ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-000148

THE STATE

APPELLANT,

V.

GRAHAM FRANKLIN DOUGLAS,

RESPONDENT.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
141 North Main Street
Sumter, South Carolina 29150
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. Whether the court abused its discretion in admitting and relying upon testimony regarding two incidents involving the victim that were irrelevant and improper character evidence, in finding that the defendant was entitled to immunity from prosecution?

2. Whether the court erred in its assessment of the evidence of intoxication as supporting the grant of immunity when the testimony did not support the findings made by the court and the court did not assess the impact of the Respondent's intoxication in assessing the reasonableness of his actions?

3. Whether the court erred in finding the defendant was reasonable in believing he was imminently facing great bodily injury when there was no evidence in the record to support such a finding?

4. Whether the court erred in granting immunity under S.C. Code Ann. § 16-11-440(C) when the shooting occurred inside of the defendant's residence?

STATEMENT OF THE CASE

Respondent Graham Franklin Douglas ("Respondent") was arrested for Murder (2010-GS-23-6119) and Possession of a Weapon during the Commission of a Violent Crime (2010-GS-23-6119). On April 24, 2012, Appellant filed a Notice of Motion and Motion to Dismiss pursuant to the Protection of Persons and Property Act. (R. pp. 424).

An evidentiary hearing on the Motion was held before the Honorable J. Michael Baxley, Circuit Court Judge, on October 2-3, 2012. Respondent was present and was represented by S. Jahue Moore, Esquire, M. Brooks Biediger, Esquire, and M.W. Cockrell, III, Esquire. The State was represented by Solicitor Ernest A. Finney and Assistant Solicitor Tyler B. Brown, Esquire, of the Third Judicial Circuit.[1]

Judge Baxley informed the parties of his decision to grant immunity by letter. (R. pp. 427-30). By letter dated November 14, 2012 and filed November 19, 2012, the State requested the judge reconsider his decision to grant immunity. (R. pp. 431-34). On January 4, 2013, the trial court filed its Order Granting Immunity and Dismissing Criminal Charges. (R. pp. 435-49). Appellant subsequently filed its Notice of Appeal.

The State now respectfully requests this Court reverse the trial court's Order Granting Immunity and Dismissing Criminal Charges.

---

[1] While this case is based in the Fourth Judicial Circuit, the Fourth Circuit Solicitor's Office recused itself from the prosecution due to a prior working relationship with Respondent.

STATEMENT OF FACTS

On May 31, 2011, Respondent Graham Douglas ("Respondent") shot and killed Eden Smith in Respondent's home. Smith was shot in the chest, and the projectile went through his heart. (R. p. 347). The injury caused excessive internal bleeding. (R. p. 347).

Respondent's Testimony Regarding Event

According to Respondent, he and Smith met to play golf on May 31, 2011. (R. pp. 27-8). Smith met Respondent at Respondent's home, a sharecropper's cabin that was located behind his parents' house. (R. pp. 15-7, 28). The two may have eaten snacks before they left to go to the golf course. (R. p. 29).

After Smith arrived, he and Respondent went to a convenience store, where Respondent purchased two cups of ice and a pack of cigarettes. (R. p. 29). According to Respondent, Smith had brought a bottle of vodka with him, and the two consumed the bottle while they were playing golf. (R. pp 29-30). After the two completed their round, they went to a liquor store to purchase another bottle of vodka. (R. p. 30). They then drove back to Respondent's house. (R. p. 30). After they arrived at Respondent's home, Respondent indicated they filtered the bottle of vodka, and consumed at least part of the bottle in his back yard. (R. p. 31-2). According to Respondent, when his father arrived to his parents' home, Respondent and Smith went inside Respondent's house.[2] (R. p. 40). Respondent indicated that he had less than one cup of

[2] Respondent indicated that the two went inside because he did not believe his father would have been pleased to see him either drinking alcohol or spending time with Smith. (R. pp. 39-40).

vodka while they were in his back yard. (R. p. 39). He did not know how much Smith had outside.

Some time after Respondent and Smith re-entered Respondent's house, Smith used Respondent's bathroom, which was located in Respondent's bedroom. (R. pp. 41-2). Respondent noted that his bathroom does not have a door, so Smith closed and locked the bedroom door. (R. pp. 41-2). Respondent testified that Smith stayed in the bathroom for more than ten minutes. (R. p. 42). According to Respondent, when Smith came out of the bathroom and bedroom, he had a bottle of Respondent's medication.[3] (R. p. 43). Respondent testified that Smith would not give Respondent the medicine. (R. p. 44). Instead, according to Respondent, Smith kept Respondent from retrieving the medication several times and taunted Respondent. (R. pp. 44-5, 91). Respondent testified, "[f]inally, I said god damn it, give me my medicine." (R. p. 45, l 4). Respondent then stated that Smith "snapped," and "went crazy."[4] (R. p. 45, l 7). "He turned around and grabbed me by my shoulders, and threw me up against the refrigerator." (R. p. 45, ll 11-12).

Respondent claimed that he was scared to death. Respondent also asserted that his knees buckled, and Smith was holding Respondent up by his biceps. (R. p. 46). When Smith let go of Respondent, Respondent fell to the floor. (R. p. 47). Respondent testified that he was dazed after he hit his head on

---

[3] Respondent testified that it was either Molzapam or Clonazepam, which was used for sleep and anxiety. (R. p. 43).

[4] Respondent noted during cross-examination that Smith had neither threatened nor harmed him before Respondent said "god damn." (R. p. 88). He further testified that there was no confrontation between him and Smith prior to the confrontation over the pill bottle. (R. p. 109).

the floor in front of his refrigerator. (R. p. 47). Respondent testified that he believed Smith struck him in one of his eyes. (R. p. 48). Respondent also claimed that Smith bit him. (R. p. 48). Respondent testified that he told Smith to leave and to leave him alone several times. (R. p. 49). Respondent crawled to his bedroom. (R. pp. 49, 92-3). Respondent asserted that he again told Smith to leave the house. (R. p. 50). Respondent then went to his dresser drawer and retrieved his pistol. (R. p. 50). Respondent testified that he stood up in his bedroom, held the gun beside him, and told Smith to leave in very stern words. (R. pp. 50-1, 93). According to Respondent, he was approximately two feet away from the kitchen at that time. (R. p. 51). Smith did not leave. Respondent testified that Smith started to advance towards him. (R. pp. 51, 95). At some point, Respondent cocked the gun, lifted it, and the gun fired. (R. p. 51). Respondent indicated that Smith was approximately one yard away when the gun fired. (R. p. 51). Respondent testified he fired the gun only once, and Smith fell afterwards. (R. p. 52). Respondent claimed that he had no memory of pulling the trigger. (R. p. 95).

After the Shooting

After the shooting, Respondent testified that he initially froze; he then knelt down and saw Smith was trying to breathe. (R. p. 53). Respondent then ran to his parents' house and called 911. (R. pp. 53, 74). According to both Respondent and his father, his father was the one who spoke with the 911 operator because Respondent was having a panic attack. (R. pp. 53, 210).

Respondent took some Clonazipam after he called 911, but before police arrived. (R. pp. 54, 74).

Respondent's father, Leon Douglas, testified that on May 31, Respondent barged into the back door of his house and used the phone. (R. pp. 209-10). The elder Douglas testified that Respondent then stated that Smith had been shot, then ran out the back door and went back to Respondent's house. (R. pp. 210-11). Mr. Douglas gave the 911 operator and EMS directions to the house. (R. pp. 210-11). He then went into the back door at Respondent's house and saw the victim dead on the floor. (R. p. 211). He recalled seeing a gun near Smith's body. (R. p. 211).

Deputy Dana Wallace was the first deputy sheriff to arrive on the scene. (R. pp. 308-09). He testified that when he got to the house, Respondent and his father were standing in the backyard of Respondent's house. (R. p. 309). Respondent told Wallace that "he come at me with a gun and I shot him." (R. p. 309, ll 15, see R. pp. 321-22). Wallace indicated that Respondent was highly intoxicated and disheveled. (R. pp. 309-10). Wallace had two other deputies detain and Mirandize Respondent. (R. p. 311).

Investigator Scott of the Chesterfield County Sheriff's Office testified that Respondent told him that the victim was coming at him with a gun, and Respondent asserted he shot the victim in self-defense. (R. pp. 336, 341). Scott noted that he did not ask Respondent any questions or interrogate him. (R. p. 336). Investigator Jordan testified Respondent did not make any statements to him that he acted in self-defense or that Smith had attacked him. (R. p. 184).

Respondent did repeatedly tell Jordan that he shot Smith. (R. p. 192). Jordan testified that he heard Respondent tell Investigator Scott that he was a murderer, that he shot Smith, and that he had to shoot Smith before Smith shot him. (R. pp. 199-200).

The Victim

Wallace saw the victim's body laying on the floor in the kitchen. (R. p. 311). He noted that the victim was ten to fifteen steps away from the back door. (R. p. 311). A pistol was near the victim's right hand on the floor. (R. pp. 311, 329, 330). The victim was not wearing a shirt, and the beige cargo shorts he was wearing were not pulled all the way up. (R. pp. 312-13). He noted there was a tear on each side of the pants. (R. p. 314). Wallace also indicated that the victim was not wearing any underwear or shoes. (R. pp. 314-15). He noticed blood on the front right side of the shorts, and a spot of blood on the back of the shorts and on the left front pocket area. (R. pp. 315-16). Wallace also indicated there was a wet spot in the front of the victim's pants. (R. pp. 319-20).

SLED Agent James Johnson was involved in a search of Respondent's house after the shooting. (R. pp. 142-43, 147). He testified that when they searched the house, Smith's body was still on the kitchen floor. (R. p. 147). Johnson testified that the body was stretched out on the floor of the kitchen; the victim's head was turned towards the dishwasher, both of his arms were spread out from his body, and his leg was up and bent. (R, pp. 147-48). A firearm was

next to Smith's right hand.[5] (R, p. 148). Johnson noted that Smith was not wearing a shirt, and he was not wearing shoes. (R, p. 154).

Investigator Jordan also indicated that he saw a firearm by Smith's right hand. (R. pp. 179-80). It appeared to Jordan that the firearm had not been opened. (R. pp. 179-80). Jordan was informed by EMS that the gun had been moved slightly when they were assessing Smith's condition. (R. p. 180). Jordan also noted that Smith was only wearing cargo pants and black socks. (R. p. 181). Jordan noted that the pants were halfway down Smith's body, and Smith was not wearing underwear. (R. p. 181).

The pathologist testified that the gunshot wound was intermediate range. There was stippling around the wound, and the end of the gun was probably a couple of feet away from the victim's skin. (R. pp. 349-50). The pathologist also found multiple bruises on the arms and back of the victim's hand, and noted they were in the areas of defensive wounds. (R. pp. 347, 348). The pathologist also stated there was a small bruise on the victim's left knee. (R. p. 349).

Smith had a blood alcohol content of .216.[6] (R. pp. 300, 371).

Physical Condition of Respondent after the Shooting

Wallace did not notice any injuries on Douglas at the scene. (R. p. 322). Respondent did not tell Wallace that he had been bruised or who bruised him. (R. pp. 327-28).

---

[5] Johnson noted that he was informed the gun had been moved by EMS, but not by much. (R. p. 169).

[6] This was based on the level from the iliac vein. (R. pp. 304-05). An ocular fluid test was also done, and the victim's blood alcohol content in the ocular fluid was .24. (R. pp. 306, 371).

Scott testified that he noticed some discoloration under Respondent's right eye when he saw him that day. (R. pp. 334-35). He did not see any blood or any scratches on him. (R. pp. 334-35). He did see that Respondent had bruises on both of his arms. (R. p. 340).

Agent Johnson testified that he went to the detention center to take photos of Respondent for injuries. (R. p. 155). Johnson noticed that Respondent had a small bruise on his knee, and there did not appear to be any significant injuries to Respondent's upper body. (R. p. 156). There did not appear to be any dark purple marks, no black eye, and no scratches. (R. p. 156). Johnson did note that he saw a visible injury to Respondent's eye, a scrape on his knee, and a little discoloration on his right arm. (R. pp. 164-65, 167). He also indicated that he did not see a bite mark. (R. pp. 156, 167).

Investigator Wayne Jordan of the Chesterfield County Sheriff's Office testified that he observed Respondent at the scene. (R. pp. 171, 172). Jordan saw Respondent had a scrape across his right knee that had dried blood, and Respondent's left eye was a little swollen. (R. pp. 173-74). He also noted that Respondent was very intoxicated and unsteady on his feet. (R. p. 175). Jordan noted that Respondent made no statements about being injured. (R. pp. 184-85). Jordan indicated that Respondent had a fresh injury above his eye, and he noticed some bruising on Respondent's arms. (R. pp. 201-02, 204-05). Jordan also stated that he did not observe a bite mark, though he noted that he did not look for one. (R. pp. 203-04).

Leon Douglas testified that Respondent's clothes appeared skewed, his face was puffy, and his right knee appeared to be bloody. (R. p. 213). He noted that Respondent did not appear to be hindered by any injuries when he was running to and from Douglas' house.

Agent Kenley testified that he and his partner went to the detention center on the night of the incident to photograph Respondent. (R. pp. 250-51). Kenley noticed a little bruise around one of Douglas' eyes, but did ont see anything bloody or purple on his face. (R. p. 251). Kenley noted that Douglas had some bruises and a small cut on his right knee. (R. pp. 252-53). He saw bruising on Respondent's biceps, but did not see any damage to the back of Respondent's arms. (R. p. 253). Kenley also noted that there was no indication that Respondent's injuries were self-inflicted. (R. p. 257). He also noted there was a bruise on Smith's right hand. (R. pp. 265-66).

Respondent testified that he did not get any treatment for his injuries at the jail. (R. p. 97). He did not need stitches in his leg, and none of his cuts, bruises or contusions required medical treatment. (R. p. 98). Respondent acknowledged that he did not have any serious permanent disfigurement resulting from his confrontation with Smith, nor did he have any protactile loss or impairment of a function of a part of his body. (R. p. 99). Brandy Teal, an LPN at the Chesterfield Detention Center who treated Respondent On June 2, 2011, testified that Respondent had bruising on his upper arms and a black right eye. (R. pp. 126-27). She indicated that his bruises were the size of a baseball. (R.

p. 127). He did not have any other injuries, and he did not receive any medication or treatment for the bruising. (R. p. 131).

Forensic Evidence

Gunshot residue was found on Smith's left palm. (R, pp. 199,392-93, 395). No gunshot residue was found on Respondent. (R. pp. 195-97, 389-92, 395).

Agent Karl Kenley of SLED processed the scene with Sabrina Felkers. (R. pp. 242-43). He noted that there was blood evidence in the kitchen. (R. p. 244). There was a blood smear under the countertop, and there was blood spatter on the cabinet. (R. pp. 244-46). He indicated that there were a few chairs overturned and the dishwasher was damaged. (R. p. 250). A vase that was located on the top of the refrigerator appeared to not be disturbed. (R. p. 85).

Blood of the victim was found on a pair of Respondent's pants recovered at the scene. (R. pp. 260-64, 270-80). Also, blood from Respondent was found on pants belonging to the victim at the scene. (R. pp. 260-64, 270-80).

Order Granting Immunity

The court granted immunity. In so doing, it noted that it found the following as favoring a finding of immunity: (1) the superior physical condition of the victim; (2) gross intoxication of the victim; (3) multiple injuries sustained by Respondent; (4) the history of assaultive behaviors by the victim; (5) the prior assault by the victim against Respondent; (6) no prior criminal charges nor history of violence by Respondent; (7) close quarters of the altercation; (8)

forensic evidence at the scene; and (9) Respondent was in his own residence. (R. pp. 441-46). The court did note that several factors weighed against granting immunity, including (1) the location of the weapon appeared suspicious; (2) the inconsistent statements by Respondent; (3) Respondent could have exited the dwelling prior to retrieving a weapon; and (4) the clothing evidence at the scene was unexplained. (R. pp. 446-48).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING AND CONSIDERING THE TESTIMONY OF OFFICER WILLIAM STAIR OF THE CITY OF MYRTLE BEACH POLICE DEPARTMENT AND SERGEANT ROY DRAKE OF THE CHERAW POLICE DEPARTMENT: THE TESTIMONY PROVIDED BY BOTH WITNESSES WAS INADMISSIBLE AND IRRELEVANT PRIOR BAD ACT TESTIMONY. AND THE COURTS RELIANCE ON THE INADMISSIBLE TESTIMONY WAS PREJUDICIAL

How the issue arose at the hearing

During his direct testimony, Respondent testified that he was aware that the victim had a criminal history of violent acts, and indicated that he was aware that the victim had previously been charged with burglary, armed robbery, assaulting a woman, assaulting to police officers, and a charge relating to some sort of criminal sexual misconduct. During cross-examination, Respondent stated that he learned of Smith's criminal charges from Smith's sister. (R. p. 67). He also noted that the day after Smith was arrested for biting a female in Cheraw and a police officer, he ran into Smith at a Bi-Lo grocery store. Respondent indicated that Smith showed him where he had been fingerprinted and told Respondent that he had bitten someone. (R. p. 68).

The defense later presented testimony from William Joseph Stair, a police officer with the City of Myrtle Beach. (R. pp. 132-39). After some identification questions were asked, the defense asked Officer Stair if he was involved in an incident with Smith. (R. p. 133). The State objected.

> I believe counsel is attempting to illicit information about character/conduct of the deceased from the period of 2007. And I do not think it is relevant to this hearing. We do not think it is probative of the issue of the Duncan case. And we would strongly object, especially because this Court is sitting today as judge and

> jury, and therefore any indication of some prior act is going to have some impact on your ability to make a decision that needs to be made at the conclusion of Duncan Hearing.

(R. p. 133, ll 16-24). In response, Respondent argued that the testimony that was being offered was of a prior assault of which Respondent had testified he was aware. (R. p. 134). Respondent argued that where the issue of self-defense is raised, and where the issue of the rationale and reasonableness of the defendant's conduct is at issue, the defendant's knowledge of prior violent acts by the victim would bear on the reasonableness of the defendant's conduct in attempting to repel the victim. (R. p. 134). Respondent further stated that he was attempting to place in the record testimony that supports his testimony that he knew of the prior bad acts.

The State responded by noting that it had no objection to Respondent's testimony regarding his understanding of Smith's history. The objection was to the testimony of this particular officer telling the Court something that he did not tell Respondent. (R. p. 134).

The court overruled the objection.

> Number one. Whether or not this would be appropriate Lyle Evidence really is not something that I can determine just off the top of my head before we hear the testimony. But there is a potential that it may be evidence that would come in under 404(b) which in a way reverses things, because typically that is the actions of the defendant as opposed to the actions of the deceased.
>
> But here we are under a Castle Doctrine Hearing that would cause us to examine to some extent the actions of the deceased.
>
> Secondly. This evidence is somewhat cumulative in that it was referred to by Mr. Douglas on his direct examination.

> And then thirdly. I believe it goes to the credibility of Mr. Douglas, and whether or not the information that he tells us in his testimony will be born out by this witness.
>
> And then finally, I believe it would go to whether or not the defendant's alleged state of mind when this incident occurred was in fact a reasonable one based on what testimony we will hear from this witness as well Mr. Douglas' impression of what had happened.
>
> I believe there is a sufficient connection that we would permit the evidence.

(R. p. 135, ll 2-23).

Officer Stair went on to testify that on December 14, 2007, he was dispatched to Broadway at the Beach. (R. p. 137). Smith was placed under arrest for public intoxication, disorderly conduct, and resisting arrest. (R. p. 137). While in the jail cell, Smith attempted to damage the lights in the cell, and Smith would not comply with requests that he walk to the front of the cell. (R. p. 137). Stair testified that he and others had to drag Smith to the front cell, and when Smith was placed on the ground in the cell to remove his cuffs, Smith started struggling and attempted to bite Stair's leg. (R. pp. 137-38).

The State also objected to the introduction of Officer Stair's report regarding the incident based on the same arguments. (R. p. 139). The court overruled the objection. (R. p. 139). Smith was charged with assaulting a police officer because he lunged towards an officer after he refused to comply with their orders. (R. p. 140). Stair noted that Smith pled guilty to all of the charges. (R, p. 141).

Later during the hearing, the defense presented the testimony of Sergeant Roy Drake of the Cheraw Police Department. (R. pp. 217-221). Sgt. Drake

testified that he was familiar with an incident in which Smith was arrested for assaulting a female. The State objected to Sgt. Drake's testimony, specifically stating that it was raising the same objection that it had to the testimony from Officer Stair. (R. p. 218). For the same reasons given previously, the court overruled the objection. (R. pp. 218-19).

Sgt. Drake went on to testify that Smith was arrested for assaulting a female. Smith was alleged to have bitten the woman on the shoulder. (R. p. 219). Drake also testified that Smith was not a problem for law enforcement until he got to the jail. Drake indicated that Smith was sobbing about his dead sister and would not comply with a request that he remove an arm band. (R. p. 219). Drake further testified that Smith had to be forcibly put in the cell, and Drake attempted to use a Taser on Smith. (R. pp. 219-21). It was also noted that Smith was highly intoxicated that night. (R. p. 220).

In its Order Granting Immunity and Dismissing Criminal Charges, the court specifically relied upon the testimony of Officer Stair and Sgt. Drake in finding Respondent's account that Smith assaulted him was supported. (R. pp. 443-44). "The Court finds that this history of assaultive and confrontive behavior, even against law enforcement officers, supports the contention of Defendant that Smith assaulted him and was the aggressor during the incident that led to the shooting."

The State objected to this finding in the Order in its Motion for Reconsideration. (R. p. 432).

Standard of Review

Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is "any evidence" to support its findings.").

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343

S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

The trial court abused its discretion in admitting the testimony of Officer Stair and Sgt. Drake; the testimony was inadmissible evidence of specific incidents of violence that were not directed against Respondent, and were not closely connected in point in time to the homicide in this case.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. An exception to this rule arises when the evidence is of the character of the victim. Specifically, "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same," is admissible for the purpose of proving action in conformity therewith. Rule 404(a)(2), SCRE. However,

> [i]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945). Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. Id. (citing State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926)).

State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000).

Here, the admission of the testimony of Officer Stair and Sgt. Drake was improper in several respects. First, neither instance presented by Stair or Drake involved an act of violence directed towards the Respondent. The assault involved in the December 2007 incident in Myrtle Beach was directed towards the officers at the detention center. The assault(s) in the 2010 Cheraw incident were directed at a female who was bitten and the two officers who were involved in processing Smith at the city jail.

Second, Respondent submits that neither incident was closely connected in time or occasion with the homicide. The Myrtle Beach incident occurred over three years before the homicide in this case. While there was no testimony establishing the exact date in 2010 the Cheraw incident occurred, it was at least more than five months before the homicide in this case on May 31, 2011. As a result, the admission of the two officers' testimony was improper.

Third, there was no testimony or evidence establishing that Respondent knew the details of these two incidents when he shot and killed the victim. While Respondent did testify that he knew Smith had a criminal history, he only indicated that he knew about some charges through Smith's sister, and that he learned about the charge relating to the biting of a female from Smith in a grocery store. (R. pp. 21, 67-8). Respondent never indicated that he was aware of any of the specific details of any of the other charges, let alone the facts testified to by Stair and Drake. In light of the lack of details provided by Respondent during his testimony regarding the incidents involving Stair and Drake, those two witnesses' testimony was not cumulative to Respondent's testimony as they

presented information and details not provided by any other witness. Furthermore, while the court asserted the testimony may go to the credibility of Respondent, the court's ultimate use of the testimony in granting immunity had nothing to do with Respondent's testimony or credibility. Finally, Drake's and Stair's testimony could not be related to Respondent's state of mind. There was no testimony or evidence presented at the hearing to show that Respondent was aware of the details of the incidents reported by Stair and Drake at the time of the shooting. Altogether, the court's admission of the testimony was clearly improper.

The admission of the testimony was prejudicial. The trial court relied upon this inadmissible evidence and testimony as primary support for finding the victim was the aggressor and assaulted Respondent. Since these prior incidents were not admissible and should not have been considered by the court in its assessment of Respondent's entitlement to immunity, the trial court's order should be vacated, and the case should be remanded for trial.

II. THE COURT ERRED IN ASSESSING THE EVIDENCE OF INTOXICATION: IT IMPROPERLY FOUND THE VICTIM'S INTOXICATION SUPPORTED THE CONCLUSION THAT RESPONDENT WAS IN IMMINENT FEAR OF SERIOUS BODILY INJURY REQUIRING THE USE OF DEADLY FORCE, AND IT FAILED TO PROPERLY ASSESS THE INTOXICATION OF RESPONDENT AS A FACTOR IN ITS ANALYSIS OF WHETHER RESPONDENT'S BELIEF HE WAS IN IMMINENT FEAR OF SERIOUS BODILY INJURY WAS REASONABLE.

What Occurred at the Hearing

At the hearing, Agent Shorrells of SLED testified that the victim had a blood alcohol content of .216. (R. p. 300). As noted by the trial court, when measured from the ocular fluid, the blood alcohol content was .24. (R. p. 306). In discussing the effects of that level of intoxication, Shorrells stated, "[f]or a more experienced drinker, someone who has had experience with it, and has drunken over time on a more regular basis, that level can actually cause severe aggression, emotional instability, it can also cause violence." (R. p. 300, ll 16-20). Shorrells noted that one would definitely see severe mood swings. (R. p. 300). Shorrells later noted that those who do have that level of intoxication are not necessarily going to be aggressive or violent. (R. p. 303).

While no blood testing was conducted on Respondent, there was ample testimony establishing that he was also heavily intoxicated. Respondent admitted that he had been drinking heavily that day, including splitting one full bottle of vodka with the victim, and drinking portions of a second bottle of vodka before the shooting occurred. Several of the law enforcement officers who arrived on the scene shortly after the 911 call indicated that Respondent appeared to be intoxicated, he was slurring his words, and he was unsteady on his feet. Also important to note, Respondent testified that he took some of his

anti-anxiety medication after the shooting, but before law enforcement arrived on scene.

In assessing the evidence regarding intoxication, the court found Shorrells' testimony and the victim's level of intoxication bore directly upon the issue of Respondent's belief of being in imminent fear of serious bodily harm that required the use of deadly force for his protection. (R. p. 442). However, the court declined to attribute a similar likelihood of violent or aggressive behavior to Respondent, asserting "there is no evidence of such behavior after police arrived on scene and during the lengthy time Defendant was in custody. To the contrary, Defendant was generally cooperative, passive, and remorseful throughout the aftermath of the incident." (R. p. 442).

Appellant submits the court's assessment of the victim's level of intoxication as evidence supporting the reasonableness of Respondent's belief he was in imminent fear of serious bodily harm is not supported by the record. First, the reliance on Shorrell's testimony was misplaced. While Shorrells indicated the level of intoxication measured in the victim can lead to violence and severe mood swings, she did note that it does not necessarily lead to violence. (R. p. 303). Further, Shorrells noted that she did not know who the victim would respond at that level of intoxication, which was a far cry from the court's assessment that Shorrells noted it would most probably lead to aggressive and violent behavior. (R. pp. 301-04).

Second, the trial court also failed to properly assess the Respondent's level of intoxication in deciding whether Respondent was acting aggressively

when he fired the shots, and in assessing the reasonableness of Respondent's claim he was in imminent peril. First, Appellant would note that Respondent's testimony indicated that he was subject to acting aggressively and suffering from severe mood swings on the day of the shooting. Respondent noted in his testimony that the physical confrontation between him and the victim started after Respondent snapped and yelled at the victim for not giving returning his medicine. (R. pp. 44-6). Further, in making its determination, the court also failed to consider the fact that Respondent shot the victim as evidence of the impact his intoxication may have had on his decision making, even though (as acknowledged by the court later in the order) Respondent could have either exited the house or simply closed the door to the bedroom.

While asserting Respondent's actions after the shooting did not warrant a negative inference, the court also ignored the fact that Respondent's father described him as being on the verge of a nervous breakdown after the shooting. (R. p. 214). Nor did the court take into account what effect Respondent's medication, taken before law enforcement arrived on the scene, would have had on interactions with law enforcement after the shooting. Also, the court's assessment that Respondent was cooperative with law enforcement was undermined by his apparent attempt to claim he shot Smith because Smith had a gun, which was not supported by the evidence. (R. pp. 309-10, 336).

Altogether, Appellant submits the court's findings regarding the effects of the intoxication of both the victim and Respondent as supportive of a grant of

immunity under S.C. Code Ann. 16-11-440(C) are not supported by the record. These findings and the grant of immunity should be vacated.

III. THE COURT ERRED IN FINDING RESPONDENT HAD SHOWN THAT HE REASONABLY BELIEVED SHOOTING THE VICTIM WAS NECESSARY TO PREVENT GREAT BODILY INJURY.

The court also erred in finding there was evidence Respondent reasonably believed shooting the victim was necessary to prevent great bodily injury. There was no evidence at the hearing that such a belief was reasonable.

"'Great bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-11-430(2). None of the evidence presented at the hearing supported a finding Respondent was facing such an injury when he shot the victim.

First, the injuries suffered by Respondent did not support a finding he was facing great bodily injury. The testimony at the hearing indicated that Petitioner suffered bruises to his arms, a bruised eye, a cut to one of his legs, and a possible bite mark. Respondent also attempted to contend he also suffered a head injury. None of these injuries were serious enough to warrant medical attention. Respondent testified that he did not believe he needed treatment for his injuries. (R. pp. 97-8). Also, none of those injuries impaired Respondent's ability to flee the house after he shot Smith. (R. p. 53). Respondent suffered no lasting damage relating to any of those injuries. Further, Respondent's testimony indicated that Smith stopped the alleged assault and went to the dining room area. (R. p. 49). There was no testimony or evidence establishing that Smith had a weapon during the confrontation immediately prior to the shooting. Altogether,

there was nothing presented at the hearing to support a finding Respondent was facing gross bodily injury when he shot the victim.

Second, there was no indication based upon the prior interaction between Respondent and Smith that Smith would inflict great bodily injury as defined by the statute. Respondent indicated that while he was attacked before by Smith some five years before the shooting, he did not indicate that he suffered a serious injury from that attack. (See R. pp. 22-3). Further, even the improperly admitted testimony regarding the two incidents at the detention centers did not reflect that Smith inflicted great bodily injury upon anyone.

Altogether, there was no evidence supporting the court's grant of immunity because Respondent's assessment that he had reason to believe he was facing imminent great bodily injury is not supported by the record. As a result, the grant of immunity should be vacated.

IV. THE TRIAL COURT ERRED IN GRANTING IMMUNITY UNDER S.C. CODE ANN. § 16-11-440(C); RESPONDENT WAS NOT "IN ANOTHER PLACE," AND THEREFORE WAS NOT ELIGIBLE FOR IMMUNITY UNDER THIS PROVISION OF THE ACT.

The trial court erred in finding Douglas was entitled to immunity from prosecution under S.C. Code Ann. § 16-11-440(C). Since the entire incident that led to the shooting occurred inside Douglas' home, Douglas was not "in another place," as is required for immunity under the statute. As a result, the trial court's reliance upon S.C. Code Ann. § 16-11-440(C) as the basis for granting immunity was an error of law and should be reversed.

Standard of Review

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Duncan, 392 S.C. 404, at 408, 709 S.E.2d at 664; Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Id. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Duncan, 392 S.C. at 408-09, 709 S.E.2d at 664; Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Respondent was not entitled to immunity under S.C. Code Ann. § 16-11-440(C) because his residence does not constitute "another place" that would allow for immunity under the statute. S.C. Code Ann. 16-11-440(C) states:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has

> the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

At issue is whether Respondent's residence qualifies as "another place" where he had a right to be in order to be eligible for immunity under this provision of the Act in accordance with S.C. Code Ann. § 16-11-450(A). Appellant submits that it does not. When read in conjunction with the other subsections of S.C. Code Ann. § 16-11-440, it is clear that "another place" in subsection 440(C) refers to places that do not include a defendant's residence, dwelling, or occupied vehicle.

S.C. Code Ann. § 16-11-440(A) states:

> (A) 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**, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A) (emphasis added). In subsections (B), (D), and (E), the statute specifically refers to the application of the presumption in subsection (A), reflecting that it applies to only a dwelling, residence, or occupied vehicle. In light of the specific references to dwelling, residence, or occupied vehicle in those other subsections, Appellant submits that it clear that "in another place" in subsection (C) refers to a place other than a dwelling, residence, or

occupied vehicle. This is further supported by the example of another place provided in subsection (C), one's "place of business," which does not fit within the definition of a dwelling, residence, or occupied vehicle.

Since subsection (C) does not apply to one's residence, the court's finding that Respondent was entitled to immunity under subsection (C) was in error. As a result, the grant of immunity should be vacated, and the case should be remanded back for trial.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court reverse the trial court's Order Granting Immunity and Dismissing Criminal Charges and remand the case for a jury trial.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
141 North Main Street
Sumter, South Carolina 29150

ATTORNEYS FOR RESPONDENT

By: _____
Alphonso Simon Jr. (Bar No. 74713)

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 3, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-000148

THE STATE

APPELLANT,

V.

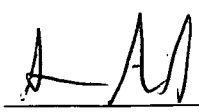
GRAHAM FRANKLIN DOUGLAS,

RESPONDENT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 3rd day of March, 2014.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-000148

THE STATE

APPELLANT,

V.

GRAHAM FRANKLIN DOUGLAS,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Appellant, certify that I have served the within Final Brief of Appellant and Certificate of Compliance on Respondent by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, S. Jahue Moore, Sr., Esq., M. Brooks Biediger, Esq., Margaret A. "Meg" Hazel, Esq., 1700 Sunset Blvd., Post Office Box 5709, West Columbia, South Carolina 29171.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of March, 2014.

ALPHONSO SIMON, JR.
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR APPELLANT