

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maité Murphy, Circuit Court Judge
Appellate Case No. 2017-000870

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT.

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SC Court of Appeals

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred in finding that Appellant was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act?
2. Whether, in the interest of judicial economy, this Court should vacate the five year sentence imposed for possession of a firearm during the commission of a violent crime where S.C. Code Ann. § 16-23-490 expressly provides that the five-year sentence for such an offense "does not apply in cases where ... a life sentence without parole is imposed for the violent crime" and Appellant was sentenced to life imprisonment without parole for the murder offense?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court abused its discretion in denying Himes' motion for immunity under the Protection of Persons and Property Act when Himes was not entitled to the application of the presumption afforded under S.C.Code § 16-11-440(C); the trial court's findings that Himes did not establish he was acting in self-defense are supported by the record; and Himes otherwise failed to establish all of the elements of self-defense?
- II. Whether Himes' sentence for possession of a weapon during the commission of a violent crime should be vacated when no objection to the sentence was made at trial?

STATEMENT OF THE CASE

On September 1, 2016, Appellant Christian Anthony Himes ("Himes") was indicted by the Dorchester County Grand Jury during the September 5, 2016 Term of the Dorchester County Court of General Sessions for one count of murder (2015-GS-18-1882) and one count of possession of a weapon during the commission of a violent crime (2015-GS-18-1883). (Indictments, R. pp. 590-593).

The case was called to trial on April 3, 2017 before the Honorable Maité Murphy, Circuit Court Judge. Michelle Williams, Esquire and Pierce Wehman, Esquire, both of the First Circuit Public Defender's office, represented Himes. The State was represented by Assistant Solicitors Donald Sorenson and Ryan Templeton of the First Judicial Circuit Solicitor's Office. On April 3, 2017, Judge Murphy heard Himes' motion for immunity from prosecution under the Protection of Persons and Property Act. On April 4, 2017, the trial court denied the motion for immunity. (R. 184-188).

On April 4-6, 2017, Himes was tried by a jury on the murder and possession of a weapon during the commission of a violent crime charges. The jury found Himes guilty of both counts on April 6, 2017. (R. 560). Judge Murphy sentenced Himes to life confinement for the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction, both to be served concurrently. (R. 570).

Before this Court is Himes' direct appeal of his convictions and sentences. Himes requests this Court reverse the trial court's denial of immunity and grant his release. The State respectfully requests this Court deny Taylor's appeal and affirm his convictions and sentences.

STATEMENT OF FACTS

On November 1, 2015, Christian Anthony Himes ("Himes") shot and killed David Ham ("Ham" or "victim") in a grassy area outside of the apartment building where Ham's estranged wife (Himes' then girlfriend) stayed. Ham suffered a gunshot wound to the neck. (R. 321). The bullet entered the right front of Ham's neck and exited from the back right side of his neck. (R. 321, 328). The shot went slightly downward, and moved slightly right to left. (R. 321, 328). The bullet injured both the jugular vein and carotid artery. (R. 324-325). The pathologist stated the cause of death was the gunshot wound to the neck. (R. 327).

Background

At the time of this shooting, Himes was in a romantic relationship with Heather Ham. (R. 11). Heather Ham was married to David Ham. (R. 11). Heather and the victim had been separated for approximately eighteen months before the shooting.

According to Himes, he and Heather began their romantic relationship towards the end of September 2015. (R. 117). Himes had previously known Heather when he lived in a group home when he was 14 or 15. (R. 115). Heather was his counselor at that time. (R. 115). At the Duncan hearing, Himes testified that after he was released from prison after serving time for a burglary, he contacted Heather to seek assistance with getting his life together. (R. 117). Shortly after that initial contact, Himes and Heather began a romantic relationship. (R. 117).

Himes would stay with Heather when he stayed in Summerville. (R. 117). He would go back and forth between Columbia and Summerville to work and to meet with his probation officer. (R. 142). Heather testified that Himes stayed with her on three

separate occasions in Summerville, and he was staying with her on the night of the shooting. (R. 81). Both Heather and Himes noted during this time, Himes did not have a vehicle, and he did not have a cell phone. (R. 77, 118). Himes acknowledged he was not given a key to Heather's apartment. (R. 119). Instead, she would let him borrow her key when he needed it. (R. 119).

At the time, Heather was married to the victim. (R. 11, 42, 120). They had been together for about twelve years. (R. 42). Heather testified the two had been separated for approximately eighteen months. (R. 66). She explained that they separated after a physical encounter between Heather and the victim. In 2014, the two had gotten into an argument, and the victim tried to drag Heather out of the house in front of the children. (R. 44). Heather testified she wanted to stop something before it got started. (R. 44-45; see R. 121, 139). Heather also noted that there had been one other prior instance of physical violence in their marriage: in 2008, the victim hit her in the face, which left a scar on her lip. (R. 45). Himes testified Heather told him about both of those incidents. (R. 120-121). Himes also indicated that Heather advised him Ham owned a gun. (R. 121). According to Himes, Heather was afraid of Ham meeting Himes; she thought there would be an altercation, and Ham would hit Himes. (R. 122).

While Heather and Ham were separated, they maintained joint custody of their two children. (R. 49-50). Heather would have the children during the week, and Ham would have the children during the weekend. (R. 49-50). Heather noted that initially, she would drop off and pick up the children; later on, when he was able to, the victim would drop off and pick up the children. (R. 50). If there were ever any issues regarding the drop off of the children, the two would help each other out. (R. 50).

On Friday, October 30, 2015, the victim picked up the children from Heather's apartment. (R. 50). Himes was in town that weekend, and he was staying with Heather. (R. 68-70, 143). Himes was not at the apartment when the exchange occurred. (R. 69, 143). Both Heather and Himes recalled Heather picked Himes up from getting a haircut, and she had dropped him off in a bank parking lot before going home to meet Ham for the children exchange. (R. 70, 143).

Later on that evening, the victim sent Heather a text message. (R. 12, 51, 72, 125, 589). Heather testified the message stated, "by the way you tell your boyfriend don't let me catch him slipping."¹ (R. 51, ll 24-5). Heather noted that at that time, she did not know Ham knew who Himes was. (R. 50). She had not disclosed her relationship with Himes to Ham. (R. 52). Notably, Heather did not see the text message as a threat. (R. 52). She noted that she did not share the text message with Himes, but Himes saw it and Himes took the message as a threat.² (R. 52, 152). Himes stated, "to me it meant if he sees me, he's gonna come at me and he's gonna attack me." (R. 125, ll 23-4). Himes also believed Heather thought it represented a threat. (R. 126).

On Saturday, October 31, Heather and Ham took the children trick-or-treating in Heather's parent's neighborhood. (R. 68, 75, 144). Ham had found the children's Halloween costumes. (R. 74). The two stopped by Heather's parent's house just prior to taking them trick-or-treating. (R. 68, 75). Heather testified Himes was not happy that Heather was taking the children trick-or-treating with Ham. (R. 69). She noted that

¹ Detective Weaver testified the message stated "[S]weetie, I care, you don't. What I needed to hear, tell your BF, assuming boyfriend, don't let me catch him slipping." (R. 12, ll 18-20).

² Himes testified Heather did show him the text message. (R. 125).

Himes expressed he wanted to be the one to go with Heather and the children trick-or-treating. (R. 74). Himes testified that it did not bother him that they took the children trick-or-treating, but he recalled he and Heather had an argument about it. (R. 144). He noted that Heather told him she did not want her children to call him Daddy. (R. 144). Heather indicated she had no issues with Ham that night; there were no issues and they had a great time. (R. 75). Ham had also sent Heather a text message to let her know that he needed her to pick up the children on Sunday, November 1. (R. 76).

On November 1, Himes borrowed Heather's car. (R. 77, 127, 144). Heather recalled he took the car between 3:30 and 3:45 p.m. (R. 77). Himes claimed he borrowed the car later in the afternoon, between 5 and 6 p.m. (R. 144). Himes did not advise Heather why he needed to borrow the car, and he did not allow her to ride with him. (R. 77-78). Himes agreed Heather did not know why he borrowed the car. (R. 147). Himes testified that he borrowed the car so he could give a friend a ride to West Ashley. (R. 145-146). Heather testified that she told Himes he had to be back by 6:30 so she could go pick up the children. (R. 78). She also stated that Himes promised he would be back. (R. 78). Himes recalled that she told him to bring the car back by a certain period of time, but he believed she told him to be back by 7 or 7:30 p.m. because she was supposed to pick up the children around 8 p.m. (R. 147). He disputed her assertion that he was supposed to be back by 6:30. (R. 148). He did not return, and Heather had no way to contact him. (R. 78, 148-149). According to Detective Weaver, in her statement, Heather indicated she was supposed to pick up the children at 8pm. (R. 13). Weaver noted that she was unable to pick up the children, and the victim had to bring them to her. (R. 14).

Sometime between 9 and 9:30 p.m., the victim contacted Heather and asked where she was. (R. 79). He also asked how the children would be getting home. (R. 79). She did not tell Ham that she could not pick them up because her boyfriend had her car. (R. 79). Heather noted that Ham had plans for attending a Halloween party that night. (R. 80).

The victim brought the children to Heather's apartment around 9:30 p.m. (R. 53, 80). When Ham came, he brought the children into the apartment, sat their stuff down, and helped Heather get them into bed. (R. 80). Heather gave Ham some mail that had ended up in her parents' vehicle, and the two talked about that for a little while. (R. 80). Heather also testified the two discussed getting back together with some things. (R. 80). Heather noted this visit lasted longer than the normal exchange. Typically, the two would talk about what the children did for the weekend, Ham would give an update on how they did, and he would leave. (R. 53). This normally lasted between ten and fifteen minutes. (R. 53).

Himes returned with Heather's car while Ham was still at the apartment. (R. 14). Himes initially asserted he returned between 8:45 and 9 p.m. (R. 149). Heather watched out for him from her door, and she cut him off when he got to the apartment. (R. 54). Himes testified she came all the way out of the apartment, told him Ham was at the apartment, and asked Himes to leave. (R. 128, 150). Heather told Detective Weaver that she let Himes know that Ham was at the apartment, and Himes left. (R. 15, 17). Heather testified she did not want a confrontation between Himes and Ham because she lived in a quiet neighborhood. (R. 55; see R. 17, 128). She asked Himes to turn around and go. (R. 55). He complied. (R. 55).

Himes went to a nearby gas station. (R. 129, 149). He testified that he was at the gas station for thirty to forty-five minutes, and he purchased some cigars while there. (R. 129, 150). He noted it was his understanding that the typical children exchange usually only lasted five to ten minutes at most.³ (R. 128). Himes then returned to Heather's apartment. (R. 129). Himes did not know Ham was still at the apartment when he returned. (R. 129).

After Himes left the first time, Heather then tried to get Ham to leave. (R. 55). When Ham left, she went to the bathroom. (R. 56). Ham soon returned because he forgot his keys. (R. 56, 82). He left before Heather got out of the bathroom. (R. 82).

Himes initially saw Ham in the breezeway of the apartment building. (R. 131). When Ham came out, he asked Himes if he was crazy. (R. 132). Himes testified he told Ham that he was, and that he "didn't want to do this here and now because [Ham's] kids was in the house." (R. 132, ll 4-5; see R. 153). Himes indicated Ham was upset, and he was waving his arms. (R. 132, 153). Ham also told Himes that he needed to leave. (R. 132, 153). According to Himes, Ham stated "he didn't want me to be a father to his kids. He wasn't going to allow his children to call me Daddy." (R. 132, ll 7-9; see R. 153). The two were yelling at one another. (R. 132). Himes also stated that Ham kept reaching in his pocket. (R. 153, 156). However, Ham also admitted he did not believe Ham had a weapon. (R. 135, 136, 155).

Himes stated that when he told Ham he was going inside, Ham blocked him off and started walking towards Himes. (R. 132-133). Ham continued to tell Himes that he

³ Himes also testified that he had been present in a back room a few times before when the children were either picked up or dropped off, and that's how long it would normally take. (R. 129, 130).

was not going to allow Himes to be a father to Ham's kids. (R. 132). As Ham approached Himes, Himes pulled out his gun. (R. 132-133). Himes pointed the gun at Ham. (R. 156). Himes thought he backed up about fifty feet towards Heather's car. (R. 133-134). Himes told Ham, this was going to destroy his kids' life and I asked him to leave." (R. 153, ll 21-22). Himes testified that Ham said, "I'm not scared of your punk ass gun." (R. 134, l 12, see R. 156). According to Himes, Ham started walking towards him aggressively. (R. 134). Himes told Ham to back up a few times. (R. 134). At that point, Himes stated Ham charged at him, and as Ham went to lunge at Himes, Himes stumbled back. (R. 134-135, 158). Himes then shot Ham. (R. 135).

Himes admitted that Ham never put his hands on Himes. (R. 154). Ham never touched Himes physically. (R. 154). Himes was also not aware that Ham's vehicle was parked behind where Himes was standing. (R. 154). Ham never showed Himes a weapon, and he never stated he was going to kill Himes, shoot Himes, or stab Himes. (R. 155). Himes also admitted Ham never made any threats other than to tell Himes he was not going into the apartment. (R. 158). Himes also did not see a weapon when Ham charged at him. (R. 158). Himes also admitted that he was pointing the gun at Ham the entire time. (R. 158).

Heather testified when she got out of the bathroom, she went to her front door and heard arguing. (R. 56, 83). She initially hoped it was not Ham and Himes. (R. 83). She heard Ham say he was not afraid of Himes's weapon. (R. 56). She confirmed she heard Ham say something like, "Oh, you think you bad because you got a gun. Come on." (R. 85, l 21 – R. 86, l 1; see R. 90). She then heard Himes tell Ham to back up three times. (R. 57, 87, 90). Then, Heather heard a gunshot. (R. 57, 87). After she

heard the gunshot, she ran outside. (R. 87). She saw Himes taking off in her car. (R. 57-87). Himes did not check on Heather, and he did not go to her apartment after the shooting. (R. 87). Ham was lying on the ground in the grass. (R. 87). She saw no weapons near or on Ham. (R. 88).

Himes stated he was not aware of any physical abuse by Ham during their separation. (R. 160).

After Himes shot Ham, he took off. (R. 160). He did not see Heather come out of the apartment. (R. 160).

Heather denied she had any violent encounters with Ham during their eighteen month separation. (R. 66-67). Also, she explained that when she told Detective Weaver that she had seen Ham with a gun before, she was referring to seeing him with a gun when they were skeet shooting. (R. 64). Also, she had seen Ham with a BB gun before. (R. 64).

Heather had not seen Himes with a handgun that weekend. (R. 73). In fact, she had never seen him with a gun before. (R. 73). Had she known Himes had a gun, she would not have allowed it in her apartment with her small children. (R. 74). Heather was not aware of what vehicle Ham was driving that night. (R. 80).

The victim had a .194 blood alcohol content, and .198 ocular fluid blood level. (R. 107).

Himes also testified that on the weekend prior to the shooting, Heather was sexually assaulted by an acquaintance in her apartment. (R. 126-127, 140). He purchased the handgun in response to the sexual assault. (R. 127, 140-141). Himes

never told Heather that he purchased the gun. (R. 142). He did not think she would allow the gun in the apartment with her two children. (R. 143).

Officer Matthew Brooks of the Summerville Police Department lived in Heather's apartment complex. (R. 91-92). That night, he heard shouting. (R. 92, 94). After Brooks muted his television, he heard a male voice say "you're not going back in that apartment." (R. 92, 123; R. 94). He then heard a single gunshot. (R. 92). After hearing the gunshot, Brooks called and notified dispatch. (R. 92). He then grabbed his gun, radio, and ID, and went outside. (R. 92). He saw the victim laying in the grass, bleeding. (R. 93). He also noted he could hear tires screeching before he got outside, not even a minute after he heard the gunshot. (R. 92-94).

ARGUMENT

- I. **The trial court did not abuse its discretion in denying Himes' motion for immunity under the Protection of Persons and Property Act. Himes failed to establish that one of the presumptions under Section 440 applied to his case; he could not establish he was acting in self-defense; and the trial court's findings regarding a number of the elements of self-defense are supported by the record.**

Discussion at the Immunity Hearing

The trial court denied immunity. (R. 185-188). Initially, the court questioned whether Himes had a right to be in the curtilage of the apartment. (R. 185). The court noted that while it did not believe the Castle Doctrine would apply, even if it did apply, Himes failed to show by a preponderance of the evidence that self-defense applied. (R. 185). First, the trial court found Himes could not show he was without fault in bringing on the difficulty.

There has been evidence in which the defendant, A, was sleeping with the victim's spouse and was around his minor children. He had been previously warned that that would cause a potential conflict, and a reasonably prudent person could reasonably foresee that that would cause conflict and fault if there was an eventual meeting there. Secondly, regarding the complete disregard of the victim's car and her timing and her requirement that she pick up her children on time, the victim confirmed the defendant completely disregarded that. And it certainly is reasonably foreseeable that that would cause a conflict which would involve the potential victim in this case having either bring his children home or having the children there, and noway to have them picked up. So, certainly, I think the defendant was previously warned that if he was in the same location as the victim that there could be a potential conflict. And, certainly, he is with fault in bringing about that because, A, he was sleeping with the victim's wife and then he didn't even return the car. Although they were separated, they were still legally married and he knew that.

(R. 185, I 16 – R. 186, I 11).

Second, the trial court found Himes did not establish the second element of self-defense, i.e. that he believed he was in imminent danger of losing his life or suffering serious bodily injury, or that he was actually in danger.

The defendant testified himself that the victim did not say: I'm going to shoot you. I'm going to stab you. I'm going to kill you. The defendant on his own testified that he did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would've had enough time to pull it out. So the Court does not find that that element was met either.

(R. 186, ll 15-22).

Third, the trial court found Himes did not establish defendant's belief he was in imminent danger was reasonable.

The Court does not find that this element was established either because of the fact that a reasonably prudent person -- although he was a little bit taller, there was not that much disparity in size. He as not armed. It appears that the defendant is the one that initially pointed the gun at the victim and not the other way around. The alleged "threat" as far as the text message is concerned can certainly be viewed in different ways. "Don't let your BF let me catch him slipping," could be interpreted in many different ways and certainly could reasonably not be interpreted as a threat if it was not interpreted as a threat by the victim's spouse.

(R. 187, ll 5-16). Fourth, the trial court found Himes could not show he had no other probable means of avoiding the danger.

That element also was not met because of the fact that as soon he saw the victim, he could have just turned around and walked away. He could have certainly avoided the conflict; or instead insisting that he go into the residence, he could have said, sure, I'm not going there. So there's certainly another way to avoid inflicting the fatal blow in this case.

(R. 187, l 21 – R. 188, l 2).

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. S.C. Code § 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.

S.C. Code Ann. § 16-11-440(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." 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. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." Curry, 406 S.C. at 371, 752 S.E.2d at 266. "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's

entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat."⁴ Id. at 371, 752 S.E.2d at 266.

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)). 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. 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.").

⁴ Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)

The denial of immunity should be affirmed under Rule 220(c), SCACR. The record clearly shows Himes was not entitled to immunity under the Act.

A. S.C. Code § 16-11-440(C) did not apply to Himes.

Himes was engaged in an unlawful activity prior to and during the confrontation with the victim. First, Himes was in unlawful possession of a firearm at the time of the confrontation. Himes acknowledged as much at the Duncan hearing. (R. 151). Himes testified he had a prior burglary conviction.⁵ (R. 137; see R. 151). By statute, Himes was proscribed from possessing a firearm. S.C. Code Ann. § 16-23-500 ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State.").

Also, prior to the shooting, Himes also unlawfully pointed and presented the firearm at the victim. S.C. Code Ann. § 16-23-410 ("It is unlawful for a person to present or point at another person a loaded or unloaded firearm."). By Himes account of the confrontation, he presented his pistol well before the victim took any action that could be considered threatening. Himes admitted he did not see a weapon on the victim. (R. 155). Further, the victim never made any verbal threats against Himes. (R. 155). At most, the victim merely told Himes that he was not going into the apartment where the victim's two children were. (R. 155). Himes further admitted the victim never had any physical contact with him. Himes pulled out his pistol and pointed the gun at the victim before the victim took any aggressive action towards Himes. Himes' testimony reflects

⁵ Himes was convicted of second degree burglary in 2014. (R. 421). Second-degree burglary is classified as a violent offense. S.C. Code Ann. § 16-1-60 (2017).

that the lunge by the victim towards Himes may have been in response to the fact Himes was pointing a gun at the victim. (See R. 134-135).

Himes' contention that he was lawfully armed in self-defense even though he was in unlawful possession of the pistol is not supported by the record. Himes' reliance upon State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), is misplaced because Burriss is inapplicable in this case. In Burriss, the South Carolina Supreme Court held that a person could be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. 334 S.C. at 265, 513 S.E.2d at 109. In Burriss, the defendant was threatened and then attacked by the victim and another male. Id. at 258, 513 S.E.2d at 106. After being pushed to the ground, the defendant drew a gun and fired two shots at the ground. Id. at 258-59, 513 S.E.2d at 106. Both men backed away. Id. at 259, 513 S.E.2d at 106. As the defendant attempted to get off the ground, one of the attackers moved to attack the defendant again. Id. The defendant picked up his gun, and it went off, killing the victim. Id. The Supreme Court found that the defendant was lawfully armed in self-defense. Id. at 269, 513 S.E.2d at 109. Since there was evidence that the firing of the gun was not intentional, the defendant in Burriss was entitled to an involuntary manslaughter charge. Id.

This case is distinguishable from Burriss in several respects. First, Himes was not lawfully armed because of an attack from the victim. Himes was not attacked by the victim. There was no testimony or evidence presented at the immunity hearing that indicated the victim had threatened Himes with a weapon, let alone attack Himes physically. By Himes' own account, the victim never made physical contact with Himes.

Himes also indicated that he may not have believed the victim had a gun. Unlike the defendant in Burris, Himes was never in a vulnerable position in relation to the victim. Second, Himes had the pistol not because of a fear of attack from the victim, but instead because of the prior sexual assault Heather suffered from a mutual acquaintance the week before.

Altogether, Himes failed to establish that §440(C) applied to his case. The denial of immunity was warranted.

B. Himes was not acting in self-defense

Himes was not entitled to immunity because the circuit court reasonably found Himes' actions in the shooting were not an act of self-defense.

1. Himes was not without fault in bringing on the difficulty.

Himes was not entitled to immunity under the Act because he could not establish a credible case that he was acting in self-defense when he shot Ham. First, Himes was not without fault in bringing on the difficulty. In a more general sense, Himes was responsible for the victim being at the apartment complex in the first place. Himes was aware that Heather needed to pick up her children from the victim that Sunday evening when he drove her car earlier in the afternoon. (R. 127-128, R. 147-149). Despite having that knowledge, he failed to return the car in a timely fashion. The victim thus had to bring the children to Heather's apartment.

More importantly to Himes' claim of self-defense, Himes actively engaged in the verbal confrontation with the victim prior to the shooting. Himes admitted that he engaged in a shouting argument with the victim prior to the shooting. (R. 132). Himes escalated the conflict by pulling out his pistol and pointing it at the victim. (R. 133-134).

By Himes' own admission, the victim did not lunge at Himes until well after Himes pointed the pistol at the victim. (R. 134-135, 159). These actions by Himes reflect that he was at fault in bringing on the difficulty.

"[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense" State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (quoting Ferdinand S. Tinio, Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense, 55 A.L.R.3d 1000, 1003 (1974)). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Jackson 384 S.C. 29, 36, 681 S.E.2d 17, 20 (Ct.App.2009)(quoting Bryant, supra). An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. Jackson, 384 S.C. at 29, 681 S.E.2d at 20.

Altogether, the record supported the trial court's determination that Himes was at fault in bringing on the difficulty. Since he was at fault, he cannot establish he was acting in self-defense. As a result, he is not entitled to immunity under the Act.

2. Himes did not believe he was in imminent danger of losing his life or sustaining serious bodily injury.

There was also evidence in the record to support the circuit court's finding that Himes did not believe he was in imminent danger of losing his life or sustaining serious bodily injury. As noted by the circuit court, Himes testified the victim never threatened to kill him, shoot him, or stab him. (R. 155). Also, Himes indicated he did not believe the victim had a gun. (R. 135, 155).

As noted by Himes, "[a] person has the right to act on appearances, even if the person's belief is ultimately mistaken." State v. Scott, Op. No. 27834 (S.C. Sup. Ct. filed Aug. 29, 2018)(Shearouse Adv. Sh. 35, p. 38)(quoting State v. Dickey, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011)(internal citation omitted). Himes contention that he was acting on appearances, however, was reasonably rejected by the circuit court. First, there was conflicting evidence and testimony at the hearing regarding whether Himes believed the victim was armed. Himes testified he told the investigator the victim was reaching around his pockets at some point during their confrontation. (R. 135). He also told the investigator that he did not believe the victim had a weapon. (R. 135, 155). The circuit court, in its role as the factfinder at the hearing, clearly resolved this conflict in finding Himes did not believe the victim had a weapon. Since there is evidence in the record to support this finding, the circuit court's order denying immunity should be affirmed. See Scott, Op. No. 27834 (S.C. Sup. Ct. filed Aug. 29, 2018)(Shearouse Adv. Sh. 35, pp. 38, 40)

3. The trial court reasonably rejected Himes' contention that his alleged belief he was in imminent danger was reasonable.

The trial court also reasonably found Himes did not establish his belief that he was in imminent danger was reasonable. First, the trial court's factual findings are supported by the record. Although the victim was a little bit taller than Himes, there was not that much disparity in size. (R. 31, 132). The victim was not armed. (R. 33, 88). It appears that the defendant is the one that initially pointed the gun at the victim and not the other way around. (R. 133-134). The alleged "threat" as far as the text message is concerned can certainly be viewed in different ways. "Don't let your BF let me catch him slipping," could be interpreted in many different ways and certainly could reasonably not

be interpreted as a threat if it was not interpreted as a threat by the victim's spouse. During the hearing, however, Heather testified she did not interpret the text message as a threat. (R. 52). Altogether, the trial court's factual findings in assessing the reasonableness of Himes' belief are supported by the record.

The trial court's determination that Himes' asserted belief he was in imminent danger was not reasonable is supported by the hearing record overall. Himes' argument that he was afraid the victim would was unreasonably based upon the victim's prior interactions with Heather, and the text message. Heather testified she and the victim separated because the victim got physical with her during an argument. (R. 44). She noted that she had not had any other physical confrontations during the eighteen months they had been separated. (R. 67). Furthermore, as already noted, Heather did not believe the text message was threatening. The reasonableness of Himes' belief were also undermined by Himes' statement to Investigator Weaver that his fear was influenced more so by Himes' prior relationship with his father, who was physically, mentally, and emotionally abusive. (R. 32). This reference by Himes reflects his fear may not have emanated from so much from the actions of the victim, but instead from his individual experience, which would not be the same as a person of ordinary firmness. "[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014). Himes' argument essentially requests such a reassessment. The trial court's finding that Himes did not establish the third element of self-defense was reasonable.

Altogether, the trial court did not abuse its discretion in finding Himes failed to establish he was acting in self-defense. As a result, he was not entitled to immunity under the Protection of Persons and Property Act. The denial of immunity should be affirmed.

II. Himes' argument that his sentence for possession of a weapon during the commission of a violent crime should be vacated is not preserved for appellate review.

In his second argument on appeal, Himes contends his sentence of five years for possession of a weapon during the commission of a violent crime should be vacated because it violates S.C. Code § 16-23-490. S.C. Code Ann. § 16-23-490(A) states:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

At trial, Himes did not object to the imposition of the sentence for possession of a weapon during the commission of a violent crime. (See R 570). As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995)(defendant's claim that his due process rights were violated because he was not present at pretrial hearing during which trial judge decided to bring in jury from another county because of pretrial publicity was not preserved, where defendant did not object to his absence from pretrial hearing), cert. denied, 516 U.S. 1096, 116 S.Ct. 821, 133 L.Ed.2d 764 (1996), overruled on other grounds by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (but for very few exceptional situations, appellate court cannot address issue unless it was raised to, and ruled upon by, trial court); Schofield v. Richland County Sch. Dist., 316 S.C. 78, 447

S.E.2d 189 (1994) (issue not raised to or ruled upon by trial judge is not properly before Supreme Court on appeal).

Since this argument was not presented to the trial court, it is not preserved for appellate review.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Himes' appeal and affirm his convictions for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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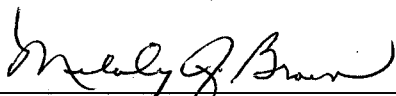
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November 5, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge
Appeal Case No. 2017-000870

(THE STATE

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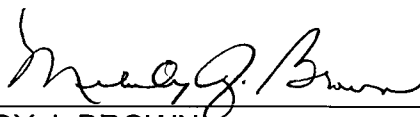
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APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent 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 5th day of November, 2018.



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