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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Pickens County

The Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN WILLIAM MCCARTY,

Appellant.

Appellate Case No. 2017-002377

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MICHAEL D. ROSS
Assistant Attorney General
S.C. Bar No. 73986

South Carolina Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6307

W. Walter Wilkins, III.
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court judge abuse her discretion by failing to resolve any conflicts in the evidence presented regarding Appellant's entitlement to immunity under the Protection of Persons and Property Act when the circuit court judge ruled that due to conflicts in the evidence, the case presented a "quintessential jury question"?

II. In the alternative, if this Court determines the judge did not abuse her discretion by abdicating her role as the fact finder, did the judge err by failing to find Appellant was immune from prosecution under the Act where Appellant proved by a preponderance of the evidence that he acted in defense of others?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court sat as the fact-finder, weighed the evidence, and applied the correct burden of proof at the immunity hearing.

II. Whether the circuit court had evidentiary support to find that appellant failed to meet his burden of proof at the immunity hearing.

STATEMENT OF THE CASE

In December 2015, a Pickens County grand jury indicted appellant for murder and possession of a firearm during the commission of a violent crime. (Indictment nos. 2015-GS-39-2275 and 2276). Appellant requested a pre-trial hearing to establish immunity from prosecution under the Protection of Persons and Property Act (the Act), S.C. Code Ann. § 16-11-410, *et. seq.* Appellant claimed that he lawfully used deadly force in defense of another. (Hr'g Tr.116, l. 21-25). On February 23, 2017, the Honorable Letitia H. Verdin presided over an immunity hearing. (Hr'g Tr. 1). Assistant Solicitors Baker Cleveland and Britni McCall represented the State of South Carolina. (Hr'g Tr. 1). Attorney Robert Newton represented appellant. (Hr'g Tr. 1).

After a full hearing, the circuit court denied appellant's motion for immunity. In a written order dated April 7, 2017, the court found that appellant had not met his burden of proof to establish immunity. (Order 1). Specifically, the court found that appellant failed to establish by a preponderance of the evidence that the third party, in whose defense appellant was acting, was without fault in bringing about the difficulty. (Order 3).

The case proceeded to trial on October 16, 2017. (Tr. 1). After a three-day trial, the jury found appellant guilty on both counts. (Tr. 504, l. 14-15). Judge Verdin sentenced appellant to thirty years for murder and five years (concurrent) for possession of a firearm during the commission of a violent crime. (Tr. 509, l. 14-17). This timely appeal follows.

STATEMENT OF FACTS

Murder of Mitchell Bradley

Appellant lived in a trailer in Liberty, South Carolina with his long-term significant other, Randy Wilson. (Hr'g Tr. 6, l. 19-24, 7, l. 15, 12, l. 5-12). In 2013, Jacob Kirk moved into the trailer to live with them. (Hr'g Tr. 6, l. 16, 87, l. 12-13).[1] The couple had known Jacob since he was a teenager and allowed him to stay without paying rent. (Hr'g Tr. 15, l. 8-19, 87, l. 19-21). In lieu of rent, Jacob helped Randy with the chores around the house. (Hr'g Tr. 11, l. 22-24). Mitchell Bradley, the victim in this case, was Jacob's younger brother. (Hr'g Tr. 87, l. 2). Mitchell was twenty-three years old. (Hr'g Tr. 47, l. 9).

On July 15, 2015, Jacob got home from work at around 5:30 pm and began drinking beer. (Hr'g Tr. 88, l. 2-5). Shortly thereafter, Mitchell joined him at the trailer. (Hr'g Tr. 88, l. 2-11). By 7:00 pm, appellant and Randy had also returned home from work and running errands, respectively. (Hr'g Tr 13, l. 21, 51, l. 4-7). They too began drinking. Appellant had some wine, and Randy had liqour. (Hr'g Tr. 51, l. 22-23, 88, l. 15-17). Appellant ate dinner with Randy and went to bed at approximately 9:30 pm because he had to work in the morning. (Hr'g Tr. 53, l. 4, 68, l. 19). Randy stayed up and put some food in the microwave for Jacob and Mitchell. (Hr'g Tr. 14, l. 3-7).

After appellant had gone to bed, Randy called his niece. (Hr'g Tr. 14, l. 8). While Randy was talking on the phone, Jacob asked him how he wanted to split up the food in the microwave. (Hr'g Tr. 14, l. 10, 89, l. 8). Annoyed at being interrupted, Randy slammed the phone down, pointed at Jacob, and said "I want you and you off my property now." (Hr'g Tr. 89, l. 9-12).

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[1] Randy's great-nephew, a minor, also lived with the couple. However, at the time of the murder he was away at summer camp. (Hr'g Tr. 7, l. 1-10).

The two began arguing, and Randy called the police. (Hr'g Tr. 15, l. 19-22,). Although they were yelling at each other, the argument never turned violent. (Hr'g Tr. 35, l. 4-14). The only physical contact occurred when Jacob "shoulder bumped" Randy when he was on the phone. (Hr'g Tr. 35, l. 9-14). After Randy called 911, Jacob began gathering his belongings in order to leave. (Hr'g Tr. 92, l. 5). Jacob's truck needed a part replaced, so Randy began working on it while the police were on their way. (Hr'g Tr. 16, l. 8-13).

The police responded to the disturbance and found Randy and Jacob grossly intoxicated and angry at each other. (Hr'g Tr. 81, l. 5-24, 83, l. 1-2). Mitchell also appeared grossly intoxicated but remained quiet. (Hr'g Tr. 81, l. 17-18, 83, l. 8). As for appellant, he woke up when the police arrived but stayed in his bedroom. (Hr'g Tr. 52, l. 23-25, 53, l. 1-3, 82, l. 3). After assessing the situation for about twenty minutes, the police advised that they could not force Jacob or Mitchell off the property because Jacob was a resident and Mitchell was an invited guest. (Hr'g Tr. 83, l. 15-25). By that point, the police concluded that everyone had calmed down. (Hr'g Tr. 83, l. 25). However, as the police left Randy yelled that they would have to come back. (Tr. 84, l. 2-4).

When the police left, Randy returned to Jacob's truck to finish replacing the broken part. Jacob approached him and said, "see, just because it's your property doesn't mean that you get to control everything that goes on here." (Hr'g Tr. 94, l. 4-6). Randy threw down his tool, walked up the porch, and began throwing around Mitchell's packed belongings. (Hr'g Tr. 94, l. 8-13). Specifically, Randy opened a carton of Mitchell's cigarettes, crumpled them up, and threw them all over the porch. (Hr'g Tr. 94, l. 10-13, 108, l. 24, 109, l. 1-2).

Upon seeing Randy throwing his stuff around, Mitchell pushed him down the steps of the porch. (Hr'g Tr. 94, l. 17-19). On the way down, Randy broke a bone in his left foot.[2] (Hr'g Tr. 18, l. 15). Randy laid on the ground for 30 to 45 seconds, got up, and walked up the steps. (Hr'g Tr. 96, l. 4-10). As he made it to the top of the steps, Randy smacked Mitchell's beer off the hand railing and tried to push him out of the way. (Hr'g Tr. 18, l. 22-23, 39, l. 1, 96, l. 12-14).

When Randy smacked the beer off the railing, Mitchell pushed him into the corner of the porch and pinned him against the bannister. (Hr'g Tr. 39, l. 14-25, 96, l. 17-19). As Mitchell held him in the corner, Randy called out for appellant's help. (Hr'g Tr. 19, l. 1-5). Mitchell started tapping Randy in the face with his open hand, asking, "What you hollering for [appellant] for Randy? What you hollering for [appellant] for?" (Hr'g Tr. 97, l. 2-18).

After Mitchell had Randy in the corner for ten to thirty seconds, appellant approached with his Beretta nine millimeter in hand. (Hr'g Tr. 62, l. 9, 97, l. 19-21, 102, l. 5-6). He tried to kick the back door open, but Randy and Mitchell were inadvertently blocking it. (Hr'g Tr. 55, l. 20-24). Appellant fired a warning shot[3] into the floor of the trailer, allowing Randy to finally push Mitchell away. (Hr'g Tr. 98, l. 23-25). Appellant then raised his weapon and fired two shots through the kitchen window. (Hr'g Tr. 56, l. 16, 57, l. 16-18, 112, l. 24). Mitchell dropped to floor, never to get back up. (Hr'g Tr. 23, l. 1-22, 99, l. 5).

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[2] Randy initially testified that he broke his leg in the fall, and appellant included this information in his brief. (Hr'g Tr. 18, l. 13; App. Brief 8, 31). However, Randy subsequently clarified that he was referring to the top of his foot. (Hr'g Tr. 18, l. 15). Additional testimony confirms that Randy's injury was a broken bone in his foot, not a broken leg. (Hr'g Tr. 37, l. 10).

[3] Although appellant stated he fired a warning shot before shooting Mitchell, the solicitor asked him on cross-examination whether he told the police that the gun accidentally discharged when he was trying to open the back door. (Hr'g Tr. 61, l. 15-17). Appellant responded, "I'm still not sure to this day because I was fighting with trying to get the door open and trying to sit there and get through the door. I had my gun in my hand at the door. That's the same thing as what I told the officer that day. I wasn't sure." (Hr'g Tr. 61, l. 18-22).

Police quickly returned to trailer after receiving the call that shots had been fired. (Hr'g Tr. 84, l. 8-15). Approximately five minutes had elapsed since they left the trailer after assessing everyone had calmed down. (Hr'g Tr. 84, l. 11). Randy was attempting CPR on Mitchell and told the officers that "John didn't mean to shoot Mitchell." (Hr'g Tr. 84, 22-25). The police found appellant quietly standing in the kitchen. (Hr'g Tr. 85, l. 15-16). After shooting Mitchell, he did not attempt to render aid to either Randy or Mitchell. (Hr'g Tr. 73, l. 11-18). Instead, he put his gun away and waited for the police to arrive. (Hr'g Tr. 73, l. 17-18, 74, l. 2).

Immunity Hearing

In support of his claim of immunity, appellant's trial counsel offered testimony from Randy Wilson and appellant. After hearing from these witnesses, the solicitor argued that appellant had "not established, by a preponderance of the evidence, immunity under the Castle Doctrine." (Hr'g Tr. 77, l. 17-18). The circuit court declined to rule for the State at that time, but advised the State could renew its motion after it presented witnesses. (Hr'g Tr. 79, l. 16-20). The solicitor subsequently called Jacob Kirk and two responding police officers.[4]

In general, the witnesses gave similar testimony. After appellant went to bed, Jacob and Randy began arguing while Randy was on the phone. (Hr'g Tr. 14, l. 8-19, 89, l. 5-12). The argument escalated, Randy called 911, and the police arrived. (Hr'g Tr. 16-19, 90, l. 19-22). Randy asked the police to force Jacob and Mitchell off the property, but the police declined because Jacob was a resident and Mitchell was his guest. (Hr'g Tr. 17, l. 15-17, 92, l.14)

When the police left, Randy and Mitchell began arguing on the steps of the back porch. (Hr'g Tr. 18, l. 4-9, 94, l. 8-16). Mitchell pushed Randy down the steps, injuring Randy's left

[4] The court also received a copy of Randy Wilson's written statement and heard recordings of the 911 calls and Randy Wilson's recorded interview with investigators. (Hr'g Tr. 3, 26, 43, 47).

foot. (Hr'g Tr. 18, l. 12-15, 94, l. 18-19). Randy walked back up the steps, smacked Mitchell's beer can off the railing, and tried to push him out of the way. (Hr'g Tr. 18, l. 21-23, 38, l. 18-23, 39, l. 1, 96, l. 6-24). In response, Mitchell pushed Randy into the corner of the porch and pinned him there. (Hr'g Tr. 19, l. 1-12, 21, l. 24, 97, l. 2-13). Although Mitchell never punched or hit him, Randy screamed for appellant's help. (Hr'g Tr. 21, l. 12-13, 40. l. 7, 97, l. 11-21). Appellant emerged from his bedroom with his weapon and tried to open the back door. (Hr'g Tr. 22, l 1-3, 55, l. 15-16, 99, l. 17-18). He fired a warning shot into the floor, but never yelled at Mitchell to stop. (Hr'g Tr. 72, l. 16-20, 73, l. 4-7, 98, l. 23, 99, l. 25) Instead, appellant shot him through the kitchen window. (Hr'g Tr. 41, l. 16-17, 56, l. 16). Mitchell fell to the floor and died on scene. (Hr'g Tr. 23, l. 1-23, 99, l. 1-5).

Despite these consistencies in testimony, the witnesses differed on several key points. First, Randy claimed he never touched any of Mitchell's personal property. (Hr'g Tr. l. 11). In contrast, Jacob testified that before Mitchell pushed Randy down the steps, Randy was rummaging through Mitchell's stuff. (Hr'g Tr. 94, l. 10-11). Specifically, he testified that Randy was crumpling up a carton of Mitchell's cigarettes and throwing them all over the porch. (Hr'g Tr. 94, l. 10-13, 108, l. 24, 109, l. 1-2). Second, Randy claimed that after the police left, Mitchell started the altercation while he was working on Jacob's truck. (Hr'g Tr. 17, l. 24-25). Randy testified that he accidentally knocked over a beer while reaching for a tool. (Hr'g Tr. 18, l. 1-10). He claimed that Mitchell "lost it," grabbed him by the arm, and slung him around. (Hr'g Tr. 16, 19-21). However, Jacob testified that never happened. (Hr'g Tr. 97, l. 17-19). Instead, he believed that Randy "was instigating the entire thing from start to finish." (Hr'g Tr. 107, l. 22-23).

The parties also disagreed over the degree of danger Randy was facing when appellant used deadly force in his defense. Randy testified that he sustained a severe neck injury in 1980 after being hit by a car. (Hr'g Tr. 8, l. 1-14). Although he had been an electrician for most of his life, at the time of the immunity hearing his neck injury prevented him from working. (Hr'g Tr. 8, l. 23, 9, l. 6-20). Randy testified that due to this previous neck injury, he feared for his life when Mitchell began "pushing on [his] face" and "twisting [his] neck." (Hr'g Tr. 40, l. 10-12). Similarly, appellant testified that after hearing Randy's "life or death" cry for help, he believed deadly force was necessary to save Randy's life. (Hr'g Tr. 53, l. 19-21, 56, l. 4-5).

In contrast, Jacob acknowledged that he was aware of Randy's neck condition, but never believed Randy was as "fragile" as he claimed at the hearing. (Hr'g Tr. 101, l. 6). In fact, Randy often "would boast about his fighting skills." (Hr'g Tr. 100, l. 22). Jacob had previously seen appellant and Randy fight multiple times, and on one occasion, appellant even put Randy in a headlock. (Hr'g Tr. 100, l. 19, 103, l. 10-11). Simply put, Jacob did not think either Randy or Mitchell were in danger of sustaining a serious injury. (Hr'g Tr. 101, l. 24). Furthermore, Jacob testified that after the warning shot, Randy was able to push Mitchell off of him. (Hr'g Tr. 98, l. 23-25).

After the court received this evidence, both parties argued their positions. When the State asserted that the facts of the case presented a jury question, the court interrupted and rhetorically asked, "[s]o are you saying immunity is never available at this stage?" (Hr'g Tr. 120, l. 9-10). The State responded that "[n]o, I think immunity is available at this stage if they proved that fact beyond a preponderance of the evidence.[5] I don't think that's the case." (Hr'g Tr. 120, l. 11-14).

[5] It appears the solicitor misspoke in stating that the appellant must prove immunity "beyond a preponderance of the evidence." As noted above, after appellant presented his two witnesses at the hearing, the solicitor argued that appellant had not met his burden of proof. In doing so, the

The circuit court took the matter under advisement and subsequently issued a written order denying appellant's motion for immunity. (Hr'g Tr. 130, l. 18; Order 1).

Circuit Court Order

In its written order, the circuit court held that "[a]fter considering the evidence presented...[appellant] failed to meet the burden of proof for the reasons set forth below." (Order 1). Although the court found "the core facts are largely uncontested," it noted "there was some dispute as to the cause and nature of the argument between Wilson, Kirk, and Bradley." (Order 1, 2). Specifically, the court highlighted Randy Wilson's testimony that Bradley acted aggressively and caused him to fear for his life. (Order 2). In contrast, Jacob Kirk testified that Randy incited the argument by destroying Mitchell Bradley's property. (Order 2). Additionally, the court noted "Kirk also testified that he did not believe the fight to be serious, and knowing of Wilson's previous injuries, he would not have allowed the fight to continue if Bradley was seriously injuring Wilson." (Order 2).

Citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997), the circuit court held that an individual has "the right to act in the defense of another person if the person being protected would have had the right to kill the assailant in self-defense, a doctrine commonly referred to as 'defense of others.'" (Order 3). However, "[i]t is the Defendant's burden to prove by a preponderance of the evidence that he had the right to act in defense of others." (Order 3). "In considering the evidence presented," the court found appellant "failed to meet his burden of proof because he did not prove that Wilson was without fault in bringing about the difficulty." (Order 3). Because this issue was dispositive, the court declined to address the other elements of

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solicitor noted the burden of proof was "by a preponderance of the evidence." (Hr'g Tr. 78, l. 25, 79, l. 1).

self-defense. (Order 3). In conclusion, "[t]he evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be resolved by a jury." (Order 4).

At trial, appellant renewed his motion for immunity after the State rested. Appellant did not ask the court to clarify its ruling or address his remaining allegations. (Tr. 325, l. 1-3). The circuit court summarily denied the motion, stating that "I stand by my previous ruling." (Tr. 325, l. 6-7).

STANDARD OF REVIEW

The standard of review for a pretrial determination of immunity is abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support." State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014)(quoting State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)). "In other words, the abuse of discretion standard of review does not allow this [C]ourt to reweigh the evidence or second-guess the trial court's assessment of witness credibility." Id. at 237-38, 768 S.E.2d at 316.

ARGUMENT

I. THE CIRCUIT COURT SAT AS THE FACT FINDER, WEIGHED THE EVIDENCE, AND APPLIED THE CORRECT BURDEN OF PROOF AT THE IMMUNITY HEARING.

As the Court is well aware, pursuant to the Protection of Persons and Property Act (the Act), an individual who is justified in the use of deadly force can seek immunity from civil and criminal liability. S.C. Code Ann. § 16-11-450. Prior to trial, the individual must establish by a preponderance of the evidence that he was justified in his use of deadly force. State v. Duncan, 392 S.C. 404, 709, S.E.2d 662 (2011). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, Op. No. 27872 (S.C.Sup.Ct. filed Mar. 27, 2019)(Shearhouse Adv. Sh. No. 13 at 35). If the circuit court determines that the individual has not met the burden of proof, the case will proceed to trial for the jury to consider the issue of self-defense. Id.

Appellant argues that the circuit court failed to determine whether he established immunity by a preponderance of the evidence. (App. Brief 11). Specifically, he points to portions of the circuit court order stating that this case presented a factual question that must be resolved by the jury. For example, as noted above, the circuit court ruled "[t]he evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be resolved by a jury." (Order 4; App. Brief 10). According to appellant, this portion of the order indicates that "[e]ssentially, the circuit court judge refused to decide whether Appellant proved by a preponderance of the evidence that he acted in defense of others." (App. Brief 12).

Appellant has taken these quotes out of context. Read as a whole, the order reveals the circuit court sat as the fact-finder, weighed the evidence, and applied the correct burden of proof

at the immunity hearing. See Cervantes-Pavon, Op. No. 27872 (S.C.Sup.Ct. filed Mar. 27, 2019)(Shearhouse Adv. Sh. No. 13 at 35). For example, in the introduction, the order reads "[a]fter considering the evidence presented, it is the ruling of the Court that the Defendant failed to meet his burden of proof for the reasons set forth below." (Order 1). The court further noted, "[i]t is the Defendant's burden to prove by a preponderance of the evidence that he had the right to act in defense of others." (Order 3). The order continues, "[i]n considering the evidence presented, we find the Defendant failed to meet his burden because he did not prove that Wilson was without fault in bringing about the difficulty." (Order 3).

The plain text of these passages confirm that the circuit court understood its role as fact-finder, weighed the evidence, and applied the correct legal standard. The subsequent portions of the order cited by appellant are not evidence that the circuit court "abdicated" its role as fact-finder, as appellant argues. (App. Brief 11-12, 17). Instead, these passages reflect the legal principle that because appellant failed to satisfy his burden of proof at the hearing, he was not entitled to blanket immunity from prosecution. A jury would have to decide the merits of his self-defense claim.

In this regard, the circuit court's language mirrors the analysis used in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). In Curry, the trial court also considered conflicting evidence at a pre-trial immunity hearing. The State's witnesses testified that the defendant got into an altercation with the victim, left the room to retrieve a firearm, and returned to shoot the victim in the back. The defendant testified he already had his firearm in his pocket and only shot when the victim lunged at him. After noting the Act requires a "pretrial determination using a preponderance of the evidence standard" the Supreme Court upheld the trial court's denial of immunity. Id. at 370, 752 S.E.2d at 266. The court held that the defendant's "claim of self-

defense presents a *quintessential jury question*, which, most assuredly, is not a situation warranting immunity from prosecution." Id. at 372, 752 S.E.2d at 267 (emphasis added). Thus, the Supreme Court in Curry used the same language and reasoning as the circuit court in this case: because the defendant did not establish immunity by a preponderance of evidence at the hearing, his claim of self-defense created a question for the jury.

In addition to using language that aligns with controlling precedent, the circuit court's actions during the immunity hearing reveal it weighed the evidence and applied the correct burden of proof. As noted above, at one point the solicitor argued that the jury would need to determine whether appellant's use of deadly force was reasonable. The circuit court pushed back, rhetorically asking, "so are you saying immunity is never available at this stage?" (Hr'g Tr. 120, l. 9-10). The solicitor replied that immunity is available, but appellant simply failed to prove his case. (Hr'g Tr. 120, l. 10-15). In other words, because appellant failed to carry his burden at the hearing, the case would go to a jury. (Hr'g Tr. 120, 15-18). By forcing the solicitor to articulate that point, the circuit court demonstrated it understood the distinction between its role as fact-finder at the immunity hearing and the jury's role as fact-finder at a trial.[6]

Nevertheless, in claiming that the circuit court "abdicated" its role as fact-finder, appellant argues that "judges have a duty to make credibility findings to the extent there was conflicting evidence during the immunity hearing." (App. Brief 12). Appellant cites no legal authority for this proposition. (App. Brief 12). Although express credibility findings of the type appellant demands may be a wise practice, there is no legal duty requiring them and their

[6] Other portions of the record also reveal the circuit court wrestling with the factual issues presented in the case. For example, the court contrasted the relevance of the victim's intent with appellant's assessment of danger (Hr'g Tr. 119, l. 19-25), the significance of the warning shot (Hr'g Tr. 122, l. 1-15), and appellant's lack of situational awareness regarding who was at fault in bringing about the difficulty. (Hr'g Tr. 124, l. 9-20).

absence would not constitute an abuse of discretion. Controlling precedent simply provides that the circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Cervantes-Pavon, Op. No. 27872 (S.C.Sup.Ct. filed Mar. 27, 2019)(Shearhouse Adv. Sh. No. 13 at 35).[7]

Furthermore, in denying appellant's claim of immunity, the circuit court implicitly ruled on the credibility of the witnesses. The court only heard two versions of the events that led to the confrontation: (1) Jacob Kirk claimed Randy Wilson was at fault, and (2) Randy Wilson claimed the victim was at fault.[8] Appellant acted in defense of Randy Wilson. In order to deny appellant's claim of immunity, the court would have to find Kirk's version more credible than Wilson's.[9] Thus, the court's credibility assessment is evident from the words, "we find the Defendant failed to meet his burden because he did not prove that Wilson was without fault in bringing about the difficulty." (Order 3). Simply put, the circuit court did not need to "show its work" as if it were solving a high school math problem.

Appellant also notes the various standards a circuit court applies in other settings, such as civil bench trials, post-conviction relief claims, and pre-trial rulings on the admissibility of evidence. (App. Brief 12-14). For example, by rule in civil bench trials the court "shall find the

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[7] Additionally, the Supreme Court has noted that "[w]hile the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve Cervantes-Pavon, Op. No. 27872 (S.C.Sup.Ct. filed Mar. 27, 2019)(Shearhouse Adv. Sh. No. 13 at 36, n. 4).

[8] Appellant conceded on cross-examination that he was did not know who was at fault in bringing about the conflict. (Hr'g Tr. 62, l. 14-15).

[9] Randy admitted that immediately before Mitchell pinned him in the corner, he knocked Mitchell's beer of the railing and tried to push him out of the way. (Hr'g Tr. 38, l. 18-25, 39, l. 1).

facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. Similarly, by statute in post-conviction relief cases the court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. In contrast, the Act imposes no similar requirement on the circuit court for pre-trial immunity hearings. Therefore, in arguing that the circuit court erred by not applying these standards, appellant is comparing apples to oranges.

In fact, this Court recently addressed an identical argument in State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018). In Andrews, the parties offered conflicting accounts of a homicide at an immunity hearing. The circuit court held that the defendant failed to meet his burden of proof, noting the inconsistent witness testimony created a jury question. Id. at 311, 818 S.E.2d at 231. On appeal, the defendant argued that because of the conflicting testimony, the circuit court had a duty to make credibility findings. The defendant also argued that the circuit court erred in ruling the inconsistent testimony made the claim of self-defense a "quintessential jury question." Id. at 314-15, 818 S.E.2d at 233.

This Court disagreed with both of those arguments, finding that "the circuit court properly submitted the case to the jury." Id. at 316, 818 S.E.2d at 234. In other words, the circuit court's finding that the inconsistent testimony created a "quintessential jury question" did not indicate that the court failed to act as a fact-finder at the immunity hearing. Instead, the finding indicated that because the defendant failed to prove his case at hearing, he was not immune from prosecution. As such, his claim presented a question for the jury. Id. at 315, 818 S.E.2d at 234.

This case presents an identical situation and should be upheld for the same reason. The circuit court sat as fact-finder, weighed the evidence, and reached a conclusion in this case.

Appellant has taken portions of the circuit court order out of context and attempts to derive a meaning that is inconsistent with both the plain text of the order and the court's statements at the hearing. Read as a whole, the circuit court order applies the correct burden of proof and aligns with controlling precedent.

II. THE CIRCUIT COURT'S RULING THAT APPELLANT FAILED TO PROVE HIS IMMUNITY CLAIM BY A PREPONDERANCE OF THE EVIDENCE SHOULD BE UPHELD BECAUSE IT HAS EVIDENTIARY SUPPORT.

In order to receive immunity from prosecution under the Act, an accused must establish all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. e.g. State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014). As the Court is aware, there are four elements of self-defense: (1) the defendant must be without fault in bringing on the difficulty, (2) the defendant must have actually believed he was in imminent danger of death or serious bodily injury, (3) a person of ordinary prudence, firmness, and courage would have shared the belief, and (4) the defendant had no other alternatives to avoid the threat.[10] Id. at 318, 768 S.E.2d at 238-39. When acting in defense of others, an accused must show that the person in whose defense he is acting would "likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997).

A. Appellant Failed To Prove That Randy Wilson Was Not At Fault In Bringing On The Difficulty.

With respect to the first element of self-defense, an individual who "provokes or initiates an assault" cannot claim self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322

[10] As noted above, the Act provides that an accused does not have to prove the fourth element of self-defense, the duty to retreat. State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014).

(1999). Stated differently, "any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for homicide." Id. Moreover, "the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." State v. Strickland, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010)(quoting State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931)).

The circuit court found that appellant failed to prove by a preponderance of the evidence that Randy Wilson was without fault in bringing about the difficulty. (Order 3). The court's ruling has evidentiary support and should be upheld. See e.g. State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016)("Under this Court's deferential standard of review, we hold there is evidence to support the [circuit court's] findings as to each element of self-defense.").

As discussed above, Jacob Kirk testified that "Randy was instigating the entire thing from start to finish ... by the way that he was speaking to me, nagging us on physically, verbally." (Hr'g Tr. 107, l. 22-25, 108, l. 1). After the police left, Randy began rummaging through and destroying Mitchell Bradley's property. (Hr'g Tr. 94, l. 8-13). Specifically, he opened a carton of Mitchell's cigarettes, crumpled them up, and threw them all over the front porch. (Hr'g Tr. 94, l. 10-13, 108, l. 24, 109, l.1-2). In response, Mitchell pushed Randy down the steps of the back porch. Nevertheless, Randy continued to provoke additional conflict. (Hr'g Tr. 94, l. 17-19). He walked back up the steps, smacked Mitchell's beer off the railing, and tried to push him out of the way. (Hr'g Tr. 96, l. 6- 24). Simply put, Randy started the conflict that ultimately led to appellant's use of deadly force. Therefore, appellant was not justified in using deadly force on his behalf.

In assessing whether Randy's conduct "was reasonably calculated to produce the occasion," this Court's opinion in State v. Strickland, 389 S.C. 210, 697 S.E.2d 681 (Ct. App. 2010) is instructive. In Strickland, the defendant was charged with murder arising from a family dispute. The defendant was arguing with his wife at her father's trailer. The wife's brother intervened, stating, "I'm not going to have this in my daddy's house." The defendant told the brother to "shut your fucking mouth" at which point the father attacked the defendant. During the ensuing fight, the defendant killed the brother and injured the father. On appeal, he argued that the circuit court erred in denying his motion for a directed verdict because he established self-defense as a matter of law.

This Court disagreed, noting that the defendant was not without fault in bringing about the difficulty. The fact-finder, in this case the jury, could have concluded that the defendant's statement to "shut your fucking mouth" might reasonably be expected to bring on the difficulty. Id. at 215, 697 S.E.2d at 684. As such, there was evidentiary support to find he was at fault in bringing about the difficulty.

Like Strickland, this case has evidentiary support to find Randy Wilson was at fault in bringing about the difficulty. Randy's actions are similar to the words used in Strickland in that both will provoke conflict. Although in an ideal world someone would shrug off Randy's actions, in the real world one can reasonably expect Randy's conduct to start a fight. Randy had no one to blame for Mitchell's response but himself. Therefore, the circuit court's ruling had evidentiary support and should be upheld on appeal.

B. Appellant's Claim That Randy Wilson Withdrew From The Conflict Is Not Preserved For Appellate Review And Fails On The Merits.

Even if an accused is at fault in bringing about the difficulty, he can regain his right to self-defense if he withdraws from the conflict and announces an intent to retire. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Stated differently, "[o]ne's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." Id. at 345, 520 S.E.2d at 322. Therefore, "[r]egardless of what extremity or imminent peril he may be reduced to in the progress of the combat," an individual must "endeavor[] in good faith to decline further conflict, and either by word or act, make[] that fact known to his adversary." State v. Taylor, 356 S.C. 227, 232 n. 2, 589 S.E.2d 1, 3 n. 2 (2003)(quoting State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495-96 (1973)).

Appellant claims that even if Randy Wilson was at fault in bringing upon the difficulty, he withdrew from the conflict and communicated that intent to the victim. (App Brief 30). Appellant failed to preserve this argument for appellate review. See e.g. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003)("In order for an issue to be preserved for appellate review, it must have been raised and ruled upon by the trial judge."). Although appellant raised the issue at the immunity hearing, the circuit court did not rule upon it. (Hr'g Tr. 128, l. 21-25, 129, l. 1-3). As noted above, the court's order only considers whether Randy Wilson was at fault in bringing about the difficulty, not whether he attempted to withdraw. (Order 3). At trial, appellant renewed his motion for immunity but never asked the court to rule on the other issues he presented. (Tr. 325, l. 1-3). The circuit court summarily denied the motion, stating "I stand by my previous ruling." (Tr. 325, l. 6-7).

Because the court did not address the remaining issues of self-defense, this case is analogous to State v. Rivers, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015). In Rivers, the defendant filed a motion *in limine* to exclude evidence of prior bad acts in a homicide by child abuse case. Specifically, the defendant claimed that there was no evidence connecting him to some injuries the child previously sustained. The circuit court denied the motion, stating, "[t]hese cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." Id. at 553, 769 S.E.2d at 265. The court also advised the defendant, "[y]ou're protected on the record on that." Id.

Nevertheless, this Court found the issue unpreserved for appellate review. The circuit court's ruling that "child cases are getting a little different treatment" failed to reveal whether it considered the defendant's argument that no evidence connected him to the child's previous injuries.[11] Therefore, this Court held the issue was never ruled upon and, as such, unpreserved. Like Rivers, the circuit court in this case did not rule upon the withdrawal argument. In fact, the circuit court's order lacked the ambiguity presented in Rivers. The circuit court explicitly declined to rule on any issue other than Randy Wilson's fault in bringing about the difficulty. Thus, appellant's argument is not preserved for review.

Furthermore, even if this Court considers the merits of appellant's argument, it fails because there is evidentiary support to find that Randy Wilson never withdrew from the conflict. As discussed above, after Mitchell pushed him down the steps, Randy walked back up the steps,

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[11] In Rivers, this Court also noted that because neither party proffered evidence at the pre-trial hearing, "the trial court could not have made a pre-trial ruling as to whether there was any evidence connecting [the defendant] to the victim's other injuries." Rivers, 411 S.C. at 554, 769 S.E.2d at 265. Although this case is unlike Rivers in that both parties presented evidence, the circuit court's order lacks the type of ambiguity presented in Rivers. Here, the circuit court reduced its findings to writing. The order explicitly declines to rule on any issue other than Randy Wilson's fault in bringing about the difficulty. (Order 3).

smacked Mitchell's beer off the railing, and tried to push him out of the way. (Hr'g Tr. 18, l. 22-23, 39, l. 1, 96, l. 12-14). These actions communicate the exact opposite of withdrawing from a conflict. In fact, it is hard to imagine a better way Randy could have *escalated* the conflict. As Jacob Kirk testified, it was "like, screw you guys, basically." (Hr'g Tr. 96, l. 24).

Appellant also claims Randy's "screams of terror" communicated an intent to withdrawal. (App. Brief 30). However, screaming for appellant only reveals Randy had bitten off more than he could chew, not that he intended to withdraw. See Taylor, 356 S.C. 227, 232 n. 2, 589 S.E.2d 1, 3 n. 2 (2003)(Noting that "[r]egardless of what extremity or imminent peril he may be reduced to in the progress of the combat," an individual must still in good faith withdraw from the conflict.). Yelling for help could also indicate a desire to double down and bring more firepower to conflict. Randy never said "you win," "I quit," or "uncle." Nor did he have time to. As Jacob testified, "they hadn't even had 10 seconds to fight" when appellant appeared and shot the victim. (Hr'g Tr. 102, l. 5-6). Because Randy did not attempt to withdraw or communicate an intent to retire, appellant was not justified in using deadly force in his defense.

C. Appellant Failed To Prove Randy Wilson Was In Imminent Danger Of Serious Bodily Injury.

Although the circuit court did not rule on the issue, appellant also failed to establish by a preponderance of the evidence that Randy Wilson was in imminent danger of death or serious bodily injury. On appeal, a respondent may raise "any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." Equivest Financial, LLC v. Ravenel, 422 S.C. 499, 507-08, 812 S.E.2d 438, 442 (Ct. App. 2018)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)); See also Rule 220(c), SCACR. In other words, this

Court "may affirm on any ground appearing in the record."[12] State v. Griffin, 339 S.C. 74, 78 n. 2, 528 S.E. 2d 668, 670 n. 2 (2000).

In this case, the record reveals that Randy Wilson was not in imminent danger of death or serious bodily injury. As discussed above, Mitchell pinned Randy in the corner of the porch and was tapping him in the face with his open hand. Mitchell never punched or hit Randy during the entire ordeal. Until appellant arrived with his firearm, no one had a deadly weapon. (Hr'g Tr. 46, l. 19-25). Furthermore, after the warning shot[13] Randy was able to push Mitchell away and get free. (Hr'g Tr. 98, l. 23-25). Therefore, at the time appellant fired the fatal shots, Randy was not in danger of imminent death or bodily injury.

Nevertheless, Randy claimed that due to a thirty-five year old neck injury, his life was threatened when Mitchell started "pushing on [his] face" and "twisting [his] neck." (Hr'g Tr. 40, l. 10-11). However, despite having the burden of proof at the hearing, appellant offered no medical evidence or expert opinion to corroborate this allegation. Appellant only offered the self-serving statements of himself and his long-term partner. Interestingly, when interviewed by law enforcement immediately following the incident, Randy never stated he was in fear for his life. (Hr'g Tr. 44, l. 3). The responding officer also testified that when he returned to the scene Randy stated that appellant "didn't mean to shoot Mitchell." (Hr'g Tr. 84, l. 25).

In contrast to appellant's self-serving testimony, Jacob Kirk testified that although he was aware of the prior neck injury, he never viewed Randy as "fragile" as he claimed to be at the

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[12] However, the South Carolina Supreme Court recently held that review of a pre-trial immunity hearing must be limited to the evidence presented at the immunity hearing. In other words, appellate review should not consider evidence presented later at trial. State v. Cervantes-Pavon, Op. No. 27872 (S.C.Sup.Ct. filed Mar. 27, 2019)(Shearhouse Adv. Sh. No. 13 at 35)

[13] As noted in footnote 3 above, there is some indication that appellant accidentally discharged his weapon while trying to open the door. (Hr'g Tr. 61, l. 15-22).

hearing. Rather, Jacob testified that Randy "would boast about his fighting skills." (Hr'g Tr. 100, l. 22). He also testified that he would have intervened if he thought Randy was in danger of sustaining a serious injury. (Hr'g Tr. 106, l. 24). Jacob had previously seen appellant and Randy fight multiple times without any serious injury. (Hr'g Tr. 100, l. 18-19). On one of these occasions, appellant even put Randy in a headlock. (Hr'g Tr. 103, l. 10-11). Furthermore, although Randy claimed he was sore after the altercation, the incident did not re-aggravate his neck injury. (Hr'g Tr. 29, l. 1-11). Simply put, this was the type of ordinary scuffle that people get into every day. It did not call for the use of deadly force.

Accordingly, not only did appellant fail to prove Randy was without fault in bringing about the difficulty, he failed to prove Randy was in imminent danger of death or serious bodily injury. As such, this Court can affirm appellant's convictions on that basis.

CONCLUSION

In arguing that the circuit court abused its discretion at the immunity hearing, appellant has taken portions of the court's order out of context. Read as a whole, the circuit court's order applies the correct burden of proof and aligns with controlling precedent. Furthermore, the circuit court had evidentiary support to deny appellant's claim of immunity. Therefore, given the standard of review on appeal, appellant's subsequent convictions should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MICHAEL D. ROSS
Assistant Attorney General
S.C. Bar No. 73986

By: Michael Ross
Michael D. Ross
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6307

ATTORNEYS FOR RESPONDENT

May 17, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2017-002377

THE STATE,

Respondent,

vs.

JOHN MCCARTY,

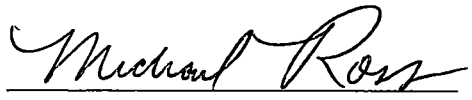
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina.

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

This 17th day of May, 2019.



MICHAEL D. ROSS
Assistant Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ALAN WILSON
ATTORNEY GENERAL

May 17, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. John McCarty
Appeal from Pickens County
Appellate Case No: 2017-002377

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the *Initial Brief of Respondent and Designation of Matter* along with proof of service in the above-referenced case.

Sincerely,

Michael D. Ross
Assistant Attorney General
S.C. Bar No: 73986

MDR/ab
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division