature could not, as found by the lower court, have intended the result sought by Appellant—elimination of the law enforcement officer exception to immunity simply because an officer, acting in the performance of his official duties, did not meet the technical requirements of the statutes. Again, such a result would be absurd and was properly rejected by the lower court.

De Facto Officer

The lower court's overall rejection of Appellant's claims was also proper where Deputy Rushton's actions were legal under the doctrine of de facto officers. It has been found that, "[a] person who has been duly elected sheriff and exercises the duties of the office is sheriff de facto, even though the person's bond is defective." 80 C.J.S. SHERIFFS AND CONSTABLES § 5 (2013) (citing Cooper v. Ricketson, 80 S.E. 217 (Ga. 1913). As explained by our supreme court: "The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers . . . . As nature abhors a void, the law of government does not ordinarily countenance an interregnum." Bradford v. Byrnes, 221 S.C. 255, 261-62, 70 S.E.2d 228, 231 (1952). Thus, "[o]ne in office, transacting the duties, is supposed to be rightfully there, and so far as third persons are concerned, that presumption legalizes his acts." Kottman v. Ayer, 34 S.C.L. 92, 95 (3 Strob. 1848). Indeed, "[i]t is the appointment that confers the office . . . . The omission to qualify by giving bond or taking the oaths is cause of forfeiture; but so long as the officer appointed continues to discharge the duties of his office, his official acts, as to third persons, are legal. The law which requires the bond, or the oath, is . . . merely directory." Id. at 94 (citing McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843);[6] see also State v. Toomer, 41 S.C.L. 216, 227 (7 Rich. 1854) ("The statutory provisions

[6] "The reason of the rule, and the rule itself, embrace every officer from the highest to the lowest. The acts of a king de facto are as binding as if he were in office by legal right, so long as those whom he governs acquiesce in his

prescribing the manner of executing the bond, suing out the commission, or taking the oaths of office, are merely directory. . . . So long as the officer appointed continues to exercise the duties of his office, his official acts as to third persons are legal."). The State submits any other result would be absurd.

Here, Appellant presented no evidence to suggest anyone in the McCormick County community, from himself to the 9-1-1 operator, to the dispatcher, to the Sheriff or the officers themselves believed they were not legally qualified to approach his residence and attempt to make contact as part of their investigation of the 9-1-1 call. As set forth by the South Carolina Law Court of Appeals and Court of Errors, under circumstances where an individual was recognized by the community as an officer, "it would be attended with the most mischievous and pernicious consequences to hold his official acts, and the official acts of all who have acted under the like circumstances, to be void." Kottman, 34 S.C.L. at 97 (3 Strob. 1848). In the absence of a showing of fraud, an individual holding an office and acting in the capacity of that office is a de facto officer and his failure to subscribe to the required oath of office will not vitiate his official acts. Davis v. Town of Cayce, 166 S.C. 372, 164 S.E. 883, 887-88 (1932). In addition, any defects in an officer's title caused by the failure to comply with the provisions of a statute, such as executing or filing a bond or taking the oaths of office within a given time frame, may be cured, "and if he be already in office, his de facto title is immediately converted into a title de jure, and has relation back to the period of his [appointment and] . . . as against all the world, is unquestionable." Toomer, 41 S.C.L. at 229 (7 Rich. 1954).

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exercise of power." Thus: "[W]here the electing or appointing power has conferred the office upon him, and he is in the actual discharge of its duties, without his title being questioned in any legal way, the community in which he lives have [sic] a right to regard him as a legal officer, and his acts, as to them, will be as valid as if he wore on his forehead, to be read by every one, the evidences of his appointment and qualification. If it were otherwise there could be no guaranty or security for the validity of the official acts of any officer." Kottman, 34 S.C.L. at 94 (3 Strob. 1848).

Specifically in regard to the office of Sheriff, our courts have applied the doctrine of de facto officers. The Court of Constitutional Law held that the Act of 1795, which required Sheriffs to give bond to the "Treasurers of the state" was "merely directory, and . . . as long as he remained in office, he must be regarded as an officer, and his own failure to perfect his security cannot be pleaded in bar against the consequence of his misconduct, in not discharging his official duties." Stevens v. Tresurers, 13 S.C.L. 107, 109 (2 McCord 1822). Later, in discussing the office of coroner, the court stated:

> It is plain, from comparing these provisions, that the office of the Sheriff is much more hedged around with obstacles to entering upon it, without giving bond, than that of the Coroner; yet, I have no doubt, that if a Sheriff were to enter upon its duties, without giving bond, that all his acts, so far as third persons are concerned, would be good. The persons confiding or transacting business to or with him, finding him in office, would have the right to say, we did not enquire by what authority he exercised it. As to them, his acts for or against them, would be good.

McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843). In Appellant's case, the deputies were clearly in office and were transacting their official duties of enforcing the laws of South Carolina by being dispatched in response to a 9-1-1 call about gunshots being fired in a residential area in the middle of the night. As de facto officers, their actions were legal in approaching Appellant's residence and trying to make contact as part of their investigation, and Appellant's argument was properly dismissed.

Dismissal of Charges not an Appropriate Remedy

Even if this Court concludes Deputy Rushton was not properly qualified under the relevant statutes, and that his action actions were also not "legal" as to Appellant and other third parties as a de facto officer, the lower court properly denied his request for immunity because it would have resulted in dismissal of the underlying charges, a remedy not warranted by a mere statutory infirmity. It is well established in South Carolina that the exclusionary rule does not

apply where there has merely been a violation of a statutory privilege and does not implicate a constitutional right. Hutto v. State, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations . . . ."). Similarly, because Appellant's challenges to the qualifications of the McCormick County deputies were based on sections 23-13-10 and 23-13-20 of the South Carolina Code and not a constitutional violation, the exclusionary rule would not apply and, as implicitly recognized by the lower court, a finding of immunity and the resulting dismissal of the charges against Appellant would not have been appropriate. For this reason, and all of the other reasons set forth above, the State submits Appellant's overall argument about Deputy Rushton not being a "law enforcement officer" under the Act is without merit and should be denied and dismissed. For all of these reasons, the denial of immunity and Appellant's convictions should be affirmed.

II.

This Court must affirm the lower court's denial of Appellant's request for immunity from criminal prosecution under the Act because Appellant failed to challenge all of the court's reasons for finding he failed to carry his burden of proof. Additionally, the trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Appellant has challenged in this Appeal.

Appellant argues the trial court committed an error of law by ruling he was not entitled to immunity from prosecution under the Act. Specifically he contends the trial court erred in concluding that: (1) he failed to prove an entry or attempted entry into his dwelling, and (2) he failed to prove he was without fault in bringing on the difficulty. The State disagrees and submits Appellant's arguments should be denied and dismissed on several grounds.

Initially, the State submits this Court should affirm based solely on the lower court's finding that Appellant failed to carry his burden of proving any of the elements of self-defense where he fails to challenge a critical portion of that finding in this appeal. As explained in Argument I above, one element of self-defense is that the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or that he actually was in such imminent danger. A related element of self-defense is that, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, and if his defense is based on actual imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. Here, the lower court specifically held: "This court does not find that the defendant has proven any of the four elements of self-defense."[7] (R. p.1774). Although Appellant now challenges the finding that he was not without fault in bringing on the difficulty, he fails to challenge the lower court's finding as to his failure to sufficiently prove the other elements of self-defense. Because Appellant has not appealed those findings, they are the law of the case and should not be considered by this Court. Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). As a result, the denial of immunity must be affirmed.

The denial of immunity should also be affirmed because the lower court's findings have evidentiary support and are not controlled by an error of law. The lower court followed the appropriate procedure under rulings from this Court and our supreme court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Appellant did not carry his burden of proving he was entitled to immunity under the Act.

[7] The duty to retreat need not be shown when seeking immunity under the Act.

Appellant's argument cannot prevail under this Court's standard of review. As in Curry, 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, have evidentiary support and are not controlled by errors of law. Therefore, the denial of immunity and Appellant's convictions should be affirmed.

The Protection of Persons and Property Act & Self-Defense

As explained above, the Act creates immunity from criminal prosecution when a person uses deadly force as permitted by the provisions of this article or another applicable provision of law and no exception to immunity applies. S.C. Code Ann. § 16-11-450 (Supp. 2009). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.").

There are four elements required by law to establish a case of self-defense. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. First, the defendant must be without fault in bringing on the difficulty. Id. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.

Id. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Id. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Id. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. Id. Again, the last element, i.e., the duty to retreat, need not be shown when seeking immunity under the Act. Id.

A person is entitled to the Act's presumption of a reasonable fear of imminent peril of death or great bodily injury 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, residence, or occupied vehicle . . . and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added).

Discussion / Analysis

Ample evidence supports the trial court's denial of immunity under the Act on both grounds now being challenged by Appellant. Indeed, the trial court's finding that Appellant failed to meet his burden of proving his claim of immunity by a preponderance of the evidence for each reason cited is supported by evidence in the record.

In regard to entry or attempted entry of Appellant's dwelling, the lower court's finding was twofold. First, Judge Keesley concluded: "The defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful." He futher found: "[Appellant] has not proven that Deputy Rushton was entering or attempting to enter the

Worley residence, by force or otherwise." Combining the two findings, the lower court concluded: "The failure of evidence regarding entry or attempted entry is fatal to the defendant's argument concerning subsection (B)." (R. p.1768-p.1769). Appellant takes issue with this finding, arguing it constitutes an error as a matter of law because he proved Deputy Rushton had entered or was in the process of entering his dwelling.

At the immunity hearing, Appellant argued he reasonably believed somebody was in the process of unlawfully and forcefully entering his dwelling. He claimed that a reasonable person inside a home, in his position, would not have known Deputy Rushton was a law enforcement officer. However, the lower court found Appellant's testimony in this regard was not credible. Under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. See State v. Smith, 383 S.C. 159, 167-68, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.") This Court is bound by these findings of fact. See Reed v. Becka, 333 S.C. at 684, 511 S.E.2d at 400 ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'"). Thus, any argument based on Appellant's alleged beliefs should be disregarded.

Appellant also argued that regardless of his subjective belief, the evidence showed Deputy Rushton was in fact attempting to enter his residence. Appellant argued that because the door to the Worley home was in the porch area under the deck, it was part of the residence and therefore the officers' acts of coming under the deck to knock on the door and ring the doorbell constituted an entry. (R.p.931-p.938).

On appeal Appellant attempts to extend this line of reasoning to argue that since a dwelling includes the curtilage of the house, the area under the Worleys' "balcony roof" is the type of place a property owner has a right to be to the exclusion of the general public, and therefore Rushton had entered or was attempting to enter the dwelling. He relies in part on Duncan to argue the porch falls within the scope of the Act's definition of a dwelling. The lower court properly rejected this argument at the hearing, and this Court should do the same.

In Duncan, the victim was asked to leave the residence but returned a few minutes later and began opening the door to a screened porch. He continued to force his way onto the porch and advanced across the porch toward Duncan at which point Duncan fired the fatal shot. Duncan, at 406-07, 709 S.E.2d at 663. Our supreme court affirmed the trial court's grant of immunity. Here, there was no screened porch and Rushton never opened any doors. Instead, he approached the door, knocked, rang the doorbell, and repeatedly announced he was a law enforcement officer. This simply does not constitute an entry in the same manner as in Duncan. To interpret the Act to find that it does would be absurd because it would mean that every person, law enforcement or not, would be treated as having entered or attempted to enter a house simply by knocking on the door or ringing the doorbell.

Even if this Court finds Rushton had technically "entered" the Worley residence by knocking on the door and ringing the doorbell, there is no evidence whatsoever the act was

unlawful or forcible, regardless of whether he was a law enforcement officer or a regular citizen. The Act provides for the presumption of reasonable fear only if the entry or attempted entry is unlawful and forcible. Here, Rushton lawfully walked to the main entry door of Appellant's house, where there was a doorbell, and rang that doorbell. Mr. Sheffield, the neighbor, could easily have done the same rather than calling 9-1-1, and there is nothing to suggest either man's approach would be considered unlawful or forcible. Judge Keesley concluded: "The defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful." (R. p.1768-p.1769). Appellant does not appear to challenge this portion of the lower court's finding, instead focusing solely on whether there was an entry. By conceding this issue, Appellant effectively concedes the lower court's immunity finding was proper, and his argument regarding entry should be dismissed.

In regard to whether Appellant was at fault for bringing on the difficulty, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." The overwhelming evidence supports this finding, particularly given the credibility findings of the lower court. The trial court carefully considered the conflicting testimony from Appellant and the officers, assessed their credibility, and concluded Appellant brought on the difficulty. Judge Keesley found Appellant knew or should have known that Rushton and the others were law enforcement officers because he asked who was there and when the officers responded they were law enforcement officers, Appellant yelled he did not give a fuck and exited the walls of his residence with a loaded rifle. (R. p.1774). These findings of fact are binding on this Court. See Reed v. Becka, 333 S.C. at 684, 511 S.E.2d at 400 ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial

when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'").

"Any act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." State v. Douglas, 411 S.C. 307, 321, 768 S.E.2d 232, 240 (Ct. App. 2014) (quoting State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Here, there are sufficient grounds for affirming the trial court's determination that Appellant did not deserve immunity under the Act. Appellant initially focuses on the gunshots that woke the Sheffields and argues that his firing of a gun at night in a rural part of South Carolina cannot, as a matter of law, be considered as reasonably calculated to bring on a violent confrontation with law enforcement. However, this argument misconstrues the lower court's finding. Judge Keesley did not find the initial shots brought on the difficulty. Instead, he found it was Appellant's actions in cursing at the officers after they had identified themselves and then coming out onto the deck with a loaded rifle that brought on the difficulty. It was these actions that precipitated the violent confrontation with Rushton.

Appellant further argues there was no way for him to definitively ascertain the identity of the individuals knocking without walking onto the balcony, because the officers did not follow proper police procedure by activating their blue lights or wearing clothing with better identification. Yet the lower court found Appellant did hear the officers identifying themselves and responded with an expletive and a loaded rifle. His attempt to justify his actions by claiming he could not "definitively" know they were law enforcement officers does not carry water because he could make the same claim even if they used blue lights and vests emblazoned with badges and the words "police." An individual in Appellant's position could simply claim he still could not "definitively" know they were not burglars in disguise. Whatever the case, the lower

court found Appellant was not credible and that he knew or reasonably should have known Rushton was a law enforcement officer, and his claim that he could not "definitively" know must be disregarded.

For all of these reasons, the trial court's denial of immunity under the Act was not an error of law. Taken as a whole, the testimony and evidence presented at the immunity hearing supported the trial judge's factual finding that Appellant failed to carry his burden of proof. Moreover, the trial judge was in the best position to weigh Appellant's credibility and conclude that his version of events was not accurate. The case was properly submitted to the jury, with the claims of self-defense and defense of habitation being fully presented and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The denial of immunity and Appellant's convictions should be affirmed.

III.

The trial court properly denied Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify because those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.

Appellant argues the trial court erred in refusing to grant a mistrial based on comments made by the solicitor during his closing argument because they were improper comments on Appellant's right not to testify and impermissibly shifted the State's burden of proof to Appellant. The State disagrees and submits Appellant's argument is 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 in his brief 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). 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. Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the denial of immunity from prosecution, the convictions, and the sentence of the lower court be affirmed.

Respectfully submitted,

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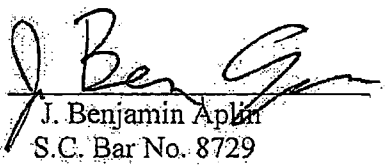
BY: 
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Columbia, South Carolina
November 13, 2017

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief of Respondent complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 13, 2017

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, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Final Brief of Respondent* dated November 13, 2017, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 13th day of November, 2017.

Angela Bennett
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