STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT

APPELLATE CASE NO. 2019-001486

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity?

2.

Whether the second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019)?

3.

Whether, in the alternative, both circuit court judges erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C)?

4.

Whether the second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the "stand your ground" provision of § 16-11-440(C), particularly where the court erroneously reasoned

that inconsistent evidence made self-defense a jury issue, that appellant had a duty to retreat, or even to avoid going to "a place he had the right to be" altogether?

5.

Whether, in the alternative if the first circuit court judge's order alone controlled, he erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence his entitlement to that immunity under both S.C. Code § 16-11-440(A) and the "stand your ground" provision of § 16-11-440(C), particularly where the court erroneously reasoned that that appellant had a duty to retreat, or even avoid going to "a place he had the right to be" altogether?

6.

Whether the trial court erred in allowing the state to introduce an aerial photograph of the incident location where the photograph depicted three vehicles parked side by side in a two-lane roadway which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to "retreat."?

7.

Whether the trial court erred in allowing the state to introduce a model car door of a Ford Explorer created by the state's investigator where that model was substantially different from appellant's actual vehicle and the use of the model was highly misleading and resulted in an inaccurate representation of the incident?

STATEMENT OF THE CASE

Appellant Kierin Dennis was indicted at the June, 2014 term of the Lexington County grand jury for the offense of murder. R. p. *. A pre-trial immunity hearing was held pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-440 (A)&(C), on November 17-19, 2014 before the Honorable Thomas Russo. Todd Rutherford and Simone Martin represented appellant. Richard S. Hubbard, III, and Shawn Graham were the solicitors. PT. II, 1. On February 4, 2015, Judge Russo issued a written order denying immunity. R. p. *.

A jury trial was then held from October 3-11, 2016 before the Honorable Eugene C. Griffith, Jr. R. p. *. Judge Griffith declared a mistrial on October 11, 2016 as the result of a hung jury. R. p. *.

When the state again chose to call the call to trial, a pre-trial immunity hearing was held before the Honorable Robert E. Hood from August 22-24, 2017 over the state's objection that appellant was not entitled to an immunity hearing despite the mistrial. Todd Rutherford again represented appellant. Shawn Graham and Rhonda Patterson were the assistant solicitors. PT1. 1. Arguments on appellant's entitlement to immunity were later held before Judge Hood on September 18, 2017. Todd Rutherford represented appellant. Shawn Graham and Rhonda Patterson were the assistant solicitors. PT2, 1.

Through counsel, appellant filed a Brief in Support of Defendant's Renewed Motion for Hearing Pursuant to S.C. Code §16-11-440 (A)&(C) dated September 21, 2017. R. p. *. Judge Hood issued an order dated October 11, 2017, denying appellant immunity. R. p. *.

Appellant's case then came on for trial before the Honorable Eugene C. Griffith, Jr., and a jury from August 19-27, 2019. Todd Rutherford and Nicole Simpson represented appellant. Solicitor Rick Hubbard and Assistant Solicitor Rhonda Patterson represented the state. R. p. *.

On August 27, 2019, the jury found appellant guilty. Tr. 1180, ll. 13-20. Judge Griffith sentenced appellant to thirty years' imprisonment. Tr. 1197, ll. 2-6.

This appeal follows.

STATEMENT OF FACTS

The first immunity hearing before Judge Russo

On the night of February 17, 2014, appellant attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. PT1. 482, ll. 2-9. The game was held in the Lexington High School Gymnasium. Appellant's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. PT1. 8, ll. 10-25; PT1. 162, ll. 19-22. Given past difficulties between students from the rival schools, additional security measures were taken as a precaution. After the game, which Dutch Fork won, Lexington High School students were directed to leave the building through the front of the gymnasium, while the Dutch Fork High School students were required to leave through the back to prevent the comingling of students from the two schools. PT1. 9, ll. 1-23; PTI. 160, ll. 13-24; PT1. 359, ll. 9-16.

As appellant and his friends were walking through the front lobby to the parking lot, numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, appellant became separated from his friends. A student from Dutch Fork followed appellant to his car. The school resource officer pulled a taser and ordered the students to leave. Eventually all the students scattered, and appellant safely got into his car and left. PT1. 246, l. 5 – 247, l. 23. Appellant never said a word to any of the Dutch Fork students in the parking lot. PT1. 247, l. 24 – 248, l. 6.

After the game, appellant and his friends went to the Cook Out. The Cook Out was a "hangout spot" for Lexington students after sporting events. It was only two to three miles from the school. PT1. 14, l. 21 – 15, l. 3; PT1. 222, l. 24 – 223, l. 1. Appellant, who was driving a gold Ford Explorer, parked at the carwash behind the Cook Out since the Cook Out parking lot was full. Will Zander, who was driving Morgan Zander and Lucky Cook, also parked at the carwash while Keith Adams parked at the PetSmart adjacent to the Cook Out. PT1. 14, ll. 9-20; PT1. 250, ll. 7-10.

As appellant and his friends were walking toward the Cook Out, they ran into Austin Sanders, a fellow Lexington student, in the parking lot. PT1. 250, ll. 7-13. Sanders told appellant that while he was in the Cook Out drive thru line, several Dutch Fork students approached and began shaking his car. The students were "rowdy" and harassed other people in the drive thru as well. PT1. 250, l. 13 – 251, l. 9.

After speaking with Sanders, appellant and his friends entered the front door of the Cook Out. Despite the Cook Out being a Lexington High "hangout," there were at least thirty to forty students from Dutch Fork inside. PT1. 17, ll. 8-16. As soon as appellant and his friends entered, Michael James, who attended Dutch Fork, approached appellant, threw his hands into the air, and asked, "That's all y'all brought?" PT1. 251, ll. 10-21. Appellant calmly responded, "We just came here to eat." PT1. 251, ll. 21-22. Appellant and his friends then went to wait in line to order food. PT1. 251, l. 23 – 252, l. 12.

While they were waiting in line, appellant overheard Dutch Fork students "picking on Lucky [Cook] about his sweater." PT1. 252, l. 13 – 253, l. 3. Michael James, the same student who confronted appellant when he entered the restaurant, stood up on a chair behind Keith Adams, put his fist over Keith's head, and motioned as if he was going to punch Keith.

Appellant and his friends continued to ignore the Dutch Fork students and waited for their food. PT1. 253, ll. 3-13.

Given the uncomfortable atmosphere, appellant told his friends, "Let's leave," and "we just need to go," but his friends wanted to wait for their food since they had already ordered. Appellant told his friends he would pay them back for the food they had ordered but that they needed to leave. PT1. 253, l. 25 – 254, l. 11. Appellant received a phone call and he stepped outside. PT1. 16, ll. 12-13; PT1. 253, ll. 19-22. Keith Adams followed appellant outside because he did not want appellant "outside by himself." PT1. 16, ll. 21-25. Shortly thereafter, Lucky Cook, Will Zander, and Morgan Zander walked outside too without their food. The group of friends were all standing by a trashcan outside. PT1. 17, ll. 18-25. Michael James walked past them. When James reached the middle of the parking lot, he turned around, threw his hands in the air, and asked, "Are you still salty?" Appellant responded, "The game was thirty, thirty-five minutes ago. Y'all won. Congratulations." PT1. 254, ll. 13-22. To avoid any confrontation, appellant then told his friends, "Guys come on, let's go" and the group began walking toward their cars. PT1. 254, l. 22 – 255, l. 8.

As they were walking, appellant heard "a whole bunch of noise behind" him. PT1. 255, ll. 8-10. When he turned around, the Dutch Fork students were "rushing" out of the Cook Out. PT1. 19, ll. 1-3; PT1. 255, ll. 10-12. About thirty to forty students "poured out." PT1. 84, ll. 4-21. They were yelling and "pulling their pants up . . . like they were getting ready to fight" or "jump" appellant and his friends. PT1. 255, ll. 12-14. Da'Von Capers, the decedent, called Morgan Zander "a bitch." PT1. 18, l. 21 – 19, l. 1; PT1. 85, ll. 2-24; PT1. 255, l. 22 – 256, l. 4. Appellant continued to walk backwards toward his car. PT1. 255, ll. 14-16. Keith Adams was "speed walking" to his car while Will Zander ran to his car. PT1. 20, ll. 10-22; PT1. 86, ll. 3-6.

The Dutch Fork students followed closely behind. After safely reaching his car, Will picked up his sister, Morgan, and Lucky Cook in the roadway near the Cook Out. PT1. 86, ll. 3-8.

After reaching their cars, Keith Adams and appellant met in the roadway between the PetSmart and the carwash. PT1. 256, ll. 13-20. They parked with their driver side windows next to each other. Appellant was facing the PetSmart and Keith was facing the Cook Out. They spoke for about two to three minutes about their plans. Appellant told Keith he was going home because he had to be at work at 5:30 the following morning. Keith was going to his father's house. PT1. 256, l. 13 – 257, l. 17. While the pair talked, Will Zander turned his car around in the PetSmart parking lot and parked behind Keith. PT1. 22, ll. 2-8; PT1. 86, l. 19 – 87, l. 4.

Keith Adams eventually drove away first. PT1. 23, ll. 13-17; PT1. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. PT1. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith explained that he took this exit because it was closest to the interstate where he was headed and because the other exit had a traffic light that "takes forever." PT1. 22, l. 21 – 23, l. 19. Keith eventually turned right out of the parking lot onto the main road. PT1. 22, l. 21 – 23, l. 19.

Will Zander, who was directly behind Keith, followed the same path past the Dutch Fork group of people who were standing on the curb and in the roadway. Will explained that he did not take the other exit near the Cook Out drive thru because it was "too congested" and he "always" took the exit between the Cook Out and the PetSmart. PT1. 87, ll. 5-17.

As Will was driving to the exit, he heard the Dutch Fork students in the roadway yelling. Will's driver's side window was already down. PT1. 87, ll. 18-21. Will stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. PT1. 87, l. 21 –

88, l. 23. There was testimony Will said: "Hey, this is what y'all are worth." PT1. 543, l. 2 – 546, l. 15. Several students from Dutch Fork, including Devon Chatman and Tyreke Farrow, ran into the road to pick up the money. PT1. 89, ll. 7-20; PT1. 451, ll. 19-25.

After Keith Adams and Will Zander pulled away, appellant backed his car up so he could likewise leave through the main exit between the PetSmart and the Cook Out. After he reversed, appellant put his car back in drive and looked forward. PT1. 258, ll. 7-11. When he looked up, he saw Will's car stopped in the roadway. It was surrounded by Dutch Fork students. PT1. 258, l. 25 – 259, l. 2. Appellant did not know at the time that Will had thrown money into the road. PT1. 258, ll. 12-21. He feared the Dutch Fork students were going to attack Will. Appellant sped forward to make sure Will was alright. PT1. 258, l. 24 – 259, l. 5; PT1. 259, ll. 14-24.

Appellant stopped behind Will's car. As soon as appellant stopped, Dutch Fork students surrounded his vehicle and approached his window, which was still about halfway down from when he was talking to Keith. PT1. 281, ll. 3-7. The students were yelling at appellant, ordering him to get out of the car, and calling him names – "pussy" and "bitch." PT1. 260, ll. 8-13; PT1. 262, ll. 10-15. Hands started reaching into appellant's window. He thought they were trying to attack him and "forcefully" pull him out of the car. PT1. 260, ll. 13-15. With his foot still on the brake, appellant leaned as far into the car as possible to get away from the Dutch Fork students. PT1. 260, ll. 15-19.

Appellant was scared and he feared for his life. PT1. 260, ll. 19-20; PT1. 262, ll. 22-23. He could not leave because Will's car was parked in front of him and there were Dutch Fork students in front and around his car. PT1. 265, l. 22 – 266, l. 17. Appellant had a knife in his center console. PT1. 262, ll. 24-25. He grabbed it, reached across his body with his right hand,

struck, and then drove away. PT1. 262, l. 24 – 263, l. 2. He did not realize he had stabbed anyone. PT1. 268, ll. 15-20.

Joshua Brooks, who attended Lexington High School, was at the Cook Out that night. PT1. 222, l. 11 – 223, l. 1. He watched as a "whole bunch" of Dutch Fork students crowded around appellant's car in the roadway. PT1. 224, ll. 13-25. The students were "banging" on appellant's car "trying to scare him." Others were reaching in appellant's window. PT1. 225, ll. 1-3. Appellant could not leave because Will Zander's car was parked directly in front of appellant. PT1. 226, ll. 14-21. Brooks saw Will get out of his car. Brooks told Will "to leave, get out of here, you don't want any problems." He knew Will and appellant were greatly outnumbered and they "were being threatened" by the Dutch Fork students. PT1. 225, ll. 10-15. Will eventually got back into his car. Brooks watched appellant drive off followed by Will. PT1. 224, ll. 13-19; PT1. 225, ll. 4-9.

Kenneth Williams, who attended Dutch Fork, was a prosecution witness. He testified that he was standing on the curb by the roadway at the Cook Out. PT1. 449, l. 20 – 450, l. 8. He saw Will Zander stop in the middle of the road and throw money out his window. PT1. 450, l. 12 – 451, l. 5. Several Dutch Fork students, including Tyreke Farrow and Devon Chatman, ran into the road to pick up the money. PT1. 451, ll. 9-25. Williams said appellant pulled up "pretty fast" behind Will and claimed that he almost hit Farrow and Chatman. PT1. 451, l. 23 – 452, l. 14. This upset the Dutch Fork students. PT1. 452, ll. 10-19. They all "lined up" outside appellant's window. PT1. 452, ll. 20-22. Although Williams never approached appellant's window, he maintained that he saw appellant's hand come out of his window and strike Da'Von Capers, the decedent. PT1. 452, l. 20 – 453, l. 9. He thought appellant just pushed Capers until Capers said, "they got me" and ran to a vehicle. PT1. 453, ll. 10-24. Williams later admitted

that he saw Capers reach into appellant's window, but he strangely maintained it was after appellant had stabbed him. PT1. 469, l. 4 – 470, l. 5.

Devon Chatman, who attended Dutch Fork, was another prosecution witness. He was also standing on the curb by the roadway near the exit between the Cook Out and the PetSmart. PT1. 485, l. 13 – 486, l. 4. He saw Will Zander pull up, stop his car, and throw money out the window. Chatman ran into the road to pick up the money. PT1. 486, ll. 5-7. When Chatman was in the middle of the road with several other students, appellant sped around the corner, pulled forward, and Chatman said he was almost struck in the leg. He estimated for the solicitor that the car missed his leg by about three to five feet. PT1. 488, ll. 4-15. Chatman claimed that if he had not jumped out of the way, he would have been hit. PT1. 488, ll. 16-19. Numerous Dutch Fork students surrounded appellant's window and confronted appellant. Chatman was not one of the students who approached appellant's window. PT1. 490, l. 1 – 491, l. 13.

Alexis Brunson, who also attended Dutch Fork, did approach appellant's car after she maintained he almost hit several students in the roadway. PT1. 512, ll. 5-25. She confronted appellant and yelled, "What are you doing? Are you crazy? You almost ran over some of our students." PT1. 513, ll. 12-21. Brunson was livid. PT1. 514, ll. 17-19. She claimed she did not see anyone touch appellant's car or reach in his window. PT1. 515, ll. 16-23. Appellant had his hand down by his thigh and Brunson maintained appellant said, "You don't want this. You don't want what I got." Brunson saw appellant punch Da'Von Capers with his right hand. She claimed appellant's hand came out of the window when he punched. PT1. 516, l. 14 – 517, l. 11. She did not see a knife. PT1. 529, ll. 1-5. After Capers was struck, Brunson said Capers tried to punch back, but appellant drove away. PT1. 517, ll. 16-21. Brunson said there was nothing stopping appellant from leaving. He was not blocked in, she claimed. PT1. 517, l. 25 – 518, l. 6.

Brunson admitted that she did not know if Capers threatened appellant before appellant struck him. PT1. 537, ll. 4-24; PT1. 539, ll. 1-5.

Tyreke Farrow, another Dutch Fork student, was crossing the street to the PetSmart where his friend's car was parked when he saw Will Zander throw money into the road. PT1. 543, l. 2 – 546, l. 15. When Farrow was in the road, he said he saw "a car coming full speed" toward him. Farrow jumped and his cousin, Xavier Holiday pulled him out of the way. PT1. 546, l. 16 – 547, l. 5. Farrow identified appellant as the driver of this car. PT1. 547, ll. 6-12. He claimed he would have been hit if he had not jumped out of the way. PT1. 547, ll. 13-15.

Farrow walked up to appellant's car and said, "What the fuck are you doing? Are you trying to hit me with your car?" PT1. 547, ll. 16-19. At least seven other Dutch Fork students approached the car, including Xavier Holiday, Lamar Butler, and Da'Von Capers. PT1. 547, l. 19 – 548, l. 4. Capers confronted appellant. He yelled, "What are you doing? You're trying to hit people in the road. Get out of your car if you want to hit people." PT1. 548, ll. 3-6. Farrow claimed appellant said, "I got something for y'all. Hey, yo, come here, come here." PT1. 548, ll. 7-10. Farrow said appellant then struck Capers with his right hand and drove away. PT1. 548, ll. 10-14. Farrow saw appellant's hand come out the window, but he did not see a knife. PT1. 553, l. 6 – 554, l. 11. According to Farrow, no one touched appellant's car or reached into the window. PT1. 550, ll. 20-24.

Lamar Butler, who also attended Dutch Fork, saw Will Zander throw money into the road. He also testified that Will said, "This is what y'all are worth." PT1. 568, l. 17 – 569, l. 24. At least three Dutch Fork students went into the road to pick up the money, including Tyreke Farrow. PT1. 570, ll. 6-23. Appellant sped forward and Butler maintained he almost struck them with his car. Xavier Holiday pulled Farrow out of the roadway. PT1. 371, ll. 1-25.

When appellant stopped in the roadway, Farrow, Holiday, Butler, and Da'Von Capers all approached appellant's car. PT1. 574, l. 4 – 575, l. 24. Capers was the closest to the window. PT1. 575, ll. 14-24. Butler claimed appellant motioned for Capers to come closer. PT1. 577, ll. 5-20. However, he admitted that he could not really see what was going on because his view was blocked by the other students. Butler thought appellant pushed Capers because Capers stumbled back into Farrow, but Butler never saw appellant strike Capers or saw appellant's hand come out the window. PT1. 577, l. 21 – 578, l. 11. After Capers stumbled, appellant drove away. PT1. 578, ll. 12-15. Butler claimed he never heard Capers say anything to appellant and that Capers never reached into appellant's window. PT1. 575, l. 25 – 576, l. 5. However, again, Butler admitted his view was blocked by the others who were standing in front of him. PT1. 577, l. 5 – 578, l. 11.

As stated above, Judge Russo denied appellant immunity in his order dated February 4, 2015. R. p. *.[1]

Facts from second immunity hearing before Judge Hood

Caitlin Voravudhi, a patrol officer with the Lexington Police Department, was one of the first officers who responded to the scene. PT2. 46, l. 24 – 47, l. 4. She received a call from dispatch indicating there was a fight in progress at the Cook Out. PT2. 49, ll. 4-14. When she arrived, there were about forty younger people in the parking lot and some adults. PT2. 47, ll. 8-21. Voravudhi attempted to control the scene and speak with witnesses. PT2. 47, ll. 8-12.

While Voravudhi was not wearing a body camera that night, the dash camera from her patrol car was recording both audio and video. Her dash camera was pointed toward the carwash

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[1] Judge Russo and Judge Hood are referred to throughout this brief respectfully by their name rather than simply as "judge" or "the court" for ease of reference, and to more easily distinguish between the facts of the first immunity hearing and the second immunity hearing.

and not the Cook Out. PT2. 50, ll. 9-24; PT2. 48, l. 12 – 50, l. 1. Voravudhi spoke to Beth Bettini, known as Beth Goodwin at the time. Bettini was the original complainant who called 911. As will be seen infra, even though Beth, Cook Out employee Zachery Lynch and Ervin Chauncy Meggett were key eyewitnesses they were not revealed to the defense or called as witnesses at the first immunity hearing. PT2. 53, l. 11 – 54, l. 20. Voravudhi's interview with Bettini was captured on her dash camera. Voravudhi also took a written statement from Bettini. PT2. 54, ll. 22-24. In her statement, Bettini said she was in the Cook Out drive thru. She saw thirty "kids" in the parking lot. They were "cussing" and screaming. A light colored Ford SUV stopped in the roadway. One person ran to the car and threw a drink at it. About ten other male teenagers approached the car. The driver of the SUV was black and had dreadlocks. The SUV "peeled out" followed by a smaller car. PT2. 55, l. 20 – 56, l. 14; See R. p. * (Defendant's Exhibit No. 1 – Bettini Statement).

Voravudhi did not verify whether Bettini called 911 that night. As a patrol officer, she merely passed Bettini's statement off to investigators. PT2. 56, l. 15 – 57, l. 22. Voravudhi also interviewed Zachery Lynch, an employee of the Cook Out, and had him write a written statement. PT2. 60, l. 10 – 61, l. 4; See R. p. * (State's Exhibit No. 1 – Lynch Statement). In his statement, Lynch said that a black male wearing a white shirt walked toward a car parked in the driveway. The male reached in the car "as if to stab somebody." Then another male walked up and threw a cup at the car. The two black males got into a gold two door Ford Explorer and drove off. PT2. 74, ll. 9-20. Voravudhi also turned over Lynch's written statement and her dash camera footage, which included her interview of Bettini and Lynch, to investigators. PT2. 66, ll. 3-12; PT2. 71, l. 12 – 74, l. 5.

Beth Bettini testified that she entered the Cook Out through the rear entrance. When she turned the corner, she saw thirty to forty teenagers in the Cook Out parking lot. They were "screaming, hollering, cussing, acting crazy." PT2. 115, ll. 1-9. Bettini had her windows down. She saw a light-colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at the driver. They were calling him names and threatening him. PT2. 115, ll. 10-19. They were yelling, "Fuck you. We'll kick your ass." PT2. 116, l. 22 – 117, l. 1. She saw a student throw a drink at the car. PT2. 115, ll. 10-19. The driver said, "Y'all leave me the fuck alone or get the fuck away from me." PT2. 117, ll. 3-6.

Bettini called 911 and described what she was witnessing. PT2. 115, ll. 10-19. She thought there was about "to be a fight." PT2. 115, ll. 20-24. She told the dispatcher that the driver of the light-colored SUV -- whom she identified as appellant --"looked scared to death" and she thought the other students were going to hurt him. PT2, 115, ll. 22-25; PT2. 117, ll. 12-19; PT2. 118, ll. 8-15. She explained that appellant could not leave because there were students in front of his car. He would have had to have hit them to leave. PT2. 120, ll. 5-7.

After everyone left, Bettini stayed and spoke to law enforcement. PT2. 120, l. 22 – 122, l. 21. First, she spoke to Deputy Voravudhi and then she talked to Investigator Brent Carter. She told Carter she had called 911. PT2. 121, l. 1 – 124, l. 2. Lexington County 911 destroyed the recording of Bettini's call before it could be preserved because the call was not "properly linked" to the CAD report for the incident. PT2. 220, l. 4 – 224, l. 18; PT2. 227, ll. 7-21.

Zachery Lynch was working at the Cook Out on the night of February 17, 2014. PT2. 161, ll. 3-11. He was outside taking a break when the stabbing occurred. PT2. 162, ll. 9-15. Lynch was standing near the dumpsters smoking. PT2. 168, ll. 1-3. He had a clear view of the

parking lot and the driveway between the Cook Out and PetSmart. PT2. 168, ll. 14-22. Lynch saw appellant attempt to pull out and leave. There were students in the roadway blocking appellant from leaving. PT2. 170, ll. 2-4. There were also students standing along the sidewalk next to the roadway. The students were "taunting" appellant, calling him names, and acting "malicious." They all gathered outside appellant's window. PT2. 170, ll. 5-8. One student threw a drink at appellant's car. PT2. 169, ll. 7-23. Lynch saw a student reach inside appellant's window with his hand "forward." Lynch thought this person was trying to grab appellant. PT2. 170, ll. 13-24. When he later learned there had been a stabbing, Lynch thought it was the person who leaned into appellant's window who "[d]id the stabbing." PT2. 170, ll. 10-24. After the person who leaned into appellant's car came back out, appellant drove away. PT2. 171, l. 18 – 172, l. 5.

Lynch gave a statement that night in the Cook Out parking lot after law enforcement responded. PT2. 162, l. 19 – 164, l. 15. He also gave a statement to Investigator Carter around 5:00 am the following morning after he got off work. At the time, he had been awake for almost twenty-four hours. PT2. 165, ll. 1-8; PT2. 173, ll. 9-23. Carter did not show Lynch any of the videos during his interview. PT2. 174, l. 19 – 175, l. 20.

Dr. Janice Ross, the pathologist who conducted the autopsy, testified the decedent had a stab wound to the left chest just underneath the nipple. PT2. 85, l. 16 – 86, l. 1. The trajectory was "downward slightly toward the middle of the body and slightly backward." PT2. 86, ll. 1-2. Ross explained that based on the trajectory of the wound, "if the knife was going straight," the decedent had to have been standing erect *or leaning over* with his head, neck, and chest parallel with the ground. PT2. 87, ll. 10-24; PT2. 91, ll. 2-19. (emphasis added). "Every percentage that [the decedent] stands up" from a position parallel with the ground, "the knife . . . has to raise up

that same percentage in order to get the same trajectory." PT2, 91, l. 25 – 92, l. 17. If the decedent was standing erect, appellant's hand would have had to have come up and struck downward, not straight across, in order to match the trajectory of the wound. PT2. 92, ll. 18-20. She acknowledged, "if the defendant were leaning back in the vehicle against the arm rest . . . that would impact how far the victim had to lean in or had to lean over in order to receive that stab wound if the defendant stabbed him with his right hand." PT2, ll. 94, ll. 4-9. "[I]f the victim was standing up, then the knife would have had to come up and down. If the victim was stooped over, then it [the knife] would have to go kind of straight parallel to the ground." PT2. 97, ll. 9-19. On cross-examination by the solicitor, while defense counsel Rutherford continued to object to the accuracy of the demonstration, Ross testified the stabbing would be "consistent" with someone stabbing outside the window. PT2. 106, ll. 3- 108, l. 18.

Ervin Chauncy Meggett, who attended Dutch Fork, was interviewed by the solicitor's office on August 26, 2016, shortly before the mistrial due to the hung jury. PT2. 364, ll. 18-22. Why Meggett was not interviewed earlier is not revealed from this record. Meggett was standing outside appellant's window when the decedent was stabbed. PT2. 367, l. 19 – 368, l. 3. He told the state during his August 2016 interview that the decedent "was in the wrong" and that appellant was trying to leave when the stabbing occurred. PT2. 366, ll. 10-16. He said the decedent was "banging" on appellant's car when appellant stabbed him. PT2. 369, l. 14 – 370, l. 3. Meggett said at the second immunity hearing that he did not remember telling the state the decedent was in the wrong and that appellant was trying to leave. PT2. 368, ll. 19-23; PT2. 370, l. 22 – 371, l. 1. All he remembered was some students were banging on appellant's car, but he did not know if the decedent was one of the individuals who was banging. PT2. 366, ll. 10-24.

Meggett admitted that he was subpoenaed to testify during appellant's first trial that ended in a mistrial. He was placed in a room with other potential witnesses. However, Meggett denied that those witnesses confronted him for previously saying "things that were unfriendly to Cape [the decedent]." PT2. 369, ll. 3-13. The decedent was a friend of his. PT2. 368, l. 24 – 369, l. 2.

As seen, Judge Hood, issued an order dated October 11, 2017 denying immunity. R. p. *.

ARGUMENT

1.

The second circuit court judge erred by relying on evidence from a prior mistrial and a prior immunity hearing held before that mistrial to deny appellant immunity from prosecution, pursuant to the Protection of Persons and Property Act, since the prior mistrial and the pre-trial hearing held before the mistrial were both a nullity.

Introduction

Appellant Kierin Dennis, through his trial counsel, Todd Rutherford, "[m]oved pursuant to the Protection of Persons and Property Act, Section 16-11-410, et. seq., of the South Carolina Code of Laws to dismiss this case, asserting that his act was justified and that, as a result, he is absolved from prosecution pursuant to the immunity granted in Section 16-11-450 of the Act." R. p. *. Order of Judge Russo at 1; R. p. *.

As seen, the incident in this case arose at the Cook Out restaurant in Lexington, which was a Lexington High School "hang out" following basketball games. Appellant, a recent graduate of Lexington High, had gone to the basketball game with his Lexington High School friends. They went to the Cook Out hangout after the basketball game. There had been some "talking" back and forth after the game between the students of the two schools, and some Dutch Fork students were present when appellant and his friends arrived at the Cook Out. Appellant's car was subsequently surrounded, and appellant fatally stabbed the decedent, where the evidence showed the decedent reached into appellant's vehicle. Appellant reasonably feared for his life or great bodily injury where being dragged out of his car during this mob scene was the reality facing him.

Relevant facts

A pre-trial hearing on appellant's right to immunity was held in Lexington County from November 17-19, 2014 before Judge Russo. Judge Russo issued an order dated February 4, 2015, denying Appellant Dennis immunity under both S.C. Code § 16-11-440(A) and S.C. Code § 16-11-440(C). See order at 10; R. p. *. Subsequently, a jury trial was held before the Honorable Eugene C. Griffith, Jr., from October 3-11, 2016. Todd Rutherford and Simone Martin represented appellant during this jury trial. Deputy solicitor Shawn Graham and assistant solicitor Rhonda Patterson represented the state. MT. 1.

On October 11, 2016 at 10:20 p.m., after being charged and recharged on self-defense, accident and malice, the jury sent out a note, stating they were deadlocked. MT. 1273, l. 12 – 1281, l. 18. After further recharges and deliberations, the judge finally declared a mistrial due to the hung jury. MT. 1284, l. 18 – 1285, l. 10.

On August 22, 2017, a second immunity hearing was held before the Honorable Robert E. Hood in Lexington County. Todd Rutherford again represented appellant Dennis. Shawn Graham and Rhonda Patterson were again the solicitors. PT1. 1.

Judge Hood asked for a procedural history of the case. PT1. 6, ll. 4-20. Deputy Solicitor Graham told the judge that appellant was out on bond after spending five months in jail. PT2. 6, l. 4 – 7, l. 5. The attorneys confirmed there had been a prior immunity hearing held before Judge Russo. PT1. 7, ll. 3-17. Graham told the judge that Judge Russo denied immunity in his order dated February 4, 2015. PT1. 7, l. 20 – 8, l. 10. A subsequent jury trial ended in a hung jury and a mistrial. PT1. 8, l. 11 – 9, l. 2. Defense counsel Rutherford then filed "a renewed motion for a hearing pursuant to 16-11-440 (a) and (c)," which was filed in June 2017. PT2. 9, ll. 3-7. R. p. * (Motion for immunity hearing).

At the first immunity hearing held before Judge Russo, prior to the mistrial, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, Bill Howard, and Appellant Kierin Dennis testified for the defense. PT1. 7-357. Witnesses Deshon Chatman, Walden Roberson, Brent Carter, Kenneth Williams, Devon Chatman, Alexis Brunson, Tyreke Farrow, and Lamar Butler testified for the state. PT1. 358-588.

Defense counsel Rutherford told the judge that the defense wanted the pathologist to testify and that she could be in the courtroom around noon that day. PT2. 9, l. 8 – 10, l. 8. Solicitor Graham then stated:

> Your Honor, the motion that Mr. Rutherford filed *is asking for an entirely new hearing* and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers [the decedent] attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence. Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.
>
> [Number] Seven talks about the manager of the Cook Out Restaurant on duty the night in question. His name is Zachary Lynch was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

PT2. 10, l. 11 – 11, l. 8. (emphasis added).

Solicitor Graham argued it was the state's position that there was no basis to give appellant what the state considered, "[a] second stand your ground hearing. There is nothing that says you get two bites at that apple." PT2. 10, l. 11 – 13, l. 19. The state contended that to be allowed another hearing, the defense should have to file a Rule 29 motion under the rules of civil procedure, based on after discovered evidence. PT2. 13, l. 3 – 21, l. 18.

In his argument, defense counsel Rutherford noted that in the event of a mistrial, there may never even be another trial. "It's up to the Solicitor's Office. It's not up to us." The defense correctly argued it was entitled to an immunity hearing. PT2. 32, l. 10 – 33, l. 2. The solicitor also incorrectly faulted the defense with not filing an appeal from the "stand your ground hearing that was denied." PT2. 12, ll. 3-7. However, in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), our Supreme Court held that the denial of a defendant's request for immunity was no longer immediately appealable. It was an interlocutory order that was not appealable. Further, appellant therefore could not appeal the denial of immunity by Judge Russo because he had not been convicted. See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016). Moreover, as argued below, a mistrial is the equivalent of no trial and it leaves the cause pending in the circuit court. "A court ruling as to the admissibility and competency of testimony during a trial, which is later declared a mistrial results in no binding adjudication of the rights of the parties." State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009).

Further, here, defense counsel Rutherford noted the investigation continued after the first immunity hearing and the defense was now aware of the fact that Beth Bettini said that appellant Dennis could not have left at the time of the stabbing because he would have had to run over two people to escape. The solicitor's office had claimed there was no evidence of Bettini calling 911. However, the state later confirmed that Bettini called 911. There was also a statement from Zachary Lynch, a Cook Out employee. The point of the defense was that, because of a deliberately sloppy investigation, where it was decided early on that appellant was guilty, Judge Russo had not considered relevant and compelling defense evidence at the prior immunity hearing. The solicitor's office in Lexington had also been less than forthcoming with exculpatory evidence. PT2. 21, l. 20 – 33, l. 2.

After hearing arguments, the judge said that he would allow the defense to "proffer all of his testimony because let's play this out. Scenario number one is I say no, you're not entitled to another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered. So, I'm gonna skip that step all together. I'm gonna let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?" The solicitor confirmed there was a copy of the prior Judge Russo immunity hearing transcript. The judge said he would review that prior transcript, as well as any "new evidence" the defense wanted to present at the immunity hearing. As will be seen, the judge also said he would read and consider evidence from the jury trial, the mistrial. PT2. 39, l. 6 – 42, l. 1.

When the defense began telling the judge about Dr. Ross and other witnesses it wanted to present, the court interrupted and said, "We're not gonna rehash the entire stand your ground [hearing]." PT2. 42, l. 2 – 44, l. 4. The judge said that he was only allowing the defense a limited hearing. PT2. 43, l. 23 – 45, l. 20.

At the immunity hearing held before Judge Hood on August 22 and August 24, 2017, he heard from Lexington police officer Caitlin Voravudhi, pathologist Dr. Janice Ross, Beth Bettini, Cook Out employee Zachary Lynch and Ervin Chauncy Meggett as defense witnesses. PT2. 47-219.

The prosecution then presented 911 operator Nikki Rogers, Alexis Brunson, former Dutch Fork student and witness Devon Chatman, investigator Marc Miramontes, and

investigator Brent Carter as witnesses. PT2. 220-376. Thus, the only defense witnesses Judge Hood heard from and saw in person were officer Caitlin Voravudhi, Dr. Janice Ross, Beth Bettini, Zachary Lynch, and Chauncy Meggett. Given the limited scope of the immunity hearing allowed, Judge Hood did not hear the testimony of appellant Kierin Dennis, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, or Bill Howard.

At the conclusion of the hearing, deputy solicitor Graham noted the judge had the transcript of the stand your ground hearing and testimony from the trial (mistrial). PT2. 376, l. 24 – 377, l. 18. Graham asked: "[I]f I could inquire what is your plan from here? I guess my question is, I don't know whether I need to renew all of my objections." The judge wondered if the attorneys thought he could get three weeks from court administration to review all of the evidence. PT2. 377, l. 19 – 378, l. 18. The judge said he would have read "everything," but he wanted to have a final hearing on "whatever legal arguments you want to [make]." PT2. 378, l. 18 – 379, l. 7. The judge said he expected the featured arguments to last about an hour, but that he needed "enough time [first] to get everything read." PT2. 379, l. 2 – 380, l. 21. The judge said his plan "right now is to reconvene September the 18th at 2:00 p.m. I will have everything read and then you all can make your legal arguments at that time. Fair enough?" PT2. 380, l. 22 – 383, l. 19.

An argument hearing was then held on September 18, 2017 before Judge Hood. Todd Rutherford again represented appellant. PT3. 1. Defense counsel Rutherford argued the defense burden on immunity was only by a preponderance of the evidence. PT3. 4, l. 22 – 6, l. 7. Defense counsel noted that Beth Bettini was an independent witness who tried to describe what happened to the solicitor's office before the trial. Bettini was told the prosecution had no record of her calling 911 on the night of the incident. "She is made to believe that they don't want to

hear what she has to say, so much so that she calls my office two days into the trial to say, hey, I described what happened to the Solicitor's Office and they don't want to hear me." PT3. 6, l. 8 – 7, l. 22.

Defense counsel told the judge that he had practiced law for "a long time." He knew that 911 calls were recorded and documented. This called the integrity of the state's investigation into question. Counsel reminded the judge that he had now heard from employee Zachary Lynch, who was an eyewitness. Lynch said, "He [the decedent] reached in the car and that's when he stabbed him." PT3. 7, ll. 2-22. Defense counsel told the judge:

> This proposition that the Solicitor is arguing that you don't get a second chance at a hearing, well, where in the law anywhere does a defendant not have a right to another hearing? This is not a second trial wherein the burden would be much higher. This is simply a hearing. We believe that we would even meet the burden that they set forth that we would have to meet for a second trial much less simply another hearing. We're not bound by what happened in that trial. If we are, then the defendant should be set free because there was a mistrial. He was not found guilty. That's it. They want to rely on the count. The count doesn't matter. It's a mistrial pure and simple and if we're bound, then let's truly be bound. Your Honor knows we're not, the State knows we're not.
>
> The fact that we are entitled to a new hearing should be clear. The fact that other evidence exists that Judge Russo did not hear when he made his initial ruling is also clear. The fact that that evidence all points to more than a preponderance that my client was acting the way that the law allows under 16-11-440 we believe is clear and based on that we would ask Your Honor to not only allow this hearing or allow the culmination of this hearing, but find that he is immune to prosecution.

PT3. 12, l. 16 – 13, l. 15.

The solicitor continued to insist that appellant was not entitled to the "new hearing" and that the evidence presented at the hearing before Judge Hood was improper and that it was only after discovered evidence. PT3. 14, l. 7 – 18, l. 3. The judge then noted that it was clear that Beth Bettini had called 911 and that "no one in the Solicitor's Office nor the defense knew about it until just before the last hearing." The solicitor verified that was correct. PT3. 18, ll. 4-15.

The solicitor nonetheless argued the defense had failed to prove the evidence he presented before Judge Hood was new, entitling him to another hearing. The solicitor further contended that even if the judge considered the evidence presented before him, that appellant had still failed to prove by a preponderance of the evidence that he was entitled to immunity. PT3. 32, l. 5 – 39, l. 8.

The solicitor cited testimony from the first hearing regarding William Zander and Keith Adams and Morgan Zander, in addition to Tyreke Farrow and Devon Chatman. PT3. 34, l. 5 – 41, l. 7. The solicitor also discussed the testimony of Michael James (who testified during the mistrial only at 541-595. The solicitor incorrectly said he "thought" the James testimony on his "duty to retreat theme" was from the "stand your ground hearing. PT3 at 26). He also cited to the testimony of William and Morgan Zander from the immunity hearing before Judge Russo. He admitted he could not prove his contention that William Zander planned to throw down the money or that appellant was angry before he went to the Cook Out hangout, and respectfully those self-serving assertions are not supported by the record in this case. PT3. 34, l. – 41, l. 7.

Defense counsel Rutherford countered that the first immunity hearing before Judge Russo was held on the state's timeframe because they called the case to trial. Defense counsel Rutherford said:

> [F]irst of all, noting that this case occurred February 17th, 2014, *and nine months later we were having a hearing in a murder case in Lexington County. The Solicitor states that I chose to do so. That is a bold face untruth. We were told that the trial was going to be called and in doing so we needed to go ahead and file our motion so that we could get it heard.* Never in the history of Lexington County in my 20 years of practice have I seen a case go from, a murder case in particular, go from the date of incident to trial in nine months and to assert that I did that or that I'm the one that caused that to happen is just *absolutely untrue and the Solicitor knows that* because he and I talked about it. <u>They chose when to have the hearing, they chose when to schedule it and all of that had to be completed before that date because they were worried that I would go back into session and it would be into the next year before it got tried. It was certainly not on me as to when to call it</u>.

PT3. 41, l. 10 – 42, l. 3. (emphasis added).

Defense counsel specifically cited the testimony of Beth Bettini, who the solicitor continued to call "a liar," even though the state "lost her information. He continues to question what she would have told 911 based on nothing but his imagination," and Ms. Bettini was naturally angry about being called a liar simply because she was an eyewitness. PT3. 44, ll. 8-15. Counsel noted that appellant was not convicted by the jury, yet the solicitor continued to argue "finality." PT3. 46, l. 10 – 47, l. 12.

Graham responded, "As far as a timeline and I honestly don't remember, *if Mr. Rutherford says he was forced to have a trial and have a stand your ground hearing* at the last minute, I'll concede to that. I don't know—I honestly don't remember." PT3. 47, ll. 17-21. (emphasis added).

The judge said at the end of the arguments that he would issue a written order, which would also address whether or not the defense was even entitled to the immunity hearing before him. PT3. 50, l. 14 – 52, l. 7.

The judge then issued an order dated October 11, 2017, which was filed on October 16, 2017, stating the matter was before the court for a hearing "on Defendant's Motion for a second hearing, asserting Statutory Immunity from Prosecution based on Protection of Persons and Property Act, Section 16-11-440, et. seq., of the Code of Laws." Order at 1; R. p. *. The order noted that the first immunity hearing was held before Judge Russo on November 17-19, 2014, and that Judge Russo issued an order denying immunity on February 4, 2015. Order at 1; R. p. *. The jury trial ended in a hung jury, and the judge declared a mistrial on October 11, 2016. Order at 1; R. p. *.

At the second immunity hearing, the court heard the testimony of "Beth Bettinni, Officer Caitlin Voravudhi, Chauncey Meggett, 911 Custodian of Records, Dr. Janice Ross, Zachary Lynch and the State's reply witnesses." Order at 2. Judge Hood's order cited testimony from the first immunity hearing that was held before Judge Russo. Compare Judge Russo's order at 2-5 with Judge Hood's order at 2-5. R. p. * & p. *.

The order cited to "inconsistent testimony" and evidence being "in direct contradiction" and ruled, "Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013)." Order at 6; R. p. *. "The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond (sic) a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence." Order at 6-7.

The order concluded, "Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the evidence. The state was allowed to respond. Further, *the Court read the testimony from the original immunity hearing and the jury trial.* The testimony has been heard and the record has been protected." Order at 7; R. p. * (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

Judge Hood respectfully erred by considering evidence from the first pretrial immunity hearing before Judge Russo and from the mistrial held before Judge Griffith. Defense counsel Rutherford asked for the new immunity hearing to which appellant was entitled. Counsel was obligated under Rule 18(a), SCRCrimp to not argue with the court once it limited what would be allowed to be considered. The solicitor in this case was successful in having Judge Hood consider the evidence from the first immunity hearing and the mistrial, where that evidence should not have been considered. The solicitor did not even want the defense to have another immunity hearing – much less a full immunity hearing -- before Judge Hood even though appellant's first trial ended in a mistrial and the pretrial hearing and the mistrial were both nullities that should not have been considered. Again, "a mistrial is equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties 'as though no trial had taken place.' Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (ruling of trial judge in proceeding ending in mistrial represents no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to the admissibility and competency of testimony during a trial, which was later declared a mistrial results 'in no binding adjudication of the rights of the parties.' Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948)." State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

In State v. Woods, the state consented to a change of venue in a death penalty case, which resulted in a jury being selected from Marion County and transported to Clarendon County. That trial ended in a hung jury and a mistrial, as here. The defendant, Woods, argued on appeal that the trial judge committed error because the jury was selected from Clarendon County for the

second trial, where the court during the first trial had brought a jury from Marion County to Clarendon County for the trial.

Our Supreme Court found no error, since the first trial resulted in a mistrial. It was a nullity, and therefore began anew when the state again called the case for trial. The Court noted that when a mistrial occurs because of the inability of the jury to reach a verdict, it is the same as if no trial took place. State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

The same is true of the pre-trial hearing in this case in which Judge Russo denied immunity. It was a nullity, and appellant was entitled to begin anew. Instead, he was forced to accept what limited hearing Judge Hood would allow him.

Further, in State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), this Court found error where during the first trial the judge held an *in-camera* hearing at which time informant Hall identified defendant Smith as a person from whom he purchased crack cocaine on February 26, 1996. The judge allowed Hall to identify defendant Smith in the jury's presence. However, the first trial ended in a mistrial because of the admission of other evidence.

A second trial was held before the same judge on September 12, 1996. Smith requested a hearing on the in-court identification. He claimed Hall's identification was tainted on the first day of the re-trial when Hall saw Smith in a holding cell. The judge ruled that defendant Smith was not entitled to another hearing on the same issue because Hall identified Smith during the prior trial where Smith had an *in camera* hearing on that same issue. However, this Court noted and held that a mistrial was equivalent of no trial at all. Therefore, the prior court's rulings on the admissibility and competency of testimony were not binding on the rights of the parties. Because the mistrial was equivalent of no trial, the trial judge could not rely on evidentiary rulings from the nugatory proceeding. This Court therefore remanded the case to the circuit

court for an *in-camera* hearing to determine whether Hall's identification of defendant Smith should be suppressed.

The same is true as to the pre-trial immunity hearing, and the mistrial in this case. It was evident that Judge Hood relied on evidence offered during a mistrial and from the prior pre-trial immunity hearing, which was also nugatory because the proceeding ended in a mistrial. That was error on the part of the court.

Moreover, the Supreme Court held in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), that a court's ruling on immunity must be based solely on the evidence presented at the pre-trial immunity hearing. On remand, the Supreme Court instructed the circuit court to only rely on that evidence presented at the new immunity hearing.

The pre-trial hearing held before Judge Russo and the subsequent mistrial held before Judge Griffith were both nullities, and Judge Hood was obligated to proceed as if those nugatory proceedings did not exist. Again, when a mistrial occurs because of the inability of the jury to agree on a verdict, it is the same as if no trial took place. That is also true of the pre-trial rulings before that trial. See State v. Mills, 281 S.C. 60, 314 S.E.2d 324 (1984); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999).

Appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new immunity hearing.

In the alternative, even if this Court were to disregard precedent, which respectfully it cannot, and hold that the prior mistrial and its attendant pretrial immunity hearing were not a nullity, the fact would still remain that appellant was entitled to the second immunity hearing held before Judge Hood. At the second immunity hearing before Judge Hood on August 22, 2017, defense counsel Rutherford noted that after a mistrial, everything starts over. Appellant

was not convicted, and there was no guarantee the case would even be called to trial again. In fact, what was highly unusual or unique in this case was that the defense came upon evidence that was newly discovered, and most of which would have been known before the first hearing but for the bungling of law enforcement and the solicitor's office. PT2. 28, l. 23 – 32, l. 13.

Here, the defense had at least three new key witnesses:

> As of two weeks ago when we were talking to Beth Bettini who went to see the Solicitor on her own volition who was one of the people that is caught on a dash cam video 15 minutes into the video I believe or eight minutes into the video as this cop just pulls forward and looks at a wall, all of a sudden you hear her talking to this lady that we identify as Beth Bettini. She says I called 911. She goes on and talks about what happened *and she sees the fear in Mr. Dennis' face*. That is relevant because as you can tell from Judge Russo's ruling when you see it, part of the testimony was that he could have left at any time. *She said he couldn't have left. He would have run over them. He couldn't leave. I saw the fear in his face, an independent witness, not a Lexington kid, not a Dutch Fork kid.* These are statements again nine minutes into a video.
>
> She says I called 911. We found her not because we were looking but because she called us two days into the trial and said, hey, I went to talk to the Solicitor's Office and they told me that I didn't call 911. They didn't have a record of it. They told us they didn't have any record of her calling 911. Well, two weeks ago we get something from the Solicitor's Office verifying that they do have the fact that she called 911. Two weeks ago. They don't have her actual recording because according to them I believe they said nobody requested it at the time, but they do now and are able or they are now able to show that she did actually call 911 after the Solicitor's Office tried to convince her they didn't have any record of her calling 911. She said she called that night and she called the next morning. Things that go to the credibility of a witness and whether we're going to actually use that witness. Information that was just now turned over two weeks ago.

PT2. 24, l. 15 – 25, l. 23. (emphasis added).

In addition to Beth Bettini, a "Dutch Fork kid," Chauncy Meggett, gave a statement to the solicitor's office dated August 26, 2016. This was following Judge Russo's order denying immunity, which was dated February 4, 2015. Meggett told the solicitor's office, even as a "Dutch Fork kid," *that appellant Dennis was trying to leave and "Cape [the decedent] went up*

and banged on his car. Cape was wrong. This is a statement that the Solicitor's Office got in August of 2016 that they turned over to us." PT2. 21, l. 20 – 22, l. 18. (emphasis added).

Defense counsel noted that the investigator decided to "charge my client five minutes after he interviewed him, five minutes according to the number that he gave, five minutes after he interviewed him on the night of the incident. He had investigated nothing at that point." Defense counsel again noted that the solicitor's office rushed the immunity hearing and the trial, in part, based on the fact that defense counsel Rutherford was a legislator. "We need to get it scheduled before you go back in session." PT2. 22, l. 5 – 24, l. 1.

Third, defense counsel cited the new testimony of Zachary Lynch, who was an employee of the Cook Out, who was out on break at the time appellant was attacked in the parking lot. "Apparently now literally today we believe that that [Lynch] statement was written with Officer Holiday. Didn't testify in the stand your ground [hearing]. Didn't testify in the trial and it comes out because we now, *the Solicitor's Office called us yesterday at 6:00 and said, hey, or emailed us at 6:00 and say, hey, Zach Lynch also appears and Beth Bettini also appeared seven minutes into Officer Holiday's tape..."* PT2. 25, l. 24 – 33, l. 2. Lynch had critical testimony that he saw the decedent and apparently others reaching into appellant's car at the time appellant stabbed the decedent. PT2. 25, l. 24 – 33, l. 2.

The solicitor incorrectly asserted, "There is nothing that allows the Court to have a second hearing." "When we found out about new stuff, we turned it over. He chose his timing when to have this stand your ground hearing." PT2. 33, l. 4 – 36, l. 16.

The judge said he was concerned about a future PCR action based on witnesses not being called, and he ruled he would allow the defense to present its evidence and allow the state to reply. PT2. 38, l. 16 – 40, l. 6. The judge then noted he would have to review the prior

testimony, which included eight to ten days of trial testimony, which would take him some time. PT2. 40, l. 4 – 42, l. 1.

As seen, Beth Bettini said at the hearing before Judge Hood that appellant could not leave because he would have hit the people surrounding his car, and that appellant looked "scared to death." PT2. 118-120; 134; 140; 143. Bettini testified that the teenagers attacking appellant were aggressive, mean, and out of control. PT2. 155.

Zachary Lynch testified before Judge Hood that the teenagers were gathered at appellant's car window. Lynch saw a person lean into the window with his hand forward as if he was attempting to grab something. Lynch even thought the decedent was the person who did the stabbing because of the way he leaned into appellant's car. PT2. 170. Lynch noted that after the person reached into appellant's car window and came back out, the car drove away. PT2. 171;180.

Ervin "Chauncy" Meggett could not be found during the defense's case-in-chief during the immunity hearing held before Judge Hood. The defense initially was going to rely on Meggett's written statement, which was exculpatory evidence for the defense. PT2. 212-216. However, Meggett appeared later, and he testified at the hearing. He told Judge Hood he saw people around appellant's car at the Cook Out and he heard "banging." He did not know if the decedent was the one banging on the car. PT2. 366. However, Meggett admitted that he previously told the state that the decedent was banging on appellant's car, and Meggett thought the decedent was in the wrong for his actions. That was substantive evidence the decedent was beating on appellant's vehicle before he was stabbed. See State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982)(prior inconsistent statement can be substantive evidence where the declarant testifies and is subject to cross-examination). When the decedent started banging,

appellant rolled down his window, grabbed a knife, and reached out the window. After appellant reached out the window, the decedent grabbed his chest. Meggett admitted he previously told authorities that appellant was trying to leave. PT2. 369-370. Meggett admitted he was interviewed by the state on August 26, 2016 after the first stand your ground hearing. PT2. 364.

The judge had the discretion to grant appellant a second immunity hearing even if precedent that the first hearing was a nullity were disregarded by this Court. The Beth Bettini, Zachary Lynch, and Ervin "Chauncy" Meggett evidence was not known at the time of the first hearing before Judge Russo, and it would have violated "the essential demands of fairness" to deny appellant another immunity hearing under these circumstances. Cf. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991)(unkept promise to instruct on the law deprived defendant of a fair exercise of his peremptory challenges even though peremptory challenges are without a constitutional basis). Further, the evidence offered at the second hearing was "after-discovered" evidence since it was discovered after the first immunity hearing, it could not have been discovered before then by the exercise of due diligence, it was material and not merely cumulative or impeaching and it probably would have changed the result of the first immunity hearing if this evidence had been heard then. See State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).

For these additional reasons the immunity hearing before Judge Hood was properly allowed, and as argued infra, when the evidence from that second hearing is also considered, Judge Hood abused his discretion by ruling appellant failed to prove he was entitled to immunity by a preponderance of the evidence. State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016)(preponderance of the evidence is the defense burden of proof as to its entitlement to immunity under the Protection of Persons and Property Act).

2.

The second circuit court judge after the mistrial erred by denying appellant immunity under the Protection of Persons and Property Act because there was inconsistent testimony, reasoning that inconsistent evidence made self-defense a jury issue, since that was improper pursuant to State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019).

Relevant facts

After the second immunity hearing before Judge Hood held on August 22 and August 24, 2017, Judge Hood held a hearing for arguments only on September 18, 2017. The defense, through counsel Rutherford, noted that the burden on appellant was only by a preponderance of the evidence to prove that he was entitled to immunity. Appellant had proven that he was in his own vehicle when he was attacked, and he was only able to stab the decedent because of how close the decedent was to appellant's vehicle. Cook Out employee Zachary Lynch testified that he saw the altercation and that decedent Capers reached into appellant's car. That is when appellant stabbed him. PT3. 4, l. 22 – 6, l. 7.

Defense counsel reminded the judge that the pathologist, Dr. Ross, testified during the trial, but not during the initial stand your ground hearing. Counsel explained that the state did not initially use Dr. Ross because "Dr. Ross as late as this week which we submitted to the Solicitor's Office in an e-mail says that it is most likely, the most likely scenario given that the perpetrator is sitting in the car, the perpetrator of the stabbing, the most likely scenario is that the victim was parallel to the ground. The only way he could have done that is as if he was in the car. We know that because Dr. Ross, pathologist, states that. We have two independent witnesses [Lynch and Bettini] and Dr. Ross who is stating again that Mr. Capers had to have been leaning like this (indicating) before he got stabbed." PT3. 9, l. 4 – 10, l. 10.

Counsel argued that solicitors were ministers of justice and that appellant had proven to the court and to the solicitor's office by a preponderance of evidence that the decedent was the aggressor that evening and that he "would have had to have been in the car" to have gotten stabbed. Counsel emphasized that the evidence at the second immunity hearing before Judge Hood was even more telling in favor of the defense and that the defense was not bound by the first trial, which was a mistrial. The mistrial simply did not bind or limit the defense. PT3. 11, l. 3 – 13, l. 15.

Deputy solicitor Graham argued that appellant was told "[t]here's a lot of Dutch Fork students here [at the Cook Out] and there's some stuff going on and they choose to go inside. When they go inside, they are met by Michael James saying, is that all you brought? According, I believe, to everyone the defendant says we're not here to fight. We're just here to eat. And Your Honor can watch the inside video of the Cook Out. Nothing else happens. There's no threats. There's no fights. There's no arguments. The defendant and his friends sit around I think it's for 15 minutes inside. They order a drink or two and they go to leave." PT3. 37, ll. 8-24.

The solicitor nontheless faulted appellant for staying at the Cook Out restaurant, and he maintained there were "multiple ways" for appellant to leave the Cook Out restaurant. PT3. 37, l. 25 – 39, l. 8. The solicitor argued:

> State versus Curry, Your Honor, 406 South Carolina 364, 2013 Supreme Court case, in that case, Your Honor, you had witnesses on both sides of the issue, people saying this and people saying that in direct contradiction of each other. After looking and analyzing immunity, the Court said that a murder defendant was not entitled to immunity from prosecution under the protection of the Persons And Property Act *where the testimony of the defendant and eye witnesses was in direct conflict as to whether the victim attacked defendant. That's exactly what we have here. That is a quintessential -- I didn't pronounce that right -- quintessential jury question.*

PT3. 39, ll. 9-21. (emphasis added).

The solicitor strangely urged that the prosecution had proven appellant's guilt during the mistrial and he reasoned "they [the jury] looked beyond a reasonable doubt, rejected self-defense, rejected the presumption of fear, how can the defendant's evidence rise to the preponderance of the evidence now?" PT3. 39, l. 22 – 40, l. 18. The solicitor continued to argue appellant was even not entitled to the immunity hearing before Judge Hood. PT3. 40, l. 18 – 41, l. 7.

In Judge Hood's order denying relief, he repeatedly referred to inconsistent or contradictory evidence. The judge noted that "the Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students. Additionally, the testimony as to the 'fear in his eyes,' given by Beth Bettinni and the Defendant, *are in direct contradiction* with the testimony of the Dutch Fork students." Order at 6; R. p. *.

"Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary fitness and courage would have entertained the same belief. *Id.* This standard has not been established by the preponderance of evidence, *based upon the inconsistent testimony.*" Order at

The judge concluded:

> Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (Murder defendant was not entitled to immunity from prosecution under Protection of Persons and Property Act where testimony of defendant and eyewitnesses *was in direct conflict as to whether victim attacked defendant*). **The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.** Therefore immunity does not apply **because the Defendant**

has not proven beyond a preponderance of evidence standard of self-defense.[2]

Order at 6-7; R. p. *. (emphasis added).

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

This issue is controlled by our Supreme Court's opinion in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), wherein the Court held the circuit court erred in finding that the immunity issue presented a jury question. "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Judge Hood did not have the benefit of our Supreme Court's opinion in State v. Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue under State v. Curry, and that immunity therefore had to be denied. However, the solicitor in this case was not the first solicitor to sell a circuit court judge that bag of goods that conflicting evidence made immunity by way of self-defense a jury issue.

The Supreme Court in State v. Cervantes-Pavon noted that "the act requires the circuit court to determine whether a movant is entitled to immunity. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination.)." Cervantes-Pavon, 626 S.C. at 451, 827 S.E.2d at 568.

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2 The "beyond a preponderance of evidence standard of self-defense" error is not insignificant since in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) the Supreme Court reversed in part because the circuit court cited to this incorrect standard in making its ruling.

Respectfully, therefore the state here successfully urging that conflicting evidence made self-defense a jury issue resulted in an abdication of judicial responsibility under the Protection of Persons and Property Act.

The court abused its discretion in this case in denying immunity, as the trial court's ruling was based on an error of law that conflicting evidence made self-defense a jury issue. State v. Douglas, 411 S.C. 307, 316, 468 S.E.2d 232, 237 (Ct. App. 2014) *quoting* State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

Our Supreme Court in State v. Manning, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) stated, "Here, the undisputed facts support a denial of immunity under subsection (A) and (C) of § 16-11-440." This language, and language from State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), has been impermissibly used to successfully urge that disputed evidence at the immunity hearing, conversely, made self-defense a "jury question." Because the circuit court's order here was based upon an error of law as explained in State v. Cervantes-Pavon, appellant's conviction should be reversed, and he should be granted a new immunity hearing.

3.

In the alternative, both circuit court judges erred by denying appellant immunity based upon the legally erroneous reasons that appellant had a duty to retreat from the situation at the Cook-Out or to avoid going there altogether since under the Protection of Persons and Property Act appellant was acting legally in a place where he had a right to be when he was attacked in his vehicle, and he had no duty to retreat pursuant to S.C. Code §16-11-440 (A) & (C).

Relevant facts

The defense alleged in this case that appellant was entitled to immunity from prosecution under both S.C. Code §16-11-440(A) and S.C. Code §16-11-440(C). S. C. Code §16-11-440 (A)

provides that "A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

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

(emphasis added).

In addition, S.C Code §16-11-440 (C), the stand your ground provision, provides, "A person who is *not engaged in an unlawful activity* and who *is attacked in another place where he has a right to be*, including, but not limited to, his place of business, *has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force*, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." (emphasis added).

At the September 18, 2017 argument hearing before Judge Hood, solicitor Graham argued that appellant Dennis "chose to go inside" after he saw Dutch Fork students at the Cook Out. However, appellant had a right to go to the Cook Out. It was a Lexington County High School "hangout" after basketball games. PT3. 37, ll. 8-24. The solicitor admitted that appellant said his friends only wanted to eat, but the solicitor nonetheless argued:

> But the defendant and his friends **chose to stay** there. The defendant steps outside when he gets a call back from the same person he texted which I believe is his cousin. When he steps out to take the call, you see the video, the other Lexington students step out. Shortly thereafter Michael James goes by and there's a dispute about who says what first, but what's clear on the video is you see Morgan Zander lean forward and bark something at Michael James' back, and

> Michael James turns around, they start talking to each other and that's when the Dutch Fork students come out. *If he didn't want to bring on the difficulty, Mr. Dennis could have left right then and there* and Your Honor knows from watching the video that he doesn't leave.

PT3. 37, l. 25 – 38, l. 13. (emphasis added).

The solicitor continued to blame appellant for going to the Cook Out—which again was a place he had a right to be, pursuant to S.C. Code § 16-11-440(C) and for not fleeing when the Dutch Fork students started trouble.

Standard of review

An abuse of discretion in an immunity case occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Discussion

It is apparent from Judge Hood's order denying immunity dated October 11, 2017 that he denied appellant immunity because he did not retreat, and because he went to the Cook Out. The judge noted, "While walking into the cookout, the defendant's friend, Austin Sanders, was leaving the Cook-Out and told the group, 'Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just—started getting rowdy in the drive-thru, shaking people's cars, and stuff like that.' *Despite this comment*, **Defendant and his group continued into the Cook-out.**" Order at 3. (emphasis added). The judge reasoned that appellant should not have gone into the Cook Out where he had a right to be and that he should have retreated when he saw the Dutch Fork students there.

Further, in the analysis section of Judge Hood's order, he wrote, "The evidence, which consists of video surveillance and witness testimony, shows the Defendant seeking out the Cook-Out restaurant and the Dutch Fork students that night. The Defendant **chose the situation** that

led to the altercation with the Dutch Fork students. The Defendant **also chose not to leave the other exits** that were available to him. He chose to drive into a crowd of Dutch Fork students." Order at 5. (emphasis added).

The judge also wrote, strangely, "Second, the Defendant must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.* **The Defendant has failed to do so in this case.** The Defendant and his friends went to the Cook-Out, **knowing that Dutch Fork Students would be present.** *The Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.*" Order at 6. (emphasis added).

The judge reasoned appellant was responsible for the situation because he went to the Cook Out and because he did not retreat. That is apparent from the judge's order.[3]

Further, S.C. Code §16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out restaurant was the Lexington County High School hangout after basketball games. Appellant was a recent graduate of Lexington County High School, who went to the basketball game. He had every right to go to the hangout that night, and he was not obligated to avoid it simply because he saw Dutch Fork students at the Cook Out upon his arrival. Appellant was not at fault for the difficulty for purposes of self-defense where he went to a public restaurant where he had a right to be.

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[3] It was strange that the judge reasoned appellant failed to prove he believed he was imminent danger or was in imminent danger because he did not avoid the situation at the Cook Out that night.

Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat, and the evidence showed his car was surrounded. Regardless, again, appellant had no duty to retreat, and the second circuit court judge's reasoning was an error of law in that regard.

S.C. Code §16-11-420(E) states that "the general assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." As our Supreme Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): "Section 16-11-440(C) is broadly worded" and it states a defendant has no duty to retreat and has a right to stand his ground.

Pursuant to §16-11-440(C), appellant was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington County hangout, was a place where appellant "had a right to be." It was therefore erroneous to reason appellant was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that appellant had the duty to retreat from the Cook Out when trouble started that appellant did not cause.

Judge Hood erred as a matter of law by reasoning appellant had a duty to retreat and that he had a duty to avoid the Cook Out restaurant where it was a place he had a right to be as long as he was acting lawfully, which he was.

Judge Russo

Judge Russo also erred by ruling appellant "could have left," and "rather than attempting to leave, the Defendant kept his vehicle stationary." Judge Russo order at 9; R. p. *. The judge impermissibly found appellant was not "without fault" for purposes of self-defense for this reason, and that appellant could have retreated. Appellant should be granted a new trial and pre-trial immunity hearing.

Again, S.C. Code §16-11-420(E) states that "the general assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." As our Supreme Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): "Section 16-11-440(C) is broadly worded" and it states a defendant has no duty to retreat and has a right to stand his ground. Pursuant to §16-11-440(C), appellant was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington County hangout, was a place where appellant "had a right to be." It was therefore erroneous to reason appellant was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that appellant had the duty to retreat from the Cook Out when trouble started that appellant did not cause. If this Court were to determine that Judge Russo's order somehow solely controlled in this case, it should be reversed because it was based on a fundamental error of law as to immunity and a nonexistent duty to avoid going places a citizen has a right to be, and a nonexistent duty to retreat and flee from persons engaged in criminal behavior who are attempting to harm you.

4.

The second circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance he was entitled to immunity under both S.C. Code § 16-11-440(A) and the "stand your ground" provision of § 16-11-440(C), particularly where the court erroneously reasoned appellant had a duty to retreat, or even a duty not to go to "a place he had the right to be" altogether.

Relevant facts

As seen, on February 17, 2014, appellant attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. PT1. 482, ll. 2-9. Appellant's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. PT1. 8, ll. 10-25; PT1. 162, ll. 19-22. Despite difficulty in the parking lot after the game between the rival schools, appellant avoided any conflict. PT1. 247, l. 24 – 248, l. 6.

After the game, appellant and his friends went to the Cook Out, which was the "hangout spot" for Lexington students after games. PT1. 14, l. 21 – 15, l. 3; PT1. 222, l. 24 – 223, l. 1. As soon as appellant and his friends entered the restaurant, Michael James, who attended Dutch Fork, approached appellant, threw his hands into the air, and asked, "That's all y'all brought?" PT1. 251, ll. 10-21. In an effort to avoid any conflict, appellant responded, "We just came here to eat." PT1. 251, ll. 21-22. While they were waiting in line, appellant saw Michael James, the same student who confronted appellant when he entered the restaurant, standing on a chair and motioning as if he was going to punch Keith Adams. PT1. 253, ll. 3-13. Again, in an attempt to avoid any conflict, appellant told his friends they should leave. The group stepped outside. PT1. 16, l. 12 – 17, l. 25; PT1. 253, ll. 19-22. Shortly thereafter, Michael James, the student who had antagonized the group earlier, walked outside, threw his hands in the air, and asked, "Are you still salty?" Appellant responded, "The game was thirty, thirty-five minutes ago. Y'all won. Congratulations." To again avoid any confrontation, appellant then told his friends, "Guys come on, let's go" and the group began walking toward their cars. PT1. 254, l. 13 – 255, l. 8.

As they were walking, about thirty to forty Dutch Fork students "rushed" out of the Cook Out and began taunting and threatening appellant and his friends. PT1. 19, ll. 1-3; PT1. 84, ll. 4-21; PT1. 255, ll. 10-14. After reaching their cars and briefly talking, Keith Adams eventually

drove away first. PT1. 23, ll. 13-17; PT1. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. PT1. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith ultimately turned right onto the main road. PT1. 22, l. 21 – 23, l. 19. Will Zander, who was directly behind Keith, followed the same path past the Dutch Fork students. As Will was driving past the students, he stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. PT1. 87, l. 21 – 88, l. 23. There was testimony Will said, "This is what y'all are worth." PT1. 543, l. 2 – 546, l. 15. Several students from Dutch Fork ran into the road to pick up the money. PT1. 89, ll. 7-20; PT1. 451, ll. 19-25. Appellant, who was the last to pull away, looked up and saw Will's car stopped in the roadway surrounded by the same Dutch Fork students who minutes earlier had threatened appellant and his friends. PT1. 258, l. 7 – 259, l. 2. Appellant did not know at the time that Will had thrown money into the road. PT1. 258, ll. 12-21. He feared the Dutch Fork students were going to attack Will. Appellant sped forward to make sure Will was alright. PT1. 258, l. 24 – 259, l. 24. Appellant stopped behind Will's car. As soon as appellant stopped, Dutch Fork students aggressively swarmed his vehicle, yelled expletives at him, repeatedly threatened him, and ordered him to get out of the car. PT1. 260, l. 8 – 262, l. 15; PT2. 115, l. 10 – 117, l. 1; PT2. 170, ll. 5-8. The students, including the decedent, Da'Von Capers, were "banging" on appellant's car "trying to scare him." PT1. 225, ll. 1-3; PT2. 369, l. 14 – 370, l. 3. One student threw a drink at appellant's car. PT2. 115, ll. 10-19; PT2. 169, ll. 7-23. Hands started reaching into appellant's window. PT1. 225, ll. 1-3; PT1. 260, ll. 13-15; PT2. 170, ll. 13-24. He thought they were trying to attack him and "forcefully" pull him out of the car. PT1. 260, ll. 13-15. With his foot still on

the brake, appellant leaned as far into the car as possible away from the Dutch Fork students. PT1. 260, ll. 15-19.

Appellant was scared and feared for his life. PT1. 260, ll. 19-20; PT1. 262, ll. 22-23. One independent witness maintained appellant "looked scared to death." PT2, l. 115, l. 22 – 118, l. 15. Appellant could not leave because Will's car was parked in front of him and there were students in front and around his car. PT1. 226, ll. 14-21; PT1. 265, l. 22 – 266, l. 17; PT2. 120, ll. 5-7; PT2. 170, ll. 2-4. Appellant had a knife in his center console. PT1. 262, ll. 24-25. He grabbed it, reached across his body with his right hand, struck, and then drove away. PT1. 262, l. 24 – 263, l. 2. He did not realize he had stabbed anyone. PT1. 268, ll. 15-20.[4]

Arguments by counsel below

At the end of the first immunity hearing, defense counsel argued appellant proved by a preponderance of the evidence that he was immune from prosecution pursuant to the Act. PT1. 604, ll. 18-20. Counsel correctly argued appellant avoided conflict at every opportunity that night, including when he first entered the restaurant and Michael James confronted him, and again in the parking lot of the Cook Out when James and others taunted him. Appellant and his friends retreated to their cars. PT1. 590, l. 7 – 592, l. 25. After reaching their cars, appellant and his friends began to drive away. Counsel admitted that Will Zander then did "something stupid."

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[4] The state presented the testimony of several Dutch Fork students who were standing outside appellant's window when the stabbing occurred. Some of these witnesses claimed no one touched appellant's car or reached into his window. PT1. 515, ll. 16-23; PT1. 550, ll. 20-24; PT1. 575, l. 25 – 576, l. 5. One witness admitted the decedent reached into appellant's window, but claimed it was after appellant had stabbed him. PT1. 469, l. 4 – 470, l. 5. Others testified that while they did not see a knife, they saw appellant's hand come out the window when he struck the decedent. PT1. 516, l. 14 – 517, l. 11; PT1. 529, ll. 1-5; PT1. 553, l. 6 – 554, l. 11. Additionally, some of these witnesses claimed there was nothing blocking appellant from leaving. PT1. 517, l. 25 – 518, l. 6. Despite this conflicting evidence, these witnesses admitted to aggressively approaching appellant's window and threatening him. PT1. 513, ll. 12-21; PT1. 547, l. 19 – 548, l. 6.

He threw money out the window. Appellant, after having been chased out of the restaurant, chased from the parking lot, and pursued down the hill toward his car, saw Will stopped in the roadway and believed Will was in danger. PT1. 594, ll. 1-22. Appellant sped up toward that area. Defense counsel argued appellant was not "using an occupied vehicle for an unlawful purpose." He was merely "trying to make sure [his] friends were okay." PT1. 594, l. 22 – 595, l. 5.

Defense counsel correctly argued appellant had a right to act on appearances even if he was mistaken. Appellant thought Will Zander was in trouble. Dutch Fork students surrounded appellant's car. Counsel asserted appellant could not leave because Will Zander, his car, and other students were in the roadway in front of appellant. PT1. 596, ll. 9-19. He argued this fact was supported by the iPad video in which someone said appellant "almost hit his own man" when he pulled away. PT1. 597, l. 24 – 598, l. 6. Regardless of whether appellant could have left, defense counsel correctly maintained appellant was not required to retreat. PT1. 598, ll. 7-10. Appellant was in his occupied vehicle. He was "in his bubble." Defense counsel said appellant testified students stuck their hands in his window and were pulling on his door handle. Appellant did not know what their intentions were. This caused fear. Appellant was scared. PT1. 599, ll. 9-14. He reacted quickly by stabbing. PT1. 600, ll. 3-14. Counsel argued "the General Assembly added occupied vehicle specifically" for situations like this. PT1. 599, ll. 9-19.

Counsel again argued appellant had no duty to retreat. He was not required to drive off and leave Will Zander in the road outnumbered forty to one. PT1. 602, ll. 5-9. Appellant made every effort that night to avoid conflict. PT1. 602, ll. 17-25. Counsel concluded that appellant was in his occupied vehicle as numerous students admittedly threatened and yelled at him.

Appellant leaned as far as possible into the car and repeatedly said, "Back away, back away, you don't want any of this." Appellant only stabbed that night because the students made him feel he was in danger of imminent peril and refused to back away from his car. PT1. 603, l. 7 – 604, l. 17.

Order denying immunity by second circuit court judge

Judge Hood denied appellant immunity by order dated October 11, 2017. R. p. * (Order). The judge found appellant failed to set forth a valid case of self-defense. R. p. * (Order). First, the judge found appellant was not without fault in bringing on the difficulty. The judge determined appellant *sought "out the Cook Out* restaurant and the Dutch Fork students that night." R. p. * (Order at 5). He further concluded, *"[Appellant] chose the situation* that led to the altercation with the Dutch Fork students. *[Appellant] also chose not to leave* [through] the other exits that were available to him. He chose to drive into a crowd of Dutch Fork students." R. p. * (Order at 5). (emphasis added). Second, the judge found appellant failed to show he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. In support of this finding, the judge asserted, *"[Appellant] and his friends went to the Cook Out knowing that Dutch Fork students would be present. [Appellant] could have left the Cook Out* without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students." R. p. * (Order at 6). (emphasis added). The judge further maintained that the testimony given by Beth Bettini as to the "fear in his eyes" and appellant's testimony were "in direct contradiction with the testimony of the Dutch Fork students." R. p. * (Order at 6). Third, the judge concluded appellant failed to establish that, if his defense was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same

belief. This finding was solely "based upon the inconsistent testimony." R. p. * (Order at 6). Lastly, the judge noted appellant had no duty to retreat. R. p. * (Order at 6). Citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge asserted appellant's "claim of self-defense presents a quintessential jury question." R. p. * (Order at 6). He found the "direct contradiction between witnesses creates an issue for a jury to decide, not the trial court." R. p. * (Order at 6). Consequently, the judge denied appellant immunity from prosecution.

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); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). 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).

Discussion

The South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). It explained "that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). Section 16-11-440(A) of the Act provides: "A person is *presumed to have a reasonable fear of imminent peril of death or great bodily injury* to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person *if the person* against whom the deadly force is used is in the process of *unlawfully and forcefully entering*, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or *if he removes or is attempting to remove another person* against his will from the dwelling, residence, or *occupied vehicle*; and the person using deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act *is occurring or has occurred.*" S.C. Code Ann. § 16-11-440(A) (emphasis added).

Section 16-11-440(C) of the Act, the stand your ground provision, provides "a person who is *not engaged in an unlawful activity* and who is attacked in another *place where he has a right to be*, including, but not limited to, his place of business, *has no duty to retreat* and has the right to stand his ground and meet force with force, including deadly force, *if he reasonably believes* it is necessary to *prevent death or great bodily injury to himself* or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 16-11-440(C) (emphasis added).

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

defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

The Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. Jones and Lee were involved in a physical altercation. Id. *Jones left the residence and returned when she had "cooled down."* Id. at 288, 786 S.E.2d at 134. (emphasis added). While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. *Believing Lee was going to hit her again*, Jones grabbed the knife out of her shirt and stabbed him. Id. The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d

at 142. Jones told police she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). After spending the day on the golf course drinking, Douglas and his friend, Charles Smith, went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. When Smith was two feet away, Douglas fired the pistol striking Smith. Id. This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' belief that Smith was about to inflict serious bodily injury upon him if he did not act was reasonable. Id. at 320, 768 S.E.2d at 240. According to this Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at

321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Section 16-11-440(A) states that when an individual is occupying his or her car and someone is using force to enter the vehicle or to remove him or her from the vehicle that individual is presumed to have a reasonable fear of imminent peril of death or great bodily injury such that deadly force is permitted. Appellant was occupying his vehicle when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant's car and reaching into the window, grasping at whatever they could reach. Appellant feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car.

The state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). That was fundamentally incorrect. The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. When he looked up, appellant saw a crowd of Dutch Fork students around Will's vehicle. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the Dutch Fork students were threatening Will and his friends in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey,

394 S.C. 491, 716 S.E.2d 97 (2011). Appellant's actions were as reasonable as the defendants in State v. Jones, and State v. Douglas, supra especially where appellant repeatedly avoided confrontations with the aggressive students from the other school. Moreover, under the common law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the "Stand Your Ground" provision of the Act. This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person.

Here, appellant was on public property on an open roadway at a public restaurant. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. He avoided conflict every step of the way. First, when he entered the Cook Out and was confronted by Michael James, appellant responded, "We just came here to eat," ignored the Dutch Fork

students, and waited in line to order food. Then when Michael James followed appellant and his friends out of the restaurant and asked if they were "still salty," appellant merely congratulated James on Dutch Fork's win and began walking to his car. When thirty to forty Dutch Fork students then rushed out of the Cook Out and began threatening and taunting appellant, appellant continued to walk backward to his car and not engage with the students.

Judge Hood found appellant failed to prove he was without fault in bringing on the difficulty because he "chose the situation that led to the altercation with the Dutch Fork students," he "chose not to leave [through] the other exits that were available to him," and he "chose to drive into a crowd of Dutch Fork students." R. p. * (Order at 5). The judge essentially reasoned that appellant was at fault because he went into the Cook Out where he had a right to be and should have retreated when he saw the Dutch Fork students there. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the "hangout spot" for Lexington High School students after basketball games. Appellant was a recent graduate of Lexington High School and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Appellant further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant's car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night. The evidence established the students were banging on appellant's car, reaching into his window, and yelling threats and profanity.

Appellant reasonably feared the students were "trying to attack" him and "forcefully pull [him] out of the car." PT1. 260, ll. 8-15. Appellant feared for his life. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on appellant's car "trying to scare him" while others were reaching in the window. PT1. 224, l. 22 – 225, l. 3. Brooks believed appellant was being threatened and he himself "felt a sense of threat." PT1. 225, ll. 14-18. Beth Bettini, another independent witness, testified appellant "looked scared to death" as the Dutch Fork students surrounded his car and screamed threats at him. PT2. 115, l. 10 – 118, l. 15. Zachery Lynch, also an independent witness, testified that he saw a student reach inside appellant's window with his hand "forward." Lynch thought this person was trying to grab appellant. PT2. 170, ll. 13-24.

Oddly, Judge Hood found appellant failed to prove this second element, that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in imminent danger, because appellant did not avoid the situation at the Cook Out. He stated, "The Defendant and his friends went to the Cook Out knowing that Dutch Fork students would be present. The Defendant could have left the Cook Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students." R. p. * (Order at 6). This strange reasoning, respectfully, has no basis or support in the record, and, as argued above, appellant did not have a duty to retreat that night.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger. Appellant proved by a preponderance of the evidence that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Again, a mob of Dutch Fork students surrounded

appellant's car, threatened appellant, banged on his car, and reached in his window. Appellant was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow.

In his order denying immunity, Judge Hood found appellant failed to establish this third element of self-defense because of "inconsistent testimony," but did not specify what the alleged inconsistent testimony was. R. p. * (Order at 6). Moreover, citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge determined appellant's "claim of self-defense presents a quintessential jury question." R. p. * (Order at 6). He asserted, "The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court." R. p. * (Order at 6). This finding was an error of law.

As argued in issue two above, in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), our Supreme Court held the trial judge erred in finding whether Cervantes-Pavon was entitled to immunity pursuant to the Act presented a jury question. The Court exclaimed, "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Id. at 451, 827 S.E.2d at 569. The Court emphasized that "the act requires the circuit court to determine whether a movant is entitled to immunity." Id. at 451, 827 S.E.2d at 568; See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). While Judge Hood did not have the benefit of the Court's opinion in Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue, and that immunity therefore had to be denied, his ruling nonetheless resulted in an abdication of judicial responsibility under the Act.

Because appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act, respectfully, this Court should reverse appellant's conviction and sentence and hold he is immune from prosecution.

5.

In the alternative, if this Court were to hold that the first circuit court judge's ruling controls, the first circuit court judge erred by denying appellant immunity under the Protection of Persons and Property Act, where appellant proved by a preponderance of the evidence he was entitled to immunity under both S.C. Code § 16-11-440(A) and the "stand your ground" provision of § 16-11-440(C), particularly where the judge erroneously reasoned appellant had a duty to retreat, or even a duty not to go to "a place he had the right to be" altogether.

Relevant facts

This Court has a lengthy statement of facts above, and also the relevant facts for issue 4 dealing with the immunity hearing before Judge Hood. To avoid unnecessary repetition factually, it is sufficient to point out that Judge Russo did not have the benefit of Beth Bettini, Zachary Lynch, and Ervin Meggett who testified at the second immunity hearing. While the testimony of those three witnesses was undoubtedly important, Judge Russo heard the same evidence on appellant continuously avoiding confrontations with the Dutch Fork students in the Lexington High parking lot, and at the Cook Out, which was the Lexington High hangout until his car was surrounded by the angry mob.

Arguments by counsel before Judge Russo

Defense counsel argued appellant proved by a preponderance of the evidence that he was immune from prosecution pursuant to the Act. PT1. 604, ll. 18-20. Counsel correctly argued appellant avoided conflict at every opportunity that night, including when he first entered the

restaurant and Michael James confronted him, and again in the parking lot of the Cook Out when James and others taunted him. Appellant and his friends retreated to their cars. PT1. 590, l. 7 – 592, l. 25. After reaching their cars, appellant and his friends began to drive away. Counsel admitted that Will Zander stopped and did "something stupid." He threw money out the window. Appellant, after having been chased out of the restaurant, chased from the parking lot, and pursued down the hill toward his car, saw Will stopped in the roadway and believed he was in danger. PT1. 594, ll. 1-22. Appellant sped up toward that area. Defense counsel argued appellant was not "using an occupied vehicle for an unlawful purpose." He was merely "trying to make sure [his] friends were okay." PT1. 594, l. 22 – 595, l. 5. Defense counsel also correctly argued appellant had a right to act on appearances even if he was mistaken. Appellant thought Will Zander was in trouble. Dutch Fork students then surrounded appellant's car. Counsel asserted appellant could not leave because Will, his car, and other students were in the roadway in front of appellant. PT1. 596, ll. 9-19. He argued this fact was supported by the iPad video in which someone said appellant "almost hit his own man" when he pulled away. PT1. 597, l. 24 – 598, l. 6. Regardless of whether appellant could have left, counsel correctly maintained appellant was not required to retreat. PT1. 598, ll. 7-10.

Appellant was in his occupied vehicle. He was "in his bubble." Appellant testified students stuck their hands in his window and were pulling on his door handle. Appellant did not know what their intentions were. This caused fear. Appellant was scared. PT1. 599, ll. 9-14. He reacted quickly by stabbing. Once the decedent was away from his window and appellant was no longer in danger, he pulled away almost hitting his friend, Will Zander. PT1. 600, ll. 3-14. Counsel Rutherford argued "the General Assembly added occupied vehicle specifically" for situations like this. PT1. 599, ll. 9-19. Appellant had no duty to retreat, and he was not required

to drive off and leave Will in the road outnumbered forty to one. PT1. 602, ll. 5-9. Appellant made every effort that night to avoid conflict. PT1. 602, ll. 17-25. Counsel concluded that appellant was in his occupied vehicle as numerous students admittedly threatened and yelled at him. Appellant leaned as far as possible into the car and repeatedly said, "Back away, back away, you don't want any of this." Appellant only stabbed that night because the students made him feel he was in danger of imminent peril and refused to back away from his car. PT1. 603, l. 7 – 604, l. 17.

Order denying immunity by first circuit court judge

Judge Russo found appellant was not entitled to immunity under both subsection (A) and (C) of § 16-11-440 of the Act. Regarding § 16-11-440(A), the judge determined appellant failed to meet his burden of proving the decedent was in the process of unlawfully and forcefully entering an occupied vehicle. R. p. * (Order at 8). The judge further found appellant failed to prove he had reason to believe the decedent was in the process of unlawfully entering his occupied vehicle. The judge noted that while appellant testified the decedent was forcefully entering his car, he found it not credible. R. p. * (Order at 8). Judge Russo also found appellant failed to establish the elements of self-defense. R. p. * (Order at 9). He concluded appellant did not show he was without fault in bringing on the difficulty. Appellant "approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side." R. p. * (Order at 9). He further found appellant's testimony that he was unable to leave after he stopped in the roadway was not credible. R. p. * (Order at 9). Assuming appellant established the second element of self-defense, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, Judge Russo found appellant failed to show that a reasonably

prudent man of ordinary firmness and courage would have entertained the same belief. R. p. * (Order at 9).

As far as § 16-11-440(C) of the Act, the judge without any explanation determined that even if this subsection applied, appellant would not be entitled to immunity because he failed to establish the elements of self-defense as he had found. R. p. * (Order at 10).

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); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). 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).

Discussion

As seen above, the South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). It explained "that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

Section 16-11-440(A) of the Act provides a presumption of reasonable fear of imminent peril of death or greatly bodily injury to a person who uses deadly force. A person is entitled to the reasonable fear presumption if (1) the person against whom the deadly force is used is in the process *of unlawfully and forcefully entering* or has unlawfully and forcefully entered . . . an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred. S.C. Code Ann. §16-11-440(A)(1)-(2). (emphasis added). Further, Section 16-11-440(C) of the Act provides that a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60. S.C. Code Ann. §16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

In this case, appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Appellant was occupying his vehicle when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on appellant's car and reaching into the window, grasping at whatever they could reach. Appellant

feared for his life. Consequently, appellant had a right to use deadly force against the decedent who appellant reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car. As to § 16-11-440(A), Judge Russo found appellant failed to prove that the decedent was in the process of unlawfully and forcefully entering appellant's vehicle. R. p. * (Order at 8). The judge emphasized that while one witness, without naming who, testified that he saw several students reach inside appellant's car from a distance, other witnesses, who were standing directly outside appellant's car, testified that no one touched the vehicle or reached inside. Additionally, no fingerprints were found on or in the vehicle. R. p. * (Order at 8). While Judge Russo did not have the benefit of the testimony from Beth Bettini, Zachery Lynch, or Chauncy Meggett, appellant nonetheless proved by a preponderance of the evidence that the decedent was forcefully trying to enter his car. Josh Brooks, the only independent witness to testify at the first immunity hearing, testified that a "whole bunch" of Dutch Fork students crowded around appellant's car in the roadway. PT1. 224, ll. 13-25. The students were "banging" on appellant's car "trying to scare him." Brooks asserted that other students were reaching in appellant's window. PT1. 225, ll. 1-3. Brooks' testimony along with appellant's vivid account of the attack was sufficient to satisfy his burden of proof. The witnesses cited by Judge Russo to support his finding were all Dutch Fork students who remained loyal to their deceased friend. Additionally, the state argued below that the presumption found in § 16-11-440(A) does not apply because appellant was engaged in an unlawful activity. See § 16-11-440(B)(3). The state argued that appellant pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, appellant was merely coming to the aid of his friend. Given the events of that evening, in which appellant and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, appellant reasonably believed the

students were threatening Will in the roadway. Appellant had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Moreover, under the common law defense of others, appellant had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, appellant's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Appellant also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C) or the "Stand Your Ground" provision of the Act. This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person. Appellant was on public property on an open roadway. He had every right to be in that location. Appellant was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence appellant experienced that evening was enough to put him in apprehension of being greatly injured. When appellant struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, appellant also satisfied subsection (C) of the Act.

Lastly, appellant set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Appellant was not at fault in bringing on the difficulty. He avoided conflict every step of the way. When he entered the Cook Out and was confronted by Michael James, appellant responded, "We just came here to eat," ignored the Dutch Fork students, and waited in line to order food. Then when Michael James followed appellant and his friends out of the restaurant and asked if they were "still salty," appellant merely congratulated

James on Dutch Fork's win and began walking to his car. When thirty to forty Dutch Fork students then rushed out of the Cook Out and began threatening and taunting appellant, appellant continued to walk backward toward his car and did not engage with the students. Judge Russo found appellant failed to prove he was without fault in bringing on the difficulty because he "approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side." R. p. * (Order at 9). The judge further found appellant remained stationary in the roadway rather than attempt to leave. R. p. * (Order at 9). He concluded appellant's testimony that he was unable to leave not credible. R. p. * (Order at 9). However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the "hangout spot" for Lexington High School students after basketball games. Appellant was a recent graduate of Lexington High School and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Appellant also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Appellant further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Appellant's car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening appellant and his friends all night. The evidence established the students were banging on appellant's car, reaching into his window, and yelling threats and profanity. Appellant reasonably feared the students were "trying to attack" him and "forcefully pull [him] out of the car." PT1. 260, ll. 8-15. Appellant feared for his life, as any rational reasonable person

would have. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on appellant's car "trying to scare him" while others were reaching in the window. PT1. 224, l. 22 – 225, l. 3. Brooks believed appellant was being threatened and he himself "felt a sense of threat." PT1. 225, ll. 14-18.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that appellant was in fact in such imminent danger. Appellant proved by a preponderance of the evidence that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Again, a mob of Dutch Fork students surrounded appellant's car, threatened appellant, banged on his car, and reached in his window. Appellant was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow. Under the Act, appellant, as argued above, had no duty to retreat and had a right to stand his ground and meet force with force.

If this Court were to determine that Judge Russo's order solely controls the issue of immunity in this case, then because appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act, respectfully, this Court should reverse appellant's conviction and hold he is immune from prosecution.

6.

The trial judge erred in allowing the state to introduce an aerial photograph of the incident location because the photograph depicted three vehicles parked side by side in a two-lane roadway

which had been staged by law enforcement officers and gave the materially false impression that the road was three lanes wide and that it was easier to "retreat."

Relevant facts

Prior to trial, defense counsel moved to exclude an aerial photograph of the incident location where law enforcement had staged three vehicles side by side in a two-lane road. Tr. 92, ll. 2 – 10. Defense counsel argued that the photograph was confusing and misleading. Tr. 92, ll. 11 – 13. Counsel further argued that by staging the cars in the photograph, the state had manipulated the scene and therefore, it did not accurately depict the scene and was unfairly prejudicial. Tr. 92, ll. 14 – 22.

The solicitor argued that the photograph was necessary to rebut appellant's self-defense case by showing that he had "so many different ways to leave" the scene. Tr. 92, l. 24 – 93, l. 15. According to the solicitor, the photograph was not confusing because it showed how wide the road was. Tr. 95, ll. 5 – 20. Defense counsel argued that by showing a photograph with three vehicles side by side, the state was giving the false impression to the jury that the road was a three-lane road when in fact it was only a two-lane road. Tr. 96, l. 15 – 97, l. 22.

The solicitor stated that his objective was not to show that this was a three-lane road but to show that three vehicles could fit in the road. Tr. 97, l. 23 – 98, l. 15. Defense counsel pointed out that none of the witnesses at the incident location on the night in question saw the area from above. Counsel further argued that people do not make decisions based on "overhead shot[s]" because they only see what is in front of them. Tr. 100, ll. 1 – 23. The judge took the issue under advisement. Tr. 102, ll. 5 – 9.

Prior to the state calling its lead investigator, Brent Carter, the solicitor brought up the issue regarding the aerial photograph. The solicitor again argued that he was not trying to show that the

road was three lanes wide, but instead that it was wide enough to fit three vehicles. Tr. 352, ll. 7 – 18. Defense counsel responded that the photograph was confusing and misleading because there was no indication as to the widths of the vehicles or the amount of space between the vehicles. Tr. 352, ll. 19 – 25. Counsel also maintained that the photograph was unfairly prejudicial. Tr. 353, ll. 2 – 19. Ultimately, the judge ruled that the aerial photograph was admissible. Tr. 358, ll. 4 – 13.

The state was permitted to introduce the staged aerial photograph with three vehicles parked side by side through Brent Carter's testimony as Exhibit 23 over defense counsel's objection. Tr. 389, ll. 17 – 22; R. p.*. State's Ex. 23 – aerial photograph on file with this Court. The photograph showed a black truck, a silver sedan, and a black SUV parked side by side in the roadway which separates the Cookout from a pet store. All three of the vehicles are parked facing the same direction. See State's Ex. 23 on file with this Court. The photograph was taken from above and to the front side of the vehicles, and showed several other vehicles parked in the parking lots on either side of the roadway. The parking lot visible on the right side of the photograph, where a white SUV and white truck are parked, is the Cookout parking lot. There were no people standing in the roadway in the photograph. See State's Ex. 23.

On the left side of the photograph, there were bushes which grow all the way to the curb of the road and there was visible dirt in the roadway next to the bushes. See State's Ex. 23. The dirt is the lighter colored portion of the roadway directly to the right of the bushes and extends in front of and behind the black truck parked in the roadway.[5] There are no white or yellow lines painted on the road demarcating lanes of travel. As this Court will see when viewing State's Exhibit 23, the black truck in the roadway, if traveling with the normal flow of traffic, would continue straight and turn right onto the main road. The silver sedan and black SUV are parked facing the "wrong"

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[5] Investigator Carter, and the trial court both agreed that this was dirt in the road. Tr. 357, ll. 5 – 16; tr. 461, ll. 1 – 13.

direction, i.e. these cars would be head on with any car that pulled into the Cookout parking lot using the proper lane of travel. See State's Ex. 23.

Carter testified that the road could "comfortably" fit three vehicles. Tr. 389, l. 23 – 390, l. 1. However, on cross-examination, Carter admitted that he did not know the actual measurements of the width or the length of the road because he did not measure it. Tr. 459, l. 17 – 460, l. 22. Carter further admitted that the road was not a three-lane road and that part of the road was covered in dirt. Tr. 460, ll. 23 – 461, l. 13.

Discussion

Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "[A] photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts." State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

Here, the trial judge erred in allowing the state to introduce a staged aerial photograph of the scene because the photograph gave the false impression that the road was three lanes wide when in fact it was only two. The solicitor's argument that he was not intending to show that the road was three lanes wide but only that three cars could fit was illogical. By showing the jury a photograph with three vehicles parked side by side in the roadway, the solicitor was conveying to the jury that the road was three lanes wide which, as the solicitor's own lead investigator acknowledged, was not the case. Tr. 459, l. 17 – 461, l. 13.

In State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244 (Ct. App. 2019), this Court determined that the trial judge acted within his discretion in excluding photographs that the defendant sought to admit in support of his third-party guilt defense. In Brooks, the defendant was accused of "unleash[ing] a hail of gunfire toward [the decedent]" in a bar room argument over a female. Id. at 623-24, 837 S.E.2d at 238-39. The Brooks Court noted that evidence of third-party guilt offered by an accused "must be limited to such facts as are inconsistent with his own guilt and to such facts as raise a reasonable inference or presumption as to his own innocence." Id. at 634, 837 S.E.2d at 244, quoting State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941).

Specifically, the defendant in Brooks wanted to admit photographs from the cell phone of a third party who was present at the bar when the shooting happened which showed a .22 caliber pistol because there were ten .22 caliber shell casings discovered at the scene after the shooting. Id. at 635, 837 S.E.2d at 245. The defendant further argued that the third party whose cell phone contained the photograph was in communication with her ex-boyfriend who sent her a text message regarding the shooting stating that "his home dog just shot his other home dog." Id.

The defendant in Brooks argued the photographs were admissible because they showed that the ex-boyfriend was the shooter. Id. at 636, 837 S.E.2d at 245. This Court disagreed, finding that the photographs did not clearly point to the guilt of the ex-boyfriend since the pistol in the photograph was capable of holding fewer rounds of ammunition than were found on the scene and the description given of the shooter by the eye-witnesses did not match the ex-boyfriend. Id. at 636-37, 837 S.E.2d at 245-56.

As in Brooks, the aerial photograph in this case was confusing, misleading, and it did not refute appellant's self-defense argument because the photograph was substantially different from the scene as it existed on the night of the incident. Law enforcement deliberately manipulated the scene

to show the roadway in a condition that was favorable to the state. It even was an inaccurate portrayal of the scene. There were no aerial photographs of where appellant's vehicle was parked in the roadway nor were there any aerial photographs showing where the other cars were parked around appellant. Because of this, the aerial photograph simply served to confuse the issue of "how many cars could fit" in the road with the actual question of whether appellant could have reasonably avoided the danger of the mob of students surrounding his car by driving away or retreating.

The state conspicuously did not include a large group of people standing around one of the vehicles in their manipulation of the scene with their staged photograph. This was because the state did not want to depict the condition of the roadway at the time of the incident, but rather to show the scene in a substantially different condition to support their retreat argument. Furthermore, the aerial photograph did not strengthen the state's argument that appellant should have retreated. Appellant was not looking down on the scene from a bird's-eye view. Tr. 100, ll. 1 – 23. Instead, he was sitting in his car surrounded by angry people who were yelling at him. Therefore, the aerial photograph misled the jury as to whether appellant could have reasonably and safely retreated.

The photograph also did not depict any relevant information as to the central issues in the case. Cf. State v. Brockmeyer, 406 S.C. 324, 354-55, 751 S.E.2d 645, 661-62 (2013) (holding that photograph of defendant with his shirt off shortly after the crime was relevant because it depicted the defendant's agitated demeanor which was relevant to undercut his claim of accident); State v. McConnell, 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986) (holding that evidence of .22 and .25 caliber bullets, a .22 caliber pistol, and a photograph showing a bullet hole in the window of an apartment were inadmissible where the alleged murder weapon was a .357 caliber pistol because "[t]here was insufficient connection between the evidence and the crime with which appellant was

charged, and the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value").

In State v. Livingston, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997), the Supreme Court held that a photograph of the victim in a felony DUI case of her and her husband on a prior occasion along with her husband's testimony was inadmissible because it was irrelevant and prejudicial. The state contended in Livingston that the photograph of the victim and her husband's testimony were necessary to explain "the reason the victim was in Beaufort County, the time she normally left work, and the route she usually took home." Id. The Court noted that none of those facts were in dispute, so the picture and testimony were irrelevant. Id. Here, while the state disputed the fact that appellant could not have reasonably avoided the danger by fleeing the scene, the aerial photograph with the three vehicles side by side did not make appellant's self-defense argument more or less probable. Again, appellant did not have a bird's-eye view of the scene and therefore would not have had any way to know that three cars could fit side by side. The fact that three cars could fit in the roadway side by side was wholly immaterial to whether appellant could have retreated.

The trial judge erred by allowing the state to introduce the staged aerial photograph of the scene because it was grossly misleading, confusing, and highly prejudicial. The photograph was a staged misrepresentation of the scene by the state which showed the roadway in a substantially different condition than it was in when appellant was surrounded by a mob of angry students while he was lawfully occupying his own vehicle. Appellant was trying to leave the Cookout when he was surrounded by a group of angry students. The state sought to manipulate the scene to make it appear that appellant had "so many ways to leave" by showing a staged photograph that was inaccurate and prejudicial where self-defense was the critical issue in this case. The trial judge erred

by allowing this photograph into evidence and appellant's conviction should be reversed. See State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019).

7.

The trial judge erred in allowing the state to introduce a model car door of a Ford Explorer created by the state's investigator because that model was substantially different from appellant's actual vehicle and use of the model was highly misleading and resulted in an inaccurate representation of the incident.

Relevant facts

The state sought to proffer the testimony of James Sullivan, who was an investigator with the Eleventh Circuit Solicitor's Office, to lay the foundation for a model of a car door he made. Tr. 513, l. 11 – 514, l. 4. Sullivan testified *in camera* that he had been an investigator with the Solicitor's Office for five years. Tr. 515, l. 25 – 516, l. 2. Sullivan recalled that he had been asked by the solicitor to create a "visual aid to assist witnesses in providing testimony." Tr. 517, ll. 1 – 2. Sullivan was never qualified as an expert in anything.

Sullivan described the visual aid he created: "It was a door mounted to a frame that was powered to allow the window to go up and down and it was done so with the measurements taken by Investigator Carter to make sure it's the correct height, but it's nothing more than a door." Tr. 517, ll. 3 – 8. The door that Sullivan used came from a "1998 Ford Explorer Sport." Appellant's vehicle was a "2001 Ford Explorer Sport." Tr. 517, ll. 12 – 18. Sullivan claimed that the difference in years was not "an issue" because "the second generation [Ford Explorer Sport] was built from 1995 to 2003 so the model basically did not change." Tr. 517, ll. 19 – 23.

Sullivan recalled that "just the door" was used during appellant's first trial and immunity hearing. Tr. 519, ll. 14 – 19. After appellant's first trial ended in a mistrial, Sullivan added a car

seat to his model "[t]o provide an extra layer of testimony . . . [and] so it's a more accurate representation." Tr. 519, l. 23 – 520, l. 6. According to Sullivan, the seat, the frame and the center console that he used for his model all came from a 1998 Ford Explorer Sport. Tr. 520, ll. 7 – 16. Sullivan stated that the seat on the model could not be moved up or down, but that it could slide back and forth "like [appellant's]." Tr. 521, ll. 12 – 23.

Sullivan said that the height of the frame of his model was based off measurements he received from Investigator Carter. Tr. 521, ll. 3 – 11. Sullivan later admitted that *he had never even seen appellant's car in person* but only photographs of it *and that his entire model was only based on a single measurement taken by Carter.* Tr. 573, ll. 18 – 24; tr. 578, ll. 12 – 18. The sole measurement used by Sullivan to create his entire model was from the ground to the window seal which Investigator Carter had measured to be forty-four and one quarter inches. Tr. 525, ll. 8 – 23. The state requested to use the model for demonstrative purposes arguing that it would be helpful and not confusing. Tr. 524, ll. 1 – 10.

On cross-examination, Sullivan admitted that there were numerous measurements that he did not take of a 2001 Ford Explorer, including the distance between the seat and the door frame, and the distance between the seat and the steering wheel. Tr. 524, l. 14 – 525, l. 7; tr. 532, ll. 3 – 21. Sullivan also admitted that tire pressure could change the height of a vehicle and that Sullivan was not aware of what the tire pressure was on appellant's vehicle or what kind of tires and wheels that it had on it. Tr. 529, ll. 15 – 24. Sullivan also failed to consider the level of the ground where the stabbing occurred and the level of the ground where Carter took his measurements of appellant's car. Tr. 530, ll. 2 – 14.

Sullivan did not know what the condition was of the suspension springs or seat springs in appellant's car and he did not do any research regarding what Ford Motor Company said about wear

and tear on the springs. Tr. 532, l. 22 – 533, l. 6. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and he acknowledged that appellant's foot was on the brake during the incident. Tr. 533, l. 7 – 534, l. 1.

Defense counsel argued that using the model was improper because the state had access to appellant's actual vehicle which they could have used. Furthermore, the model did not include a steering wheel or other critical measurements like the distance between the seat and the steering wheel or how far back the seat was when appellant was sitting in it. Tr. 537, l. 7 – 538, l. 23. Counsel further argued that the state also failed to take into consideration the type of tire or tire pressure of appellant's car. Tr. 539, l. 1 – 540, l. 1.

The solicitor then introduced a photograph of the model that was used in appellant's first trial which was taken by The State Newspaper which showed appellant and defense counsel using the model during appellant's testimony at his first trial. Tr. 541, ll. 2 – 25; R. p.* (Court's Exhibit 2 – photograph of car door model on file with this Court). The solicitor stated that the car seat was added to the model after appellant's first trial which he argued made the model more realistic. The solicitor also claimed that the only measurement that mattered was the height of the seat in appellant's vehicle. According to the solicitor, appellant could sit in the seat and move it forward or backward to where he thought it was on the night of the incident. Tr. 542, ll. 1 – 21.

Defense counsel pointed out that it was not appellant's burden to show what happened and that suggesting appellant be required to position the seat in the correct location was improper burden shifting. Tr. 542, l. 23 – 544, l. 7. Counsel argued that the model was inaccurate and misleading and should not be used as a demonstrative exhibit. Tr. 544, ll. 16 – 17. Counsel further argued that allowing the model to be used as a demonstrative exhibit would place appellant in the position of having to demonstrate what happened using an inaccurate model. Tr. 545, ll. 13 – 20.

The judge ruled that the model was admissible for demonstrative purposes and that defense counsel's arguments regarding the inaccuracies "went to the weight and not the admissibility" of the exhibit. Tr. 546, ll. 21 – 25. The Court then asked Investigator Carter to demonstrate how he measured the height of the door and to measure the height of the model Sullivan made. Tr. 549, ll. 2 – 7. Defense counsel pointed out that measuring the demonstrative was not the same as measuring appellant's actual car. Tr 550, ll. 14 – 25.

After the lunch recess, with nothing under oath, the solicitor informed the judge that Sullivan and Carter *measured the model* during the break and that "at most it would be off less than one sixteenth of one inch basically to the benefit of the defense." Tr. 551, ll. 19 – 24. Defense counsel responded that appellant could not benefit from the model being "off" and that the model still did not accurately depict the inside parameters of the vehicle. Tr. 552, ll. 1 – 19. Counsel again argued that it was improper for the state to use a model that did not match appellant's actual vehicle. Tr. 555, l. 7 – 556, l. 4. The judge again ruled that the model could be used as a demonstrative exhibit and that counsel for both sides could manipulate the model in the courtroom and defense counsel could cross-examine the witnesses on the inconsistencies of the model. Tr. 558, ll. 15 – 22.

Sullivan then testified in front of the jury about how he put the model together and he was cross-examined about the numerous differences between his model and appellant's actual vehicle. Tr. 559, l. 15 – 585, l. 10. Sullivan admitted in front of the jury that there were numerous measurements that he did not take of appellant's car, including the distance between the seat and the pedals, and the distance between the seat and the steering wheel. Tr. 573, ll. 4 – 17. In fact, *Sullivan never even physically examined appellant's car* but instead only saw photographs of it. Tr. 573, ll. 18 – 24. Sullivan further admitted that *his model was based on a single measurement taken by Investigator Carter and that Carter had not marked exactly on appellant's car where the*

measurement even came from, nor did Sullivan know whether Carter had used a level when he took the measurement of appellant's car. Tr. 570, l. 19 – 571, l. 3; tr. 578, ll. 12 – 18. Sullivan acknowledged that he did not know whether his model door and appellant's door had the same curvature to them either. Tr. 571, ll. 7 – 18. Sullivan also failed to measure the height of appellant's seat in relation to the roof of the car. Tr. 574, ll. 11 – 16. Sullivan did not know what the condition was of the shocks in appellant's car and admitted that in a car as old as appellant's, the shocks may have deteriorated. Tr. 569, l. 5 – 18. Sullivan also did not know how applying the brake could affect the height of appellant's vehicle and acknowledged that appellant's foot was on the brake during the incident. Tr. 569, l. 19 – 570, l. 4. Finally, Sullivan did not know how far forward or backward appellant's seat was. Tr. 577, l. 7 – 578, l. 11.

Alexis Brunson was a student at Dutch Fork High School who was present at the Cookout the night of the incident. Brunson claimed that appellant "looked like" he was trying to run her friends over in the street and was "driving really fast" but then stopped "abruptly." Tr. 742, l. 17 – 743, l. 18. However, Brunson admitted that she did not know whether appellant had even seen her friends in the street and that she "just assumed that he did." Tr. 751, ll. 17 – 20. She recalled she was "very upset" and admitted that she was one of the individuals who approached appellant's car window when he was stopped in the Cookout parking lot. Tr. 743, l. 19 – 744, l. 16. Brunson continued: "I went up to the window and I was basically like, what the fuck are you doing? Like you need to get out of here." Tr. 745, ll. 1 – 6. According to Brunson, appellant had his hand in his pocket, and he said "you don't want what I have" to the students who approached his car. Tr. 745, ll. 13 – 19. Brunson maintained that it "looked like" appellant threw a punch out the window with his right arm and then drove away. Tr. 746, ll. 4 – 15. Brunson claimed that none of the people who approached appellant's car reached inside his window or threw anything into his car. Tr. 746,

ll. 16 – 22. Brunson then used the car door model to reenact her recollection of the incident over defense counsel's renewed objection. Tr. 748, l. 10 – 749, l. 14.

Lamar Butler was a junior at Dutch Fork High School on the night of the incident. Tr. 759, ll. 6 – 15. Butler attended the basketball game and went to Cookout afterwards with the other students. Tr. 759, l. 18 – 762, l. 11. Butler also claimed that appellant "almost hit" his friends as appellant was leaving the Cookout but that appellant stopped his car before hitting anyone. Tr. 766, l. 18 – 767, l. 8. Butler admitted that approximately six people, including himself, approached appellant's car window. Tr. 768, ll. 9 – 16. Butler further admitted that "everybody [was] pretty much . . . yelling [and] cussing" at appellant and that appellant's window was rolled halfway down. Tr. 769, ll. 1 – 8. However, Butler denied that anyone reached into appellant's car or threw anything inside the car. Tr. 770, ll. 1 – 7. Butler was then asked by the solicitor to step off the witness stand and reenact the incident using the state's demonstrative exhibit. Butler was asked to indicate using the model how far appellant's window was rolled down at the time of the incident. Tr. 770, ll. 11 – 22. The solicitor also asked Butler to sit in the car chair to demonstrate how appellant was sitting during the incident. Tr. 771, ll. 5 – 21. Butler then claimed appellant made a "quick jab" out the window and then drove off which Butler demonstrated using the demonstrative exhibit. Tr. 772, ll. 2 – 14.

Discussion

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court dealt with the admissibility of a videotaped animation of a car accident in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell's videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The

trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

In analyzing this issue, the Cantrell Court noted:

> Computer animation allows attorneys to convert witnesses' verbal testimony into dynamic, visual demonstrations capable of mentally transporting jurors to the scene. . . . *However, a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images.* The computer maxim "garbage in, garbage out" applies to computer animations.

Id. at 383-384, 529 S.E.2d at 536 quoting G. Ross Anderson, Jr., *Computer Animation; Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995) (emphasis added). The Court continued:

> The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. *If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great.* Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id., at 369, 384, 529 S.E.2d at 536 quoting State v. Trahan, 576 So.2d 1, 8 (1990) (emphasis added).

The Cantrell Court affirmed the trial judge's refusal to admit the evidence and noted potential problems with computer animations: "[T]he potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence . . ." Id. at 384, 529 S.E.2d at 536. The Court then established a new rule regarding the admissibility of computer animations:

> We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its

> probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Id. The Court also urged trial judges to give a limiting instruction that "the animation represents only a re-creation of the proponent's version of the event; it should in no way be viewed as the absolute truth." Id. at 387, 529 S.E.2d at 537. In this case the model of the car door used by the state was a wholly inaccurate representation of appellant's car because it was "just a door" with a car seat added to it. The car door model was based on a single measurement taken by Investigator Carter which was then used by a *different* investigator, Sullivan, in building the model as a "visual aid." Tr. 578, ll. 12 – 18. The model did not take into account critical measurements and features like the location of the seat or the distance between the seat and the steering wheel. In fact, the model did not even have a steering wheel or dashboard. Furthermore, Sullivan failed to consider how far forward or backward appellant's seat was located on the night of the incident. All of these measurements and features were critical to appellant's self-defense case because his argument hinged on the fact that at least one of the angry students reached into appellant's car door before he stabbed the decedent in self-defense. These measurements were necessary to create a model that accurately depicted the dimensions of the interior and exterior of appellant's car.

In State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009), the Supreme Court held that "[n]on-scientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." In White, the state specifically argued that "reliability need not be shown for the admission of non-scientific expert testimony" and the Supreme Court specifically rejected that argument. Id. at 272-273, 676 S.E.2d at 687-688. The White Court held:

> [T]he trial courts of this state have *a gatekeeping role* with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications *and reliability* and further find that the proposed evidence will assist the trier of fact.

White, at 274, 676 S.E.2d at 689 (emphasis added).

Here, the trial judge failed to exercise his gatekeeping function and exclude the exhibit for being grossly unreliable and inaccurate. Sullivan's model simply could not be reliable when Sullivan *never even saw appellant's car in person and the model was based on a single measurement taken by another person.* The trial judge could not disregard his gatekeeping duty as he did by saying that the inaccuracies in the model went to "weight and not admissibility." Tr. 546, ll. 21 – 25. The trial judge had an affirmative duty to make a determination as to reliability before allowing this demonstrative exhibit to be shown and used in front of the jury. The judge also failed to give a limiting instruction to the jury, disregarding the Supreme Court's ruling in Cantrell, 339 S.C. at 387, 529 S.E.2d at 537.

Similar to the computer animation at issue in Cantrell, the phrase "garbage in, garbage out," applies with equal force here. The model simply could not be construed as an accurate representation of appellant's vehicle when it was based on only a single measurement – the height of appellant's driver's side window from the ground. If Sullivan's goal was to make an accurate model of appellant's vehicle he should have used additional measurements including the distance between the seat and the door frame, the distance between the seat and the steering wheel, the distance between the seat and the pedals, and the distance between the seat and the ceiling of the car. Sullivan admitted that he did not take any of these critical measurements in creating his model. Tr. 524, l. 14 – 525, l. 7; tr. 532, ll. 3 – 21; tr. 573, ll. 4 – 17; tr. 574, ll. 11 – 16. Instead of taking the numerous measurements that would have been required to make an accurate model of appellant's car, the state cut corners to produce something that the solicitors could use for theatrical purposes during appellant's trial. As the Cantrell Court noted: "If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts,

the danger that the jury may confuse art with reality is particularly great." Id. at 369, 384, 529 S.E.2d at 536. Here, the model car door did not portray any original facts in controversy, nor was it based on any witness testimony. Instead, it was a prop created by the Solicitor's Office to be used for dramatic reenactments by hostile witnesses to appellant, Brunson and Butler. These theatrical performances had no place in appellant's trial and the trial court erred in allowing the state to use such a crude and inaccurate demonstrative.

Although the rule laid out in Cantrell dealt specifically with computer animations, it provides an important framework for dealing with any recreation of events by a party. Here, the recreation was even more vivid than a computer animation as it was live witnesses acting out the event using an inaccurate prop created by the state. The state had its witnesses use the demonstrative exhibit to refute the second and third elements of self-defense which are that the defendant either was actually in imminent danger of losing his life or sustaining serious bodily injury or he believed he was in such danger, and that a reasonable person in the defendant's circumstances would have stuck the fatal blow himself, or a reasonable person would have entertained the same belief as the defendant. See State v. Wiggins 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). The state did this by purportedly showing that none of the people who approached Appellant's car ever reached into his car, i.e. appellant was not actually in imminent danger nor did he have a reasonable belief he was in imminent danger. The solicitor even had Butler sit in the seat of the model and pretend to be appellant in order to act out his version of events and specifically to claim that only appellant reached out of the car when nobody had reached into the car. Allowing witnesses to act out the event using an inaccurate demonstrative was extremely prejudicial and had a very high likelihood of misleading and confusing the jury.

In State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), the Supreme Court noted that for an out-of-court experiment to be admissible, "substantial similarity" is required between the conditions of the experiment and the conditions existing at the time of the incident in dispute. The Kahan Court upheld the use of an out-of-court experiment done by the state's investigator to determine the maximum distance the alleged murder weapon could deposit gunshot residue on clothing. Id. at 245, 233 S.E.2d at 294. In Kahan, the investigator fired the alleged murder weapon at an article of clothing that was "made of similar material and of a similar weave pattern as the gown worn by the deceased" from various distances. The Court determined that the experiment was substantially similar to the conditions existing at the time of the incident and was properly admitted. Id. While Kahan dealt with an "experiment" and this case involved a prop used by witnesses to reenact the event, there needed to be a substantial similarity between appellant's car and the model which was created. Otherwise, the reenactments by the witnesses in court simply could not be relied on as having any basis in reality. Furthermore, unlike in Kahan, this case involved dramatic reenactments by witnesses in court using an inaccurate demonstrative. This resulted in a much greater chance of misleading the jury and prejudicing appellant than an experiment conducted in a controlled environment.

The state's model was inaccurate and therefore, it could only be used by witnesses to confuse and mislead the jury about the incident. The use of the model was extremely prejudicial to appellant because his argument of self-defense depended on where he was and where the angry mob of students were in relation to his car. Specifically, appellant was prejudiced by the state's misleading attempt to refute the second and third elements of self-defense by "acting out" how none of the students who approached appellant's car ever reached into his car. The prejudice to appellant was compounded by the fact that Butler physically sat down in the seat of the model and pretended

to be appellant and claimed that only appellant reached through the window to strike the decedent. Again, this painted a misleading, confusing and highly inaccurate picture of what actually happened. The trial court abdicated his discretionary gatekeeping function and erred in allowing the state to use this inaccurate car door model for courtroom theatrics and further failed to give a limiting instruction to the jury to place the demonstrative exhibit in its proper context. Appellant's conviction should be reversed. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

CONCLUSION

By reason of the foregoing arguments, this Court should reverse the circuit court's order that appellant was not entitled to immunity from prosecution pursuant to S.C. Code §16-11-410 et seq., specifically §16-11-440 (A) & (C). In the alternative, this Court should reverse appellant's conviction and remand his case to the Lexington County Court of General Sessions for a new trial.

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ATTORNEYS FOR APPELLANT

January 12, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED
Jan 12 2021
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

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 12th day of January, 2021.

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