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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case Tracking No. 2020-001122

The State, Respondent,

vs.

Marquez Devon Glenn, Appellant.

INITIAL BRIEF OF RESPONDENT

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I. The trial court did not abuse its discretion in denying Appellant's request for immunity under the Protection of Persons and Property Act because there is evidence in the record from which the court could conclude Appellant failed to prove all required elements of self-defense by a preponderance of the evidence.

II. Even assuming the trial court erred in finding Appellant was not "in another place where he ha[d] a right to be" and erred in finding him on proper trespass notice, the finding was irrelevant to the trial court's determination of whether he met the requirements for immunity because the trial court specifically found he did not have a duty to retreat, thereby applying section 16-11-440(C) of the South Carolina Code. (Appellant's Issues II and III).

STATEMENT OF THE CASE

Appellant was indicted at the July 2014 term of the grand jury for Greenville County for attempted murder (count 1) and possession of a weapon during the commission of a violent crime (count 2) (2013-GS-23-006789). On August 3, 2015, the case was called for trial at the Greenville County Courthouse before the Honorable John C. Hayes, III.

Prior to trial, Appellant made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (the Act). After the parties argued their respective positions, the jury was qualified and selected. Prior to the jury being sworn, the trial court conducted a pretrial immunity hearing per the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). At the close of that hearing, after taking testimony, observing evidence, and hearing additional arguments from both sides, the trial court found Appellant had failed to establish he was entitled to immunity under the Act because, at the time of the shooting, he was not in a place he had a right to be.

Appellant was found guilty of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. He was sentenced to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime.

Following a successful appeal to the South Carolina Supreme Court, the case was remanded to the circuit court for reconsideration of Appellant's pre-trial immunity request. Judge Hayes was no longer available to preside of the reconsideration, which was heard instead by the Honorable Letitia H. Verdin. In consideration of the ongoing Covid-19 pandemic and the need for precautions, both parties agreed an additional immunity hearing with further witnesses was unnecessary and Judge Verdin determined the transcript of the original hearing provided an

adequate record for her consideration. After receiving supplemental briefing from both parties, Judge Verdin took the matter under advisement. Judge Verdin issued an order denying immunity on June 15, 2020. Appellant filed a motion to reconsider, which was denied on July 28, 2020. This appeal follows.

STATEMENT OF FACTS

On the evening of April 12, 2013, Kevin Bruster, the victim's uncle, went to Shelricka Duncan's house looking for her mother. Shelricka attempted to prevent Kevin from entering and tried to get him out of her house. Tivarius Henderson, Appellant's brother, assisted her in removing Kevin. (T.85-86; R.___). In the process, Tivarius was cut by a razor blade. (T.86; R.___). Shelricka described Kevin as intoxicated when he tried to enter her house. (T.89; R.___).

After getting thrown out of Shelricka's house, Kevin went to find his nephew, the victim. When he found the victim, Kevin yelled "somebody jumped me." (T.108; R.___). The victim heard Kevin say "they done jumped on me . . . [c]ome help me get my moped back." (T.204; R.___). The victim and others around, including Delni Nunez, ignored Kevin because "he looked like he was drunk." (T.108; R.___). The victim told Kevin: "man, go on." Kevin kept begging for the victim's assistance so he agreed to walk over through the cut through. (T.204-205; R.___).

The first person they encounter was Appellant, who had just finished speaking to a police officer about the prior incident at the complex. (T.93; 152-153; R.___). The victim walked up to him and asked him what happened to his uncle. (T.93; 108; 205; R.___). The victim was "cool" and "really calm" without agitation. (T.97; 111; R.___). The victim was not "trying to have an argument or a fight." (T.109; R.___). The victim did not make any threats or say anything threatening. (T.113; R.___).

After the victim asked what happened, Kevin punched Appellant. (T.205; R.___). Appellant indicated Kevin "tried to swing on me." He "jerked" and Kevin hit the cup of alcohol Appellant was holding in his hand. It splashed alcohol into Appellant's eyes. He was "knocked . . . off balance a little bit" by Kevin's blow. (T.156; R.___). Appellant indicated he was punched

in the face, though he later indicated jaw area, and finally the neck. (T.181; R.___). Delni Nunez turned her back because she believed Appellant and Kevin were going to fight. (T.108; R.___).

After getting the alcohol out of his eyes, Appellant began "fumbling in his pocket," and "as he got up with the gun" Appellant said "n***** die, n*****, and started busting the gun." (T.205; R.___). The victim was shot twice by Appellant. Once in the arm and a second time through the chest. The second shot resulted in the victim being paralyzed. (T.206; R.___). While on the ground, Appellant's brother Tivarius ran over and kicked him in the face. (T.205; R.___).

Shelricka, Delni, nor Jamarus Smith saw the victim with a gun. (T.102; 116; 127; R.___). Additionally, Kiana Grayson testified she never saw Appellant reach for a gun. (T.191; R.___). The victim indicated he did not have a gun. (T.206; R.___). No gun was found after the victim was shot a paralyzed.

Appellant fled the scene. He passed by a deputy on his way out of the complex. According to the investigating officer, someone stopped and said there had been a fight, but no one reported they were involved in a shooting or that they had shot someone. (T.201-202; R.___). Appellant threw his gun into the Reedy River on his way from the scene. (T.202; R.___).

STANDARD OF REVIEW

In reviewing this case previously, the Supreme Court articulated the standard of review to be utilized by the appellate court:

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

State v. Glenn, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019). The Court will "not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009).

ARGUMENT

I. The trial court did not abuse its discretion in denying Appellant's request for immunity under the Protection of Persons and Property Act because there is evidence in the record from which the court could conclude Appellant failed to prove all required elements of self-defense by a preponderance of the evidence.

Appellant contends the trial court erred in denying his request for immunity. While he argues there was evidence presented from which the trial court could have decided immunity in his favor, he ignores the evidence which supports the trial court's determination. There was evidence in the record to support the trial court's determination Appellant was not in actual danger of death or great bodily injury, nor did he reasonably believe he was in danger of death or great bodily injury. Additionally, there was evidence in the record to support the trial court's determination a reasonably prudent man of ordinary firmness and courage would not have held the same belief nor would have struck the fatal blow in order to save himself. Based on this Court's standard of review, the trial court's determination that Appellant failed to establish his entitlement to immunity by a preponderance of the evidence should be affirmed.

The immunity provision of the Act at issue provides:

> (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer....

S.C. Code Ann. § 16–11–450 (Supp. 2013).

The South Carolina Supreme Court considered the immunity provision in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The Court concluded: "We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under

the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." Id. at 410, 709 S.E.2d at 665 (emphasis added).

"Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). The South Carolina Supreme Court stated:

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

State v. Glenn, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019) (quoting State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011)). The defendant may not have to prove the fourth element of self-defense—the duty to retreat—if he can demonstrate he meets the requirements of section 16-11-440(C) of the Act.

The circuit court specifically found Appellant was without fault in bringing on the difficulty. The court found Appellant did not provoke the reaction from Kevin or do anything to cause the difficulties. Additionally, the circuit court specifically found that Appellant did not have a duty to retreat. As a result, the only relevant questions are 1) whether Appellant actually was in imminent danger of losing his life or sustaining serious bodily injury or believed he was in

imminent danger of losing his life or sustaining serious bodily injury; and 2) if the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life or either 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. This Court, based on the well-established standard of review, must determine whether there is any evidence to support the trial court's determinations on these two issues and may not reweigh the evidence or determine credibility of the witnesses. See State v. Marshall, 428 S.C. 11, 17–18, 832 S.E.2d 618, 621–22 (Ct. App. 2019) ("Appellate courts review an immunity determination for abuse of discretion. A circuit court abuses its discretion when its ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."). Because there is evidence supporting the trial court's determinations, as will be discussed, this Court should affirm.

The circuit court correctly determined, after reviewing all the evidence presented at the immunity hearing, Appellant failed to establish he was in imminent danger or that he believed he was in imminent danger. The court properly noted no gun was found on the victim and the remaining testimony was inconsistent. The majority of the testimony, including from multiple witnesses presented by Appellant indicated the victim was never seen with a gun. At trial, Appellant premised his belief of imminent danger on the existence of a gun and the victim's threatening him with a gun. The circuit court clearly did not find this testimony credible given the court's finding regarding the failure to locate a gun and the discussion of the punch as the only attack on Appellant. (Order Denying Motion for Immunity, p.2; R.___).

As a result, the sole basis for Appellant's alleged need to act in self-defense actually appearing in the record and for which the trial court gave credence would have been a single punch[1] by Kevin, an intoxicated individual, which did not do any significant harm to Appellant; and instead, merely knocked his alcoholic drink into his eyes.[2] There was no imminent danger of death or serious bodily injury existing from the single punch from an intoxicated individual. See e.g., State v. Jones, 228 S.C. 484, 497–98, 91 S.E.2d 1, 8 (1956) (overruled on other grounds) (finding "jury was fully justified in rejecting that plea, for it will be noted that even according to appellant's testimony, he was never struck by any of the three weapons, but on the contrary took them away from Bertha one by one, and struck her with them in turn when she was unarmed and defenseless"). Appellant would not have been entitled to utilize deadly force against Kevin, he certainly was not entitled to utilize it against the victim.

Further, as the court found there is no evidence at all of any hostility from the victim to Appellant. Testimony by numerous witnesses indicated the victim approached Appellant without any hostility. He was calm and merely asked what happened to his uncle. (T.93; 97; 108; 109; 11; 113; 205; R.___). Certainly there is evidence in the record to support the circuit court's determination that the victim's behavior did not justify a belief by Appellant that he was in imminent harm. See e.g., State v. Manning, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) ("Further, the victim was unarmed at the time she was shot, meaning we cannot say that the trial judge abused his discretion in denying Respondent immunity . . . .").

[1] In his Brief, Appellant attempts to describe the attack as being "violently punched in the throat by one of those adversaries . . . ." Appellant's own testimony seems to contradict this exaggerated characterization when he indicates: Kevin "tried to swing on me . . . I kind of jerked . . . he **knocked me off balance a little bit**." (T.156; R.___) (emphasis added). The only harm that is described as coming from the punch was the result of alcohol going into Appellant's eyes and needing to be wiped out.

[2] Appellant could not even remember where the single punch landed. He testified it was the face, the neck, the jaw, the throat, or somewhere between the face and throat. (T.181; R.___). Obviously, this punch was not memorable or significant enough to constitute a threat of serious bodily harm or death when he cannot even describe where it landed.

Additionally, Appellant's own actions after the shooting belie his claim that he was in imminent danger or that he believed he was in imminent danger. After shooting the victim multiple times, he got into a car and fled the scene. He passed by one officer and stopped at a subsequent officer arriving on scene. He never told that officer he was involved in a shooting, he shot someone out of fear, or that he was forced to defend himself. (T.201-202; R.___). Instead, they merely relayed that there was "a fight down there." (T. 202; R.___).[3] Significantly, in addition to fleeing the scene, Appellant's response was to throw his gun into the Reedy River in order to cover up evidence of the crime. (T.202; R.___). These actions are not the actions of someone who believed they acted appropriately in self-defense and the trial court could consider Appellant's subsequent behaviors in assessing his belief of imminent danger at the time of the shooting. See e.g., State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("[Appellant] was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury.").

Finally, even if Appellant believed he was in imminent danger, the trial court properly concluded a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief, and that conclusion is supported by the evidence at the hearing. No reasonable person would believe it is necessary to shoot someone multiple times when that person never exhibited hostility towards you, never touched you, and was not carrying a gun—all of which are supported in the evidence. In addition, even considering Kevin's punch as applying to both Kevin and the victim, a single punch which only knocks a person "a little off balance" does not warrant

[3] There is absolutely no evidence of any kind in the record to support Appellant's claims in his brief regarding why he failed to stop and tell police who he was and his involvement in the incident. He never maintained he was afraid to talk with police or to provide his story. Instead, the record clearly belies these alleged excuses because Appellant, immediately before the confrontation with the victim and Kevin, was discussing what happened earlier with an officer—the same officer he passed while fleeing the scene immediately after the shooting. (T.152-153; R.___). Additionally, Appellant voluntarily agreed to speak with Investigator Whaley at the law enforcement center.

multiple gun shots being fired in response and no reasonable person of ordinary firmness and courage would have believed the only means of protecting himself would be to fire multiple shots at an unarmed person.

There is evidence in the record to support the circuit court's determination that Appellant failed to prove the second and third elements of self-defense by a preponderance of the evidence. While Appellant's counsel may have a different opinion regarding the evidence and may wish this Court agree with his version of events, this Court is not to reweigh the evidence but only to determine whether there is evidence to support the trial court's conclusion. Appellant simply points out competing facts, and asks this Court to reweigh the evidence to come to a different conclusion from the trial court. This Court cannot partake of Appellant's request, but must instead determine whether the circuit court committed an error of law—which it did not—or whether there is no evidence upon which the circuit court could render its decision. See State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (equating the "any evidence" standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence"). Because there is evidence in the record supporting the conclusion, this Court should affirm because Appellant has failed to demonstrate the circuit court committed an abuse of discretion in denying his motion for immunity.

II. Even assuming the trial court erred in finding Appellant was not "in another place where he ha[d] a right to be" and erred in finding him on proper trespass notice, the finding was irrelevant to the trial court's determination of whether he met the requirements for immunity because the trial court specifically found he did not have a duty to retreat, thereby applying section 16-11-440(C) of the South Carolina Code. (Appellant's Issues II and III).

Appellant maintains the trial court erred in finding Appellant was a trespasser and was not "in [a] place where he ha[d] a right to be" when he shot the victim. Even assuming Appellant is correct in his arguments, the determination does not provide any relief nor does it change the circuit court's determination he was not entitled to immunity.

Section 16-11-440(C) 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) (2013).

If Appellant can meet the requirements of section 16-11-440(C) then he is exempt from establishing he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. In other words, he would have no duty to retreat prior to using deadly force. In order to do so, the South Carolina Supreme Court has found that one cannot be acting unlawfully nor can they be in a place they are not entitled to be and either was the proximate cause of the need to use deadly force. Even if he is in a place he is not entitled to be or acting unlawfully, if that behavior is not causally connected

to the use of deadly force then he can still have no duty to retreat. See Glenn, 429 S.C. at 119–20, 838 S.E.2d at 497.

In considering the relationship between Appellant's status as being on trespass notice and his entitlement to immunity, the trial court specifically concluded:

> The record reflects no evidence of a causal connection between the shooting and the Defendant's status as a trespasser. This Court finds that the Defendant's shooting of Elphonso Bruster was not proximately related to whether he was trespassing at the time he fired his gun. The Defendant's shooting of Elphonso Bruster, instead of Kevin Bruster who actually struck the defendant, had no proximate connection to whether he was unlawfully trespassing at Spring Grove.

(Order Denying Immunity p.3; R.___). In order for Appellant's status as a trespasser to impact any determination of immunity, the circuit court was required to find his trespassing proximately caused the difficulty or there was a causal connection between the trespass and the use of deadly force. See Glenn, 429 S.C. at 119–20, 838 S.E.2d at 497 ("Similarly, analyzing a defendant's 'right to be' in a place where he is attacked under section 16-11-440(C) without considering proximate cause or a causal connection to the incident leaves an innocent person's ability to seek the Act's protection up to happenstance, which we also do not believe was the intent of the Legislature. Such analysis in this context is supported by our longstanding self-defense precedent predating the Act."). The circuit court specifically concluded no such connection existed.

Additionally, it is clear the circuit court properly considered section 16-11-440(C) and did not require Appellant to demonstrate a duty to retreat. In particular, she found: "The Defendant must satisfy all of the elements of self-defense, **except the duty to retreat**, to secure immunity." (Order Denying Immunity p.3; R.___). As a result, even if her conclusion that Appellant was a trespasser at the time of the incident, and was not allowed to be where he was because of the trespass notice, this ruling did not affect her ultimate conclusion Appellant failed to satisfy the

remaining elements of self-defense and was not entitled to immunity. See e.g., State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (The Court acknowledged "a commonsense principle our appellate courts have long recognized—'whatever doesn't make any difference, doesn't matter.'"); Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 345, 831 S.E.2d 435, 440 (Ct. App. 2019) (calling the same maxim "one of the great appellate truths"). As a result, even if this Court were to conclude the trial court erred in making its findings regarding Appellant's trespass status, there is no relief which could be granted Appellant. The trial court properly determined he had no duty to retreat and did not have to prove the fourth and final element of self-defense. Accordingly, Appellant has failed to demonstrate how he was prejudiced by the determinations made by the trial court, even if those determinations were erroneous.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by having a copy emailed to Appellant's counsel of record, Christopher T. Brumback, at the primary email address provided by the Attorney Information System (AIS):

I further certify that all parties required by Rule to be served have been served.
This 14th day of April, 2021.

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William Blitch

From: William Blitch
Sent: Wednesday, April 14, 2021 9:34 PM
To: chris@brumbacklangley.com
Cc: Caroline Collins
Subject: Glenn Marquez Initial Brief of Respondent 2020-001122
Attachments: Glenn Marquez Initial Brief of Respondent 2020-001122 (02541469xD2C78).pdf

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Good Evening Mr. Brumback,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in The State v. Marquez Glenn (2020-001122). These documents will be submitted to the Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

William

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