STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER MURREY,

APPELLANT

APPELLATE CASE NO. 2019-001795

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by denying appellant immunity from prosecution, pursuant to S.C. Code § 16-11-440 (C), where appellant was not engaged in unlawful activity in a place he had a right to be, a hotel where he stayed with his his co-workers, appellant and his co-workers were threatened by the drug dealing decedent, appellant legitimately felt he and his co-workers faced death or great bodily injury due to the drug dealer's threats and actions and the court erroneously reasoned appellant had a duty to retreat and that "conflicting evidence" made self-defense a jury issue?

STATEMENT OF THE CASE

Appellant Walter Murrey, Jr., was indicted at the January 11, 2018 term of the Sumter County grand jury for the offense of murder. R. p. *. His case was called to trial on October 14, 2019 before the Honorable George M. McFadden, Jr., and a jury. Michael Routzong represented appellant. Assistant solicitor John Meadors represented the state. Tr. 1.

On October 18, 2019, the jury found appellant guilty of murder. Tr. 620, ll. 6-11. Judge McFadden sentenced appellant to thirty years' imprisonment. Tr. 630, ll. 2-8.

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 denying appellant immunity from prosecution, pursuant to S.C. Code § 16-11-440 (C), where appellant was not engaged in unlawful activity in a place he had a right to be, a hotel where he stayed with his co-workers, appellant and his co-workers were threatened by the drug dealing decedent, appellant legitimately felt he and his co-workers faced death or great bodily injury due to the drug dealer's threats and actions especially and the court impermissibly reasoned appellant had a duty to retreat and that "conflicting evidence" made self-defense a jury issue

Relevant Facts

The judge noted that the defense was seeking immunity from prosecution and that a pre-trial hearing would be held pursuant to State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). In this case, the defense was seeking immunity pursuant to S.C. Code § 16-11-440 (C), the "stand your ground" provision of the statute. Tr. 37, l. 3 – 40, l. 9.

Defense counsel Routzong told the judge the evidence would show that appellant had been hired to work on the Shaw Air Force Base hanging drywall. While being driven to Sumter to work, his new co-worker, Caleb Gomez, told him he had been robbed at the hotel where the co-workers stayed while working on the Shaw Air Force Base. Upon arrival in Sumter that same day, May 17, 2017, appellant worked at the Shaw Air Force Base and returned that night with his co-workers to that hotel, the Quality Inn. Tr. 40, l. 10 – 41, l. 2.

The Shaw Air Force Base workers then grilled chicken outside of appellant's room at the Quality Inn. Unfortunately, the decedent, Brandon Cummings, an illegal drug dealer, "interrupted the gathering and asked for a cigarette lighter. Mr. Murrey claims that he was, at

that moment, told that Brandon Cummings is the person that robbed Caleb Gomez." Tr. 41, ll. 3-9.

Defense counsel told the judge that appellant later saw Gomez backed up against the wall by the decedent. The decedent initiated this confrontation, and "Rafael Rodriquez and Cody Shelton [his co-workers] all agree that the group of coworkers asked Cummings to leave them alone. All agree that Mr. Cummings threatened to shoot them." Appellant had returned to his room to get his gun [an apparent .22 caliber] because of the hostile environment. Tr. 42, ll. 1-15.

Appellant lost sight of the decedent, but he later saw him coming from behind a bush, and "[h]e appeared to have something in his hand. Mr. Murrey says he feared that Mr. Cummings would fulfill his promise to shoot Mr. Murrey and his co-workers. Mr. Murrey pulled a gun from his pocket and fired at Cummings until he reasonably believed the danger to himself and others were concluded—was concluded." Tr. 42, l. 23 – 43, l. 4.

Appellant reasonably believed that the decedent would fulfill his threat and kill Appellant Walter Murrey, Jr. at that moment. Appellant Murrey was not at fault in bringing on the difficulty. He was acting lawfully in a place he had a right to be, and he was entitled to immunity. Tr. 42, l. 23 – 43, l. 21.

The defense then called Appellant Murrey as the first witness during the immunity hearing. Appellant was thirty-two years old, and he was from Louisiana. Tr. 44, l. 6 – 45, l. 9. After a background check, appellant was hired to work on the Shaw Air Force Base. New co-worker Rafael Rodriquez picked appellant up from the Augusta Greyhound Bus Station and drove him to the Shaw Air Force Base. During that ride from Augusta to Sumter, another co-worker and passenger, Caleb Gomez, "informed me, he said there's a lot that goes on at the

hotel." Gomez informed appellant that drug dealers and gang members frequented the hotel. Tr. 45, l. 23 – 46, l. 23.

Appellant said he understood from his future co-workers that they really only used the hotel to sleep at night and to "wash up." They would be working at the air force base most of the time, but the hotel was nonetheless dangerous because there had been robberies there. Appellant was told that one man had tried to buy marijuana, and the buyer was cheated out of his money in a frightening manner. Tr. 46, l. 21 – 47, l. 6.

Regardless, appellant related that he was happy to have a job at Shaw Air Force Base because he needed the money. The men arrived at Shaw Air Force Base around noon, and appellant worked until five o'clock. He then went to the hotel with his co-workers, and after checking in to the hotel, he remembered his co-workers gathered together to barbeque dinner. Tr. 47, l. 16 – 49, l. 21.

The decedent showed up at this time, and Caleb Gomez let the other men know that the decedent was the man who had robbed him on a prior occasion. Tr. 49, l. 22 – 51, l. 6. Appellant testified that the decedent acted like he was armed, and appellant was very apprehensive of the decedent for that reason, and the fact that Gomez said the decedent had robbed him in the past. Tr. 51, l. 2 – 52, l. 19. The decedent acted like he wanted to bring on an altercation with the co-workers.

Another large man, not the decedent, asked appellant if he could come by his room. Appellant said he asked this large man, "like what you mean." Appellant said this apparently gay man acted in an aggressive manner towards him, so appellant went to his hotel room, and "I put the gun in my pocket before I go back out [be]cause I wanted to go to sleep. But I wanted to make sure the guys [were] all right with all that happened at the hotel…" Tr. 53, l. 6 – 55, l. 3.

As appellant walked into the common areas of the hotel, he saw Caleb Gomez backed up against a wall by the decedent. Appellant asked the decedent, in an attempt to deescalate the situation, whether he knew Caleb. The decedent told appellant he did not know Caleb, and appellant then said that there was "no sense in arguing with somebody you don't know. Just leave, you know. And, at that point, he [the decedent] started back at Caleb again, you know, to make the altercation worse, and I was like do you really know him. And he said no again but [he was] still looking at Caleb . . . while Caleb [was] up against the wall not saying nothing." Tr. 55, l. 23 – 56, l. 4.

Appellant continued to try to deescalate the situation, but the decedent "exploded saying this is my town. This [is] my hotel. I run this. Y'all [are] not from around here. They don't have no cameras. I'm going to be back. All you gonna hear is gunshots [the decedent said while] clapping his hands as he walked going past our room towards the back." Tr. 56, ll. 11-17. Appellant interpreted the decedent's continuous clapping of his hands as meaning there were going to be gunshots fired. Others interrupted it to mean the same thing. Tr. 56, ll. 20-25.

Appellant was shaking and worried after this confrontation because the decedent "had done been going in his pockets already, you know, and I ain't know what he can have. At that point, when I got towards the end corner of the building, he had done already disappeared. When I got to the corner, I seen him again coming back, and, fearing for my life—" as appellant saw the decedent coming forward towards him – appellant shot him. Appellant testified that it appeared the decedent had something in his hand, and appellant feared being shot and killed because he believed the decedent was armed. Tr. 56, l. 25 – 58, l. 23.

On cross-examination by the assistant solicitor, appellant testified he did not call the police because "[I] was told the police were called when I was getting ready to call." Tr. 64, ll.

7-13. Appellant's roommate at the hotel had called the police. Appellant also told the solicitor that at the time of the shooting, he was escorting Cody, Rafael, and Caleb around the hotel since he was the only one armed. The decedent had said "he was on his way back" to shoot them, and appellant told the solicitor "[I] was fixing to lose my life. It wasn't like I just killed him. He threatened to kill us. I had to take him at his word cause, if not, that would of been my life, especially—" At this point, the solicitor interrupted appellant again. Tr. 70, l. 6 – 71, l. 12.

Appellant agreed that he went to work the next day and he did not mention the shooting. Appellant explained that he was suspicious of law enforcement because of what happened to him as a child. Appellant had to testify against his father as a child, and the police routinely came to the family home because his father was addicted to drugs. Appellant unfortunately viewed the police with suspicion based upon his childhood experiences. Tr. 72, l. 9 – 74, l. 16.

Appellant also related that his first appointed attorney did not call him back while he was in jail. Appellant did not get a preliminary hearing, and he felt abandoned by the system while he was in jail. These were the reasons appellant was not initially forthcoming with the police about having killed the decedent in self-defense. Tr. 74, l. 7 – 77, l. 16.

Appellant continued to explain to the solicitor that he was trying to be the peacekeeper on the night of the fatal shooting, but that the decedent was clapping his hands in a threatening manner, mimicking gunshots, and that he was afraid for his life. Tr. 82, l. 22 – 84, l. 17. The decedent was acting like he was going to shoot at the air force base workers while appellant tried to be the peacekeeper. Tr. 88, l. 1 – 91, l. 21.

Finally, on cross-examination, appellant said he did not remember how many times he shot at the decedent, but "like I said, it was about at least five shots, and, when I shot, I shot it all at once." Appellant denied he stood over the decedent and shot him. Tr. 98, ll. 13-23.

On redirect examination, appellant repeated that the decedent acted like he was armed with a gun. Appellant was shaking and afraid for his life at the time, and he thought the decedent was going to kill him. Tr. 100, l. 9 – 102, l. 24.

Caleb Gomez testified that during the initial ride from North Augusta to Sumter, Caleb told appellant about the "crazy things" that happened at the hotel, "robberies and such" where the co-workers stayed. Tr. 105, l. 20 – 107, l. 18. Caleb described the coworkers from the Shaw Air Force Base as "easy pickings because we were coming from out of town. We didn't know anybody, and we were just coming for work." Tr. 106, l. 14 – 108, l. 21.

On the night of the fatal shooting, Caleb testified he thought the decedent was either going to rob him again, bully him, or intimidate him. "[H]e was mocking us the whole time." Caleb felt very threatened and, when the decedent was clapping his hands, he thought the decedent was going to shoot everyone. Tr. 108, l. 11 – 110, l. 23.

On cross-examination, Caleb told the solicitor that the decedent told the men he was going to return the next day and kill them. Caleb explained that the decedent was threatening their lives and clapping his hands and saying that he was going to shoot and kill them. Tr. 116, l. 1 – 122, l. 20.

Thirty-one-year-old Rafael Rodriguez drove appellant and Caleb Gomez to the job site at Shaw Air Force Base from Augusta. Tr. 124, l. 12 – 125, l. 21. Rafael remembered seeing the decedent around the Quality Inn, where the Shaw Air Force Base workers stayed. Tr. 126, l. 7 – 127, l. 25.

When Rafael saw the decedent that fatal night, "the vibe [] was already there." Rafael explained he had heard the "stories" about the decedent, and "I felt like something was wrong." Tr. 127, l. 1 – 128, l. 16.

Rafael felt "like my life was in danger, and everyone else's life could of been in danger also." Rafael related how the decedent was clapping in a threatening manner, meaning to convey he was going to kill someone. Tr. 129, l. 5 – 130, l. 4. Rafael explained that the decedent had threatened to shoot him and that the decedent was constantly clapping his hands. Rafael did not know if the decedent was armed that night. Tr. 130, ll. 1-21; tr. 131, ll. 1-13. However, just before Rafael heard the gunshots, he heard a threat, and he heard the decedent clapping his hands. Tr. 130, l. 1 – 131, l. 13.

On cross-examination, Rafael said he thought his supervisor terminating appellant because of the shooting was a harsh action. Tr. 133, l. 13 – 134, l. 9. Rafael testified that he had asked the decedent to leave or "go away" that evening because the decedent was a troublemaker. Tr. 141, ll. 1-14.

The state called the decedent's girlfriend, Lashay Andrews, as a witness. Tr. 142, l. 21 – 143, l. 20. Andrews had known the decedent since she was thirteen years old. Tr. 143, l. 24 – 144, l. 7. Andrews admitted on cross-examination that the decedent was a drug dealer. The decedent dealt cocaine, but she claimed that he only bought marijuana but did not also sell that drug. Tr. 154, l. 7 – 156, l. 1.

Andrews took the decedent to the Quality Inn at about 9:15 p.m. on May 17, 2017. The decedent went to the Quality Inn to deal in drugs. Andrews claimed that despite the fact that the decedent was a cocaine dealer, he did not carry a gun. Tr. 151, ll. 5-10.

She dropped the decedent off and parked in the parking lot. She went inside the hotel to use the bathroom. She said she heard arguing when she returned to the car. She maintained that she saw appellant walking behind the decedent. She contended that the decedent was saying, "Fuck you, nigga, and then he was like, you know, leave me alone. I'm 'bout to go." Tr. 146, ll.

11-22. Andrews claimed that at this point, appellant shot the decedent. Tr. 146, l. 11 – 147, l. 6. Andrews identified appellant from the second line up she was shown by the police. Tr. 158, ll. 3-17.

Arguments of Counsel

Defense counsel argued appellant was entitled to immunity under the Protection of Persons and Property Act. Appellant had proved by a preponderance of the evidence that he was "at a place where he was allowed to be. He was attacked by another. He was not engaged in unlawful activity. He had no duty to retreat, and, Your Honor, he testified and, and you heard from everybody—there's agreement on everything, Judge. Everyone agrees that he was, that he—that Brandon Cummings threatened the entire group. That was the testimony. And Mr. Murrey was standing there. He heard that threat." Tr. 159, ll. 6-19.

Defense counsel noted that appellant became armed for the protection of himself and others, and that appellant was only in town to work at Shaw Air Force Base. He was not buying or purchasing drugs. The only reason appellant shot the decedent was because he feared for his life. Appellant had a room at the hotel, and he was there legally. Tr. 159, l. 6 – 160, l. 21.

The judge agreed that appellant possessing a firearm, even though he was not allowed to because of a prior conviction, did not disqualify him from his right to act in self-defense, given the holding of State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) on that legal point. Defense counsel observed that appellant had the right to defend himself from the threat. The defense had proved by a preponderance of the evidence that appellant was entitled to immunity from prosecution. Tr. 159, l. 6 – 160, l. 21.

The solicitor argued that it was "a credibility issue," and he claimed the testimony was inconsistent. Tr. 161, ll. 5-21. The solicitor repeated, "Judge, credibility, believability

throughout." Tr. 161, l. 5 – 162, l. 2. The solicitor claimed that appellant could have gone in his room and gone to bed. The solicitor was arguing appellant had a duty to retreat. The solicitor maintained that, although the decedent was saying he was going to return "[a]nd get y'all. This is my world. This is my hood," and that he was clapping his hands, that the decedent was leaving. Tr. 162, l. 19 – 164, l. 19. There were "numerous issues of credibility, and respectfully think this is a matter that a jury should decide." Tr. 164, ll. 17-24.

Defense counsel countered that, under the totality of the circumstances, the record showed appellant had been up for thirty-seven hours and that he had only come to Sumter to work. Appellant's reaction to the decedent's actions – based on the past problems at the hotel that appellant knew of – was reasonable. Tr. 166, l. 1 – 168, l. 8. The testimony of Andrews, the decedent's girlfriend of many years, showed her bias, but the record showed by a preponderance of the evidence that appellant acted reasonably in self-defense that evening. Tr. 165, l. 3 – 168, l. 21.

The judge said he would return to the courtroom shortly and issue his ruling. Tr. 168, l. 22 – 169, l. 25.

The judge then ruled he was not going to grant appellant immunity. Tr. 170, l. 2 – 171, l. 24. The judge cited the testimony of Caleb Gomez about being drunk and reasoned it went to "the element of credibility and believability." The judge stated:

> So I don't know how I can even cross the threshold or get to those elements when I have so much trouble believing so much of what was said that was contradictory at times, several times. And then, at the very end, we have a clash, a very divergent clash of versions of what happened. I don't find that Mr. -- find the names here. I got so many names going on right now. That the Defendant met his burden of proof, which wasn't high. It wasn't that high. I would have preferred much straightforward testimony and answers to a lot of questions. But, if I were to cross over and get past that into the Duncan and statutory matters, it, it, it troubles me that this

> happened in a breezeway. Not in, not in his room. Not even near his room. And then it's the, the, the -- this -- the statement made by Mr. Meadors that he interjected himself into it. Now, I understand Mr., Mr. Routzong's position on that, but I'm, I'm not, I'm not sure he was entirely free of getting involved in this situation, and to what degree he was involved. So, for that reasons -- for those reasons, then I, I respectfully deny the motion not, not because of anything Mr. Routzong did, Mr. Routzong did or did not do. So, that's out of the way now.

Tr. 171, ll. 1-24.

At the conclusion of the evidence when renewing his motion for a directed verdict, defense counsel also renewed his motion for the judge to find appellant immune from prosecution.[1] Defense counsel offered that because the judge had now heard all of the trial evidence, he was in a much better position to rule that the defense had shown by a preponderance of the evidence that appellant was immune from prosecution under the act. Importantly, though, defense counsel did not ask the judge to consider any evidence offered since the pre-trial immunity hearing since that pre-trial immunity evidence was the only evidence the court properly could consider. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) which was issued almost six months prior to appellant's trial (filed March 27, 2019 and this trial was held from October 14-18, 2019). Tr. 544, l. 17 – 552, l. 21.

The solicitor again contended that there was conflicting evidence "all the way around, and Your Honor, we believe, correctly ruled that Defendant had not proved, by preponderance of the evidence [that he was immune from prosecution.]" Tr. 547, l. 16 – 549, l. 23.

The judge again noted what he considered contradictions in the evidence and determined that the jury should decide the matter. Therefore, he declined to grant immunity. Tr. 549, l. 24 –

[1] The defense earlier moved for a directed verdict as a matter of law on self-defense. Defense counsel cited State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) on self-defense if it later appeared the decedent was not armed, and he cited State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) on the right to act on appearances. Tr. 437, l. 21 - 446, l. 14.

550, l. 3. Defense counsel then told the judge that a circuit court judge had been reversed for ruling it was a jury issue simply because of contradictory evidence. Tr. 550, l. 22 – 551, l. 8. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019).

The judge further offered that appellant had "several opportunities to turn and go back or go into his room or another room. He did not. He kept on going. I, I find that he had the chance, based on what he said by his testimony, that he could have turned around. He could of stopped, but he didn't do that." Tr. 551, ll. 9-23.

Defense counsel responded that appellant had no duty to retreat under the Act, and he objected to the judge's ruling on that basis. The solicitor, apparently recognizing these clear legal errors, interjected that he felt the judge only meant to say that appellant did not prove he was entitled to immunity by the preponderance of the evidence. The judge then responded, "to use those magic three words, I do. I don't find that he, he's met his burden by the preponderance of the evidence on that issue." [2] Tr. 551, l. 9 – 552, l. 14.

Discussion

The defense proved by a preponderance of the evidence that appellant was immune from prosecution. 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)

"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

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[2] Because the motion for immunity under the Persons and Property Protection Act was renewed, argued again by both sides, and again ruled upon again at the close of the evidence, appellant, out of an abundance of caution, has included the trial testimony in the record to show nothing beyond the pre-trial immunity hearing was asked to be considered by the defense or considered by the judge when he again denied appellant immunity at the close of the evidence. Tr. 544, l. 17 – 552, l. 21.

standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

As defense counsel correctly argued, appellant was only in Sumter and staying at the Quality Inn because he was working at the Shaw Air Force Base. The decedent conversely was a drug dealer. The decedent had no right to be dealing drugs at the Quality Inn where appellant stayed. There was an abundance of evidence that appellant and his co-workers from Shaw Air Force Base felt threatened by the decedent. The decedent was clapping his hands in a menacing manner indicating gunshots were to follow, he was again making threats, and the drug dealer reasonably was thought to be armed on the night of the May 17, 2017 shooting.

That guns and violence follow drug dealers is hardly a novel concept. See State v. Williams, 427 S.C. 246, 251-252, 830 S.E.2d 904, 907 (2019), *citing* Harmelin v. Michigan, 501 U.S. 957, 1003 (1991) ("Studies ... demonstrate a direct nexus between illegal drugs and crimes of violence."); State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) (citing, in a different context, the "indisputable nexus between drugs and guns"). Congress enacted subsection 924(c)(1)(A) for the purpose of separately criminalizing the combination of drug dealing and unlawful possession of a gun, not just the individual crimes. Smith v. United States, 508 U.S. 223, 240 (1993) ("When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination."). Congress recognized the causal connection between the presence of an unlawfully possessed gun and violence in illegal drug transactions. Muscarello v. United States, 524 U.S. 125, 132 (1998) ("This Court has described

[subsection 924(c)(1)'s] basic purpose broadly, as an effort to combat the 'dangerous combination' of 'drugs and guns.'" (citing Smith, 508 U.S. at 240)).

Further, beyond the fact that appellant had proved he was entitled to immunity by a preponderance of the evidence, the judge's reasoning that appellant could have retreated to his hotel room was legally erroneous under the Immunity Act. S.C. Code § 16-11-440 (C) states that "a person who is not engaged in unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business **has no duty to retreat and has the right to stand his ground** and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in § 16-1-60." (emphasis added).

Again, appellant and his co-workers were paying lodgers at the Quality Inn. The decedent was an illegal drug dealer. Appellant had every right to walk around his hotel unmolested, and not being threatened by the drug dealing decedent. Appellant had no duty to retreat pursuant to S.C. Code § 16-11-440 (C), and the judge committed an error of law by reasoning otherwise.

Further, the fact that there was conflicting evidence as to immunity issue does not alone justify the court denying immunity. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019). This was another error of law by the trial judge. Respectfully, it is hard to imagine an immunity hearing where there was not some seemingly conflicting evidence.

The defense proved by a preponderance of the evidence that the decedent was making threats and that appellant's apprehension and fear of the decedent was reasonable. Appellant proved he had the right to act in self-defense.

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Id. n.4. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. Id. Section 16-11-440 (C) provides the movant has no duty to retreat if, at the time of the attack, he was in a place where he has a legal right to be." State v. Cervantes-Pavon, 426 S.C. 442, 449, 827 S.E.2d 564, 567-58 (2019).

Further, "a person has the right to act on appearances, even if the person's belief is ultimately mistaken." State v. Dickey, 394, S.C. 491, 501, 716 S.E.2d 97, 101 (2011), *citing* State v. Fuller, 297 S.C. 440, 443-444, 377 S.E.2d 328, 331 (1989); State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000), *citing* State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Appellant also did not have to wait for the decedent "to get the drop on him," where he reasonably acted on the appearances of the drug dealing decedent making threats against the men. State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). Appellant reasonably thought the decedent was armed. A conclusion that the decedent was not armed is only a consideration when granting or denying immunity. It certainly is not a bar to immunity given the right to act on appearances. State v. Cervantes-Pavon, 426 S.C. 442, 449, 827 S.E.2d 564, 567-58 (2019).

As this Court explained in State v. Harris, 382 S.C. 107, 114, 674 S.E.2d 532, 536 (Ct App. 2009), "[The defendant] doesn't have to wait until his assailant gets the drop on him, he has

a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him."). This language has been interpreted to mean a defendant does not have to wait until actually fired upon to use force to defend his life. State v. Nichols, 325 S.C. 111, 117-18, 481 S.E.2d 118, 121-22 (1997); see also Starnes, 340 S.C. at 322, 531 S.E.2d at 913 (holding that once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act).

Appellant was not engaged in unlawful activity. He was only in Sumter to work at the Shaw Air Force Base, and he was only at the Quality Inn because that is where his co-workers stayed at night. Appellant did not bring on the difficulty. Appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief as argued below. Further, appellant had no duty to retreat as the judge erroneously reasoned, and appellant had the right to stand his ground. Appellant proved by a preponderance of the evidence that he had the right to act in self-defense.

There was an abundance of evidence, to the point of being overwhelming evidence, that the decedent was a hostile drug dealer, who was threatening the lives of appellant and his co-workers, clapping his hands in a menacing fashion, and making death threats. Any reasonable citizen would respectfully have feared for his physical safety and the physical safety of his friends, co-workers or loved ones. Appellant was in a place he had a right to be, he was acting lawfully, and he reasonably believed based on appearances, and he proved on that basis by a preponderance of the evidence, that his actions were necessary to prevent great bodily injury or

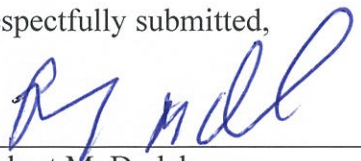
death to himself or his co-workers. Again, appellant proved by a preponderance of the evidence that he was acting in self-defense, and that he was entitled to immunity under S.C Code §16-11-440 (C) by way of S.C. Code §16-11-450. See State v. Glenn, 429 S.C. 108, 117-118, 838 S.E.2d 491, 496 (2019); State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018); State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016).

Appellant did not have a duty to retreat from the menacing decedent, where he had every right to be at the hotel with his co-workers. This Court should respectfully reverse the ruling of the trial judge denying appellant immunity. Appellant proved by a preponderance of the evidence that he was acting in self-defense, **and** that he was entitled to immunity under S.C Code §16-11-440 (C) by way of S.C. Code §16-11-450. Appellant also has shown the judge committed two errors of law by reasoning appellant had a duty to retreat and by reasoning that conflicting evidence made the self-defense element a "jury question." See State v. Cervantes-Pavon, 426 S.C. 442, 449, 827 S.E.2d 564, 567-58 (2019); State v. Glenn, 429 S.C. 108, 117-118, 838 S.E.2d 491, 496 (2019); State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018); State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016).

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and an order issued granting appellant immunity from prosecution, pursuant to S.C. Code §16-11-440 (C) and §16-11-450. In the alternative, this Court should reverse appellant's conviction, and remand this case to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT

This 17th day of December, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER MURREY,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 17th day of December, 2020; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Walter Murrey, #381752, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of December, 2020.

Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT