STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAWTON LEROY HOLLOWAY,

APPELLANT

APPELLATE CASE NO 2019-000477

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying Appellant immunity from prosecution, where he was attacked in his own home by a man who was threatening to inflict harm on Appellant and his family, where Appellant was in reasonable fear of his life, and where Appellant was therefore justified in using deadly force to defend himself?

II. Whether the trial court erred in failing to suppress Appellant's statement to law enforcement, where Appellant requested counsel after being advised of his Miranda rights, where law enforcement placed Appellant in an interview room after he invoked his right, where officers continued recording Appellant's statements, and where Appellant's statements made while he was in custody should have been suppressed?

STATEMENT OF THE CASE

On October 27, 2017, a Spartanburg County grand jury indicted Appellant for murder and possession of a weapon during a violent crime. R. 535. Appellant proceeded to a five-day trial before the Honorable R. Keith Kelly and a jury on March 11, 2019. R. 21. Appellant was represented by James “Chip” Price III, James Price IV, and E. Powers Price. Derrick Bulsa, Lindsey Overby, and Russell Ghent appeared on behalf of the state.

The jury found Appellant not guilty on the murder charge, guilty of voluntary manslaughter, and guilty of the possession of a weapon during the commission of a violent crime. R. 527, ll. 1 – 10. Judge Kelly sentenced Appellant to twenty years’ incarceration on the manslaughter charge and five years on the weapons charge, concurrent. R. 534, ll. 1 – 10.

This appeal follows.

ARGUMENT

I. The trial court erred in denying Appellant immunity from prosecution, where he was attacked in his own home by a man who was threatening to inflict harm on Appellant and his family, where Appellant was in reasonable fear of his life, and where Appellant was therefore justified in using deadly force to defend himself.

Standard of review

A defendant's entitlement to immunity from prosecution under the Protection of Persons and Property Act must be decided pretrial using a preponderance of the evidence standard. State v. Duncan, 392 S.C. 404, 410-11, 709 S.E.2d 662, 665 (2011). Appellate courts review an immunity determination for abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). A trial court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Relevant facts

Appellant Lawton Holloway defended himself and his family against a trespasser in his home on August 31, 2017. A pre-trial motion asserting statutory immunity under the Protection of Persons and Property Act was filed on March 11, 2019. R. 1. At trial, Appellant moved for immunity and testified accordingly. R. 69, l. 25 – R. 124, l. 4. The trial court also heard testimony from two additional witnesses, Kristen Malpass and Andrew Lawson, officers with the Spartanburg County Sheriff's office. Immunity from prosecution was denied. R. 148, l. 3 – R. 153, l. 15.

The day before Jeremy Bell attacked Appellant, Appellant celebrated his son's eighteenth birthday. R. 70, ll. 8 – 25. Appellant lived with Lisa Wood, the boy's mother; they had been together for over ten years. Id. Appellant left the house around 10:00 a.m. to run errands. R. 71, l. 24 – R. 72, ll. 16. After he finished, he stopped by a restaurant called Kalahari's. R. 72, l. 21 – R. 73, l. 13. Wood and Appellant knew the owners of the restaurant and liked to play pool there. Id. While at Kalahari's, Appellant had a drink and spoke with the bartender, Christina. Id. Appellant mentioned that Wood was cooking a meal for their son's birthday, and Appellant offered to bring Christina some food later that day. Id.

After the dinner birthday celebration, Appellant asked a friend to stop by the house to inspect the floor for damage. R. 73, l. 14 – R. 74, l. 20. Appellant and his friend walked down a hill in his backyard and had a drink near the creek which ran through the yard. Id. Wood and some of the neighbors later joined Appellant; everyone socialized for an hour until it started raining. R. 74, ll. 13 – 20. Wood wanted to go to Kalahari's, so she and Appellant left their home around 10:00 p.m. and rode in Appellant's truck to the restaurant. R. 75, ll. 5 – 12.

At Kalahari's, Appellant saw Jeremy Bell, a coworker of Wood's. R. 75, l. 17 – R. 76, l. 15. Appellant stayed at the restaurant for a few hours. When it closed, the bartender Christina and Jeremy were invited back to Appellant and Wood's house. R. 76, l. 16 – R. 77, l. 22. Appellant and Lisa rode in his truck; Jeremy and Christina were in their own respective cars. Id. The group stopped at a convenience store and purchase beer and cigarettes. Bell drove to his own house, not far from Appellant's, and picked up liquor. Id. Appellant recalled arriving back at his own house around 2:30 a.m. on August 31, 2017. R. 77, ll. 16 – 17.

Wood warmed up dinner for Christina. After she finished eating, everyone walked down to the creek and made a campfire. R. 78, ll. 4 – 12. Appellant and Bell were both drinking. R.

81, ll. 10 – 11. Around 3:00 a.m., Christina left to go home. R. 79, l. 18 – R. 80, l. 12. Appellant walked up the hill to the driveway with her. Id. Bell then came inside to update an app on the television that allowed Wood to watch movies. R. 81, l. 18 – R. 83, l. 14. After Bell updated the software, Appellant, Wood, and Bell socialized. R. 83, l. 19 – R. 84, l. 21.

Wood became tired, laid down on the sofa with a blanket, and fell asleep. Id. Appellant and Bell continued talking. While discussing recent events in Charlottesville, Bell became belligerent so Appellant asked him to leave. R. 83, l. 14 – R. 86, l. 22. Bell became aggressive and got in Appellant's face. Appellant then bagged up Bell's liquor and insisted that he leave. R. 87, l. 12 – R. 88, l. 13. Bell apologized and the two men walked outside together. Bell got in his car and started it up. Id.

Appellant walked back down the hill to ensure that the fire had been extinguished. Id. When he walked back up to the house and entered through the back door, he realized he had not locked the front door. While walking to the front of the house to lock the door, he saw a figure in the living room straddling Wood. R. 88, l. 14 – R. 89, l. 20. Appellant approached the sofa, realized it was Bell, and noticed his hands around Wood's neck. R. 89, ll. 11 – 25. Wood would later testify that she is a deep sleeper and "the house could burn down around [her] and [she] wouldn't know it." R. 292, ll. 15 – 24.

Appellant asked Bell what he was doing, and in response Bell indicated that he was going to sexually assault and kill Wood. R. 90, ll. 1 – 23. Bell also threatened to do the same to Appellant's fourteen year-old daughter. Id. Appellant unsuccessfully attempted to wake Wood up. Appellant was concerned that she may be dead and understandably noted that he was scared and unsure what to do. Appellant described Bell's demeanor as being "in a zone" and said "[i]t was like he didn't recognize me." R. 110, ll. 22 – 24.

The house did not contain any guns, save a pellet rifle used for snakes. R. 91, l. 2 – R. 92, l. 6. Appellant did not approach Bell out of fear that he may have retrieved a gun from his car. R. 92, l. 7 – R. 93, l. 15. Appellant ran into the kitchen and grabbed a knife. He was unable to locate a cell phone, and his home did not have a land line. Appellant credibly testified "[a]t that point the only thing I could see was life and death." R. 93, ll. 11 – 13.

When Appellant got back into the living room, Bell rushed Appellant while informing him that he was going to kill Appellant. R. 93, ll. 16 – 25. Appellant described Bell as weighing 70 pounds more than him. The lights were off during the entire encounter. R. 95, ll. 4 – 5. In self-defense, Appellant stabbed Bell with the knife; R. 115, ll. 1 – 15.

Appellant then ran to Wood and discovered that she was not moving. R. 95, ll. 6 – 23. She woke up after he shook her, and Appellant told her to call the police. Id. Appellant told her "he tried to rape you." Id. Appellant, frightened, located his truck keys and very slowly drove away from his home. R. 95, l. 24 – R. 96, l. 23. After only driving for half of a mile, he realized that he had not checked on the children in the home, and he turned around. Id. When he arrived back at the house, the police were there.

Kristen Malpass testified that she received the 911 call around 6:02 a.m. on August 31, 2017. R. 125, ll. 6 – 21. She was the first police officer to arrive at Appellant's home; the fire department and EMS had already arrived by the time she got there. R. 125, l. 22 – R. 126, l. 3. It took her approximately fifteen minutes to arrive after receiving the call. R. 131, ll. 6 – 15.

She found Bell's body. R. 126, ll. 19 – 24. Malpass claimed there was no evidence of a struggle outside of where Bell's body was located. R. 129, ll. 12 – 19. She confirmed that Appellant told Wood that Bell was trying to sexually assault her. R. 131, ll. 1 – 5.

Andrew Lawson, an officer with the Spartanburg sheriff's department, drove to Appellant's home but did not go inside the residence. R. 135, ll. 6 – 14. He met with Appellant at the police station. R. 132, ll. 16 – 24. Lawson confirmed Appellant's testimony, including the threats to Wood and imminent attack from Bell. R. 135, l. 18 – R. 136, l. 10. Lawson attended the autopsy and recalled approximately fourteen stab wounds—located in the front, back, side, and neck/shoulder area—were noted. R. 133, ll. 17 – 23.

After the trial court heard testimony from those three witnesses, Appellant argued that his conduct was covered under the statute such that he was immune from prosecution. R. 138, l. 16 – R. 139, l. 10. The state's argument in response was twofold: that the facts did not allow for immunity and that the Act was unconstitutional. R. 139, l. 17 – R. 145, l. 17.

The trial judge denied the request for immunity. R. 148, l. 3 – R. 153, l. 15. He found that "the defendant's version of the event is not credible because it is not consistent with the other physical evidence in the case." R. 148, ll. 19 – 22. This determination was based partially on the placement of the furniture, allegedly preventing Bell and Appellant from scuffling or running. R. 149, ll. 9 – 11. Additionally, the trial judge expressed doubt about Appellant's timeline and suggested that it would not have taken him fifteen minutes to drive one mile, round trip. R. 149, l. 11 – R. 150, l. 15. For those reasons and more, the trial judge did not find Appellant's testimony "reasonable and plausible" and denied immunity. R. 153, ll. 7 – 15.

<u>Discussion</u>

In 2006, the South Carolina General Assembly promulgated the Protection of Persons and Property Act to provide immunity from prosecution to persons acting in defense of themselves or others if they are found to be justified in using deadly force. S.C. Code Ann. § 16-

11-450; State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). The Act codified the common law Castle Doctrine and extended its reach. S.C. Code Ann. § 16-11-420(A) ("It is the intent of the General Assembly 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").

"Under the Castle Doctrine, '[o]ne 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 ordinarily is an essential element of that defense.' " State v. Jones, 416 S.C. 283, 291, 786 S.E.2d 132, 136 (citing State v. Gordon, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924)). The Legislature adopted the Act based on its finding 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).

Specifically, the immunity section of the Act provides:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (2015). "[A]nother applicable provision of law" includes the common law of self-defense. State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018). See also Jones, 416 S.C. at 300 n.8, 786 S.E.2d at 141 n.8. This means a defendant may seek immunity from prosecution under the Act by "demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Curry, 406 S.C. at 372, 752 S.E.2d at 267.

During the immunity 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. For immunity claims under this theory, "a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. Accordingly, a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable.

There are four elements a defendant must establish to justify the use of deadly force under the common law of self-defense:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). See also Curry, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4 (citing State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Section 16-11-440(A) may, under appropriate facts, replace the reasonable fear element of self-defense by providing a presumption that the person's fear was reasonable under certain circumstances. The presumption of subsection (A) does not apply, however, "if the victim has an equal right to be in the dwelling or residence." Jones, 416 S.C. at 292, 786 S.E.2d at 137 (citing Curry, 406 S.C. at 370, 752 S.E.2d at 266).

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.

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 his sister. Sales found his sister at her home holding her face. When his 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.

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).[1] 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.[2]

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[1] 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.

[2] "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).

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.

Unlike Curry, the decedent in the matter at bar had left Appellant's home; the invitation had expired, and he was no longer allowed in the house. The undisputed testimony from Appellant was that Bell had overstayed his welcome and been ushered out the door to his car. Appellant testified that Bell got into his car and started it. Because he believed Bell to be driving away from his house and off the premises, Appellant went back down to the creek to extinguish the fire. Thus, Bell was no longer an invited guest on the property. When he returned, he was a trespasser. Alternatively, if he had never driven away, his continued presence on Appellant's property was unlawful. 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 decedent was not lawfully in the residence. Wood never suggested that she extended an invitation that Bell stay; she was asleep at the time he left. 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.

Also under the "another applicable provision of law" language of S.C. Code Ann. § 16-11-450(A), Appellant was entitled to the defense of habitation. The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." State v. Lee, 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987). "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." Rye, 375 S.C. at 124, 651 S.E.2d at 323. 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. Rather, the defense of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id. "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.' " State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001)

(quoting Lee, 293 S.C. at 537, 362 S.E.2d at 25). Although self-defense and habitation are analogous, the defenses are not identical. Rye, 375 S.C. at 124, 651 S.E.2d at 323.

When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion. State v. Sparks, 179 S.C. 135, 137, 183 S.E. 719, 720 (1936).

> A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.

State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923). In State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2010), this Court held the defendant was entitled to a jury instruction on the defense of habitation.

It is undisputed that Appellant defended himself in his home. Law enforcement found the decedent's body inside Appellant's home. Based on Appellant's testimony, Bell was there unlawfully and had trespassed. Appellant was without fault in bringing about the difficulty; he defended himself from imminent attack on his own premises and was entitled to the defense of habitation.

The evidence presented to the trial judge demonstrated that Appellant was in actual fear of great bodily injury or losing his life or believed he was. During the hearing, Appellant testified that he stumbled upon Bell straddling Wood with his hands around her neck. Appellant was unsure whether Bell had armed himself with a weapon from his car. Understanding an impending sexual assault or worse about to occur, Appellant attempted to save Wood and his children from attack. After arming himself, Appellant was rushed by Bell. Thus, he was in actual fear of great bodily injury or losing his life while being rushed by a man larger than himself. Therefore, Appellant's

assertion that "the only thing [he] could see was life and death" was reasonable under the circumstances, including the explicit threat to kill Appellant, Wood, and their daughter. R. 93, ll. 11 – 13.

Appellant was also within his statutory right to use deadly force under S.C. Code Ann. § 16-11-440(C). There were no allegations of illegal activity in this case, unlike State v. Glenn, Op. No. 27935 (S.C. Sup. Ct. filed December 18, 2019) (Shearouse Adv. Sh. No. 49 at 25). Appellant was in his own home, somewhere he had a right to be, and had no duty to retreat. Further, he stood his ground when Bell attacked him and met force with force, as he reasonably believed it was necessary to prevent the commission of violent crime, namely the assault and subsequent killing of members of his family.

Appellant was attacked in his home, a place he had a right to be. Bell ran towards him while stating that he was going to kill Appellant. This occurred after Bell threatened to sexually assault and kill Wood. The actions and threatening words of Bell communicated his aggressiveness and intent to harm Appellant and his family.

Appellant reasonably believed deadly force was necessary to prevent the commission of a violent crime. Bell had previously left the house, gotten into his car, and cranked it. He was no longer subject to the prior invitation which allowed him to be a guest on Appellant's property. Therefore, when he reentered the home, it was illegally. As such, Appellant was understandably startled and confused as to why Bell was in his home and on top of Wood. Coupled with Bell's unambiguous threatening words and actions, Appellant was justified in responding with deadly force.

Appellant knew Bell had been in the military. R. 92, ll. 7 – 21. Together with Bell's size and weight advantage, Appellant was concerned that Bell could kill him and then follow through

with his threats. Additionally, Bell had been to his car before illegally reentering Appellant's home and could have armed himself with a weapon in order to pursue his violent intentions.

In finding that Appellant was not in fear of imminent death or peril, the trial judge ascribed an erroneous standard to Appellant's son who had just turned eighteen years old and was on the autism spectrum:

> And it's also notable that although he is an autistic child, the 18 [year] old, the young man who turned 18, it was noted several times by the defendant he is a very large fellow himself, physically large and there's no reason this Court would believe that if he heard his mom scream in the house that he would not come to her aid. So this Court finds that the second element to believe that reasonably he was in fear of imminent death or peril, that he fails that burden of proof.

R. 152, ll. 11 – 19. This reasoning fails to account for the possibility of a sound machine that many individuals with autism use to help sleep at night. An artificial sound machine could have prevented any noises from being heard by Appellant's son. Further, the above reasoning assumes that an eighteen year old with autism would act in accordance with typical standards rather than the generally muted fear response that accompanies individual who have been diagnosed with autism. Autism is a developmental disorder that affects a child's ability to communicate, use imagination, and establish relationships with others. See Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 883 (9th Cir.2001). Children with autism generally have significant deficits in language development, behavior, and social interaction. One of the primary ways that children learn is through imitation of the actions and sounds that they see and hear. Autistic children, however, generally have a greatly reduced ability to imitate. Cty. Sch. Bd. of Henrico Cty., Virginia v. Z.P. ex rel. R.P., 399 F.3d 298, 300 (4th Cir. 2005). People with autism are very sensitive to sounds; even if Appellant's son heard screams or other sounds, it likely would have scared him, thus causing him to hide, retreat, or place his hands over his ears. See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d

478, 481 (4th Cir. 2011) (child "falls on the moderate-to-severe end of the autism spectrum. He is functionally non-verbal, in that he does not often use language spontaneously, and he is very sensitive to noise.").

Additionally, the trial court stated, "it's just curious to this Court as to why any man would not attempt to free Lisa from a choking before taking time to arm one's self." R. 153, ll. 7 – 9. Such a ruling holds Appellant to an arbitrary standard not rooted in South Carolina law. Considering the early morning hour, Bell's intoxication, and the unknown status of whether Bell was armed, Appellant was allowed to arm himself. During the pre-trial hearing, Appellant established all of the elements necessary to prove immunity. Thus, Appellant was entitled to immunity under the Act. The trial judge erred in finding otherwise.

II. The trial court erred in failing to suppress Appellant's statement to law enforcement, where Appellant requested counsel after being advised of his Miranda rights, where law enforcement placed Appellant in an interview room after he invoked his right, where officers continued recording Appellant's statements, and where Appellant's statements made while he was in custody should have been suppressed.

Standard of review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) "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) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Relevant facts

A Jackson v. Denno[3] hearing was held in Appellant's case; the trial court heard testimony from Andrew Lawson. R. 52, l. 21 – R. 67, l. 16. He testified about his recollections from August 31, 2017. When he arrived at Appellant's home, Appellant was in the custody of a different officer. R. 53, ll. 1 – 6. Lawson spoke with another officer who requested that he interview Appellant. Appellant was transported to the sheriff's office and placed in an interview room which was equipped with video and audio recording capabilities. R. 53, ll. 16 – 24.

Lawson plainly admitted "the purpose of putting [Appellant] in that room was to get an interview from him." R. 53, l. 25 – R. 54, l. 2. He claimed not to have been aware that Appellant had invoked his right to counsel at this point. R. 54, ll. 3 – 5. Supposedly after discovering this, Lawson informed Appellant that law enforcement was in the process of getting a search warrant to collect evidence from him. R. 54, ll. 12 – 15. Appellant had not been arrested at this point. R. 54, ll. 16 – 18. Lawson indicated that Appellant was held at the sheriff's office for at least two hours, most of which was recorded and preserved for use at trial. R. 58, ll. 7 – 10.

During the pre-trial hearing, the state relied on a recorded "interaction" with Appellant that Lawson declined to refer to as an interview. (State's Exhibit 4: Video). While in custody, Appellant complained that the handcuffs were too tight; an officer repositioned them in front of him. The officer can be seen in the video interacting with Appellant. The officer indicated that Appellant had been telling him "a bunch" and "some stuff about what's been going on." (Video

[3] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)

9:10 – 9:30). The officer excused himself and left Appellant in the room with Lawson. Lawson informed Appellant that he "just want to get your side of it." (9:45 – 10:00).

Immediately thereafter, Lawson stepped out of the room. Upon reentering, he advised Appellant that he was informed that Appellant had invoked his right to counsel at his house. (10:55 – 11:10). Lawson informed Appellant that he was in investigative detention and began asking Appellant for his name and identification. Mark Gaddy, another investigator, then walked into the room and stated:

> We were informed that you invoked your right to an attorney at the scene. Now … that's fine; that doesn't mean we can't talk to you. But you need to understand that you invoked your right to an attorney at the scene. So at this point right here, are you wanting to go further and talk to us?

(12:15 – 13:00). Gaddy repeatedly pressed Appellant on whether he would speak with law enforcement. (13:00 – 16:00). Gaddy told Appellant he could either waive his right or Gaddy and Lawson would leave the room. (16:00 – 16:30). In response, Appellant again requested an attorney. (16:30 – 16:45). Both officers then left Appellant in the room alone. While alone in the room, Appellant seemingly fell asleep. (26:00). After waiting alone for over twenty minutes, Appellant went in search of the restroom and asked about using the telephone to call his mother. (39:00 – 41:00).

Law enforcement then began photographing Appellant. (48:30 – 50:00). Appellant inquired if this was going to occur without his attorney. Appellant then spoke about the events leading up to the stabbing with Lawson. (51:50 – 57:10). Another officer then attached ankle cuffs to Appellant's legs. Appellant was later told he needed to prove his innocence. R. 63, l. 24 – R. 64, l. 13. None of the officers ever advised Appellant when he would receive the attorney he requested. His repeated requests for an attorney notwithstanding, an officer swabbed Appellant for DNA after allegedly obtaining a warrant. Again, Appellant inquired if the buccal

swab was going to occur without an attorney. No testimony was elicited from the officers suggesting any of the officers forwarded Appellant's request for an attorney.

After the Denno hearing, the trial judge ruled on the voluntariness of Appellant's statement. R. 153, l. 15 – R. 156, l. 15. Curiously, the trial judge distinguished Appellant's pre-trial testimony from his statements in the video:

> He's Mirandized and in investigative detention, but before he's Mirandized he's really sort of Mirandized informally is what we talked about, but he certainly was formally Mirandized and in investigative detention, but he continues to talk. He repeats phrases that the dude is crazy, hurt, high, family, killed my kids. But he never says - - and I listened carefully last night as I was going through this because I knew it would be one of the issues, he never says that the dude attempted to rape Lisa, my wife, my girlfriend or fiancé.

R. 154, ll. 4 – 13. Appellant's statements, made after he repeatedly invoked his right to counsel, were used to cast doubt upon his testimony pre-trial. The statements prejudiced him, especially in the immunity hearing. The trial judge seemingly found Appellant not credible based upon minor discrepancies in his testimony. Appellant repeatedly stated that he protected himself and indicated that the decedent was going to kill him and his family at his house.

Discussion

The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478–79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court went on to say that "[o]nce warnings have been given, the subsequent procedure is clear ... [i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Id. In addition, police are restricted from initiating contact with a suspect when that contact is the "functional equivalent" of an interrogation. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

The "functional equivalent" of an interrogation is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect." Id. Once an accused has invoked his right to have an attorney present during custodial interrogation, he may not be subjected to further police interrogation "unless the accused himself initiates further communications, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

In Edwards, the accused was arrested on several charges, and given his Miranda rights at the police station. Edwards acknowledged that he understood his rights, and agreed to be questioned. The accused stated that "he wanted to make a deal," but the interrogating officer advised him that he did not have the authority to make a deal and would need to talk to the county attorney. The accused called the attorney, but changed his mind, and hung up requesting an attorney of his own. The questioning terminated; the accused was returned to jail. Subsequently, two other detectives visited the accused. The accused was told that he had to talk to the detectives. He did, and confessed.

The United States Supreme Court established a bright line test for determining whether the right to counsel, once invoked, had been waived:

> When an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation, even if he had been advised of that right.

451 U.S. at 485, 101 S.Ct. at 1885. The Court further tempered its bright line ruling with the following exception:

> "An accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has

> been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police."

451 U.S. at 485, 101 S.Ct. at 1885.

In Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the United States Supreme Court considered what constituted initiation under the Edwards rule. The four justice plurality concluded in Bradshaw that "inquiries or statements ... relating to routine incidents of the custodial relationship would not suffice but that questions which evinced a willingness and a desire for a generalized discussion about the investigation would." 462 U.S. at 1047, 103 S.Ct. at 2836.

The United States Supreme Court has stressed "the Edwards rule is not a constitutional mandate, but judicially prescribed prophylaxis." Maryland v. Shatzer, 559 U.S. 98, 130 S.Ct. 1213, 1220, 175 L.Ed.2d 1045 (2010). As such, it is "justified only by reference to its prophylactic purpose." Id. (quoting Davis v. United States, 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)). According to the Court, the purpose behind the Edwards rule is "to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). Stated differently, "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." Minnick v. Mississippi, 498 U.S. 146, 151, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

When analyzing a criminal defendant's invocation of her right to counsel, a trial court must make two separate inquiries:

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Smith v. Illinois, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (per curiam) (internal citations omitted).

In its ruling concerning Appellant's statements, the trial court failed to make findings in two regards. R. 154, l. 15 – R. 156, l. 15. There was no outright determination whether Appellant actually invoked his right to counsel. Secondly, the trial court never found that Appellant knowingly and intelligently waived the right he had invoked. As such, the court erred in allowing the statements to be used at trial.

The actions of Gaddy, Lawson, and the other officers constituted badgering and coercive pressure. Members of law enforcement repeatedly attempted to speak with Appellant who presumably had been awake all night. Further, he had been drinking. Lawson recognized Appellant's intoxication. R. 135, l. 18 – R. 136, l. 10. Nonetheless, officers repeatedly suggested he should prove his innocence. Multiple officers came and went while Appellant was in "investigative detention" during business hours on a Thursday morning when counsel could have more expeditiously been appointed. The state trampled on Appellant's right to have counsel appointed and continued to badger, invite commentary, and put pressure on Appellant without affording him his right to counsel which had been repeatedly invoked.

CONCLUSION

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

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd 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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 23, 2020

s/Taylor D. Gilliam
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