STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES R. ROSENBAUM,

APPELLANT

APPELLATE CASE NO. 2018-002240

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err in permitting the state to elicit testimony from Appellant that he was gang raped in the military where the testimony was not relevant and the danger of unfair prejudice substantially outweighed any probative value?

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STATEMENT OF THE CASE

On November 29, 2017, a Horry County grand jury indicted Appellant for murder (2017-GS-26-5269). R. 1000. On June 18, 2018, Appellant, through counsel, moved for immunity from prosecution pursuant to the Protection of Persons and Property Act. R. 985. Likewise, Diane Durkin, Appellant's co-defendant, filed a motion for immunity pursuant to the Act. R. 3, ll. 5-8. On July 16-17, 2018, the Honorable Benjamin H. Culbertson presided over a hearing on the motions. R. 1. Nancy R. Livesay and Christopher D. Helms represented the state. R. 1. Thomas Jarrett Bouchette and Johnny Gardner represented Durkin. R. 1. Alex Hyman represented Appellant. R. 2. At the conclusion of the hearing, Judge Culbertson denied immunity to Appellant and Durkin. R. 293, l. 19 – R. 294, l. 21. On July 24, 2018, Appellant filed a motion for reconsideration. R. 988. The state responded to the motion on July 25, 2018. Without hearing argument on the motion, Judge Culbertson denied the request for reconsideration on August 15, 2018. R. 998.

Thereafter, the state, represented by Jimmy A. Richardson, II, and Helms, called the case to trial before Judge Culbertson and a jury on December 3-10, 2018. R. 249. Alex Hyman and Travis Hyman represented Appellant. R. 249. Bouchette and Gardner continued to represent Durkin. R. 250.

Immediately prior to closing arguments, Durkin entered a plea to voluntary manslaughter with a negotiated sentencing range of five to fifteen years pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). R. 875, l. 3 – R. 888, l. 14. Judge Culbertson sentenced Durkin to fifteen years imprisonment. R. 888, ll. 11-13.

Thereafter, Appellant's trial continued. At its conclusion, the jury found Appellant guilty of voluntary manslaughter. R. 983, ll. 7-11. Judge Culbertson sentenced Appellant to fifteen years imprisonment. R. 984, ll. 12-18; R. 1002.

On December 18, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate 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, 289, 786 S.E.2d 132, 136 (2016).

ARGUMENT

I. The trial judge erred when he denied Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed Appellant killed the deceased in his home after the deceased attempted to sexually assault Appellant's girlfriend.

Relevant facts

The evidence

Appellant and his girlfriend, Diane Durkin, moved to Horry County in March 2015. R. 5, ll. 4-6; R. 105, ll. 11-14. Later that year, Durkin met Roy Davis, the deceased, through a mutual friend, Kelly Jordan. R. 8, ll. 1-9. The three used drugs together at Jordan's home. R. 8, ll. 8-9. Durkin learned the deceased worked on a nearby farm. R. 9, ll. 10-12. In fact, the deceased told her that she could probably get a job on the farm. R. 9, ll. 6-9. Later, Durkin drove the deceased to another residence not far away. R. 9, l. 18 – R. 10, l. 4. The deceased went into the residence, purchased drugs, and returned to Durkin's car. R. 10, ll. 8-18. The two returned to Jordan's house. R. 10, ll. 17-18. After the deceased and Jordan used the drugs, Durkin drove the deceased to his home on the farm. R. 10, l. 21 – R. 11, l. 2. Over the course of the next few months, Durkin pursued a job on the farm. R. 11, ll. 13-21.

On July 11, 2016, Durkin went to the farm to inquire about a job around 7 p.m. R. 13, ll. 10-16. After talking to the farm's owner, Durkin saw the deceased on a tractor. R. 15, ll. 1-6. The deceased flagged her down and asked for a ride. R. 15, ll. 7-10; R. 122, ll. 21-23. Durkin agreed, and the deceased got into her car. R. 15, ll. 14-16. When the deceased asked for $20, Durkin called Rosenbaum to obtain his consent. R. 16, ll. 6-8; R. 122, ll. 16-23. Durkin stopped at a gas station where she withdrew $20 from an ATM, which she gave to the deceased. R. 16,

ll. 21-22. Durkin then took the deceased to the home of the drug dealer where she had previously taken him. R. 16, l. 23 – R. 17, l. 6.

During this time, Appellant, with the intention of working out, drove to his local gym. R. 123, l. 15 – R. 124, l. 15; R. 124, ll. 22-23. However, when Appellant saw the number of cars in the parking lot, he decided to return home where he could work out using his personal equipment. R. 126, ll. 13-22; R. 128, ll. 12-16.

Durkin then went home. R. 18, ll. 5-6. Approximately fifteen minutes later, the deceased arrived at her door. R. 18, ll. 12-13. When the deceased requested she drive him home, she refused. R. 18, ll. 18-23. However, Durkin agreed to allow the deceased to enter her home for a cool glass of water. R. 19, ll. 3-7. Durkin returned to her household chores while the deceased drank his water in the kitchen. R. 19, ll. 12-15. When she returned to the kitchen, she found the deceased naked. R. 19, ll. 16-20. Durkin told him to "get the fuck out." R. 19, ll. 21-23. Unfazed, the deceased said, "'Give me that pussy.'" R. 19, ll. 24-25. Further, the deceased "clocked [her] in the eye, backhanded [her] across the face" causing her to fall to the floor. R. 20 ll.1-4. As the deceased got on top of Durkin, she kicked and screamed to get him off of her. R. 20, ll. 4-5. Durkin thought "he was either going to kill [her] or rape [her]." R. 22, ll. 7-10.

While Durkin was screaming, Appellant arrived. R. 22, ll. 20-22; R. 130, ll. 14-18. When Appellant entered, he saw "a naked man pulling her hair" and "trying to force her to perform oral sex." R. 135, ll. 3-5. Appellant used a baseball bat to get the deceased off of Durkin. R. 23, ll. 12-13; R. 136, ll. 17-20. He hit the deceased approximately three times in the head before the deceased finally got off of Durkin. R. 137, ll. 3-9. The deceased responded to the first hit by telling Appellant "he was going to fucking kill [him]." R. 137, ll. 17-19. Thereafter, the deceased and Appellant struggled over control of the baseball bat. R. 23, ll. 12-

15; R. 138, ll. 16-18. The struggle went into the kitchen where knives were in the sink and the drawers – easily accessible to the deceased. R. 142, ll. 3-18. During the melee, Durkin momentarily got the bat, which she used to strike the deceased in the legs and groin. R. 24, ll. 5-18.

At Appellant's request, Durkin got a pellet gun for Appellant. R. 144, l. 18 – R. 145, l; R. 146, ll. 4-8. Appellant shot the deceased with the pellet gun. R. 146, ll. 9-10. Again, the deceased was unfazed. R. 149, ll. 3-4. Appellant used the butt of the gun to hit the deceased in the chest in an effort to subdue him. R. 150, ll. 9-11. During the few times that Appellant was able to overpower the deceased, he would insist that the deceased not move. R. 152, ll. 6-11. As to be expected during such a fracas, both men threw punches, and the deceased even bit Appellant's finger. R. 167, ll. 9-14.

Durkin called 911, begging for help from the authorities. R. 23, ll. 15-17. At some point, the deceased tried to leave the home where Durkin and Appellant lived. R. 63, l. 16 – R. 64, l. 3. Both Durkin and Appellant explained they were trying to detain the deceased until the police could arrive and arrest him. R. 64, ll. 1-17; R. 152, ll. 12-18.

When everyone had calmed down to some degree, Appellant took a photograph of the deceased because he feared the deceased would flee before the police arrived. R. 155, ll. 12-20. Appellant admitted to the state that when he took the photograph, the threat that the deceased had posed was "eliminated." R. 173, ll. 17-21.

Additionally, Appellant called his friend Paul to ask for his help because it was taking the police an inordinate amount of time to arrive to the call for help. R. 154, ll. 4-12. As soon as the deceased saw Appellant on the phone with someone, the deceased attempted to make his getaway. R. 155, ll. 3-4. Appellant tackled him. R. 155, ll. 5-6. Appellant then held the

deceased against the wall. R. 156, ll. 18-20. Appellant then took the deceased down to the ground. R. 157, ll. 19-20. Both men were out of breath. R. 157, ll. 20-21. Appellant stood up, and the deceased stood up. R. 157, l. 21. As the deceased tried to walk, he collapsed. R. 157, l. 22.

At all times during this ordeal, Appellant was in fear for his and Durkin's safety. R. 168, ll. 3-20.

Arguments on the motion for immunity

After Appellant and Durkin presented their evidence, the state made "some sort of motion kind of similar to a directed verdict." R. 231, ll. 12-15. The state argued Appellant could not seek immunity pursuant to section 16-11-450(A) because the deceased "was invited in, so he had the right to be there." R. 232, ll. 10-12. Relying upon State v. Oates, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017), the state argued the Court held "that once there's no longer a force or there's no longer a threat then the attack has to stop." R. 231, l. 25 – R. 232, l. 4. Accordingly, the state argued Appellant was not immune from prosecution under the Act because the deceased no longer posed a threat to Appellant when he was trying to leave out the front door. R. 232, l. 6 – R. 233, l. 16. According to the state, "between the time [the deceased] is there and trying to get out the door he is killed in his attempt of trying to leave the residence." R. 233, ll. 16-18. In the state's estimation this was "not what stand your ground was meant for. Stand your ground was meant for being able to protect yourself … but then when the attack ends it's no longer stand your ground." R. 233, ll. 19-24.

Put simply, the state argued that Appellant engaged in an unlawful killing because the deceased "was down, unarmed, trying to leave" when he was killed. R. 234, ll. 5-7. According to the state, it was no longer a fight for life. R. 234, ll. 12-13. Further on this point, the state

argued that Appellant's posture switched from a defensive one to an offensive one. R. 234, ll. 15-21. This was so because the deceased was not a threat when "he was going for the door." R. 235, ll. 6-9. In other words, it was the state's contention that Appellant brought on the difficulty after the deceased was subdued. R. 245, ll. 1-8. Because Appellant exercised his right to effectuate a citizen's arrest, he was "bringing on whatever happens next." R. 245, ll. 8-10. According to the state, the deceased was "not doing anything wrong" when he was trying to leave, and Appellant was at fault for "bringing on whatever altercation and whatever happen[ed] next" because Appellant attempted to stop the deceased and hold him for the police to arrive. R. 245, ll. 13-16.

Appellant argued that "[h]ad [Appellant] had a gun he would have had the right to go in and presumably under the Castle Doctrine and, and to shoot him and kill him on the spot if he believed that he was protecting another person from great bodily injury and himself from great bodily injury." R. 241, ll. 18-22. Appellant emphasized that the uncontradicted testimony showed Appellant was restraining the deceased in anticipation of the police arriving and arresting the deceased. R. 242, l. 22 – R. 243, l. 6. Further, Appellant argued that the deceased was no longer an invitee because Durkin rescinded her invitation and the deceased committed a crime while in the residence. R. 244, ll. 13-19.

Ruling

At the conclusion of the hearing, the trial judge indicated that he was denying immunity to Appellant. The judge determined Appellant had not satisfied his burden of proof because Appellant had not presented "evidence as to the manner of death." R. 246, ll. 24-25. Specifically, the judge indicated he did not know if the deceased died as a result of "the first blow when [Appellant] walked into the mobile home" or "if it was the blow to the leg when Ms.

Durkin hit him as, under the state's theory, he was trying to leave." R. 246, l. 25 – R. 247, l. 3. Additionally, the judge stated he did not know if the deceased died from wounds suffered from "a combination of the entire fight." R. 247, ll. 3-4. Based upon Appellant's failure to present "evidence as to the manner of death," the judge denied the motion for immunity. R. 247, ll. 6-7.

Importantly, the judge indicated that he agreed that if Appellant "walked in, witnessed this sexual assault, hit him in the head, that blow caused the death right there, there would be an immunity." R. 247, ll. 7-10. However, the judge was convinced that he must deny immunity because the Act failed to "say anything about how much force you can use when you're trying to detain somebody until the police arrive." R. 247, ll. 13-15. In fact, the judge indicated he did not know the answer to how much a force a person could use when executing a citizen's arrest. R. 247, l. 15. He stressed this point: "I mean, where you come in and you witness a sexual assault and you try to hold the person there until the police arrive, how much force can you use, I don't know, but that's for another date and time and that's why we'll have a trial in this case." R. 247, ll. 16-21.

After the hearing, Appellant filed a motion for reconsideration. Specifically, Appellant noted that although Durkin invited the deceased into her home, she rescinded the invitation when she told him to "get the fuck out." R. 988. To this point, Appellant implored the judge to grant immunity pursuant to section 16-11-440(A) of the South Carolina Code. R. 988. Specifically, Appellant argued the deceased's failure to leave the residence meant he was committing an unlawful entry under the Act. R. 988. The uncontroverted testimony at the hearing was that Durkin requested the deceased leave, the deceased was partially clothed, and the deceased attempted to sexually assault Durkin; thus, Appellant was entitled to the presumption of reasonable fear of imminent peril or death pursuant to section 16-11-440(A). R. 988. Conceding

that the presumption could be rebutted, Appellant argued the state failed to present any evidence – or argument drawn from the evidence presented by Appellant – to rebut the presumption. R. 988. The judge summarily denied the motion. R. 998.

Discussion

Protection of Persons and Property Act

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). "The General Assembly [found] that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of

self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) 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, or if the defendant was actually 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; and (4) 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 the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

Additionally, the Act contemplates immunity when a person acts in defense of another. "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918)

(noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[1] "'[A] person is justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original). When a person interferes in a difficulty on behalf of another, "he may lawfully do in another's defense what such other might lawfully do in his own

[1] Although many jurisdictions have abandoned a strict adherence to the alter ego rule, they have done so only to "allow exculpation based upon the intervenor's reasonable belief that his defensive action was required." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 159-160 (Spring 1995).

defense *but no more*; he … is subject to the same conditions, limitations, and responsibilities as the person defended." Id. (quoting Lovejoy, 15 So.2d at 301) (emphasis in the original). South Carolina adopted the alter ego rule in 1906. State v. Cook, 78 S.C. 253, 59 S.E. 862 (1906).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), the South Carolina Supreme Court examined the defense of others instruction as it applied to the defendant in a criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. The Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which the Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

Section 16-11-450(A) of the South Carolina Code

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). One provision provides that

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is

> intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-450(A).[2] The presumption does not apply if the person "against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder." S.C. Code Ann. § 16-11-440(B)(1).

In short, of the elements of self-defense and defense of others, a person entitled to immunity pursuant to section 16-11-440(A) need only prove by a preponderance of the evidence that he did not bring on the difficulty.[3]

The South Carolina Supreme Court noted that a person who is a social guest has a right to be in the dwelling. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). In that case, the deceased had been invited into the apartment of Curry's mother. Id. at 368, 752 S.E.2d at 265. There was no indication that anyone requested the deceased leave. Id.

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[2] In many respects, this provision of the Act mirrors the common law defense of habitation. "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). "Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious injury or damage." Id. "Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id.

[3] "One attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which is ordinarily an essential element of that defense." State v. Gordon, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924).

Here, the deceased was not a lawful resident of the dwelling. Thus, the only question is whether he had a right to be in the dwelling at the time of the altercation. Quite simply, he did not. The undisputed testimony was that Durkin told the deceased to leave the residence. Although Durkin initially invited the deceased to enter the house, she exercised her right to evict the deceased from the house. When the deceased refused to leave, he was a trespasser and had no right to be in the dwelling. See S.C. Code Ann. § 16-11-620 (stating that "any person who, having entered into the dwelling house … without having been warned fails and refuses, without good cause or good excuse to leave immediately upon being ordered or requested to do so by the person in possession" commits a criminal offense); Wright v. United Parcel Service, Inc., 315 S.C. 521, 523, 445 S.E.2d 657, 659 (Ct. App. 1994) (stating that "[a]lthough the entry by a person on the premises of another may initially be lawful, the person because a trespasser when the person fails to depart after being asked by the owner to leave"); State v. Starnes, 213 S.C. 304, 312, 49 S.E.2d 209, 212 (1948) (explaining that "[i]f an intruder refuses to leave the dwelling house at the request of the householder, the latter may use the necessary force to eject him, and if in the effort to eject him, the life or safety of the householder or a member of the household is jeopardized, he may kill in self-defense").

Here, Appellant used deadly force against the deceased and he is entitled to immunity pursuant to section 16-11-450(A) for the use of such force. According to the record evidence, the deceased was not lawfully in the residence due to Durkin's request that he leave. Additionally, it was undisputed that Appellant knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. When Appellant arrived at his home, he heard Durkin screaming. He also heard another man's voice. When he entered the residence, he saw a partially clothed man pulling Durkin's hair and in the process of forcing her to perform oral

sex. Having satisfied the statutory requirements, Appellant was entitled to a presumption of reasonable fear of imminent peril or death or great bodily injury to himself or another person. Therefore, it was only necessary that Appellant show he was not at fault at bringing on the difficulty.

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "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." Id.

In State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), the South Carolina Supreme Court analyzed Dickey's claim that he was entitled to a directed verdict because the evidence showed he was exercising his right to self-defense as a matter of law. Dickey was a security guard at Cornell Arms apartments. Dickey, 394 S.C. at 495, 716 S.E.2d at 98. Two men were guests of residents of the apartment complex. Id. When the men refused to leave, Dickey, in his role as security guard, intervened. Id. at 495, 716 S.E.2d at 99. Dickey contacted the police, and the men decided to leave. Id. at 496, 716 S.E.2d at 99. When the men walked outside, Dickey walked behind them so that he could tell the police where the men had gone. Id. The men turned toward Dickey, made threats, and advanced toward Dickey. Id. at 496-497, 716 S.E.2d at 99. Dickey pulled his gun, but one of the men continued to advance. Id. at 497, 716 S.E.2d at 100. When the man reached under his shirt, Dickey feared the man had a weapon. Id. In response, Dickey fired his gun, killing one of the men. Id.

Analyzing the first element of self-defense, the Court held Dickey was not at fault in bringing about the harm. Id. at 499, 716 S.E.2d at 101. The Court recognized "a business proprietor's right to eject a trespasser from his premises." Id. The Court explained that "[i]f the

proprietor is engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty, and would not be bound to retreat." Id. at 499-500, 716 S.E.2d at 101. The Court concluded that Dickey was exercising his right to eject trespassers in good faith, as the agent of the apartment complex and, as a matter of law, he was not at fault for bringing on the difficulty because he had not brandished his gun, had followed the men outside only to alert the police to their whereabouts, and had not used threatening or words or posture. Id. at 500-501, 716 S.E.2d at 101-102.

The South Carolina Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" where she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142.

Appellant was not at fault in bringing on the difficulty where he walked into his home to find the deceased physically and sexually assaulting his girlfriend, with whom Appellant lived. Under the doctrine of defense of others and defense of habitation, Appellant was entitled to use force against the deceased to defend his girlfriend and his home. Thus, contrary to the trial judge's finding, Appellant satisfied section 16-11-440 (A) and was entitled to the presumption of reasonable fear of imminent bodily injury or death when he used deadly force against the deceased.

Section 16-11-450(C) of the South Carolina Code

In the alternative, if this Court were to determine that the deceased was lawfully in the dwelling under section 16-11-440(B) or that Appellant did not know or have reason to believe that an unlawful and forcible entry had occurred or was occurring, then Appellant was entitled to immunity pursuant to section 16-11-440(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(C). Under this subsection, Appellant was required to prove all elements of self-defense or defense of others except the duty to retreat.

Appellant was not engaged in an unlawful activity because he was entering his home and acting to defend his girlfriend, his home, and himself. Appellant had a right to be in his home. See Jones, 416 S.C. at 298, 786 S.E.2d at 140 (explaining that section 16-11-440(c) provides immunity to individuals attacked in their homes by another household member). The testimony showed Appellant was acting to prevent death or great bodily injury to himself or his girlfriend or to prevent the commission of criminal sexual conduct, which is a violent crime as defined in section 16-1-60 of the South Carolina Code. See S.C. Code Ann. § 16-1-60 (including criminal

sexual conduct as violent crimes). As discussed supra, Appellant was not at fault in bringing on the difficulty. Therefore, the only question as to Appellant's ability to obtain immunity pursuant to section 16-11-440(C) was whether Appellant feared imminent danger of loss of life or great bodily injury to himself or his girlfriend and, if so, whether that fear was reasonable.

In Jones, 416 S.C. at 288, 786 S.E.2d at, 135, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[4] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

[4] This Court granted certiorari on November 5, 2015. However, on July 13, 2016, this Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, the Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id.

Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951).

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

Furthermore, an individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the

Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.; see also State v. Scott, 424 S.C. 463, 472-473, 819 S.E.2d 116, 120 (2018) (explaining that what the defendant "knew in the heat of the moment" controlled whether the defendant was in actual imminent danger or reasonably believed he was).

Additionally, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

The evidence presented to the judge demonstrated that Durkin was in actual fear of great bodily injury or losing her life or believed she was. During the hearing, Durkin testified that the deceased took off his clothes and tried to sexually assault her. Despite her efforts to physically resist the deceased she was overpowered. She made clear that she believed the deceased was going to kill her or rape her. Durkin's testimony was corroborated by Appellant's. According to Appellant, he heard Durkin screaming while outside the home. When he entered the home, he saw the deceased pulling Durkin's hair and preparing to force her to perform oral sex on him. Thus, Durkin was in actual fear of great bodily injury or losing her life. To the extent this Court

determines Durkin was not in actual danger, the evidence supports the conclusion that Durkin believed she was and that her belief was reasonable.

The evidence also showed that Appellant was in actual fear of great bodily injury or losing his life or believed he was during the struggle with the deceased in which Appellant had entered to defend Durkin. Appellant explained the deceased threatened to kill him after Appellant hit him with the bat. Further, Appellant and Durkin testified the deceased fought over a baseball bat with the deceased gaining control over the bat multiple times. The struggle between the deceased and Appellant continued into the kitchen where knives were readily accessible to the deceased. To the extent this Court determines Appellant believed he was in fear based on the evidence presented, the belief was reasonable in light of the deceased's conduct, including his explicit threat to kill Appellant.

The trial judge indicated that he was denying immunity to Appellant because the Act failed to "say anything about how much force you can use when you're trying to detain somebody until police arrive." R. 247, ll. 13-15. The judge did not know how much force one could use when executing a citizen's arrest. R. 247, l. 15-21. He determined that the jury would have to decide how much force Appellant could use when he was exercising his right to arrest the deceased. R. 247, l. 15-21. This was error.

According to statutory law, "[u]pon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law." S.C. Code Ann. § 17-13-10. Additionally, "[a] citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person: (a) has committed a felony; (b) has entered a dwelling house without

express or implied permission; (c) has broken or is breaking into an outhouse with a view to plunder; (d) has in his possession stolen property; or (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed." S.C. Code Ann. § 17-13-20. The South Carolina Supreme Court explained that "[i]n order to invoke the defense of justifiable killing in apprehending a fleeing felon, appellant at a minimum must show that he had certain information that a felony had been committed, and he used reasonable means to effect the arrest." State v. Cooney, 320 S.C. 107, 111, 463 S.E.2d 597, 599 (1995) (internal citations omitted).

The trial judge erred when he denied immunity based upon his claim that he did not know how much force a person could use when effectuating a citizen's arrest. According to statutory law, and as interpreting by controlling case law, Appellant was entitled to use deadly force to arrest the deceased. Appellant saw the deceased commit a felony – the attempted criminal sexual conduct of Durkin. Therefore, he was entitled to arrest the deceased pursuant to section 17-13-10. Additionally, Appellant was entitled to arrest the deceased pursuant to section 17-13-20 because the deceased had committed a felony, was in the house without permission as he had been requested to leave by Durkin, and the circumstances raised a suspicion that he intended to commit a felony. Repeatedly, Appellant and Durkin told the deceased not to leave the residence, but the deceased continued to attempt to flee from justice. Under the statute and case law, Appellant was entitled to use force, including deadly force, to arrest the deceased. See State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174-175 (1993). The judge was required to "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." See State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Appellant was entitled to immunity under the Act. The trial judge erred in finding otherwise.

II. The trial judge erred in permitting the state to elicit testimony from Appellant that he was gang raped in the military where the testimony was not relevant and the danger of unfair prejudice substantially outweighed any probative value.

Relevant facts

When cross-examining Appellant, the solicitor asked how Appellant was honorably discharged from the military in 1980. R. 792, l. 19 – R. 793, l. 4. Defense counsel objected to the evidence as irrelevant and that the danger of unfair prejudice substantially outweighed its probative value, and the judge heard the matter in camera. R. 793, ll. 5-25. Defense counsel explained that Appellant was sexually assaulted while he was in the military, thirty-six years prior to his trial, which resulted in his honorable discharge from the military. R. 793, ll. 16-18. The solicitor argued that the sexual assault was relevant because Appellant received "a hundred present disability from the military," he was "still under the stress of that situation," and the state theorized that the crime was racially motivated. R. 794, ll. 9-15.

The judge overruled the objection. R. 795, ll. 2-14. According to the judge, it was the state's theory that Appellant killed the deceased due to racially motivated revenge for the sexual assault he suffered as a soldier. R. 795, ll. 2-14.

In light of the judge's ruling, the solicitor asked Appellant about his discharge from the military in front of the jury. R. 803, ll. 1-4. Appellant explained that in 1980, he was taking a shower when he was attacked by two males. R. 803, ll. 4-5. The solicitor then asked, "What color were those males?" R. 803, l. 6. Appellant responded that both were black. R. 803, ll. 6-7. Responding to the solicitor's questioning, Appellant acknowledged that he suffered from PTSD "because of the rape by two black males." R. 803, ll. 15-21. Appellant denied being racist because of that experience or "anything in life." R. 803, ll. 22-25.

In closing, the state capitalized on the judge's erroneous admission of this highly prejudicial information. The solicitor told the jury that Appellant took a photograph of the deceased as "a trophy, as sick as it sounds." R. 913, ll. 12-21. According to the solicitor was "no different than a hunter having a deer head on the wall." R. 913, ll. 21-22. In the solicitor's words, "[t]his was a trophy for him because he knows he's just about to kill a black man." R. 913, ll. 22-23. The reason that Appellant would want to kill a black man and would want a trophy for such a killing was because of what happened to Appellant in the military. R. 913, l. 24 – R. 914, l. 3. Although the solicitor understood "how he would have some animosity there," Appellant's experience being gang raped in a shower by two men was no excuse for the death of the deceased. R. 913, l. 24 – R. 914, l. 3.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means 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." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "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, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

Appellant's horrific experience of being gang raped in the shower while in the military was not relevant to any issue in the trial. Appellant's trauma had no direct bearing upon any matter in the case. The fact that he suffered unimaginable and indescribable brutality at the hands of two men over thirty years prior failed to establish or make more or less probable any matter in controversy. There was no evidence to connect the two events or to show that the two events were connected for Appellant. Rather, Appellant was forced to relive the horrendous gang rape while on the stand testifying for his life in front of a group of strangers when the rape had no bearing whatsoever on the matter for the jury to decide.

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v.

Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state and the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the state's irrelevant cross-examination of the Appellant regarding his rape by two men in the military over thirty years prior to

the offense and prior to the trial. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury.

In light of Appellant's admission to killing the deceased, the question before the jury was whether the deceased's death was the result of murder, voluntary manslaughter, involuntary manslaughter, or self-defense. In other words, Appellant's *mens rea* was a critical issue. The state used the fact that Appellant had been gang raped by two men in 1980, over thirty years prior, to provide it with ammunition to argue Appellant was racist and killed the deceased because the deceased was black. The gang rape was not probative of any matter before the jury. The state presented no connection between the rape and the killing. However, the danger of unfair prejudice was extremely high as shown by the solicitor's closing argument. The state exacerbated the prejudicial effect of the evidence during its closing by arguing that Appellant killed the deceased intentionally to avenge himself against the men who raped him over thirty years ago. This was "a naked attempt by the state to appeal to the jurors' emotions and cloud their ability to impartially weigh the evidence." See Matter of Campbell, 427 S.C. 183, 195, 830 S.E.2d 14, 20 (2019).

III. The trial judge erred in permitting the state to elicit testimony from Appellant told the jailers that he did not want to be in the same cell as any African Americans where the testimony was not relevant and the danger of unfair prejudice substantially outweighed any probative value.

Relevant facts

During the state's cross-examination of Appellant, the solicitor indicated he wished to question Appellant about a statement he made at the jail. R. 796, ll. 12-15. Specifically, the solicitor claimed Appellant "made it clear that he did not want to be housed in the same cells with any African-Americans." R. 796, ll. 12-15. The judge indicated that because it was a statement made by Appellant, it was admissible. R. 797, ll. 22-23; R. 798, l. 25 – R. 799, l. 1; R. 800, ll. 14-17; R. 801, ll. 12-21.

When the cross-examination resumed, the solicitor asked Appellant if he told the jailers he "didn't want to be housed in the same cell with any African-American inmates." R. 804, ll. 10-11. Appellant explained that the person he was alleged to have murdered was black and he did not want to be in the same cell with any black people because he feared reprisal by a relative of the deceased. R. 804, ll. 10-15. Appellant provided this full explanation to the jailers at the time. R. 804, ll. 10-15. The judge asked if Appellant's request was because of racism, and Appellant indicated it was not. R. 804, l. 25 – R. 805, l. 3.

During his closing argument, the solicitor reminded the jurors of Appellant's request at the jail immediately after he told the jurors that Appellant took a photograph of the deceased because he wanted a "trophy" of his kill of a black person in retaliation for being gang raped while in the military. R. 914, ll. 4-10. Specifically, the solicitor argued:

> What else do we know about [Appellant]? Well, when he got to jail one of the first things he tells the jailers, 'Don't put me in a cell with black people.' One, what was his explanation for that? Because they might be related to [the

> deceased]. Because they're black they might be related to [the deceased]? That ain't why he said that. We know why he said that.

R. 914, ll. 4-10. Thus, the state used Appellant's request at the jail to argue to the jury that Appellant was racist and the death of the deceased was racially motivated.

Discussion

Appellant incorporates by reference the legal discussion presented in Issue II. Appellant's request at the jail was not relevant to any issue in the case. Appellant's housing request at the jail had no tendency to make any fact of consequence more or less probable. The jury was tasked with deciding whether Appellant was guilty of murder or a lesser offense. Appellant's request for housing at the jail was completely unrelated to any of the issues in the trial.

Further, the danger of unfair prejudice substantially outweighed the probative value presented by the evidence. Appellant requesting not to be in the same cell as African-Americans was an attempt to protect himself from reprisals from the deceased's family and friends. In light of Appellant admitting to killing the deceased, the fact that he wanted protection from the deceased's loved ones was not probative of whether he killed the deceased. In fact, the evidence was not probative of any matter at issue in the case. However, the danger of unfair prejudice was substantial. The statement was easily construed to cast Appellant as a racist. This danger persuaded the jury to render a verdict based on emotion, not the evidence presented. The solicitor seized upon this danger in his closing argument when he placed himself in league with the jury by stating, "We know why he said that." Having just argued to the jury that Appellant killed the deceased to avenge his prior horrific gang rape at the hands of two black men and Appellant's desire for a trophy of the kill, the solicitor argued to the jury that Appellant's house request reinforced that Appellant was a racist and was motivated by racism to kill the deceased.

No evidence supported such a conclusion, but the solicitor made the argument anyway in an effort to appeal the jury's emotions.

IV. The trial judge erred in failing to instruct the jury that statements may be used only against the person who made them where the statements of the non-testifying co-defendant were admitted into evidence prior to the co-defendant entering a guilty plea and were allowed to be considered by the jury.

Relevant facts

During its case-in-chief, the state presented numerous statements made by Durkin, which would not have been admitted had Durkin not been on trial. The state's second witness, Mark Johnson, an officer with the Horry County Police Department, recounted for the jurors what Durkin said to him when he arrived on the scene. R. 304, ll. 12-19. Johnson claimed Durkin said the deceased was smoking crack and then attempted to sexually assault her. R. 304, ll. 12-19.

Additionally, the state called Bridgett Briles, a jailhouse snitch, to tell the jury what Durkin allegedly told her while the two were in the same cell at the detention center awaiting trial. R. 520, l. 25 – R. 524, l. 13. Briles claimed that Durkin told her that she and the deceased where "having sex off and on for about two years" and that Durkin "took the kill shot that murdered" the deceased. R. 523, ll. 9-18. Further, Briles claimed Durkin "changed her story a lot." R. 523, l. 22. According to Briles, Durkin talked about how she wished she had cleaned up after the deceased's death so that she would not have been caught. R. 525, ll. 1-10. Most incriminating, Briles asserted that Durkin confided that she was worried the police would realize the deceased's clothes were folded, which would alert them to the fact "that she had something to do with murdering" the deceased. R. 525, ll. 11-16.

During the charge conference, Appellant requested the judge give the jury "a limiting instruction" "to explain that the testimony against one defendant can't be used against one

Defendant can't be used against the other." R. 872, ll. 14-25. Appellant explained the instruction was necessary because the state introduced numerous incriminating statements by Durkin during its case-in-chief. R. 872, ll. 14-25.

The judge requested "case law" that said he had to charge that. R. 873, ll. 1-2. When Appellant argued that the line of Confrontation Clause cases mandate such an instruction, the judge explained that he wanted "an appellate decision that says that the Court has a duty to charge that a statement can only be used against one defendant when the other one - -." R. 873, ll. 6-9. Despite Appellant's argument regarding the necessity of the jury understanding that Durkin's statements could not be used against Appellant, the judge refused to provide the instruction because he determined there was not "any violation" of the Confrontation Clause. R. 874, ll. 13-14.

When charging the jury, the judge instructed the jury that "the trial of this case started with multiple Defendants." R. 961, ll. 17-18. He explained that the case against Durkin had been "resolved." R. 961, ll. 18-19. He continued:

> The case against the Defendant James Richard Rosenbaum and the evidence 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.

R. 961, l. 19 – R. 962, l. 1.

Discussion

Had Durkin not been tried jointly with Appellant, Durkin's statements would not have been admissible at Appellant's trial. In State v. Holmes, 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000), the trial court permitted portions of a non-testifying co-defendant's statement to police to be read to the jury. The non-testifying co-defendant was not on trial with the defendant.

Holmes, 342 S.C. at 117, 536 S.E.2d at 673. The trial court ordered the statement redacted to eliminate any reference to the defendant, however. Id. The Supreme Court held the statements were not admissible because the defendant was unable to confront the declarant. Id. at 119, 536 S.E.2d at 674. Further, the Court held the redaction did not save the statement. Id. "Redaction has come into play as a tool to allow admission of a co-defendant's confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants." Id. (emphasis in original). "Redaction may not be used as a means to avoid the strictures of the hearsay rules and the Confrontation Clause." Id.

The Court confronted a similar issue to the instant case in State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980). The state called LaBarge to trial along with his co-defendant, Jackson. LaBarge, 275 S.C. at 170, 268 S.E.2d at 279. During the trial, the state introduced a confession given by Jackson that implicated LaBarge, but the statement was redacted to exclude direct references to him. Id. However, Jackson entered a guilty plea at the conclusion of the state's case. Id. at 170-171, 268 S.E.2d at 280. LaBarge moved to withdraw Jackson's statements from evidence, but the judge refused. Id. at 171, 268 S.E.2d at 280. The judge, however, did instruct the jury that any written statements could only be used against the defendant who made them. Id.

The Court held "the trial judge erred in failing to remove Jackson's out-of-court statement from the record and to admonish the jury to disregard it, and erred in letting the statement go to the jury room as an exhibit." Id. According to the court, "the statement was not relevant to any remaining issue" because Jackson pled guilty. Id. Under controlling Supreme Court precedent, "the statement could not have been used against LaBarge in any event." Id.

The Court held the "error was compounded later when the judge allowed the jury … to consider the statement." Id. In light of Jackson no longer being a defendant "the trial judge's charge had the effect of bringing the statement to the jurors' attention while telling them they could not use it against LaBarge." Id. Due to the error, the Supreme Court granted LaBarge a new trial. Id.

Thus, while Durkin's statements to Briles and Johnson were likely admissible at the time the judge admitted them because Durkin was a co-defendant, the statements would not have been admissible against Appellant. After Durkin pled guilty, her statements were no longer relevant to Appellant's trial. Appellant's request that the jury be instructed that statements by one defendant could not be used against another defendant was the minimum that was required of the trial judge in these circumstances. See Bruton v. United States, 391 U.S. 123, 135 (1968) (noting the use of limiting instructions in joint trials and explaining how limiting instructions do not cure the admission of incriminating statements by a non-testifying co-defendant when the statements implicate the defendant). Yet, the judge refused. Instead the judge instructed the jury that the case against Durkin had been "resolved" and that the evidence against Appellant "should be considered separately and individually from the evidence and law concerning" Durkin. R. 961, l. 19 – R. 962, l. 1. This instruction merely highlighted for the jury that Durkin had made incriminating statements and that only Appellant remained on trial. Further, the instruction was impossibly confusing as the jury was unlikely to know, particularly without an instruction explaining, what evidence was only against Durkin and what evidence was only against Appellant.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court reverse the lower court and hold he is entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act. In the alternative, regarding Issues II, III, and IV, Appellant respectfully requests this Court reverse his conviction for manslaughter and remand for a new trial.

s/*Susan B. Hackett*
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Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of April, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 22, 2020

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