STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Aug 31 2020
SC Court of Appeals

Appeal from Lexington County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HEIRBERONE HEAVA FOSTER,

APPELLANT

APPELLATE CASE NO. 2019-000892

ANDERS BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

The court erred by ruling appellant could not be found immune from prosecution, pursuant to S.C. Code § 16-11-440(A) or the stand your ground provision of § 16-11-440(C), because he grabbed a shotgun from his kitchen to defend himself against the decedent, who was in appellant's backyard and was attempting to harm appellant with a dangerous object, since obtaining a firearm from his kitchen to protect his home, himself, and his family from a dangerous criminal should not have disqualified appellant from invoking Castle Doctrine immunity given the intent of the General Assembly in enacting it 4

Introduction 4
Arguments 11
Ruling 13
Discussion 15

CONCLUSION 20

PETITION TO BE RELIEVED AS COUNSEL 21

TABLE OF AUTHORITIES

Cases

Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) 18

State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) 16

State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (2010) 12

State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) 12

State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) 3, 16

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011) 16

State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) 3, 16

State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016) 3, 12, 17

State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) 12

State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) 12

State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) 3

State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) 12, 15, 16, 17

State v. Timothy Jones, Jr. 14

Statutes

S.C. Code § 16-1-60 15

S.C. Code § 16-11-440(A) .... passim

S.C. Code § 16-11-440(B)(2) 19

S.C. Code § 16-11-440(C) .... passim

S.C. Code § 16-11-450 16

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling appellant could not be found immune from prosecution, pursuant to S.C. Code § 16-11-440(A) or the stand your ground provision of § 16-11-440(C), because he grabbed a shotgun from his kitchen to defend himself against the decedent, who was in appellant's backyard and was attempting to harm appellant with a dangerous object, since obtaining a firearm from his kitchen to protect his home, himself, and his family from a dangerous criminal should not have disqualified appellant from invoking Castle Doctrine immunity given the intent of the General Assembly in enacting it?

STATEMENT OF THE CASE

Appellant was indicted at the December 2016 term of the Lexington County Grand Jury for the offense of the murder. Appellant was also indicted for possession of a weapon during the commission of a violent crime for that same incident. R. 787. Appellant's case was called to trial on May 20, 2019 before the Honorable William P. Keesley, and a jury. Aimee Zmroczek and Ryan Schwartz represent appellant. Rhonda Patterson and Luke Pincelli were the assistant solicitors. R. 1.

On May 23, 2019, the jury found appellant guilty on both counts. R. 774, l. 22 – 775, l. 5. Judge Keesley sentenced appellant to thirty years' imprisonment for murder and five years concurrent for possession of a weapon during a violent crime. R. 784, l. 25 – 785, l. 3.

This appeal follows.

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); see State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence).

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. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007); State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

ARGUMENT

The court erred by ruling appellant could not be found immune from prosecution, pursuant to S.C. Code § 16-11-440(A) or the stand your ground provision of § 16-11-440(C), because he grabbed a shotgun from his kitchen to defend himself against the decedent, who was in appellant's backyard and was attempting to harm appellant with a dangerous object, since obtaining a firearm from his kitchen to protect his home, himself, and his family from a dangerous criminal should not have disqualified appellant from invoking Castle Doctrine immunity given the intent of the General Assembly in enacting it

Introduction

A Castle Doctrine hearing was held, in which defense counsel told the judge the defense was seeking immunity, pursuant to both S.C. Code § 16-11-440(A) and (C). R. 63, l. 18 – 64, l. 21. Defense counsel noted this was an unusual case because there was a "typical bond condition" – no contact order -- against appellant for having a criminal domestic violence of a high and aggravated nature charge pending. The alleged victim was his wife. However, Appellant Heirberone Foster and his wife had reconciled, and they had been living together for some time. Further, the decedent in this case was appellant's grown-up son, who had a criminal record, had an extensive substance abuse problem, who "hated the police," and who was living with his girlfriend two houses removed from appellant's house. He was intoxicated on the day of the incident, .20 blood/alcohol content, and Xanax in his system. Yet, the state's witnesses during the Castle Doctrine hearing, for the most part, testified that the decedent was not acting abnormally.

Appellant Foster was the first defense witness during the pre-trial hearing. He was fifty-eight years old at the time of trial. R. 65, ll. 13-23. Appellant told the judge he was from

Lexington county, and that he graduated from Airport High School. He had been living in Gaston for three years where he worked as a construction worker who "owned my own business." R. 66, ll. 1-19.

Appellant had to stop working construction when he "had a 22-pound sledgehammer fall off a 18-foot wall and hit me in the center of the back." R. 66, ll. 20-22. Because of the back injury, appellant had other health problems. Aside from that, he took medication for "[b]lood pressure, cholesterol medicine, pain medication. Different things." R. 66, l. 23 – 67, l. 7.

Appellant had been depressed and had many suicidal thoughts since he had shot and killed his adult son. R. 67, ll. 8-15. The shooting also caused his wife, a witness in his defense, to divorce him. R. 69, ll. 3-15.

Appellant testified he had attempted to protect his son, Will, when Will was growing up against gang members in the neighborhood. At the time of the fatal incident in this case, Will was living with his girlfriend, Leann Cotton, "two houses up from us." R. 70, l. 18 – 71, l. 14. Will's relationship with Leann was "toxic," according to appellant. They were always fighting "with her ex-boyfriends or boyfriends or babies' daddies or her." Appellant also shared that his Will had a serious substance abuse problem with mainly alcohol and marijuana. R. 72, ll. 4-5.

Appellant related that his son would become very aggressive -- "out of control" -- when drinking or using drugs. Appellant's various family members had called the police about Will's behavior when he was intoxicated in excess of twenty times. R. 73, l. 20 – 75, l. 5.

Appellant also testified that his decedent son in the past had "[c]hoked me, spit on me, hit me in the face with a pistol…" and stabbed him with a "steel hair pick." R. 75 l. 20 – 76, l. 9. Appellant confirmed that he did not call the police every time that his son became "out of control." R. 76, ll. 12-17.

At other times, such as in December 2009, when appellant's son had beaten him appellant had him arrested. R. 78, l. 24 – 79, l. 6. In July 2008, his son was arrested for fighting with a South Congaree police officer and for having a knife in his possession. R. 78, ll. 15-23. Appellant said he "begged" the police to try and help his son. R. 79, l. 19 – 80, l. 3. However, his son's problems continued as he began burglarizing houses with his brother, Bradley. R. 80, ll. 1-22. Appellant also experienced problems because his son became involved in gang activity in the neighborhood. R. 81, l. 20 – 83, l. 12.

Appellant related how his son had been placed on a trespass notice not to come to his house. His son "hated [the] police" which only exacerbated the problem. R. 89, l. 4 – 90, l. 10.

On the day of the fatal incident, appellant remembered he went to the grocery store with his mother at about eleven o'clock in the morning. He shopped for an entire month in advance, so they did not return to his house until about two-thirty in the afternoon. R. 90, l. 14 – 91, l. 17.

Will, the son, telephoned appellant asking permission to use appellant's grill for a cookout. Appellant readily agree to lend his grill to Will. R. 91, l. 11 – 92, l. 3. However, appellant recalled that Will needed help moving the grill because "he was too drunk." R. 92, l. 4 – 93, l. 3. As stated, Will had a blood-alcohol reading of .20, and he had Xanax in his system at the time of the shooting.

Appellant described how Leann Cotton's sister, Ronita Cotton, drove up near his house with her tire going flat and fluid "running out of the car." R. 93, l. 14 – 94, l. 7. Since Ronita did not have a spare tire, appellant gave her a spare tire he had laying around. He also promised to fix the fluid leak. R. 94, ll. 11-18.

At this time, Will was playing cards and drinking gin with his friend, Rodney, who was known as "Fat Bastard." R. 94, l. 22 – 95, l. 13. Appellant repeated that Will was already very drunk at this time.

Appellant testified that he put Ronita's car up on cement blocks so that "the jack wouldn't fall on me." R. 98, ll. 4-21. Appellant soon realized the transmission line was broken so "I told Will to call Leann and tell Leann to tell Ronita to get a hose and two clamps." R. 99, ll. 4-14. Will respondence was: "I ain't fucking with that." R. 99, ll. 15-24.

Appellant went back to his house and sat on his carport. In the meantime, Leann and Will then got in an argument about Will having girls over for the cookout. R. 100, l. 18 – 102, l. 6.

Will walked over to appellant's house during this argument, and he went inside appellant's house. Will was drunk, and he began beating on appellant's refrigerator, "trying to turn the refrigerator over, [he] knocks a hole in the sheetrock, and I'm standing there and I'm saying Will, stop." R. 102, ll. 7-12. "I told my wife Cathy that I wasn't gonna sit there and look at it, I wasn't gonna sit there and watch him tear up my house again no more. I'm not gonna do it." R. 103, ll. 3-6.

"[T]hat's when he [Will] turned around and he grabbed a level and said I'll kill you now and that's when he ran me out the back door with the level." R. 103, l. 8 – 104, l. 7. Appellant remembered Cathy became hysterical because of Will's out-of-control behavior after appellant escaped into his backyard. Will followed appellant out the backdoor, and "trying to get away from him" appellant walked to where his dog was sitting on the carport. Appellant knew Will was scared of the dog, which weighed 120 pounds, so appellant stayed near the dog. R. 105, ll. 7-23.

Will swung the level at appellant and at his dog. "Will stepped back, took off his shirt and took him a drink out of his [gin] bottle and I looked at him and I shook my head and he said there ain't no need you shaking your head because I'm gonna fuck you and Bradley [appellant's other son] up...That's when Cathy and Haley [appellant's daughter] and Leann came outside. Haley and Cathy came outside first trying to take the level from him. They couldn't." R. 106, ll. 1-10.

Will then grabbed a two-by-four that was laying in appellant's yard and came after appellant with it on appellant's carport. R. 106, l. 11 – 109, l. 14. Appellant said he was scared when Will came after him with the two-by-four. He was hoping his wife Cathy and Haley could get Will to settle down. However, "[t]hey couldn't stop him, nobody could stop him period, and they tried...And then that's when Will grabbed the two by four and he knocked Cathy down and when he knocked Cathy down, she said oh, my arm..." R. 109, l. 19 – 110, l. 9. [T]hat's when I went in the house and I got the shotgun and that's when I [brought] the shotgun and the shotgun went off..." R. 110, ll. 3-9.

The shotgun belonged to Will, but appellant remembered it had been placed by the freezer, where he had recently unloaded groceries. The freezer was just inside his kitchen door. Appellant said he merely went inside the kitchen and grabbed the gun, and "I walked outside and I pumped it." Appellant was was on his backsteps at the time, and the decedent was about eight feet away from him with the two-by-four in his hands. R. 113, l. 18 – 115, l. 8. Appellant testified he pumped the shotgun to scare Will, "to make him stop," "and it just went off ..." Appellant related that Will was threatening to kill him and wielding a two-by-four at the time. R. 113, l. 18 – 115, l. 23.

Appellant told the judge he had "walked away" from Will six to eight times that day to avoid trouble before this accidental shooting while he was armed in self-defense. R. 118, l. 7 – 120, l. 8.

On cross-examination, appellant said, "I was afraid for my life. R. 128, ll. 8-23. Appellant said when he went inside the house to grab his shotgun that he did not feel safe. He told the solicitor that he did not think about locking the door and hiding inside his house. R. 135, l. 2 – 142, l. 6. Appellant said he was acting in self-defense when he grabbed the gun. The shotgun went off by accident when appellant "racked it" on the outside steps. R. 145, ll. 2-15.

Appellant's wife, Cathy Foster Amaker, testified that appellant was living with her despite his prior arrest for criminal domestic violence of a high and aggravated nature. R. 150, l. 9 – 161, l. 10. Cathy thought the charges against appellant had been dropped. She said that even if the charges had not been dropped, that appellant had been living with her with permission in their house for some time. R. 160, l. 24 – 161, l. 10.

Appellant's mother, Nellie Foster, testified that Will Foster, appellant's son, was "really high" on the day of the shooting. This was early afternoon when she brought appellant back from the grocery store. R. 163, l. 17 – 167, l. 23.

Nellie related that Will got "mean and angry at everybody" when he drank. R. 167, ll. 10-16. After Nellie brought appellant back from the grocery store, she left to go to work. She was not there at the time of the fatal incident. R. 168, l. 4 – 171, l. 8.

Leann Cotton testified that she lived with appellant's son, Will. Will was the father of her daughter. R. 188, ll. 8-24. Leann remembered on that fatal day that she was arguing with Will, and that Will kicked appellant's grill over in anger. Leann maintained that appellant and Will began cursing at each other when Will knocked the grill over. R. 192, l. 8 – 195, l. 12.

Leann's testimony was that "they were both [appellant and Will] standing there holding sticks, yelling in each other's faces." She essentially blamed both men for fighting, although she downplayed Will's role. She claimed at one point that appellant had a shovel in his hand, and "It was a random stick that Will had in his hand. I don't see it there [in the exhibit] but it was not a two by four," she claimed. A two by four was found in the yard by the police after the shooting.

Leann testified, "Vernon [a friend] snatched it out of his [Will's] hand. I don't know if he walked off with it or threw it, but Vernon Blanding snatched it from him." R. 198, ll. 15-24. Vernon Blanding's statement to the police was later read into the record when he was found to be in hiding from service of a subpoena. Investigator Burt of the Lexington County Sheriff's Department said that Blanding told him that Will turned over appellant's grill and Will then picked up a two-by-four. Will followed appellant around the yard with the two by four. Blanding said he took the two-by-four away from Will while Will was attempting to hit appellant with it. R. 662, l. 4 – 663, l. 10. Will told Blanding he was not going to stop going after appellant regardless of what they did to try and stop him. R. 662, l. 21 – 663, l. 7.

Leann Cotton maintained after appellant went into the house after Will tried to hit him with the board that everything changed. She claimed and minimized: "[W]e kind of even [were] laughing about it, and we were getting ready to walk off before he [appellant] came back outside and shot him." R. 198, l. 15 – 199, l. 17.

Leann admitted she had pending criminal charges, drugs and otherwise with the Lexington Solicitor's Office at the time of this hearing. This was when she finally gave a statement to the solicitor's office and testified for them. R. 203, l. 5 – 205, l. 12.

Haley Foster, appellant's daughter, remembered the incident of that May 10, 2016 day. She testified that after Will was trying to hit appellant outside that appellant went inside the

house. Haley claimed that Will was no longer a threat to appellant at the time appellant shot her brother from the backstep outside the kitchen. R. 223, l. 17 – 227, l. 12. Haley did admit that a metal stick or pipe had been taken away from Will as he attempted to hit appellant with it before the shooting. R. 229, l. 11 – 233, l. 6.

Deputy Tyler Watford of the Lexington County Sheriff's Department testified for the state during the immunity hearing. He testified that appellant was found nearby in another yard after the shooting. Appellant was on his knees next to a chair as if in a "praying position." R. 234, l. 23 – 239, l. 5.

Watford recalled that appellant kept apologizing and repeating that the shooting was an accident. "The gun just went off."[1] R. 239, l. 12 – 244, l. 16. Appellant told Watford that he begged his son to leave him alone but that his son kept coming after him with a two-by-four in his hands. R. 245, l. 23 – 247, l. 15. The decedent had a pipe in his hand also when appellant got the shotgun, pumped it, and it went off by accident. R. 248, l. 1 – 251, l. 19.

Arguments

Defense counsel Zmroczek argued the defense had a 51% burden of proof given the preponderance of the evidence standard to show that appellant was entitled to immunity under subsection A or subsection C of the Castle Doctrine statute. She argued it was apparent that appellant was living in the house with his wife, Cathy in the house at the time. R. 253, l. 6 – 254, l. 21. He was in a place he had a right to be – his own home.

Under State v. Scott[2] and State v. Jones[3], the principal of law was that a person was not required "to retreat into their home, lock the doors and wait for the calvary. That was a direct

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[1] The defense asked for a jury instruction on accident which the judge did not charge. R. 699; r. 734; r. 741.

[2] State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018)

quote from the judge in that order, which was affirmed by the Supreme Court as modified [in State v. Scott] . . ." Counsel noted that "The law does not require that he [appellant] lock the doors and wait for him [the attacher] to find another weapon in the yard or in the house to – to come after him." R. 253, l. 6 – 254, l. 21.

Counsel reminded the judge that appellant's son had a blood-alcohol reading of .20, and the evidence of his "out of control" behavior when he drank a lot. Counsel argued that appellant had armed himself in self-defense. The fact the gun going off by accident had never been considered by our courts as a reason to disqualify a defendant from a self-defense charge. Counsel correctly cited to State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (2010); State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), and State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) in support of her position. R. 256, l. 7 – 258, l. 3.

Counsel noted that the evidence showed appellant's decedent son "just kept coming, he just kept coming..." "He was acting in self-defense when the gun accidentally discharged, which is certainly proper under the law, and in this case, Your Honor, we certainly believe we have met our burden by a preponderance of the evidence that he is entitled to immunity under the act." R. 258, ll. 3-12.

The solicitor argued that appellant did not have a right to be at his house because there was "still an active court order" as a result of the domestic violence arrest. Appellant, the solicitor maintained, did not have the right to "stand his ground" because it was "not even his residence." R. 258, l. 17 – 259, l. 24.

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3 State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016)

The solicitor said that Leann Cotton and Haley Foster testified they "thought that everything was over, Your Honor, that there was a sufficient cooling off period, they were going on their merry way. The Defendant went inside the residence that he was not even supposed to be at, stayed there for moments, Your Honor, before reentering outside with a deadly weapon . . . he said it was all an accident. That is not the purpose of this castle doctrine statute, Your Honor." R. 260, ll. 6-25.

The solicitor also maintained that subsection (C) of the statute, S.C. Code §16-11-440 on the right to stand your ground did not apply. She again reasoned appellant did not have a right to be at the house. The solicitor also claimed that appellant could not maintain that he feared for his life or feared sustaining great bodily injury from the decedent wielding a two-by-four. R. 261, l. 1 – 263, l. 9.

In response, defense counsel argued that appellant had armed himself in self-defense and the shooting being an accident did not preclude appellant from being protected by subsection (A) and subsection (C) of the Castle Doctrine statute, S.C. Code §16-11-440. R. 263, l. 11 – 264, l. 25.

The solicitor concluded by maintaining that when appellant went inside to grab the gun, the decedent and the others were allegedly in his yard talking and laughing. R. 265, ll. 3-9.

Ruling

The judge ruled from the bench and did not issue a written order because he said there was a "unprecedented situation as far as I know here in Lexington County in that there is a death penalty case going on here that is probably going to be one of the longest cases ever tried in criminal court in South Carolina, and involves the alleged killing of five children [State v.

Timothy Jones, Jr.]." The judge said he would therefore rule from the bench and not do a written order as preferred by this Court and the Supreme Court. R. 266, l. 10 – 267, l. 3.

The judge first noted that our Supreme Court had asked the legislature to revisit the immunity statute as there were too many ambiguous factors to be interpreted by the Court. R. 267, ll. 4-13. The judge ruled that *"it does not appear to me that this case presents itself as one for which the act was intended."* R. 267, l. 4 – 276, l. 19. (emphasis added).

The judge said under S.C. Code § 16-11-440(A)(1) that it had not been proven that there was a forcible entry into appellant's residence. The judge also stated that it had not been proven that appellant "was underneath the roof." He offered that there was no evidence that the decedent was unlawfully, forcibly entering the residence. The judge said there must be "a current existing threat." The threat could not be "a previous threat," and the judge apparently reasoned the threat here had ended. R. 267, l. 4 – 276, l. 19.

The judge also ruled that appellant was not entitled to immunity under subsection (C), which provided a person who was not engaged in unlawful activity on his own property could be immune from prosecution when he stood his ground. The judge ruled that appellant had a right to be at the home regardless of the bond condition or the no-contact order. Nonetheless, the judge ruled that there was not enough evidence to show that appellant was under any threat of great bodily harm or death when he shot his decedent son. The judge reasoned there was "nothing more than speculation" of imminent danger to appellant. R. 267, l. 4 – 276, l. 19.

The judge said this would have been a different situation if the decedent had a gun, where the decedent could have shot through a door or window after appellant. The judge said the decedent not having a gun that day played a major reason in his ruling that appellant was not entitled to immunity. R. 267, l. 4 – 276, l. 19.

Discussion

S.C. Code § 16-11-440(A) provides in relation to this case that,

> A person is presumed to have a reasonable fear of imminent peril or death or great bodily harm...if the person: (1) against whom deadly force is used is in the process of unlawfully and forcibly entering...dwelling [or] residence...(2) and [the person] 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 § 16-11-440(C), which also applies to this case, states,

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily harm to himself or another person or to prevent the commission of a violent crime as defined in § 16-1-60.

Defense counsel correctly relied upon State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018), in arguing that appellant was entitled to immunity, pursuant to S.C. Code § 16-11-440(A), the Castle Doctrine. In Scott, the defendant went out onto his porch with his roommates gun, waiting for his children to return home after they had telephoned him and informed him that they were being chased in their car by angry armed teenagers. Scott left his porch and went back inside his house.

When the automobile containing Scott's children turned into the driveway, Scott shot at the car or cars that were following his teenage children because he correctly thought that they were armed and dangerous. There was evidence Scott heard a shot or shots being fired. When Scott fired his gun at the vehicles following his teenage children, one of the young men in the car was hit and killed. Our Supreme Court held that Scott was entitled to immunity under the Castle Doctrine. The Supreme Court in Scott cited State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263,

266 (2013), which stated, "§ 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the act."

The Supreme Court wrote that there were four elements that must be established to justify the use of deadly force in self-defense, as enunciated in State v. Dickey, 394 S.C. 491-499, 716 S.E.2d 97, 101 (2011). These four elements also must be established to put forth a successful case of immunity.

The defendant must show that he was "[(1)] without fault in bringing on the difficulty; (2) the defendant...actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent person of ordinary firmness and courage would have entertained the same belief...; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did in the particular instance." See State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (Defendant entitled to immunity where the angry decedent returned to appellant's house and was beating on his door -- seemingly trying to enter -- after being ordered to leave).

Here, appellant was on his own property at the time he shot and killed the decedent. The evidence showed that the decedent had wielded a metal level, which apparently contained flammable liquid, at appellant while using it as a weapon. Further, there was evidence the decedent attempted to hit appellant and his dog with a two-by-four. Both devices were certainly being used as deadly weapons at the time. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (whether a hand or fist was a deadly weapon was a question of fact for the jury).

Appellant was being attacked on his carport or in his backyard. This was right outside his backdoor. As such, appellant had no duty to retreat. As defense counsel correctly argued, the trial judge in State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018), had ruled that Scott did not have to cower inside his house with the doors locked and wait for the "calvary to come" and save him. Appellant had the right to go into his own kitchen and retrieve the shotgun when he was being attacked in the curtilage of his own property. Appellant retrieved the shotgun, and it discharged by accident, killing the decedent. This was unfortunate, it was tragic, but it was in self-defense.

Appellant testified he feared for his life at the time he was being attacked. To disqualify appellant from immunity merely because he went inside to retrieve his shotgun for protection would respectfully be a misreading of the intent of the General Assembly as to the immunity act. The judge here ruled it did not appear to him that this case presented a case for which the immunity act was intended. That was an error of law. The General Assembly did not intend for a person to have to retreat into their own home and cower inside until the aggressor chose to leave his property. Appellant had the right to meet force with force, and the brief interlude in which appellant had to obtain a shotgun from his kitchen for the protection for himself, his family, and his habitation did not disqualify him from immunity. That could not have been the intent of the General Assembly when it enacted the Castle Doctrine and stand your ground provision of S.C. Code § 16-11-440(C).

In State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), the Supreme Court held the defendant was entitled to immunity where she stabbed and killed her boyfriend with whom she was cohabitating. The boyfriend became mad at Jones and attacked her outside of the apartment

they shared. Jones retreated inside the apartment, and she grabbed a nearby knife to use as a weapon in the event the violence against her began again.

When Jones's boyfriend attempted to hit her again, or Jones reasonably believed he was going to hit her again, the Supreme Court reasoned Jones had no duty to retreat because she was attacked on her own property and she was immune from prosecution, pursuant to S.C. Code § 16-11-440(C), when she stabbed and killed her boyfriend. As to the rationale for the stand your ground provision of S.C. Code § 16-11-440(C), the Supreme Court noted that a person who protects himself or herself against a cohabitant is still entitled to the protection of the stand your ground provision, where they are defending themselves on the property they share with their attacker. See, also, Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992)(the defendant could be deemed to be acting in self-defense when she killed her batterer while he slept pursuant to the battered woman's syndrome). The Supreme Court reasoned that since Jones was acting in self-defense at the time she stood her ground, she was entitled to immunity from prosecution, pursuant to S.C. Code § 16-11-440(C). The fact that want Jones went inside and retrieved the knife after being attacked outside did not disqualify her from immunity.

The judge here erred by reasoning appellant was not standing his ground because he "changed his ground" by going into the kitchen to retrieve the shotgun. Appellant was not obligated to give himself the Hobson's choice of (1) facing the much younger decedent, who was armed with a two-by-four or a metal level, and risk being killed while unarmed; or, (2) hoping to retreat inside his house where he would cower until the decedent hopefully decided to leave or he could get the police to intervene in time.

There was evidence the decedent had gone into appellant's house earlier that day and attempted to turn his refrigerator over. The decedent was drunk and on drugs, and there was an

abundance of evidence the decedent became "out of control" when under the influence of alcohol and drugs.

Appellant respectfully did not lose his right to stand his ground by going inside his kitchen, retrieving his gun, and coming back outside onto the curtilage of his own property where the decedent was shot in self-defense while appellant stood his ground pursuant to S.C. Code § 16-11-440(C). The trial judge's ruling that appellant was not entitled to immunity in this case, respectfully, renders the General Assembly's intent that a person has the right to defend himself or herself on their own property without practical meaning. This Court respectfully should vacate appellant's convictions and issue an order ruling appellant is entitled to immunity, pursuant to S.C. Code § 16-11-440(A) and 16-11-440(C).[4]

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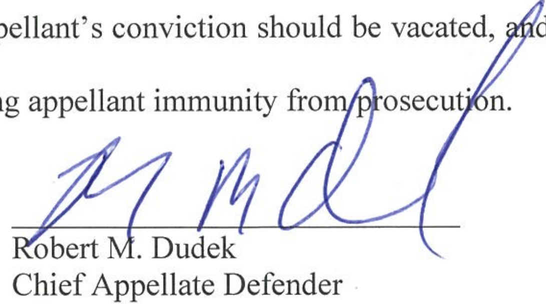
[4] Appellant submits that S.C. Code § 16-11-440(B)(2), which exempts a person "sought to be removed" where that person is child in the lawful custody or under the lawful guardianship of the person seeking immunity does not apply to this case. The decedent was not living on appellant's property at the time. He was an emancipated intoxicated adult son who had been to prison, and he was attacking appellant on appellant's property. The General Assembly did not intend that a person, such as appellant, would not be entitled to immunity from prosecution merely because his adult, emancipated son, drunken son, who had become a criminal, chose to attack his father on his father's property. Regardless, this "exemption" only applied to § 16-11-440(A) and not § 16-11-440(C).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be vacated, and this case remanded for the issuance of an order granting appellant immunity from prosecution.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Aug 31 2020
SC Court of Appeals

Appeal from Lexington County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HEIRBERONE HEAVA FOSTER,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Heirberone Heava Foster states:

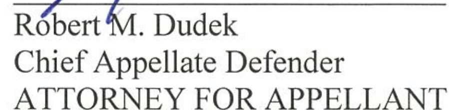
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William P. Keesley, which was held on May 20 - 23, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Heirberone Heava Foster.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 31st day of August, 2020.

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THE STATE, RESPONDENT,

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HEIRBERONE HEAVA FOSTER, APPELLANT

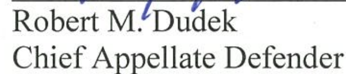
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments
(2) Entire trial transcript dated May 20-23, 2019

I certify that this designation contains no matter which is irrelevant to this appeal.

August 31, 2020



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
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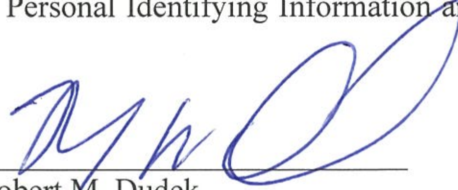
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

August 31, 2020.



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