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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County

The Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

Respondent,

v.

XZAREIRA OKEVIS GRAY,

Appellant.

Appellate Case No. 2019-001109

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court abused its discretion in denying immunity from prosecution where two eyewitnesses and a surveillance video discredited appellant's claim of self-defense.

II. Whether the circuit court abused its discretion in admitting a surveillance video where a witness with knowledge testified to its authenticity, its distinctive characteristics confirmed its authenticity, and its content discredited appellant's claim of self-defense.

III. Whether the circuit court abused its discretion in denying appellant's motion for a new trial where appellant failed to offer any competent evidence of a coerced verdict and only sought a hearing in order to compel inadmissible juror testimony.

STATEMENT OF THE CASE

In May 2018, the Greenwood County Grand Jury returned indictments against Xzareira Okevis Gray (appellant) for murder and possession of a weapon during the commission of a violent crime. (2018-GS-24-0829 and 0830). The State alleged that appellant shot and killed Demetrius "Meatball" Fuller (victim). (2018-GS-24-0829). The case proceeded to trial on May 6, 2019 before the Honorable Frank R. Addy. (Tr. 1). Attorneys Janna Nelson and Shane Goranson represented appellant at trial. Assistant Solicitors Joshua Thomas and Carson Penney prosecuted the case.

Prior to trial, appellant sought immunity from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et. seq.* (Tr. 43, l. 18-23). After a full hearing on the issue, the circuit court denied the motion from the bench. (Tr. 119, l. 11-12). The jury ultimately found appellant guilty as charged on both counts. (Tr. 603, l. 23; 604, l. 1). The court sentenced appellant to thirty-five years for murder and five years, consecutive, for possession of a weapon during the commission of a violent crime. (Sent. Tr. 15, l. 14-23)

Appellant subsequently moved for a new trial, alleging the jury may have felt "undue pressure to render a verdict." (MNT 2). In support of his motion, appellant attached a printout of a social media post from one of the jurors. (MNT Ex. A). The circuit court denied appellant's motion in a written order. (Order 2). The court held that appellant alleged insufficient grounds to warrant a hearing on the matter. (Order 2). This appeal follows.

STATEMENT OF FACTS

Murder of Demetrius "Meatball" Fuller

Officer Kirby Claphan of the Greenwood Police Department was on patrol during the early morning hours of August 26, 2017. (Tr. 162, l. 11). Near the end of his shift, he pulled into the city maintenance shop to put gas in his patrol car. (Tr. 162, l. 24-25; 166, l. 8-9). While at the shop, he heard a gunshot that "sounded real close." (Tr. 163, l. 1). In fact, Officer Claphan believed that the gunshot came from Gray Street, which was "directly behind" him. (Tr. 163, l. 2-3; 176, l. 1; St. Ex. 6). He and another officer immediately drove towards the sound of gunfire. (Tr. 163, l. 3-4).

When Officer Claphan drove down Gray Street, he saw four men standing outside a house at 323 Gray Street. (Tr. 163, l. 16-17; 173, l. 9-20). As he passed by the house, a woman flagged him down and directed him one street over. (Tr. 163, l. 18-23; St. Ex. 6). Once there, Officer Claphan found Demetrius Fuller (victim) lying on the ground outside an apartment. (Tr. 164, l. 15-21; St. Ex. 10). The victim was not wearing a shirt and had a gunshot wound to the stomach. (St. Ex. 11-12; Tr. 165, l. 203). He was also wearing a paper wristband indicating he had been to the Getaway Bar and Grill. (Tr. 210, l. 7-11; St. Ex. 11-12). The victim was asking for water and mumbling something unintelligible. (Tr. 194, l. 19-22).

Paramedics arrived on scene and realized that the victim was fighting for his life. (Tr. 216, l. 13-24). As they rushed him to the hospital, he went into cardiac arrest. (Tr. 217, l. 1-2). The victim died in the emergency room. (Tr. 323, l. 23-24). An autopsy would later confirm that the cause of death was a single gunshot wound to the abdomen. (Tr. 342, l. 18). The bullet pierced a major artery leading to the victim's lower body, causing him to bleed to death. (Tr. 342, l. 6-23).

The autopsy also revealed that the victim suffered no other significant injuries.[1] (Tr. 340, l. 7-8). In particular, there was no bruising on the victim's hands, indicating that he had not thrown a punch.[2] (Tr. 341, l. 12-13). Additionally, there was no alcohol or drugs in the victim's blood, which meant he was not under the influence when he died.[3] (Tr. 411, l. 20-25; 414, l. 5).

At the hospital, a detective spoke with the victim's family in hopes of identifying people who witnessed the shooting. (Tr. 348, l. 1-3). The detective learned that Raymond Kennedy, who was at the hospital, saw what happened. (Tr. 348, l. 6-11). Kennedy explained that on the night of the murder he was hanging out at Ricky Grant's house, which is on Gray Street. (Tr. 219, l. 5-11). Appellant, appellant's brother, and the victim were also there. (Tr. 219, l. 13-15). Later that evening, appellant, the victim, and Grant decided to go to a club. (Tr. 219, l. 18-20). All three men left in the same car. (Tr. 220, l. 3). Appellant and Grant subsequently returned to the house without the victim. (Tr. 220, l. 5-6).

About an hour after they returned, Kennedy saw the victim walking down Gray Street towards the house. (Tr. 220, l. 15-16). The victim was upset that his gun was missing and went inside. (Tr. 222, l. 12-16; 223, l. 4-6). When he entered Grant's house, the victim repeatedly asked appellant if he had his gun. (Tr. 222, l. 5-23). Appellant denied having the victim's gun, and the two men began to argue. (Tr. 222, l. 23; 223, l. 1). Grant told them to take the argument outside, so they did. (Tr. 223, l. 7-9). Appellant's brother tried to calm everyone down, but the argument continued on the front porch. (Tr. 225, l. 11-23).

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[1] The pathologist did note a scrape on the victim's right knee. (Tr. 340, l. 8-9).

[2] According to the forensic pathologist, the absence of any bruises to the hands or fingers also meant that no one had "tight control over his hands." (Tr. 341, l. 12-13).

[3] The toxicologist noted there was alcohol in the victim's ocular fluid, indicating that the victim was in the "postabsorptive phase of consuming alcohol." (Tr. 413, l. 4-6).

Once they were outside, appellant pushed the victim off the porch and yelled, "I ain't got your gun." (Tr. 226, l. 1-6). Nevertheless, the victim "kept asking about the gun," and they started "tussling" in front of the house. (Tr. 226, l. 10-20). The two men briefly "locked up" in the front yard before the victim fell to the ground. (Tr. 227, l. 1-7). Kennedy saw the victim on the ground, heard a gunshot, and looked up at appellant. (Tr. 227, l. 5-24). Appellant was holding a gun and subsequently ran behind the house. (Tr. 227, l. 24; 228, l. 7). The victim was able to get up and said, "the MF shot me for real." (Tr. 227, l. 7-8). Although the victim tried to run for help, he collapsed on the next street over. (Tr. 228, l. 16-18).

After speaking with Kennedy, the detective traveled to Ricky Grant's house to further investigate. (Tr. 348, l. 18-21). Grant lives at 323 Gray Street. (Tr. 259, l. 6). When the detective arrived, he found a shell casing in the front yard. (Tr. 348, l. 23). Additionally, an individual later reported that a gun was discovered in some bushes behind the house. (Tr. 291, l. 19-22; 353, l. 12-21). SLED compared the gun to the shell casing found in the yard and the bullet removed during the autopsy. (Tr. 422, l. 9-22). The gun matched both. (Tr. 422, l. 11-13; 423, l. 1-5).

While collecting evidence in Grant's yard, the detective noticed that the neighbor across the street had several surveillance cameras. (Tr. 351, l. 1-10). The neighbor explained that he regularly checks his cameras to ensure they are constantly recording footage. (Tr. 144, l. 21-25; 145, l. 10-13). One of the cameras points towards Grant's house. (Tr. 144, l. 11-18; 351, l. 8-10). The neighbor allowed the detective to review the footage captured earlier that morning. (Tr. 146, l. 15-21). Although the time stamp on the surveillance system was not accurate, the detective compared the time that was showing on the live feed with the time on his cell phone. (Tr. 351, l. 24-25; 352, l. 1-7). Once he determined how much the time stamp was off, the detective rewound

the footage to the approximate time of the murder. (Tr. 352, l. 2-7). When the detective saw police cars ride through, he realized that the camera captured footage from the murder. (Tr. 352, l. 2-7).

In addition to obtaining surveillance footage, the detective interviewed Ricky Grant. (Tr. 356, l. 16). Grant confirmed that he, appellant, and the victim rode over to The Getaway Bar and Grill. (Tr. 260, l. 7-22). When they got to the club, the victim hid a firearm in some bushes across the street. (Tr. 261, 1-5). According to Grant, guns are not allowed inside the Getaway Bar and Grill. (Tr. 261, l. 25). Although Grant and the victim went inside the club, appellant stayed in the parking lot. (Tr. 261, l. 4-10). About an hour later, Grant and appellant went back to the house. (Tr. 262, l. 15-18). They left the victim at the club. (Tr. 262, l. 21).

The victim subsequently returned to Grant's house and said he could not find his gun. (Tr. 264, l. 10-17). When he asked appellant about the missing gun, the two got into an argument. (Tr. 264, l. 13-17). As the argument intensified, Grant told them to take it outside. (Tr. 264, l. 22-23). Appellant and the victim went outside, while Grant stayed in the house. (Tr. 264, l. 25). About a minute later, Grant heard a gunshot and ran to the front door. (Tr. 265, l. 2). He opened the door and saw the victim running down the street holding his stomach. (Tr. 265, l. 5-7). Appellant appeared to be in shock and tried to come inside the house. (Tr. 265, l. 11-12). Grant refused to let him in and never saw him again that night. (Tr. 265, l. 15-18).

After interviewing these witnesses, the detective obviously identified appellant as a suspect in the murder. (Tr. 354, l. 25). Law enforcement tried to locate appellant in Greenwood, but could not find him. (Tr. 355, l. 4-5). Ultimately, law enforcement arrested appellant at a family member's apartment in Columbia. (Tr. 355, l. 5-11).

Immunity Hearing

Prior to trial, the circuit court held a hearing to consider appellant's motion for immunity from prosecution. Appellant testified that two weeks before the murder, he and the victim's brother got into a fight at Grant's house. (Tr. 48, l. 3-4; 55, l. 12-13). Apparently, the victim's brother had a gun and chased appellant into the house. (Tr. 55, l. 12-16). Twenty minutes later, the victim arrived and took the gun from his brother. (Tr. 55, l. 12-16; 61, l. 2-3). Following this incident, appellant heard a rumor that the victim was on Gray Street looking for him. (Tr. 55, l. 23-25). Appellant subsequently went to Gray Street to investigate, but could not find the victim. (Tr. 56, l. 4-7). Nevertheless, other individuals told appellant that the victim had been there earlier with a gun. (Tr. 56, l. 5-10).

It was against this backdrop that appellant recounted the night of the murder. (Tr. 46, l. 9-20). As appellant and Grant were about to drive to the club, the victim knocked on the car window and asked to come along. (Tr. 47, l. 1-5). Grant looked at appellant to see if it was okay, and appellant reluctantly agreed. (Tr. 471, l. 3-7). When they got to the club, Grant and the victim went inside. (Tr. 47, l. 13) Appellant remained in the parking lot and drank a few beers with some friends. (Tr. 47, l. 15-16). After some time, Grant returned to the car and the two went home. (Tr. 47, l. 17-23). The victim was still inside the club when they left. (Tr. 49, l. 2).

The victim later returned to Grant's house on foot. (Tr. 49, l. 2-13). Appellant testified that the victim was walking down the street so loudly that he could hear him from inside the house. (Tr. 49, l. 11-13). When the victim got to Grant's house, he allegedly confronted appellant about the prior altercation with his little brother. (Tr. 49, l. 14-17). According to appellant, the victim said, "I still owe you for hitting my brother in the mouth." (Tr. 52, l. 7-8). Grant told them to go outside because they were making too much noise. (Tr. 49, l. 17). Appellant went outside and

started to walk home, but he turned around because Grant had promised to give him a ride. (Tr. 47, l. 22-23; 49, l. 20-23). Appellant went back inside the house, and the victim followed him. (Tr. 49, l. 22-24). The argument continued, and Grant again asked them to leave because they were being too loud. (Tr. 49, l. 24-25).

Appellant testified that when he went back outside a second time, the victim "swung and hit me. When he hit me, we got to tussling."[4] (Tr. 50, l. 5-6). The two began "tussling" for about thirty seconds. (Tr. 50, l. 6). During the scuffle, appellant allegedly saw the victim reach for a gun in his waistband. (Tr. 50, l. 10-15). Appellant let go of the victim, grabbed the gun, and stumbled backwards. (Tr. 50, l. 14-17). As appellant fell back, he could see the victim rushing towards him in a "rage." (Tr. 57, l. 14-15; 58, l. 8-11). Appellant shot the victim as he was falling backwards.[5] (Tr. 53, l. 17). He claimed that if he did not grab the gun, the victim would have used it against him. (Tr. 56, l. 20-24).

On cross-examination, the solicitor elicited two key points. First, appellant denied that the argument arose over the victim's missing gun. (Tr. 63, l. 4). Rather, appellant maintained that the victim was still upset about the previous altercation. (Tr. 63, l. 5). Appellant even made clear that prior to the scuffle, he never saw the victim with a gun that night. (Tr. 69, l. 25). Second,

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[4] Appellant's pre-trial testimony was somewhat inconsistent on this point. On direct exam, he testified that when he went outside, the victim "swung and hit me." (Tr. 50, l. 5). Later during direct exam, he stated that the victim "*tried to hit me* or whatnot." (Tr. 53, l. 5-6)(emphasis added). On cross-examination, the solicitor pointed to a photograph and asked where the fight started. (Tr. 64, l. 7-9). Appellant responded, "he *hit me* right here. And we started tussling right here." (Tr. 64, l. 10-11)(emphasis added).

[5] Appellant was somewhat inconsistent on this point too. At first, he testified that "I stumbled back and the gun fired, fired the gun." (Tr. 50, l. 10-11). He later clarified that "when I was falling back, I shot." (Tr. 57, l. 4-5). When asked on cross-exam whether the gun fired on accident, appellant responded, "It was a [sic] accident because I was scared at the time. Like I didn't mean to do it. Like I'm just being real. It was a [sic] accident to me." (Tr. 68, l. 6-8).

appellant denied that his brother was at Grant's house that night. (Tr. 62, l. 20-24). The State would present evidence that contradicted both of these assertions.

Raymond Kennedy and Ricky Grant each testified that the argument arose over the victim's missing gun. (Tr. 81, l. 7-21; 99, l. 1-25). Kennedy explained that "when [the victim] came back he asked about a gun...he was angry about his gun – about his gun being missing." (Tr. 81, l. 7-12). According to Kennedy, the victim "kept asking about his gun," and appellant "kept telling him he didn't have the gun." (Tr. 82, l. 17-18). Kennedy further testified that the victim accused appellant of being the only one who knew where he put the firearm. (Tr. 82, l. 11-14). Ultimately, "they got to scuffling and the gunshot went off." (Tr. 82, l. 18-19). Appellant's brother was standing right beside appellant when he pulled the trigger. (Tr. 90, l. 17-25; 91, l. 1-4).

Grant corroborated that account. He testified that before entering the club, the victim hid his gun in some bushes across the street. (Tr. 98, l. 13-25). When the victim returned to Grant's house, he asked appellant for his gun back. (Tr. 98, l. 9-10). According to Grant, an argument arose after appellant denied having the victim's gun. (Tr. 99, l. 8). The victim accused appellant of taking it. (Tr. 99, l. 20). While the two were arguing, Grant even told appellant, "if you got his gun, give it to him." (Tr. 108, l. 7-8). Grant later heard gunfire when the two went outside. (Tr. 100, l. 10-13).

In addition to offering Kennedy and Grant's testimony, the State introduced the neighbor's surveillance footage. (Tr. 77, l. 1-2). The State argued that appellant's version of events did not match the surveillance footage. (Tr. 113, l. 7-9). Specifically, the footage shows that the victim was not rushing towards appellant, as appellant claimed. (Tr. 113, l. 7-13). The video also shows that a third individual, likely appellant's brother, is standing beside appellant as he fires the gun. (Tr. 113, l. 14-23). Although the State conceded that appellant was in a place that he had a right

to be, it maintained that appellant could not otherwise establish the remaining elements of self-defense. (Tr. 112, l. 17-19). In assessing that argument, the court zeroed in on the cause of the dispute. The State confirmed its theory of the case was that the argument "was about a gun." (Tr. 115, l. 25).

The circuit court ruled from the bench. In announcing its ruling, it noted "the question before the Court is whether the defendant in this case has demonstrated by the preponderance of the evidence that there -- that he is entitled to protection under the Castle Doctrine." (Tr. 117, l. 3-5)). The court found that appellant was an invited guest, and therefore, had a right to be where he was. (Tr. 117, l. 6-7). Nevertheless, the court held that "based on the varying evidence...and passing upon the credibility of the witnesses who have testified, the Court finds that the defendant has not met his burden of proof." (Tr. 117, l. 22-25).

In response, defense counsel pointed out that "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity," citing State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). (Tr. 118, l. 11-13). Instead, the "court must sit as fact finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." (Tr. 118, l. 13-15). The court acknowledged the argument, but noted that the other witnesses contradicted appellant's testimony. (Tr. 118, l. 17-25, 119, l. 1-2). According to the court, had the other witnesses corroborated appellant's testimony, it "might be more inclined to say that the defense has met the burden of proving it by the preponderance of the evidence." (Tr. 118, l. 24-25; 119, l. 1-2). But "since there is so much conflicting evidence, these matters are best left to the finders of fact, namely the trial jury." (Tr. 119, l. 6-8). As such, the court denied appellant's motion for immunity from prosecution. (Tr. 119, l. 11-12).

Appellant's Trial

Appellant took the stand in his own defense. Compared to his pre-trial testimony, there were subtle differences in his story. For example, during the immunity hearing appellant testified that that the victim punched him when he went out on the front porch.[6] (Tr. 50, l. 5-6). However, appellant told the jury that the victim "swung and he like missed. He swung, but he really missed me. And so we get locked up and come off the steps."[7] (Tr. 450, l. 16-17).

Appellant also added details to his story. He testified that he and Grant were laughing at the victim when the victim returned to the house. (Tr. 446, l. 18). The victim took offense to the laughter and confronted appellant about the prior altercation. (Tr. 447, l. 3-4; 466, l. 2-7). Additionally, appellant told the jury that the victim was wearing either a shirt or a tank top during the scuffle. (Tr. 468, l. 15-16). Like his pre-trial testimony, appellant claimed he wrestled the gun away from the victim, stumbled back, and fired the weapon. (Tr. 451, l. 1-7). However, appellant added that his eyes were closed when he fired, so he was unaware if the victim was hit. (Tr. 456, l. 1-2). After the shooting, appellant took a cab all the way to his sister's house in Columbia. (Tr. 456, l. 4-5; 472, l. 18).

The State argued that appellant's story did not align with the evidence presented. According to the solicitor, if the argument arose because the victim did not have his gun, then it "takes away [appellant's] self-defense story." (Tr. 534, l. 9). In other words, if the victim is looking for his gun at the start of the fight, he likely does not have it tucked in his waistband, as

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[6] As noted above, appellant's testimony at the immunity hearing was somewhat inconsistent on this point. See Footnote 4 above.

[7] After appellant testified pre-trial, the forensic pathologist testified during the State's case-in chief. The pathologist noted the absence of any bruises on the victims' hands or fingers. According to the pathologist, the absence of bruising indicated that the victim did not punch anyone. (Tr. 341, l. 12-13).

appellant claimed. Additionally, the solicitor noted that the victim was not wearing a shirt when the police found him, so nothing would have concealed a firearm tucked in his waistband. (Tr. 522, l. 13-25). The victim also did not have any alcohol in his blood, indicating he was not drunk and looking to pick a fight. (Tr. 521, l. 12-24). The absence of any bruising to the victim's hands also confirmed that he did not punch anyone. (Tr. 523, l. 22). Finally, the solicitor noted that the surveillance video reveals that the victim was a safe distance away and not charging anyone when appellant fired the weapon. (Tr. 527, l. 21-24).

The jury began deliberations at 12:40 pm. (Tr. 586, l. 13). At 5:43 pm, the court received a note that "some jurors are concerned about kids at home." (Tr. 597, l. 1, 23-24; Ct. Ex. 5). The court instructed the jurors that they could call home to check on their families, but otherwise directed them to continue. (Tr. 599, l. 10-16). At 8:58 pm, the court received another note asking for a break in order to use the phone and smoke. The note also suggested the jury was "getting a little bit deadlocked in the opinion of the foreperson." (Tr. 601, l. 9-10). Specifically, the note read that "we are pretty deadlocked at 10:2." (Ct. Ex. 6).

The court offered the jury a choice between continuing to deliberate that evening and reconvening the following Monday. (Tr. 601, l. 23-25; 602, l. 1-11). The jury chose to continue deliberations and reached a verdict almost two hours later. (Tr. 602, l. 23; 603, l. 1-2). At 10:50 pm, it found appellant guilty as charged on both counts. (Tr. 602, l. 23; 603, l. 21-25; 604, l. 1). At appellant's request, the court polled the jurors individually. (Tr. 604-611). The verdict remained unchanged. (Tr. 604-11).

Given the late hour, the court deferred sentencing until the following week. (Tr. 610, l. 3). The parties reconvened on May 14, 2019. (Sent. Tr. 1). At sentencing, the court noted appellant's lengthy criminal history. (Sent. Tr. 14, l. 16). It sentenced appellant to thirty-five years for murder

and five years for possession of a weapon during the commission of a violent crime. (Sent. Tr. 15, l. 14-22). The court ordered the two sentences to run consecutively. (Sent. Tr. 15, l. 22-23).

Post-Trial Motion

On May 23, 2019, appellant filed a motion for a new trial. (MNT 1). In it, he alleged that the jury may have been unduly influenced in reaching its verdict. Specifically, appellant noted that the jury deliberated until almost 11:00 pm without any dinner. (MNT 1). Additionally, appellant offered a Facebook post from one of the jurors that read "Wtf...just getting out of court frm [sic] all day....14 long hrs!!!" (MNT Ex. A). In response to a comment on the post, the juror replied, "general sessions murder trial...just couldn't leave without a verdict." (MNT Ex. A). According to appellant's motion, the juror did not respond to an investigator's attempt to make contact with her. (MNT 1-2). Appellant requested a hearing so that the court could question each juror whether they felt undue pressure to reach a verdict. (MNT 2).

The court denied the motion without a hearing. (Order 1). First, the court noted that although the jury suggested it was struggling to reach a verdict, it did not indicate it was deadlocked. (Order 1). As such, the court never gave an *Allen* charge.[8] Second, the court held that a lengthy deliberation, standing alone, was insufficient to warrant an inquiry into the nature of the deliberations. (Order 1). Third, the court assessed that the nature of the inquiry would likely be improper because it would cause the jurors to reveal the subject matter of their deliberations. (Order 2). According to the court, the Facebook post did not provide cause to justify the drastic step of questioning all twelve jurors. (Order 2). Finally, the court noted that it ordered the jury a late lunch. Although supper was not provided, the jury room was stocked with drinks, crackers,

[8] Allen v. United States, 164 U.S. 492 (1896).

and other snacks. (Order 2). The court also declined to eat dinner while the jury deliberated. (Order 2).

STANDARD OF REVIEW

Pretrial Immunity Hearing

The standard of review for a pretrial determination of immunity is abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). In applying this standard, appellate courts do not "reweigh the evidence or second-guess the trial court's assessment of witness credibility." State v. Douglas, 411, S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014). Rather, "[a]n 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." Id. at 316, 768 S.E.2d at 237 (quoting State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)).

Admission of Evidence

The standard of review for the admission or exclusion of evidence is an abuse of discretion. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

Denial of Post-Trial Motion

"A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion." State v. Dean, 427 S.C. 92, 101, 828 S.E.2d 243, 248 (Ct. App. 2019)(quoting State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007)).

ARGUMENT

I. THE CIRCUIT COURT'S PRE-TRIAL RULING ON IMMUNITY SHOULD BE UPHELD BECAUSE THE COURT APPLIED THE CORRECT BURDEN OF PROOF, RESOLVED CONFLICTING EVIDENCE, AND REACHED A CONCLUSION WITH AMPLE EVIDENTIARY SUPPORT.

As the Court is well aware, pursuant to the Protection of Persons and Property Act (the Act), an individual who is justified in the use of deadly force can seek immunity from civil and criminal liability at a pre-trial hearing. S.C. Code Ann. § 16-11-450; State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). To obtain immunity, the accused must establish by a preponderance of the evidence that he was justified in his use of deadly force. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Although "written orders are not always practical given the timing of the immunity hearing, the circuit court, in announcing its ruling, should at least make specific findings on the elements on the record." State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019). If the circuit court determines that the individual has not met his burden of proof, the case will proceed to trial for the jury to consider the issue of self-defense. Cervantes-Pavon, 426 S.C. at 451, 827 S.E.2d at 569.

A. The Circuit Court Correctly Applied The Preponderance Of The Evidence Standard At The Pre-Trial Immunity Hearing.

The circuit court left no doubt in articulating appellant's burden of proof at the immunity hearing. Prior to ruling, it framed the issue as "whether the defendant in this case has demonstrated *by the preponderance of the evidence* that there -- that he is entitled to protection under the Castle Doctrine." (Tr. 117, l. 3-5)(emphasis added). After noting appellant's story conflicted with the other evidence presented, the court specifically found that he "has not met his burden of proving

by the preponderance of the evidence that he's entitled to protection under the Act." (Tr. 117, l. 23-25)(emphasis added). When appellant raised additional arguments, the court cited the burden of proof a third time. Again, the court stated appellant had the burden of proving his case "*by the preponderance of the evidence*." (Tr. 119, l. 1-2)(emphasis added).

Although the circuit court cited the preponderance of the evidence standard three times in its ruling, appellant believes it did not actually apply that burden of proof. (App. Brief 11-13). Instead, appellant argues the court's explanation for denying immunity indicates it applied a higher burden. For example, the court advised that "[i]f it was a clear open and shut case where all witnesses testified as to what [appellant's] version of events were, it might be inclined to grant the defendant's motion." (Tr. 117, l. 15-18). Additionally, the court informed defense counsel that "to the extent that your client's testimony would have been corroborated by others who were present at the scene, the Court might be more inclined to say that the defense has met" its burden. (Tr. 118, l. 22-25; 119, l. 1). But according to appellant, the most egregious example occurred when the court advised counsel that "If [it] had a hundred percent or very firm belief in the version of events put forward by your client and argued by you, then, perhaps, there would be -- it would be a different outcome, obviously." (Tr. 118, l. 17-21). Appellant believes these words reveal the circuit court applied a burden of proof greater than a preponderance of the evidence. (App. Brief 13).

Appellant has misinterpreted the plain meaning of the court's words. The circuit court was not speaking in absolute terms. Contrary to appellant's assertion, the court's language did not mean a preponderance of the evidence *required* all of the witnesses to corroborate his account. (App. Brief 13). Rather, the court's language was conditional: <u>if</u> appellant's testimony was corroborated by other evidence, it <u>might</u> be inclined to grant immunity. (Tr. 117, l. 15-18). Words

have meaning. Appellant's argument fails because he cannot bend the court's words to mean something else.

Furthermore, the court's language is an accurate statement of the law. In assessing the merits of an immunity claim, appellate courts in this state have consistently considered whether an accused's story is corroborated by other evidence. For example, in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), this Court upheld a grant of immunity because the "objective evidence was consistent with [the accused's] testimony concerning the events leading up to the shooting." Id. at 319, 768 S.E.2d at 239. Similarly, in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the Supreme Court of South Carolina affirmed the denial of immunity for the same reason. The court reasoned that the Act does not "require a trial court to accept the accused's version of the underlying facts." Id. at 371, 752 S.E.2d at 266.

Simply put, the law in this state reflects a common sense approach to resolving these fact-intensive disputes. As applied here, the circuit court's ruling aligns with this approach and should be upheld. See State v. Andrews, 427 S.C. 178, 182, 830 S.E.2d 12, 14 (2019)("[T]he circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent.").

B. The Circuit Court Acted As The Fact Finder At The Immunity Hearing, Weighed The Evidence Presented, And Reached A Conclusion Under The Act.

In addition to applying the correct legal standard, the record below reveals the circuit court acted as the fact finder, weighed the evidence presented, and reached a conclusion under the Act. See Cervantes-Pavon, 427 S.C. at 451, 827 S.E.2d at 569. For example, after the presentation of evidence, the court asked the State whether its investigation definitively linked ownership of the weapon to either the victim or appellant. (Tr. 115, l. 4-23). When the solicitor replied there was no forensic evidence linking the weapon to either party, the court followed up by confirming the

State's theory of the case was that the argument "was about a gun." (Tr. 115, l. 22). The court's questioning provides insight into its rationale for denying immunity. If the argument began because the victim could not find his gun, then the victim likely did not have it hidden in his waist band during the scuffle.

Furthermore, the court explicitly considered other facts as well. It assessed whether appellant had a legal right to be on the property, noting "both parties were invited guests." (Tr. 117, l. 6-7). The court also considered the differences in testimony regarding the distance between the two men when appellant used deadly force. (Tr. 117, l. 8-10). Additionally, the court remarked that "the [surveillance] video is very dark and it is hard to see what's transpiring, but we do have different versions of events being offered by various witnesses. All of them are nuanced." (Tr. 117, l. 11-14). Finally, the court assessed the credibility of the witnesses. (Tr. 117, l. 21-25). In short, the record reveals that the court sat as the fact-finder, weighed the evidence presented, and reached a conclusion. See Cervantes-Pavon, 426 S.C. at 452, 827 S.E.2d at 569.

In reaching its conclusion, the circuit court also made specific findings on the record. See Glenn, 429 S.C. at 123, 838 S.E.2d at 499. As noted above, the court found that appellant had a legal right to be on the property when he used deadly force because he was an invited guest. (Tr. 117, l. 6-7). After making this finding, the court further held that appellant failed to prove he was immune from prosecution by a preponderance of the evidence. (Tr. 117, l. 22-25). Read in context with the court's initial inquiry over the cause of the argument, and its subsequent finding of appellant's right to be there, the holding indicates appellant failed to prove the remaining elements of self-defense. If the argument arose over the victim's missing gun, as the two other witnesses testified, then appellant cannot credibly claim either a reasonable fear of bodily harm or no fault at bringing upon the difficulty. See e.g. State v. Marshall, 428 S.C. 11, 18-19, 832 S.E.2d 618,

622 (Ct. App. 2019)(citing the elements of self-defense that the accused must show at the pre-trial immunity hearing).

Despite the circuit court's express ruling that appellant failed to carry his burden of proof, appellant argues that the court erred by refusing to resolve the conflicting evidence. (App. Brief 15). Appellant characterizes the circuit court's ruling as an "abdication" of its role as fact-finder at the hearing. (App. Brief 15). Again, appellant has seized upon some of the collateral language in the court's ruling. Specifically, after denying immunity the court noted, "since there is so much conflicting evidence, these matters are best left to the finders of fact, namely the trial jury." (Tr. 119, l. 6-8). Appellant believes this comment indicates that the court refused to resolve conflicting evidence at the immunity hearing. (App. Brief 16-17). Appellant also asserts that the conflicting evidence imposed a duty on the trial court to make credibility findings. (App. Brief 14).

Unfortunately for appellant, the Supreme Court of South Carolina recently rejected the same argument in State v. Andrews, 417 S.C. 178, 830 S.E.2d 12 (2019). In Andrews, the trial court found that the defendant failed to establish immunity by a preponderance of the evidence. After issuing its ruling, the court remarked that the "very inconsistent" testimony of the witnesses created a question to be resolved by the jury. The case proceeded to trial, resulting in a conviction. On appeal, the defendant argued that the trial court had a duty to make credibility findings because the testimony of the witnesses differed. Additionally, the defendant claimed that the trial court's statement that the facts created a "quintessential jury question" constituted reversible error. According to the defendant, the words indicated the trial court failed to resolve conflicting evidence presented by both sides.[9]

[9] The facts of the case, including the accused's appellate arguments, are discussed in this Court's opinion. See State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018) *vacated by* State v. Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019).

The Supreme Court disagreed with that argument. It first acknowledged that the trial court's statement regarding the "quintessential jury question" was a quote from one of its prior decisions, State v. Curry.[10] The court noted "[t]his excerpt from *Curry* has been the source of much confusion for the bench and bar." Andrews, 427 S.C. at 181, 830 S.E.2d at 13. According to the court, the situation in Curry was unique in that the defendant moved for immunity *after* the State had presented its case-in chief. As such, the language was not intended to allow trial courts "to automatically deny immunity in cases with conflicting evidence." Andrews 427, S.C. at 181, 830 S.E.2d 13. Instead, the language reflected the unique procedural posture of the case: because the defendant failed to establish his immunity during the State's case-in-chief, the trial court properly submitted the case to the jury. Id.

After addressing its prior opinion in Curry, the Supreme Court held that the trial court's language did not indicate a failure to resolve conflicting evidence. As part of its analysis, it first noted that the trial court correctly cited the preponderance of evidence standard as the burden of proof at the immunity hearing. Id. at 182, 830 S.E. 2d at 13. The Supreme Court then held:

> while the circuit court may not have set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent. Thus, we find no error in the circuit court's application of the law.

Id. at 182, 830 S.E.2d at 14.

The same analysis applies here. Like the situation in Andrews, the circuit court explicitly applied the correct burden of proof in its ruling. Rather than abdicating its role as fact-finder, the

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[10] 406 S.C. 364, 752 S.E.2d 263 (2013).

circuit court simply resolved the facts against appellant. As will be shown below, the circuit court's ruling has ample evidentiary support and aligns with controlling precedent.

C. The Circuit Court's Denial of Immunity Has Evidentiary Support Because Two Eyewitnesses And The Surveillance Video Conflict With Appellant's Story.

The circuit court acted within its discretion because appellant relied exclusively on self-serving testimony to satisfy his burden of proof. As discussed above, appellant claimed that the victim started the fight because he was still upset about the prior altercation with his little brother. (Tr. 52, l. 7-8). Two other witnesses contradicted that claim. Raymond Kennedy and Ricky Grant each testified that the dispute arose because the victim could not find his gun and assumed appellant had taken it. (Tr. 81, l. 7-21; 99, l. 1-25). At first glance, this would appear to be a minor detail in assessing appellant's self-defense claim. But in this particular case, it went to the heart of the matter: if the victim cannot find his gun at the start of the fight, he most likely does not have it tucked in his waistband during the ensuing scuffle. Appellant's self-defense claim unravels at that point.

Appellant was also adamant that his brother was not there that night. (Tr. 62, l. 20-24). This too was contradicted by other evidence. Raymond Kennedy testified that appellant's brother was standing right beside appellant when he fired the fatal shot. (Tr. 90, l. 17-25; 91, l. 1-4). In fact, the surveillance video appears to support Kennedy's testimony. (St. Ex. 2). As the solicitor pointed out, the video reveals someone else standing next to appellant when he fires the fatal shot. (Tr. 113, l. 6-7). The solicitor argued that if appellant's brother has his back during the confrontation, then deadly force is less likely to be necessary. (Tr. 113, l. 14-23).

The surveillance video also contradicts appellant's version of firing the fatal shot. Appellant testified that he wrestled away the gun, stumbled back, and fired as the victim ran towards him in a "rage." (Tr. 50, l. 10-11; 51, l. 15-17; 57, l. 14-15). But the video does not

support that story. Rather, it appears that the victim is stationary in the moments leading up to the gunfire. (St. Ex. 2).

Indeed, the record reads as if even appellant was unsure of his own story. As noted above, appellant initially implied that the gun went off by accident, stating, "I stumbled back and the gun fired, fired the gun. Like -- and that's what happened." (Tr. 50, l. 10-11). He later testified that his actions were intentional, stating, "[a]fter I backed up he started coming with like rage force like. And that's when I shot." (Tr. 57, l. 14-15). On cross-examination, appellant tried to clarify this apparent contradiction, explaining to the solicitor, "I'm saying my finger hit the trigger...It was a [sic] accident because I was scared at the time. Like I didn't mean to do it. Like I'm just being real. It was a [sic] accident to me." (Tr. 68, l. 6-8).

Additionally, appellant gave inconsistent testimony about whether the victim actually punched him. Again, he initially testified that the victim "swung and hit me. When he hit me, we got to tussling." (Tr. 50, l. 5-6). He later appeared to back off that statement, stating that the victim "*tried to hit me* or whatnot." (Tr. 53, l. 5-6)(emphasis added). On cross-exam, appellant returned to his original position, explaining to the solicitor that "he hit me right here. And we started tussling right here."[11] (Tr. 64, l. 10-11).

Given the inconsistencies in appellant's story and the absence of any corroborating evidence, this case is analogous to State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). In Curry, the defendant and the victim got into an argument at a New Year's Eve party. Some bystanders separated them, and the fight appeared to be over. At this point, the circuit court received conflicting evidence. Several witnesses for the State testified that the defendant ran upstairs,

[11] Although review of the circuit court's ruling is limited to the evidence presented at the immunity hearing, Cervantes-Pavon, 426 S.C. at 453, 827 S.E.2d at 569, appellant told the jury that the victim "swung and he like missed. He swung, but he really missed me." (Tr. 450, l. 16-17).

returned with a gun, and shot the victim in the back. In contrast, the defendant testified that he was already carrying a firearm because he planned on celebrating the New Year with gunshots. The defendant claimed that he only used deadly force because he thought the victim was lunging at him.

The Supreme Court of South Carolina affirmed the trial court's denial of immunity. In its ruling, the court noted that the defendant "appears to argue the Act should be construed to require a trial court to accept the accused's version of the underlying facts." Id. at 371, 752 S.E.2d at 266. This the court refused to do. Rather, "immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Id. at 372, 752 S.E.2d at 267. Because the accused's version of events was inconsistent with the other evidence presented, the trial court did not abuse its discretion in denying immunity. Id.

The same reasoning applies here. The State's witnesses and the surveillance footage contradicted appellant's story. In the face of this conflicting evidence, the circuit court was not required to blindly accept appellant's version of events. As such, it did not abuse its discretion in denying immunity.

II. THE CIRCUIT COURT PROPERLY ADMITTED THE SURVEILLANCE VIDEO BECAUSE A WITNESS WITH KNOWLEDGE ESTABLISHED ITS AUTHENTICITY, ITS DISTINCTIVE CHARACTERISTICS CONFIRMED ITS AUTHENTICITY, AND ITS CONTENT DISCREDITED APPELLANT'S CLAIM OF SELF-DEFENSE.

Relevant Facts

During the immunity hearing, the State introduced the surveillance video through the neighbor. (Tr. 70-78). The neighbor testified that he has eight security systems installed at his house, all of which feed into a central monitor. (Tr. 71, l. 23). One of those cameras points towards Gray Street. (Tr. 72, l. 4-5). According to the neighbor, that camera was working on the morning

of the murder, August 26, 2017. (Tr. 72, l. 10). The neighbor explained that he knew the camera was working properly because he checks it every few days. (Tr. 72, l. 12-15).

The surveillance footage has a time stamp in the upper right hand corner. (St. Ex. 2). The time stamp reads "2017-08-26 18:10:00" at the start of the video. (St. Ex. 2). Around seven minutes and fourteen seconds into the video,[12] one can see the flash of a gunshot in the bottom left hand quadrant of the video. (St. Ex. 2). Seconds later, an individual runs down Gray Street and out of the picture. (St. Ex. 2). Within two minutes, police cars drive down Gray Street in the same direction as that individual. (St. Ex 2).

Appellant objected to the introduction of the video at the hearing because the time stamp did not match the time of the murder. (Tr. 74, l. 1-6). Specifically, appellant argued the time stamp appeared to be approximately 6:00 pm in military time. (Tr. 74, l. 4-6). The court responded by permitting the solicitor to lay additional foundation. (Tr. 74, l. 7-8). The neighbor subsequently explained that when he installed the system, he just plugged it in and did not set the correct time. (Tr. 76, l. 1-2). In order to review footage from a specific time, he "counts backwards" however far he needs to go. (Tr. 76, l. 3-6). The court subsequently overruled the objection, noting it went to the weight of the evidence, not its admissibility. (Tr. 76, l. 18). The court further advised that its ruling only addressed the video's admissibility at the hearing, not during the State's case-in-chief. (Tr. 76, l. 22-23).

Appellant subsequently moved *in limine* to bar admission of the video at trial. (Tr. 122, l. 12-25; 123, l. 1-3). Again, appellant argued that "the timestamp does not match the actual time of the incident." (Tr. 122, l. 12-13). Alternatively, appellant argued the video was inadmissible under Rule 403 because the poor quality of the picture invited speculation from the jury. (Tr. 122, l. 23-

[12] The time stamp reads 18:17:16. (St. Ex. 2).

25). The court disagreed, assessing that the State had made a sufficient showing of authenticity and that the video depicted relevant information. (Tr. 125, l. 23; 126, l. 13-14). After the court explained its conditional ruling, the solicitor noted that the lead detective could further clarify how he determined the video was from the time of the shooting. (Tr. 126, l. 1-3).

The neighbor's testimony during the State's case-in chief was similar to that given pre-trial. He has eight security cameras at his house, one of which faces Gray Street. (Tr. 144, l. 7-13). The cameras constantly record and feed into a monitor in his room. (Tr. 145, l. 3-13). (Tr. 145, l. 20-23). Because he never entered the correct time when he installed the system, if he wants to see a particular point in time, he just counts back as needed and rewinds accordingly. (Tr. 146, l. 6-14). On August 26, 2017, a police officer came to his house and asked to review footage from that morning. (Tr. 145, l. 20-23; 146, l. 15-21). The officer rewound the footage back to the "early morning hours" that day. (Tr. 146, l. 21). The neighbor identified the footage as what he and the officer reviewed that morning. (Tr. 148, l. l. 1-8). The court admitted the video into evidence.[13] (Tr. 148, l. 18-19).

[13] After the video was admitted into evidence, the jury heard additional details on its authenticity. For example, the neighbor pointed to Gray Street in the middle of the picture and the city shop in the background. (Tr. 149, l. 5-13). Later on, the lead detective identified the city shop, Gray Street, Ricky Grant's house, and Ricky Grant's vehicle. (Tr. 358, l. 25; 359, l. 1-21). The detective also identified on the video where he found the shell casing. (Tr. 364, l. 1). With respect to the inaccurate time stamp, the detective explained that he simply compared the time on his phone to the time on the live feed. (Tr. 352, l. 2-3). After he figured out the difference between the two, he rewound the footage to the approximate time of the shooting. (Tr. 352, l. 3-5). The detective assessed that the shooting appeared on the footage shortly before the police cars drive through. (Tr. 352, l. 5-7). Furthermore, as discussed above, Raymond Kennedy's description of events matches the footage on the video. Kennedy testified that appellant fired the weapon, the victim ran down Gray Street, and the police arrived shortly thereafter. (Tr. 227, l. 17-24; 228, l. 16-18; 230, l. 19-25). Should the Court find the neighbor provided insufficient testimony to authenticate the video, this subsequent evidence should render any error harmless. See e.g. United States v. Luna, 649 F.3d 91, 103 (1st Cir. 2011)("If evidence is admitted prematurely because it is not yet authenticated, a court of appeals need not remand for a new trial if later testimony cures the error.").

A. The Neighbor's Testimony That The Video Contained Surveillance Footage Of The Crime Scene On The Morning Of The Murder—Coupled With The Distinctive Features Of The Footage Itself—Authenticated The Video Under Rule 901.

In order to authenticate evidence under Rule 901, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(a), SCRE. By way of illustration, Rule 901 articulates several ways to authenticate various types of evidence. Relevant here, a "witness with knowledge" may testify "that an item is what it is claimed to be." Rule 901 (b)(1), SCRE. Additionally, distinctive characteristics, such as appearance, contents, or substance can establish an exhibit's authenticity. Rule 901 (b)(4) SCRE. As this Court has noted, "the burden to authenticate ... is not high." Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014). Authentication only requires a prima facie showing that the evidence is what the proponent claims it is. State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019). In other words, "a party need not rule out any possibility the evidence is not authentic." Id. Instead, once the "prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine, and if so, what weight it carries." Id.

The neighbor's testimony constituted a prima facie showing that the video was what the State claimed it was: surveillance footage of the crime scene on the morning of the murder. As discussed above, the neighbor testified that one of his surveillance cameras faced Gray Street and constantly records footage onto a central monitor. (Tr.144, l. 13; 145, l. 3-13). The neighbor routinely checks his equipment to ensure everything is recording properly. (Tr. 144, l. 23-25; 145, l. 10-11). On the day of the murder, a police officer came to his house and asked to review that camera's footage from earlier that morning. (Tr. 145, l. 20-23; 146, l. 15-21). According to the

neighbor, the police officer rewound the footage "back a few hours to the early morning hours." (Tr. 146, l. 19-21). The neighbor confirmed that the State's exhibit was the same footage that he and the officer reviewed. (Tr. 147, l. 9-25; 148, l. 1-8). Based on this testimony alone, a juror could reasonably find that the video was what the State claimed it to be: surveillance footage of the crime scene on the morning of the murder.

Despite the operator of the surveillance equipment testifying that the footage was from the crime scene on the morning of the murder, appellant argues that the testimony failed to establish authenticity. (App. Brief. 34). Specifically, he claims that the neighbor was "unable to provide any additional circumstantial evidence to establish the video was from the morning in question or was accurately recorded." (App. Brief 34). This argument lacks merit. As noted above, authentication does not require that level of proof. Under Rule 901, the State only needed to make a prima facie showing that the evidence is what it was claimed to be. Green, 427 S.C. at 230, 830 S.E.2d at 714. Once the neighbor provided direct testimony that the video depicted the crime scene on the morning in question, additional circumstantial evidence was unnecessary.

Furthermore, though unnecessary, the video's distinctive characteristics provide circumstantial evidence it was from the morning in question. See Rule 901(b)(4), SCRE. The date on the video's time stamp was from the day of the murder: August 26, 2017. (St. Ex. 2). Granted, the hour on the time stamp was incorrect because the neighbor did not input the correct time of day when he installed the system. (Tr. 146, l. 3-5). As such, the neighbor and police officer had to "count back" to ensure they retrieved footage from the time of the murder. (Tr. 146, l. 6-21). Nevertheless, the video depicts the flash of gunfire, an individual running away, and the arrival of police cars within minutes. (St. Ex 2). Perhaps if the video revealed routine or innocuous activity, appellant could argue that the neighbor's language was too imprecise to ensure the footage

was from the correct point in time on the morning of the shooting. But gunfire is not routine or innocuous activity. This is Greenwood after all, not Fallujah. Because the video captures gunfire at the crime scene on the morning of the murder, a juror could reasonably conclude it was authentic.

This analysis mirrors the Court's precedent in Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). In that case, Atlantic Private Equity Group executed a promissory note to a bank for a commercial loan. The note was secured by real estate in Beaufort County. Deep Keel, LLC later purchased the note and brought a foreclosure action when Atlantic defaulted. Deep Keel sought to introduce the original loan documents between Atlantic and the bank through its sole member, who purchased the note from the bank. The witness testified that he received and examined the loan documents while negotiating the transaction with the bank. Atlantic argued that the testimony was insufficient because the witness could not articulate "when, how, or by whom the documents were prepared, how they came to be in the possession of [the bank], or how they were maintained by that bank." Id. at 65, 773 S.E.2d at 611. According to Atlantic, he was not a "witness with knowledge" under Rule 901(b)(1) because he had no involvement with the original transaction.

This Court disagreed, noting that "[t]he authentication requirement does not demand this degree of proof." Id. Despite having no involvement in the preparation, execution, or maintenance of the documents, the witness did have sufficient personal knowledge to authenticate them because he purchased them from the bank. Id. at 66, 773 S.E.2d at 611. Furthermore, the specific and distinctive information on the loan documents, such as the date of the loan, the amount of the loan, and the loan number, also supported a finding of authenticity. Id.

The witness in Deep Keel was in a similar position as the neighbor in this case. During the shooting, the neighbor was not watching his surveillance cameras any more than the witness in Deep Keel was watching the execution of the loan documents. Nevertheless, as the operator of the surveillance system, the neighbor could provide personal knowledge that the video offered into evidence depicted the crime scene on the morning of the murder. Additionally, the distinctive features contained on the video establish authenticity. Like the unique details of the loan in Deep Keel, the video's depiction of gunfire, an individual running away, and the arrival of police ensures it was authentic. As such, the circuit court did not abuse its discretion in finding the State sufficiently authenticated the video.

B. The Circuit Court Properly Overruled Appellant's Rule 403 Objection Because The Video Tended To Disprove Appellant's Self-Defense Claim.

Rule 403 provides that even relevant evidence "may be excluded if its probative value is ***substantially outweighed*** by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE (emphasis added). The party seeking to exclude evidence under Rule 403 bears the burden of establishing the evidence is inadmissible. State v. King, 424 S.C. 188, 200 n. 6, 818 S.E.2d 204, 210 n. 6 (2018). On appeal, the standard of review is abuse of discretion. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). The trial court's "decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

In assessing the probative value of evidence, "we must first consider what was practically in dispute at trial." State v. Phillips, 430 S.C. 319, 327, 844 S.E.2d 651, 655 (2020). As applied here, appellant argued he acted in self-defense because he reasonably feared for his life. (Tr. 542, l. 14-25; 561, l. 9). Specifically, appellant claimed that he took the gun from the victim's

waistband, stumbled back, and fired when the victim rushed towards him. (Tr. 451, l. 1-7). Appellant also claimed that his brother was not present at the scene. (Tr. 463, l. 2-7). The video contradicts both of these claims.

Approximately seven minutes and fourteen seconds into the video, a flash from a gun is visible in the bottom left hand quadrant of the video. (St. Ex 2). In front of the shooter, there is an individual who appears to be hit. (St. Ex. 2). In contrast to appellant's testimony, that individual is stationary immediately before the gunfire. (St. Ex. 2). In other words, the victim is not rushing towards the shooter, as appellant testified. Additionally, the video reveals the presence of a third-party standing next to the shooter when he fires. (St. Ex. 2). As noted above, Raymond Kennedy testified that appellant's brother was standing in the front yard when he shot the victim.[14] (Tr. 224, l. 16).

The surveillance footage gave the jury an unbiased perspective to assess appellant's claim that he reasonably feared for his life. As the circuit court noted, a picture is worth a thousand words. (Tr. 125, l. 16-17). During closing arguments, defense counsel even referred to the video in an attempt to challenge Raymond Kennedy's testimony. (Tr. 548, l. 18-20). Although the video likely would not win an Academy Award for production value, its probative value was high because it contradicted the heart of appellant's claim of self-defense.

Nevertheless, appellant believes the risk of confusing or misleading the jury substantially outweighed the video's probative value. Essentially, appellant argues the video was a blank canvass upon which the State could paint any picture it wanted. (App. Brief 39). But the quality of the video was self-evident to anyone who laid eyes on it. The jury needed no formal training

[14] During the immunity hearing, Raymond Kennedy testified that appellant's brother was standing beside appellant when he fired the weapon. (Tr. 90, l. 17-25: 91, l. 1-4). At trial, his testimony was that appellant's brother was in the yard when appellant fired. (Tr. 224, l. 16).

or advanced degree to assess whether the State's picture matched what they saw on the screen. In other words, the nature of the evidence presented little, if any, risk that the State could use it to mislead the jury. .

In this regard, two recent cases are particularly instructive. First, in State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020), the Supreme Court of South Carolina considered whether a particular presentation of touch DNA evidence should have been excluded under Rule 403 as misleading the jury. Specifically, law enforcement collected touch DNA samples from: (1) the murder weapon found at the scene and, (2) the inside of the victim's pants pocket. The DNA analyst concluded that the defendant "could not be excluded" as the contributor of touch DNA found on these two samples. The analyst further estimated the chance that a randomly selected individual could have contributed the sample on the weapon was one in two hundred. The chance of a random match to the pocket was one in two.

The court began its analysis by assessing the probative value of the evidence. To do so, it needed to "consider what was practically in dispute at trial." Id. at 327, 844 S.E.2d at 655. The court noted that in most murder cases, identifying who touched the murder weapon would be very relevant in solving the crime. However, in Phillips the defendant admitted to handling the weapon earlier that day. As such, the probative value in connecting the defendant to the murder weapon was minimal. Likewise, the probative value of the DNA sample found in the victim's pocket was also minimal. According to the analyst, half of the population could have deposited the DNA fragment found in the victim's pocket.

After finding the evidence was of minimal probative value, the court assessed the danger of misleading the jury. It first noted that the concepts discussed by the DNA analyst: touch DNA,

non-exclusion DNA, and random match probability, "are not at all straightforward."[15] Id. at 330, 844 S.E.2d at 657. Due to the nature of this evidence, even when "completely and accurately presented to a jury, there is significant potential the testimony will be confusing and misleading." Id. 334, 844 S.E.2d at 658. The attorney in Phillips exacerbated that risk by failing to elicit questions that would have educated the jury on the limits of the evidence.[16] Additionally, the attorney elicited testimony that was "simply wrong" from a scientific perspective.[17] Id. at 338, 844 S.E.2d at 661. Given the minimal probative value of the evidence, the confusing nature of the evidence generally, and the specific testimony that was wrong, the Supreme Court of South Carolina overturned the conviction.

As can be seen, Phillips provides a stark contrast to this case. Unlike the situation in Phillips, the evidence in this case is "straightforward." See Id. at 330, 844 S.E.2d at 657. Instead of wrestling with complex science and statistical probabilities, the jury only had to watch a surveillance video. A layman sitting on the jury could easily wrap his head around the nature and quality of the surveillance video. Contrary to appellant's assertion, the jury was not forced to

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[15] The court noted that unlike traditional DNA analysis, touch DNA typically involves only a fragment of a DNA profile, which creates problems in identifying the source. The court also noted that the ability to exclude a suspect at the contributor, i.e. non-exclusion evidence, requires additional evidence regarding the likelihood that another individual in a population could also be excluded. Finally, the court addressed random match probability, i.e. the likelihood that a random person will have a DNA fragment identical to the sample collected. The court noted the risk that jurors could confuse random match probability with a statistical probability of guilt. Id. at 331-34, 844 S.E.2d at 657-68.

[16] Specifically, the court noted the analyst failed to explain the inherent limitations in analyzing only a fragment of a DNA profile. Id. at 336, 844 S.E.2d at 660. Additionally, the analyst did not articulate the method she used to calculate random match probability. Id. at 337, 844 S.E.2d at 660.

[17] The court noted the analyst conflated: (1) a finding that an individual can be excluded as a contributor of a sample with a finding that the individual never touched the item, and (2) a finding that a fragment of DNA matches an individual's DNA standard with a finding that the person touched the item. Id. 339, 844 S.E.2d at 661.

accept the solicitor's interpretation at face value. Instead, the jury could determine for itself whether the solicitor was attempting to mislead it. Had the solicitor attempted to do so, it would have been akin to Groucho Marx asking whether the jury was going to believe him or their lying eyes.

Because the nature of the evidence created little, if any, risk of misleading the jury, this case is more analogous to State v. Hopkins, Op. No. 5766 (S.C.Ct.App. filed Aug 19, 2020)(Shearhouse Adv. Sh. No. 32 at 93). In Hopkins, the State alleged that a drug dealer put "a hit" out on the victim because he had become a snitch. Nineteen minutes after the murder allegedly occurred, the defendant sent a text message to an unknown, "burner" phone. Id. at 101. The message read, "Dats done need to Holla at u." Id. at 96. When a third party attempted to collect money for the hit, the drug dealer replied that the defendant had already collected the money and acted alone. The circuit court admitted the text message, and the jury found the defendant guilty as charged. On appeal, he argued that the text message should have been excluded under Rule 403 because it was too ambiguous and confusing.

This Court rejected that argument, finding that the text message provided circumstantial evidence of the defendant's guilt. Given the timing of the text, the jury could infer that the text meant that the defendant had killed the victim and was attempting to collect money for the hit. Furthermore, the Court characterized the danger of any unfair inference or speculation from the jury as "slight." Id. at 102. In other words, the nature of the evidence presented little risk of misleading the jury. As long as the jury could understand English, it could assess the evidentiary value of the text without being misled.

The situation in this case is similar. A jury can assess the evidentiary value of a surveillance video just as easily as a text message. Both are readily understood and commonly used in everyday

life. The danger of misleading the jury in either situation is "slight." See Id. Because the probative value of the surveillance video in this case was substantial, the circuit court acted within its discretion in admitting it. As such, the circuit court's ruling should be affirmed.

III. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S POST-TRIAL MOTION WITHOUT A HEARING BECAUSE THE JUROR'S SOCIAL MEDIA POST DID NOT INDICATE A COERCED VERDICT AND THE REMEDY SOUGHT WOULD HAVE INVITED INADMISSIBLE JUROR TESTIMONY UNDER RULE 606(b), SCRE.

Rule 29, SCRCrimP, provides criminal defendants an avenue to file post-trial motions. A post-trial motion under Rule 29 "may in the discretion of the court, be determined on briefs filed by the parties without oral argument."[18] Rule 29(a), SCRCrimP. In other words, the decision to hold an evidentiary hearing on a post-trial motion is within the trial court's discretion. As this Court has held in a similar context, "[i]f there is any reasonable basis for the decision not to hold a hearing, the decision will be affirmed on appeal." State v. Garrard, 390 S.C. 146, 153, 700 S.E.2d 269, 273 (Ct. App. 2010).

The circuit court had a reasonable basis to deny appellant's request for a hearing based on the content of the Facebook post alone. As noted above, the juror posted, "general sessions murder trial ... just couldn't leave without a verdict." (MNT Ex A). The plain text indicates a reflection upon the juror's sacrifice of time to fulfill the civic obligation of jury service. Contrary to appellant's argument, it does not mean the juror thought she was *physically barred* from leaving the courthouse. The circuit court was crystal clear in giving the jury a choice between continuing

[18] Appellant articulates his argument to this Court in terms of a motion for a new trial based on after-discovered evidence. (App. Brief 41-48). Specifically, appellant relies upon Rule 29(b), SCRCrimP. Respondent notes the five prong test for a new trial based on after-discovered evidence, discussed in appellant's brief, applies "when relief is sought based on evidence discovered post-trial that *is material to the accused's guilt or innocence*." McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013)(emphasis added). Because appellant's basis for relief is not related to his guilt or innocence, it would not fall under Rule 29(b). See Id.

deliberations into the evening and returning the following week to continue. (Tr. 601, l. 23-25; 602, l. 1-11). Appellant's interpretation of the Facebook post is so literal that it defies common sense. If a lawyer says "I can't leave my desk until I finish this brief" he has not indicated a literal inability to leave his desk. Rather, the lawyer is simply revealing a priority given to the task at hand. The juror's Facebook post reveals a similar commitment to the difficult task at hand: arriving at a unanimous verdict.

In addition to the plain meaning of the social media post, its form and surrounding circumstances warranted caution. Appellant did not present a sworn affidavit to accompany the Facebook post. Thus, the post itself was of little value. At a minimum, the circuit court could insist upon a sworn affidavit before marching the jury back to the courthouse. See State v. Ziegler, 364 S.C. 94, 112-13, 610 S.E.2d 859, 869-70 (Ct. App. 2005)(holding the circuit court was not required to take juror testimony regarding alleged misconduct because the defendant only provided unsworn statements from jurors). Furthermore, the juror apparently declined to respond to appellant's investigator. (MNT 2). Had the juror been expressing frustration at being coerced to render a verdict, as appellant argues, then surely she would have been more forthcoming to appellant's counsel.

Furthermore, the remedy appellant sought—juror testimony regarding their internal deliberations and understanding of the circuit court's instructions—was inadmissible. Rule 606(b), SCRE provides:

> a juror may not testify as to **any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict** or indictment **or concerning the juror's mental processes in connection therewith,** except that a juror may testify on the question whether **extraneous prejudicial information** was improperly brought to the jury's attention or whether any **outside influence was improperly brought to bear upon** any juror.

(emphasis added). As the rule makes clear, juror testimony is generally limited to determine whether there was an external influence upon the jury. Id. A case of external influence arises "where jurors receive information during deliberations from some outside source." Zeigler, 364 S.C. at 110, 610 S.E.2d at 867.

Nevertheless, South Carolina courts have recognized a "strict" exception to permit juror testimony about internal influences when necessary to ensure "fundamental fairness." Id. To date, South Carolina courts have recognized two situations serious enough to fall under this exception: (1) allegations of racial or gender intimidation towards a particular juror, and (2) allegations that the jury began deliberating prematurely. See State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995); State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999); see also Winkler v. State, 418 S.C. 643, 667-68, 795 S.E.2d 686, 699 (2016)(Hearn, J., concurring)(noting these two exceptions). In contrast, allegations that jurors misunderstood the law are insufficient to implicate fundamental fairness. State v. Pittman, 373 S.C. 527, 555, 647 S.E.2d 144, 158 (2007)("a jury's misapprehension of the law is not enough to impeach a verdict"); State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004)(holding that a juror's decision to convict because she erroneously believed that the defendant would not receive jail time did not affect fundamental fairness).

The matters appellant seeks to address on remand would involve the jury's internal deliberations and its understanding of the circuit court's instructions. Specifically, appellant seeks to compel testimony surrounding: (1) the impact of the length of deliberations on the jury, (2) the impact of "lack of nourishment" on the jury, and (3) the jury's understanding of "whether a verdict had to be rendered." (App. Brief 48). None of these categories involve admissible juror testimony under Rule 608(b). If a juror is irritable because he has to stay past 5:00 pm, that involves an internal jury matter. If a juror is grouchy because he has only eaten a pack of crackers since lunch,

that too involves an internal jury matter. And if a juror misunderstands the court's instructions, that involves an internal jury matter.

Nor does the information appellant seeks to elicit fall under one of the recognized exceptions for fundamental fairness. Appellant has not alleged any coercion arising from racial prejudice. See Hunter, 320 S.C. at 88, 463 S.C. at 316. Likewise, there is no allegation that the jury began deliberations prematurely. See Aldret, 333 S.C. at 311, 509 S.E.2d at 813. Thus, the circuit court was rightfully skeptical of opening the door to jury's internal deliberations. As the Supreme Court of South Carolina has warned:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might vindicate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct ... [and] the result would be to make what was intended to be a private deliberation the constant subject of public investigation.... [T]he argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.

Shumpert v. State, 378 S.C. 62, 69–70, 661 S.E.2d 369, 373 (2008)(quoting McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

To be clear, the issue for this Court is not whether the jury's verdict was coerced. Appellant never objected on this ground while the jury was deliberating. See State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999)(holding that because "a party must object at the first opportunity to preserve an issue for review," allegations of juror misconduct should have been raised during

deliberations when counsel became aware of them). Instead, the issue is whether a Facebook post, standing alone and without further explanation, required the trial judge to compel all twelve jurors to reappear in court for an inquiry. The law does not compel such a result. If appellant wants to go on a fishing expedition for evidence to overturn his conviction, then that is his prerogative. But he does not get to force the court, the jury, and the State to go along with him. As the Supreme Court of South Carolina has noted, "trial courts are justified in exercising a degree of caution before entertaining such evidence in an attack on a jury's verdict." Shumpert v. State, 378 S.C. 62, 69, 661 S.E.2d 369, 372 (2008). Accordingly, the circuit court rightfully denied appellant's motion without a hearing. As such, its ruling should be affirmed.

CONCLUSION

The circuit court did not abuse its discretion in denying appellant's motion for immunity, admitting the surveillance video, or denying the post-trial motion for a new trial. For the reasons articulated above, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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September 14, 2020

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Sep 14 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Frank R. Addy, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

XZARIERA OKEVIS GRAY,

Appellant.

Appellate Case No. 2019-001109

CERTIFICATE OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Certificate of Service have been forwarded to Appellant's counsel, Susan B. Hackett, Esq., via email today, September 14, 2020 to shackett@sccid.sc.gov, and her assistant Kat Kasperski kkasperski@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 14h day of September, 2020.

Brandy Rankin

Brandy Rankin,
Legal Assistant to Michael D. Ross
Assistant Attorney General

Donna D'Alessio

From:	Donna D'Alessio
Sent:	Monday, September 14, 2020 4:12 PM
To:	'shackett@sccid.sc.gov'
Cc:	Kasperski, Katriel (kkasperski@sccid.sc.gov)
Subject:	Gray, Xzareira Okevis - Appellate Case No. 2019-001109 - Initial Brief of Respondent, Designation of Matter and Certificate of Service
Attachments:	Gray, Xzareira Okevis - Appellate Case No. 2019-001109 - Initial Brief of Respondent 9-14-2020 (02378831xD2C78).pdf

Dear Ms. Hackett,

Attached is a scanned copy of the Initial Brief of Respondent, Designation of Matter, and Certificate of Service for the above captioned case. The Initial Brief of Respondent, Designation of Matter, and Certificate of Service are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Thank you,

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