

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of General Sessions
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2018-002240

THE STATE,RESPONDENT,

v.

JAMES R. ROSENBAUM,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. The trial judge properly denied Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act after finding, based on the evidence, that Appellant failed to meet his burden of proof.
- II. The trial judge properly allowed the State to introduce evidence of Appellant's status as a victim of sexual assault and his jailhouse statements as probative evidence of a racial motive for his crime. (Appellant's Issues II and III).
- III. The trial judge properly instructed the jury to disregard evidence of the codefendant's guilt, including her self-incriminating statements, and to base a determination of his guilt based solely on the evidence presented concerning his guilt.

STATEMENT OF THE CASE

Appellant was indicted in Horry County for murder. On July 16-17, 2018, a hearing was held to determine whether Appellant and his codefendant, Dianne Durkin, were entitled to immunity through the Protection of Persons and Property Act. The Honorable Benjamin H. Culbertson presided over the hearing and denied immunity.

On December 3-10, 2018, a jury trial was held in front of Judge Culbertson. Alex Hyman and Travis Hyman represented Appellant; Thomas Bouchette and Johnny Gardner represented Durkin; Solicitor Jimmy A. Richardson, II, and Assistant Solicitor Christopher D. Helms represented the State. Immediately prior to closing arguments, Durkin entered a plea to voluntary manslaughter. The jury found Appellant guilty of voluntary manslaughter, and the trial judge sentenced Appellant to fifteen years' incarceration.

Appellant filed a timely notice of appeal and brief in support thereof. This Brief of Respondent now follows.

STATEMENT OF FACTS

On July 16–17, 2018, an immunity hearing was held pursuant to S.C. Code Ann. § 16-11-410, the South Carolina Protection of Persons and Property Act (Act). Appellant and his codefendant, Diane Durkin, claimed they killed Victim in self-defense after he attempted to rape Durkin in their home. However, evidence presented by the parties at during the hearing, including Durkin’s own phone call to 9-1-1, quickly unraveled the tale spun by the defendants during the hearing.

Immunity Hearing

Durkin’s Testimony

Durkin was the first defendant to testify during the immunity hearing. According to Durkin, she and Appellant dated for approximately two years before moving to Horry County. By her own admission, Durkin abused drugs throughout her life, including heroin when she moved to Horry County in 2015. On one occasion around August of 2015, when Appellant was staying at the nearby Veterans Hospital for treatment, she met Appellant while using drugs with her friend Kelly Jordan. Durkin, who was unemployed, was told by Victim that she could potentially get a job at the farm where he was employed. Durkin claimed that same night she also drove Victim, who did not possess a motor vehicle, to the home of a drug dealer located near her own residence and then dropped him off at his home a few miles away. (H.Tr.P.14, line 13–H.Tr.p.23, line 16)

Durkin testified she did not see Victim again until July 11, 2016, when she visited his farm to ask the farm’s owner a job. There, she ran into Victim who asked to borrow twenty dollars and requested a ride to the home of the drug dealer they visited in August 2015. Durkin claimed that after dropping Victim off, she did not expect to see him again. Later, Victim

showed up at her door seeking a ride home, but Durkin refused. She instead gave him a glass of water and then returned to a backroom to fold laundry. When she returned to the kitchen, Victim was “completely naked.” Durkin demanded Victim leave because he refused, hit her in the face, and tackled her onto a mattress sitting out on the living room floor. Victim ripped her shirt, and almost immediately thereafter Appellant serendipitously entered the home wielding a baseball bat which had been on the back porch. Durkin claimed the two men began wrestling and fighting for control of the bat, and at some point she obtained it. She claimed she only ever struck Victim in the legs and groin with the weapon. (H.Tr.p.23, line 17–H.Tr.p.34, line 24)

Durkin also testified about her meeting with police after the incident, and admitted that she told law enforcement a number of lies. Durkin conceded that she told officers she had never met Victim prior to the evening of the attack and that Victim had pulled out a crack pipe while at her home. She also initially informed officers that she had smoked crack with Victim. To justify these misstatements, Durkin claimed she was trying to tell officers whatever “they’d want to hear” to escape the situation with charges filed against her. (H.Tr.p.34, line 25–H.Tr.p.42, line 13)

During cross-examination, Durkin’s story continued to unravel. She could not definitely say whether Appellant used the bat to hit Victim. In fact, she claimed Victim must have acquired his bloody head injuries by hitting his head when wrestling with Appellant. Durkin was unable to recall the details of the fight, and guessed that the blood found around the home was a result of the men fighting. She also stated that she and Appellant kept the bat on the porch to hit balls to their dog, but actually did not have a dog at that time. Durkin’s shirt, which she claimed was ripped around her “cleavage part” and the sleeve when Victim assaulted her, had only a

small tear in its armpit. Photographs also showed Victim was not naked during the fight; he wore shorts, socks, and shoes. (H.Tr.p.42, line 16–H.Tr.p.71, line 15)

Durkin admitted that after dropping Victim off at the drug dealer’s home, he was stuck in her neighborhood unless she drove him home. She also vacillated between admitting and denying she and Appellant were trying to keep Victim in the home. Durkin recalled that at some point, Victim, injured and bloody, was staggering towards the front door, but somehow ended back on the mattress and stopped moving and speaking.¹ After being shown a picture taken on Appellant’s phone which showed Victim sitting on the mattress, Durkin admitted that following Victim’s statements of being unable to move, he was not a threat, and that he was subsequently beat more after those statements. (H.Tr.p.72, line 4–H.Tr.p.85, line 9)

When the State asked Durkin about her interview with police, she admitted that she told officers that Victim had not solicited a ride from her the night in question; she had offered a ride on her own initiative and then “started smoking” with him. She also “probably” told officers that she never told Victim to leave her home that night. When confronted with her statements from the 9-1-1 recording, Durkin acknowledged she told Victim, “I’m going to get you, I’m going to get you, don’t you leave, I’ll kill you myself” and made other aggressive and threatening comments while Victim made none and only begged for help. Tellingly, Durkin admitted that she wasn’t protecting herself or Appellant when beating Victim with the bat. (H.Tr.p.85, line 15–H.Tr.p.110, line 12)

Appellant’s Testimony

¹ While the State was trying to further question Durkin about Victim’s transition from talking and staggering to his unresponsive state, Durkin invoked her Fifth Amendment right against self-incrimination. The trial judge upheld the invocation, despite the State’s argument that Durkin waived that right by testifying at the hearing. The trial judge justified his position by saying that Victim had not totally waived her right because the immunity was a motion hearing and not a trial determining guilt or innocence. (H.Tr.p.78, line 7–H.Tr.p.80, line 3)

Similar to Durkin, Appellant testified that the two of them moved to South Carolina in 2015 and was hospitalized at the Veteran's hospital in Charleston in August of 2015, but elaborated his hospital stay was due to a combination of depression, anxiety, and substance abuse issues. Further, he claimed that the mattress on their living room floor had been there for months prior to Victim's death, and was where they often relaxed and watched TV. (H.Tr.p.115, line 24–H.Tr.p.127, line 21; H.Tr.p.215, lines 9–21)

Appellant testified that on the day of the shooting, he spent most of the afternoon and early evening with his friend Mark and the two of them went shopping at a meat plant and then Walmart. He returned home around 5:15 p.m. When Durkin arrived home fifteen minutes later, the two of them got into an argument about her unemployment. He left and went by himself to a location known as Savannah Bluff. When he returned home, he called Mark and asked if he wanted to go with him to the gym later. He then went to Mark's home in person, stayed about ten minutes, and returned home. He called Durkin around 7:42 p.m. and was on the phone with her while she solicited some barn or horse farm about job opportunities; Appellant remained on the phone while Durkin put the phone down and went up to the location. When she returned, she told Appellant "some lady answer[ed] the door" and told Durkin the "farm" was not hiring. Appellant's phone call with Durkin lasted fifty minutes to an hour. Later in the call, Durkin told Appellant she was giving someone a ride, but did not disclose the identity of that individual. Later, either during that call or in a new phone conversation which took place minutes later, Durkin asked to loan her unidentified passenger twenty dollars and Appellant agreed to the request. (H.Tr.p.127, line 22–H.Tr.p.139, line 14)

Around 9:00 p.m., Appellant called Mark about going to the gym, but Mark decided against going. Appellant decided to go to the gym after 9:00 p.m., by himself. When asked

about the fact that Durkin said she was home around 8:30, Appellant claimed that was impossible because he had not yet left the house. He left the house minutes after 9:00 p.m. and went to the gym, during which he received phone calls from Durkin he elected not to answer, but turned around to head home upon discovering the gym's parking lot was full. At the time Appellant had on his person a pair of UFC fighting gloves which he claimed he also used to lift weights. (H.Tr.p.139, line 15–H.Tr.p.146, line 11)

Appellant testified that upon returning home, he heard Durkin screaming from within the home. After also hearing a man's voice, Appellant put on his UFC fighting gloves, grabbed the metal bat off the back porch, and entered the home through the back door, which he noted was fortuitously unlocked. Upon entering he saw Victim, naked, attempting to force Durkin, clothed, into performing oral sex. At this time, Appellant ran over and hit Victim in the head with the bat for the first time. In response, Victim told Appellant, “[he’d] f***ng kill [Appellant].” The men began fighting each other, occasionally wrestling on the floor and vying for control of the bat. In total, Appellant hit Victim in the head with the bat three times. At times, both men were able to get up and a portion of their fight occurred in the kitchen. (H.Tr.p.146, line 12–H.Tr.p.159, line 8)

Appellant recalled some of the events which transpired during the 9-1-1 call, but testified the events occurred differently than they were described by Durkin. At some point, Appellant instructed Durkin to grab his twenty-five caliber pellet rifle, which he used to shoot Victim in the arm. Appellant also recalled Durkin hit Victim in the chest with the bat and Appellant hit Victim's chest with the butt of his pellet rifle. Soon, Victim was lying down on the floor. Appellant admitted to hearing Victim claim he was unable to move, and noting that, at that point, Victim's shorts/pants were down around his ankles, which he then claimed were in that position

on Appellant for the duration of their fight. Between the five and ten minute marks of the 9-1-1 recording, Appellant was standing over Victim and repeatedly hitting him in the chest, and possibly the head, with the butt of the rifle. Appellant recalled that around the ten-minute mark of the recording, he called his friend Paul to request he bring his gun to the home, at which time Victim “freaked out” and attempted to flee the house. Appellant pressed Victim against the wall and trapped him, at which time Durkin began kicking Victim. The two men fell to the floor, after which Victim stood up, walked over to the mattress, and collapsed. Appellant did not move or speak after that point. (H.Tr.p.159, line 9–H.Tr.p.179, line 17)

Appellant, like Durkin, admitted his testimony conflicted with statements he made to police. Further, he noted he was placed into a detox cell following his arrest and was going through withdrawal from Oxycodone and Valium. (H.Tr.p.179, line 18–H.Tr.p.180, line 20)

Cross-examination proved even more difficult for Appellant’s claims of defending himself and Durkin. He admitted a video he took on his phone of Victim, sitting on the mattress and slumped forward, before police arrived and that he never told police about the video. Further, when speaking with police, he claimed his continued attacks on Victim “didn’t even faze him” and Victim continued to talk trash and threaten Appellant until the end of the altercation. Appellant admitted that the video showed the mattress covered in blood and Victim “beat to hell.” He also admitted that at the time the video was taken, the “threat” of Victim had “been eliminated.” After the State confronted Appellant with the 9-1-1 recording, Appellant admitted he actually hit Victim with the gun several additional times, and then continued to do so to “hold him down,” “keep him down.” (H.Tr.p.185, line 10–H.Tr.p.215, line 8)

Appellant admitted that while he was incarcerated for his role in Victim’s death, he had his father send a letter to Durkin, despite the fact he was prohibited from communicating with

Durkin due to their statuses of codefendants. He conceded that the purpose of the letter was to write to her about the facts of the case; to “remind her what happened.” When pressed for further details about his version of events, Appellant was unable to recall Mark’s last name or address. When again asked about what happened when Victim tried to escape the trailer, Appellant claimed he tackled and restrained him while Durkin hit him in the legs. (H.Tr.p.215, line 22–H.Tr.p.231, line 24)

The final witness to testify at the immunity hearing was Paul Ridgely, the person Appellant called during the confrontation with Victim. Ridgely had visited the home about a month before Victim’s death to install a washer and dryer, at which time no mattress was out on the floor. (H.Tr.p.237, line 25–H.Tr.p.247, line 20)

9-1-1 Recording

The 9-1-1 recording captured a very different series of events than what was described by Durkin and Appellant. Notably, Durkin and Appellant appear to be in control of the situation throughout the whole audio. Throughout the recording, Durkin and Appellant are heard yelling at Victim.² Victim, however, is never heard shouting obscenities or threats; instead Victim is shouting in pain and asking for mercy. Further, the distinctive sound of a metal bat making contact with something (or someone) is heard tens of times throughout; the sound is so distinctive that without being told a bat was being used, the 9-1-1 operator specifically asked about the use of a bat without any information from Durkin. Whenever the 9-1-1 operator asks for details such as Victim’s name or how he got into the house, Durkin declined to answer and, when she did finally release Victim’s first name, lies and states she only met him that day.

² Throughout the 9-1-1 recording, Durkin repeatedly claims that Victim is a “pedophile” because she heard he “peeped” into the window of a twelve-year-old girl. Neither Durkin nor Appellant attempted to explain or substantiate these claims during the immunity hearing or trial.

Towards the end of the recording, Durkin, without talking to Appellant, claimed the latter rushed into the house after hearing her screams; a detail Appellant himself had yet to disclose.

Additionally, Appellant is heard calling Victim a “f***ing n***er” in the recording. (State’s Exhibit 6)

Immunity Ruling

Following the presentation of evidence, the State argued Durkin and Appellant were not entitled to immunity under the Act because they failed to meet their burden of proving conformity with the statute; specifically, the parties inappropriately used deadly force against Victim even after any potential threat from him had passed. To support its argument, the State cited to State v. Oates, 421 S.C. 1, 803 S.E.2d 911 (2017), in which the Supreme Court affirmed the denial of immunity to a defendant under subsections (A) and (C) of the Act. Notably, the defendant in Oates claimed he was in reasonable fear of imminent peril or death but evidence presented at his immunity supported the opposite conclusion; several witnesses testified that the conflict between Oates and his victim had subsided at the “particular point in time” the fatal shooting occurred, evidence which the trial judge found credible and which he used as his basis in denying immunity. The Supreme Court affirmed the denial of immunity to Oates, reiterating that a trial judge is in the best position to determine witness credibility and weigh evidence.

(H.Tr.p.248, line 11–H.Tr.p.249, line 19; Oates, 421 S.C. 1, 803 S.E.2d 911)

Based on Oates, the State contended that there was ample evidence that Victim killed at a point when no reasonable threat or fear thereof existed. The State noted both defendants agreed that at the time Appellant took the video of Victim sitting and slumped, but still alive, any “threat” no longer existed and the situation was in control. In fact, Appellant’s decision to record the video of Victim and to take the opportunity to pick up a phone and call his friend only

supported such a conclusion. Further, both defendants testified they hit Victim after that point in time. As the State noted, the Act and the general principles of “stand your ground” do not provide immunity for using deadly force against a severely injured person trying to escape harm: the concept of “stand your ground” is a defensive concept and designed to justify an unlimited offense against a person. (H.Tr.p.249, line 19–H.Tr.p.253, line 22)

In response, Durkin’s counsel argued the current case was distinguishable in that there was no distinctive “kill shot” to Victim; he was hit numerous times throughout the conflict, with Appellant and Durkin testifying involved efforts to subdue which turned into a mutual fight. Further, Durkin’s counsel claimed there did not appear to be any dispute that Durkin and Appellant feared for their safety during the fight. He also argued that it would negate the whole point of “stand your ground” if after an attacker was subdued he was permitted to leave. However, when the judge pressed counsel on his position, he walked back his comments and said deadly force would not be permitted to detain an assailant. However, he appeared to argue that some of the blows which occurred during Victim’s attempt to escape caused or contributed to Victim’s death, and that under the Act there is no “duty to seek some kind of less deadly remedy” because the purpose of the Act was to eliminate such a requirement. (H.Tr.p.253, line 23–H.Tr.p.258, line 11)

Appellant’s counsel argued that, had his client had a gun when he entered the home, he would have been permitted to shoot and kill Victim as soon as the conflict began. Further, Appellant claimed that no evidence had been entered as to Victim’s manner of death, which counsel understood was not the result of any head injury but a laceration to the thoracic aorta in Victim’s chest. Also, like Durkin’s counsel, Appellant’s counsel argued the blows which killed Victim could have occurred at any time throughout the conflict. In response, the judge noted no

evidence as to Victim's cause of death was entered at the hearing and it was the defendants' burden to prove their entitlement to immunity at the hearing, which included the presentation of necessary evidence. Further, the judge noted that the question was not whether the defendants had to let Victim escape, but whether their actions merited immunity under the Act; even if the judge denied immunity, their actions could still be used as defenses to secure an acquittal at trial. (H.Tr.p.258, line 12–H.Tr.p.261, line 23)

The State agreed with the judge that the defendants, upon whom the burden of proof fell for the immunity hearing, had the burden to include evidence of Victim's cause of death and, without that evidence, they could not prove Victim was killed by a blow which occurred prior to his incapacitation. (H.Tr.p.261, line 24–H.Tr.p.263, line 18)

After hearing the various arguments, the judge found the defendants failed to prove by a preponderance of the evidence they were entitled to immunity. He explained that without evidence as to Victim's cause of death, he could not determine whether a single blow, or a combination of the entire fight, killed him. Further, had Appellant entered the home and killed Victim instantly, "there would be an immunity" but, the Act did not apply to questions regarding the appropriate amount of force for detaining someone who is no longer a threat. (emphasis added). Both defense attorneys found the judge's explanation of his ruling sufficient.

(H.Tr.p.263, line 19–H.Tr.p.265, line 7)

Trial Evidence

At the conclusion of the pretrial Jackson v. Denno³ hearing, Appellant's counsel noted any recordings of Durkin's statements to police should be suppressed because any allusions to

³ 378 U.S. 368 (1964)

Appellant's actions by Durkin could lead to a Bruton⁴/Confrontation Clause violation if Durkin decided against testifying and Appellant's counsel would not have an opportunity to cross-examine her on those statements. Durkin's counsel joined in the motion, expressing similar concerns. The trial judge agreed that such a situation would be improper and should be avoided, but noted such concerns would only apply to statements which specifically referenced Appellant—not to statements which applied solely to her own guilt or actions—and that the statements referencing Appellant could be redacted to avoid implicating Bruton. The State agreed, and noted that only testimonial evidence which is inculpatory against a codefendant need be redacted; Durkin's statements implicating herself and Appellant's statements implicating himself were still admissible evidence at trial. Ultimately, the trial judge decided to take the motion under advisement until the parties could review the specific evidence at issue, the defendants' statements to law enforcement and to cellmates. (T.Tr.p.213, line 3–T.Tr.p.229, line 15)

The State began its case by introducing and playing the 9-1-1 recording to the jury. (T.Tr.p.266, line 11–T.Tr.p.269, line 22; State's Exhibit 6)

Corporal Mark Johnson with the Horry County Police Department was one of the first officers to arrive at Appellant's and Durkin's home on the night of Victim's death. When he arrived, he immediately observed a "tremendous amount of blood" around the home and noted Victim's head appeared mutilated. Appellant and Durkin, however, appeared unharmed. Durkin informed Corporal Johnson that she had picked Victim up from the horse farm and brought him straight to her house. Victim then began smoking crack, took off his clothing, and then attempted to assault Durkin. Later, at the detention center, Appellant showered and discovered a laceration

⁴ Bruton v. U.S., 391 U.S. 123 (1968)

on his leg so Corporal Johnson took him to the hospital based on detention center protocol. At the hospital, doctors determined the wound was not serious and placed a “Band-Aid” on it. (T.Tr.p.271, line 10–T.Tr.p.287, line 11)

Christopher Hager, one of the first paramedics on the scene, checked Victim and noticed he had a large head wound on the top of his head. Victim was dead by the time paramedics arrived at 10:03 p.m. (T.Tr.p.293, line 5–T.Tr.p.297, line 23)

At the beginning of the second day of trial, the parties again discussed potential Bruton issues with the evidence, but the state confirmed it intended to avoid introducing any statements in which either defendant, directly or indirectly, implied the guilt of the codefendant. (T.Tr.p.308, line 10–T.Tr.p.312, line 18)

Officer Jill Domogauer, a crime scene investigator with the Horry County Police Department, arrived at the scene shortly after the crime and collected evidence. Notably, Officer Domogauer observed and photographed blood spatter on the ceiling of the home in addition to the walls and floors of the home. She also found a folded shirt and a hat behind the living room coffee table. Appellant’s UFC bloody gloves were found in the kitchen sink, with water running overtop of them. Similarly, blood was found on the metal bat and the butt of the pellet rifle. Victim was found wearing shoes, underwear, and shorts; the shorts and underwear were pulled “down” on his backside but were “up” in the front. Finally, no illegal drugs or paraphernalia associated with the use of such substances was found anywhere in the home, not even on Victim’s corpse. (T.Tr.p.315, line 8–T.Tr.p.320, line 6; T.Tr.p.334, line 3–T.Tr.p.360, line 12; T.Tr.p.382, line 21–T.Tr.p.382, line 11; Tr.p.405, line 24–T.Tr.p.406, line 8)

Later, outside the presence of the jury, the State proffered the testimonies of witnesses Bridget Briles and Lynndale Lewis who, respectively, were incarcerated with Durkin and

Appellant and heard them make incriminating statements about their involvement in Victim's death. Notably, the purpose of proffers was to ensure that Briles's and Lewis's testimonies omitted any statements by a defendant incriminating his or her codefendant, which avoid potential Bruton violations while testifying before the jury. The trial judge took it a step further and required the witnesses to avoid statements made by a defendant which implied the codefendant acted improper in any way, even if it was separate from the charged crime; Lewis was forbidden from testifying Appellant heard or believed Durkin had cheated on him with Victim. (T.Tr.p.464, line 14–T.Tr.p.483, line 19; T.Tr.p.502, line 6–T.Tr.p.511, line 6)

In front of the jury, Briles and Lewis limited their testimonies to the requirements set forth by the trial judge. Briles testified she was incarcerated with Durkin for several days. Durkin initially claimed that on the night of Victim's death, he had raped her and she responded by beating him to death with a baseball bat. However, Durkin's story started to change almost immediately. Before long, Durkin admitted to her she knew Victim for approximately two years, during which time they often used drugs together and had sex. She "backed away" from the story of Victim's trying to rape her and admitted to taking the "kill shot" on him. By their third and fourth days together, Durkin stated she wished she had bleached the house and just dumped Victim's body in a river somewhere, and if she had done so she would never have been caught. Durkin also admitted to folding Victim's shirt and that she worried police would notice that detail and know "she had something to do with murdering [Victim]." Horrified by this information, Briles and her attorney contacted police. (T.Tr.p.547, line 20–T.Tr.p.556, line 12)

Lewis testified about his interactions with Appellant, with whom he was incarcerated for several days. Appellant, on their second day together, opened up to Lewis about what occurred the night of Victim's death and the events leading up to it. Appellant informed him that he had

stayed at the VA hospital for some period of time, and when he was released he heard information regarding Victim which made him jealous and angry. On the night in question, Appellant waited down the street from his own home, waiting for Victim to arrive. He then returned to home with his vehicle's lights off, put on his "fighting gloves," grabbed a bat, and then ambushed a naked Victim and began beating him with the bat. Appellant struck his first blow on Victim's head and recited, with detail, Victim's injuries and reactions to the battery. (T.Tr.p.571, line 20–T.Tr.p.578, line 19)

Randy Hucks, the farmer who employed Victim, explained he had known him for years. Prior to the night of the crime, Victim told Hucks that he and Durkin had a sexual relationship. He had witnessed Durkin visit Victim on multiple occasions, including the day of attack. Hucks testified Durkin went to his farm that day specifically to see Victim and only asked about employment while waiting for Victim to finish his work. Hucks told Durkin they were not hiring additional employees. (T.Tr.p.614, line 21–T.Tr.p.620, line 16)

Ridgley testified again during the State's case at trial. Again, he stated that when he helped Appellant and Durkin install a washer and dryer approximately a month before the crime, no mattress was on the floor of the living room. (T.Tr.p.637, line 17–T.Tr.p.645, line 17)

Dr. Edward Proctor, Jr. was the forensic pathologist who performed Victim's autopsy. He testified Victim's head injuries, a series of lacerations which produced a substantial amount of blood, were serious wounds but not what caused his death; Victim died as a result of blunt force trauma to his chest which caused the laceration of his aorta and significant internal hemorrhaging. Additionally, he discovered defensive wounds on Victim, including the fracture of his arm at his elbow and fractured ribs. Dr. Proctor concluded all of Victim's injuries, aside from the pellet gun bullet wounds, were caused by blunt force trauma. On cross-examination,

Dr. Proctor testified that the aorta tear, while fatal, would not have immediately prevented Victim from moving and speaking; however, once combined with his other injuries such as his fractured arm and ribs, Victim would have been unable to resist an attack. (T.Tr.p.521, line 9–T.Tr.p.546, line 8)

Aaron Edens, a form FBI agent assigned to its Joint Terrorism Task Force testified as an expert witness in forensic cell phone examinations. He noted that forensic investigation of cell phones included several components. First, data is collected from the phone itself. The second component involves looking at the records and data maintained by the cellular service providers themselves. The third and final area of analysis involves data collected by applications downloaded on the cell phone. (T.Tr.p.715, line 8–T.Tr.p.722, line 23)

The State hired Edens to review AT&T cell phone records along with location history records from Google. He explained the two sets of data were collected differently: AT&T location records are based on cell site location information collected when phone calls and texts are sent or received. Google data, collected by the Android operating system, collects and stores data any time “an event” occurs on the phone, including unlocking it or when an application accesses the internet; the process occurs in the background of the phone even when applications such as Google Maps are not utilized. This Google data can be created when a cell phone, with wireless network mode enabled, attempts to access the internet through nearby wireless networks. Edens reviewed Google data, associated with Appellant’s internet account, collected at four times that evening; 8:46 p.m., 8:48 p.m., 8:50 p.m., and 8:52 p.m. All four sets of Google data were collected at the same location, located approximately 250 feet from Appellant’s and Durkin’s home. (T.Tr.p.723, line 12–T.Tr.p.735, line 7)

Paulette Sutton, an expert in bloodstain pattern analysis, was the State's final witness. She reviewed the blood spatters and stains from Appellant's home and found several interesting details. For example, several stains showed evidence of blood clotting, which indicated Appellant was injured in such a way to cause bleeding, and those wounds were clotting between ten and fifteen minutes of the wounds being created. Those clots were then transferred to the walls and area around Victim when he was struck with enough force to detach the clots from his wounds and send them towards the nearby surfaces.⁵ Sutton also found blood "castoff" on the ceiling of the mobile home and the back of Appellant's shorts; Sutton testified both sets of castoff patters were created when a bloody object, such as the bat, was quickly raised overhead, swung downwards, and raised again in a repeating pattern. Sutton testified a large pool of blood located between the kitchen and living room was created by an actively bleeding wound located either on or inches above the floor. Finally, she concluded nearly all of the blood from the crime scene came from Victim. (T.Tr.p.752, line 20–T.Tr.p.788, line 17)

Appellant's Testimony

After the State rested its case, Appellant elected to testify in his own defense. Appellant claimed that on the day of the crime, Hucks "gave her a job" after their conversation. He went to the gym with his UFC fighting gloves to use them to lift weights; he never used them on punching bags or "anything like that." Again, he claimed he kept a metal bat on the back porch to hit tennis balls to his dog, a dog which they had given away prior to the crime. He claimed, in total, only hit Victim in the head with the bat three times. The men spent a majority of the fight "exchanging punches and wrestling." Appellant took the video of Appellant and called Ridgely

⁵ Sutton testified the clots were transferred from the wounds to the surface through "translational energy." She explained that a wound on a forehead would begin to clot and then significant force from a fist or bat to the back of the head would transfer towards the front of the head and eject the clots in that direction. (T.Tr.p.788, lines 3–17)

after Victim was incapacitated, but soon after Victim dashed for the door and the two men began wrestling again. After Victim fell on the mattress and stopped moving, Appellant went to the kitchen sink to wash a bite wound and removed the UFC gloves to do so. Appellant admitted he provided numerous “inconsistencies” in his story to police which did not align with his trial testimony, including a claim that he never wore the fighting gloves. Notably, Appellant admitted he knew Durkin had cheated on him during the beginning of their relationship. (T.Tr.p.825, line 22–T.Tr.p.871, line 25)

Outside the presence of the jury, the parties and the trial judge discussed the State’s ability to question Appellant on three subjects which indicated the crime against Victim, at least in part, was racially motivated: (1) Appellant’s honorable discharge from the military after being sexually assaulted by black soldiers, for which he was still receiving full disability payments and which he told officers gave him post-traumatic stress disorder; (2) After Appellant arrived at the detention center following police questioning, he told officers he did not want to be put in a cell with any “African-Americans”; and (3) Appellant threatened a detention center guard who was black. Trial counsel objected on the ground of relevance, believing these instances of conduct were not related to the charged crime and that such incidents were character evidence. The trial judge found the third situation did not have a clear racial motive, so he excluded it. However, the trial judge found the State could question Appellant about the first two incidents. (T.Tr.p.889, line 5–T.Tr.p.898, line 13)

When questioned about the incidents admitted he was assaulted by two black males in 1980 and that the incident gave him post-traumatic stress disorder and was the reason he received full disability benefits from the military. When asked if he told guards at the detention center he did not want to share a cell with any African-American inmates, he admitted to making

such statements but claimed he only made the request because he feared being put into a cell with one of Victim's family members. (T.Tr.p.899, line 1–T.Tr.p.901, line 2).

The remainder of Appellant's cross-examination included other important admissions. Appellant admitted that when he took the video of Victim on his phone, Victim was incapacitated. When asked why Ridgely never brought his gun over to the house, he testified that while he was on the phone with Ridgely, the police arrived. He also admitted that it was be "unusual" for a rapist to fold his shirt before sexually assaulting someone. Appellant also conceded that when officers asked him if he wore his fighting gloves during the attack, he denied wearing them and stated his finger would not have been bitten if he had them on. Appellant admitted that he intentionally lied to officers about the gloves because he did not want them thinking he went into his home looking to fight Victim. (T.Tr.p.904, line 14–T.Tr.p.917, line 9)

After the defense rested, the parties presented motions to the court. Appellant's counsel whether the trial judge would charge the jury that testimony used against one defendant couldn't not be used against the other defendant. Noting that the witnesses who testified about the defendants' statements, such as Briles, had to remove any mention of codefendants from their testimony, the State and trial judge believed no instruction was necessary because no Bruton or confrontation clause issue occurred. (T.Tr.p.949, line 25–T.Tr.p.970, line 20)

Before court could resume the following day, Durkin decided to plead to voluntary manslaughter. Given the change in circumstances, the trial judge decided to amend his proposed charges. He decided to remove any reference to "the hand of one is the hand of all" and any language relating to "aiding and abetting." He also added the following language:

[T]he case against the Defendant, Diane Marie Durkin, has been resolved. The case against the Defendant, [Appellant], and the evidence of and the law concerning him should be considered separately and individually from the evidence and law concerning the Defendant, Diane Marie Durkin. Any thoughts

you may have concerning the case against the Defendant, Diane Marie Durkin, should not control your verdict as to the Defendant, James Richard Rosenbaum.

Neither the State nor Appellant objected to this remedial instruction. The charge was repeated as proposed to the jury. Again, neither party objected to the instructions. (Tr.p.972, line 1–T.Tr.p.986, line 16; T.Tr.p.1061, line 18–T.Tr.p.1062, line 1; T.Tr.p.1079, line 22–T.Tr.p.1080, line 1)

STANDARD OF REVIEW

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.").

ARGUMENT

I

The trial judge properly denied Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act after finding, based on the evidence, that Appellant failed to meet his burden of proof.

Appellant argues the trial judge erred in failing to grant him immunity from prosecution pursuant to the Act. The State disagrees. As stated below, the trial judge properly denied immunity based on the evidence presented.

Whether a defendant is entitled to immunity under the 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 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 indented 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 forces knows or have reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
- (C) 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.

“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). “Section 16–11–450 [2015] provides immunity from prosecution if a person is found to be justified in using deadly force under the Act.” Id. “Such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court” Id. at 372, 752 S.E.2d at 267. If a defendant fails to make such a showing, then his claim of self-defense “presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.” Id.

Thus, a defendant seeking immunity under the Act must prove he was acting in self-defense by demonstrating: (1) he was not without fault in bringing on the difficulty of the situation; (2) he was in imminent danger of death or serious bodily injury, or believed he was in such danger; (3) if the defense is based on an actual belief of imminent danger, a reasonable person of ordinary firmness and courage would have held the same belief. Id. at 374, 752 S.E.2d at 268, n.8. However, the fourth element of self-defense—the duty to retreat—is excused under the Act. Id.

In State v. Oates, 421 S.C. 1, 803 S.E.2d 911 (2017), this Court considered the limits of the Act. In Oates, the named defendant sought immunity after shooting a victim with whom he was involved in an altercation. 421 S.C. at 7, 803 S.E.2d at 914. During the conflict, which originated over Oates’s attempt to tow his victim’s vehicle, it was uncontested that the victim at one point pulled out a gun and acted in such a way that Oates appeared fearful. Id. at 8–9, 803 S.E.2d at 915–16. However, the parties disagreed over the actions immediately preceding

Oates's use of deadly force: Oates claimed he shot his victim when the latter attempted to forcibly remove him from his tow truck, but the State's witnesses claimed that Oates drew his own weapon, causing victim to put his own gun away and literally walk or run from Appellant at which time. Id. at 9–11, 803 S.E.2d at 916–17. Video evidence confirmed the witnesses' testimonies and a forensic pathologist confirmed that five of the victim's six bullet wounds occurred on the posterior portion of his body. Id.

Ultimately, the Court affirmed the trial judge's denial of immunity under the Act, under both S.C. Code Ann. §§ 16-11-440(A) and (C). The trial court noted found Oates failed to meet his burden of proving he was entitled to the defense, finding persuasive the State's evidence that the conflict between Oates and his victim had abated at the moment Oates used deadly force. Based on the deferential standard of review, the Court found the trial court's ruling was supported by evidence and thus proper.

Citizen's Arrest

Initially, the State notes that Appellant's argument regarding the trial judge's "failure" to grant immunity based on the law of citizens' arrest is not preserved for review. Neither defendant actually argued for it; they merely referenced a general right to detain an assailant until law enforcement can arrive. The actual doctrine of citizen's arrest, including its assorted elements, was not pled to the judge and is not preserved for appellate review. See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) (stating that in order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity.) Further, citizen's arrest is enumerated in the Act as a ground justifying a pretrial grant of immunity.

Regardless, citizen's arrest similar to the Act, limits the use of force to "reasonable means to effect the [citizen's] arrest." See State v. Cooney, 320 S.C. 107, 111, 463 S.E.2d 597, 599 (1995). As explained below, the trial judge did not err in finding the defendants failed to prove they used reasonable force against Victim.

Analysis

Appellant's argues that because the defendants presented "undisputed" evidence that they feared for their safety, they were entitled to act in self-defense and claim immunity under the Act. Appellant wholly ignores three critical considerations. First, it was the defendants' burden to prove, by a preponderance of the evidence, they were entitled to immunity. Because the burden was on defendants, it was up to them to present enough evidence to meet their burden. In such a situation, even undisputed evidence from a defendant may not satisfy his burden of proof.

Second, the evidence presented at the hearing was certainly not "undisputed." In fact, the defendants' testimonies wer often contradictory and greatly undermined their credibility. For example, Durkin admitted to telling officers she never met Victim prior to the attack, yet at trial admitted to knowing him, lending him money, and driving him to pick up drugs. Appellant also made extremely inconsistent claims: he initially told officers that he was forced to constantly hit Victim because his blows "didn't faze him" and that he was a threat throughout the entire fight, swearing and shouting threats. By the time of the hearing, Appellant conceded Victim was beaten to a point he was no longer a threat and that he did not continuously spew threats at Appellant. Notably, Appellant felt comfortable enough with the situation that he took a break to use his phone to video Appellant's battered and slumped body.

Additionally, the defendants' testimonies were also disputed by the other evidence presented at the hearing. Ridgely noted that, contrary to the defendants' claims, a mattress had

not been on their living room floor for “months.” Finally, and most importantly, the 9-1-1 recording disputed the defendant’s claims that Victim was only hit a few times or that he was a threat necessitating continued force; Victim is heard constantly throughout the recording begging for mercy while the continuous clang of a metal bat is heard impacting his body.

The third critical consideration ignored in Appellant’s brief is that, as explained in Oates, a person’s right to use deadly force under the Act is not unlimited; a person may not use deadly force against another if there is no longer an imminent threat of serious harm. This consideration is evidenced in the trial judge’s observation that the Act does not have language instructing on how much force can be used to detain a person. The trial judge was correct: the Act has no language pertaining to any sort of arrest/detaining scenario and thus is excluded. Regardless, evidence was presented at the trial indicating Victim was incapacitated and immobile, much less a threat to the defendants. Thus, the trial judge properly found the defendants failed to prove, by a preponderance of the evidence, that they were entitled to immunity.

II

The trial judge properly allowed the State to introduce evidence of Appellant's status as a victim of sexual assault and his jailhouse statements as probative evidence of a racial motive for his crime. (Appellant's Issues II and III)

Appellant argues the trial judge improperly admitted evidence of his sexual assault as well as his jailhouse statements in which he stated he did not want to be housed with African-Americans. The State disagrees with this allegation of error. Both statements were admitted as probative evidence of his motive for killing Victim.

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). “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. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE.

Appellant argues the admission of evidence of his sexual assault while in the military and his request to not be placed in a cell with African-Americans was irrelevant to his guilt and thus the danger of unfair prejudice from the admission of the information substantially outweighed any probative value. However, evidence of Appellant’s racism was critical in this case. This case did not involve a question of identity: the parties all agreed Appellant and Durkin were the actors involved in Victim’s death. Instead, guilt hinged on two considerations: the motive for attacking/killing Victim—self-defense or an intentional effort to cause malicious injury—and the intermingled issue regarding the propriety and degree of force used against Victim. Appellant’s racism is an important consideration for both of these issues.

As noted above, Appellant’s potential racism first surfaces during the 9-1-1 recording. After beating Victim to death, he refers to him as a “f***ing n***er.” At that moment, the State was presented with evidence that a racial component to the crime could have existed, especially given that the State also possessed evidence indicating this was an intentional killing and not self-defense. The incidents presented were additional, powerful evidence that racism may have guided Appellant’s actions; Appellant testified that his sexual assault in 1980 was still impacting him at the time of trial twenty-eight years later: he received full disability compensation from the military and still possessed post-traumatic stress disorder from the incident. Appellant’s other statement, made hours after the crime, indicated that a primary concern of his at the detention center was not to share a cell with any African-Americans.⁶

⁶ In his brief, Appellant again argues that he made the statement out of fear of being incarcerated with potential family members of Victim. It is the State’s contention that this explanation, even if true, still indicates racist attitudes and assumptions by Appellant.

Here, it was the State's burden to prove Appellant's actions were not in self-defense, but constituted an intentional effort to harm Victim, or at the very least Appellant's actions involved a degree of force which exceeded the needs of the situation. Evidence of Appellant's racism, first heard during the 9-1-1 recording, certainly made it more probable that Appellant's actions were not self-defense and were appropriately admitted for such purposes. See Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Because this evidence was a critical consideration for evaluating the propriety of Appellant's actions, its probative value eclipsed any potential for unfair prejudice. See Rule 403, SCRE. Accordingly, the trial judge did not err in admitting this evidence.

III

The trial judge properly instructed the jury to disregard evidence of the codefendant's guilt, including her self-incriminating statements, and to base a determination of his guilt based solely on the evidence presented concerning his guilt.

Appellant claims the trial judge erred in failing to disregard evidence of the codefendant's guilt. The State disagrees; the record indicates the trial judge provided a proper charge which exceeded the charge requested by Appellant. Regardless, as noted below, the issue is not preserved for review because Appellant failed to object to the charge provided by the judge.

Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005).

In the instant case, any objection to the trial judge's jury charge is not preserved for appellate review. Prior to Durkin's decision to plead guilty, Appellant's counsel requested a limiting instruction which the trial judge deemed unnecessary at that time due to his strict enforcement of Bruton. After Durkin pled, the trial judge proposed a jury charge which completely divorced Durkin's and Appellant's cases and removed any language which would

allow the jury to impute the guilt of one defendant to the other. No objection was made to the proposed charge, nor was any objection lodged after the charge was presented to the jury. Accordingly, Appellant's objection to the adequacy of the charge is not preserved for review by this Court. See Johnson, 363 S.C. 58–59, 609 S.E.2d 523.

Analysis

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009) (citing Richardson v. Marsh, 481 U.S. 200, 206 (1987)). "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." Richardson, 481 U.S. at 206. A narrow exception to this rule was outlined by the Supreme Court in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the Supreme Court held, in a joint trial, admission of a non-testifying codefendant's statement that expressly inculcates the defendant violates the defendant's rights under the Confrontation Clause, as the use of only a limiting instruction is insufficient to remove any prejudice to the defendant. 391 U.S. at 136–37. However, in Richardson, the Supreme Court held the rule outlined in Bruton did not apply where the statement "was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." 481 U.S. at 208. The Supreme Court also indicated Bruton can be complied with by redaction. Id. at 208–09.

However, when dealing with statements of non-testifying codefendants, the Supreme Court does not take a position that would unjustifiably shackle the state in presenting an admissible confession. See State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994). In cases where

a co-defendant's version of the facts would otherwise be admissible, to require the State to redact completely anything that could be viewed in combination with other evidence as a reference or allusion to the defendant, would "unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial." Id. at 307, n. 2, 450 S.E.2d at 50 n. 2 (where co-defendant's statement he was not driving did not incriminate the defendant on its face was admissible, even though it was clear there were only two (2) people in the vehicle, the other was obviously the defendant).

The statements made by Appellant's codefendant were properly admitted at trial. They did not implicate petitioner at all on their face. In fact, Appellant concedes that had Durkin not pled, the statements were "likely admissible" under Bruton. (See Br. of Appellant, p.38) Pursuant to Bruton, the trial judge allowed Durkin's self-incriminating statements into evidence only after any reference to Appellant was removed from them.

Appellant's sole contention is that the trial judge should have given a curative instruction to the jury stating that the *statements* of one defendant cannot be used against the other. First, as noted above, the trial judge prevented any witnesses testifying to comments from a defendant to omit any reference to his or her codefendant. Thus, there were no improperly admitted statements requiring a corrective instruction. Second, and most importantly, the trial judge's charge actually went above and beyond the charge requested by Appellant: the trial judge instructed the jury that all the *evidence* and *law* against Durkin was inapplicable to Appellant. Such a charge includes any and all of Durkin's statements.

The State notes Appellant tries to support his position by citing to two cases: State v. Holmes, 342 S.C. 113, 536 S.E.2d 671 (2000) and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980). In the case of the former, the Supreme Court noted it was not dealing with a Bruton

issue concerning redaction; the statement at issue was the confession of a defendant who was not tried jointly with Holmes so the court found the statement implicated the same hearsay and confrontation clause concerns associated with admitting the statements of a non-testifying witness. See Holmes, 342 S.C. at 116–119, 536 S.E.2d at 672–74. In LaBarge, the statement in question was not redacted as required by Bruton and its progeny; instead of redacting any mention of a second person, LaBarge’s name was changed to “Mister X” in the statement. Further, the jury was told it could still consider the statement even though Jackson, the codefendant who made the statement, had already pled guilty.

In the instant case, the issues found in Holmes and LaBarge are not present. The trial judge took painstaking efforts to ensure that no Bruton violations existed during the trial. When Durkin decided to plead, the trial judge issued a charge which told jurors to disregard any and all evidence pertaining to Durkin and to consider only the evidence and law presented against Appellant.

Accordingly, the trial judge properly handled any and all Bruton issues which arose at trial.

CONCLUSION

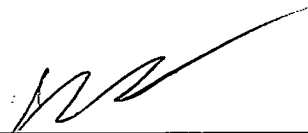
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 3, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
The Honorable Benjamin H. Culbertson, Circuit Court Judge

RECEIVED
MAR 03 2020
SC Court of Appeals

Appellate Case No. 2018-002240

THE STATE,RESPONDENT,

v.

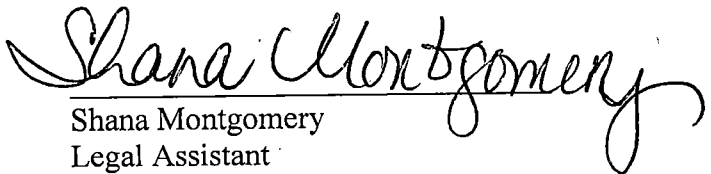
JAMES R. ROSENBAUM,APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 3rd day of March, 2020.



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ALAN WILSON
ATTORNEY GENERAL

March 3, 2020

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S.C. Commission on Indigent Defense
Division of Appellate Defense
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RE: State v. James R. Rosenbaum – Appellate Case No. 2016-000976

Dear Ms. Hackett:

I am enclosing two copies of the Motion to File Initial Brief of Respondent and Designation of Matter, along with proof of service, in the above referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
Bar Number 100231

RECEIVED

MAR 03 2020

SC Court of Appeals

WFS/ssm
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division