STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN D. FORD,

APPELLANT

APPELLATE CASE NO. 2019-001912

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 22, 2017, an Horry County grand jury indicted Appellant for the murder of Jamal Burgess (2017-GS-26-2914), the murder of Dameion Alston (2017-GS-26-2913), possession of a weapon during the commission of a violent crime (2017-GS-26-2915), and unlawful possession of a weapon by a person convicted of a violent crime (2017-GS-26-2912). R. 907 – 908; R. 910 – 911; R. 913 – 914. Appellant's counsel, Jonny McCoy, filed a motion to dismiss pursuant to section 16-11-450 of the South Carolina Code of Laws. R. 879. On March 5, 2019, the Honorable Benjamin Culbertson presided over a hearing on the motion. R. 1. McCoy represented Appellant, and Mary Ellen Walter and Joshua Holford represented the state. R. 1. At the conclusion of the hearing, Judge Culbertson denied Appellant's request for immunity. R. 195, ll. 7-20; R. 902.

On November 4-8, 2019, the state called Appellant to trial before the Honorable Paul M. Burch and a jury. R. 196. Additionally, the state called Aliga Campbell, who had been charged with the same offenses under an accomplice liability theory, to trial. R. 196. Holford and Walter continued to represent the state, McCoy continued to represent Appellant, and Eric Fox represented Campbell. R. 196. After deliberating for approximately two hours, the jury requested to view the "timeline," which had not been admitted into evidence, but used by the prosecution as a demonstrative aid. R. 873, l. 13 – R. 874, l. 16; Supp. R. 1. Further, the jury requested copies of the autopsy reports, which had not been admitted into evidence. R. 874, ll. 1-4; Supp. R. 2. The judge returned the jurors to the courtroom to permit them to view the timeline despite the fact that it was not admitted as an exhibit. R. 874, ll. 4-16. According to the judge, he could not send the timeline to the jury room because it was not admitted as an exhibit,

but he permitted the jurors to observe the timeline in the courtroom during their deliberations. R. 874, ll. 4-16.

The jury acquitted Campbell of all charges. R. 876, ll. 2-8. The jury acquitted Appellant of the murder of Alston. R. 876, ll. 9-11. However, the jury convicted Appellant of the murder of Burgess and the two weapons charges. R. 876, ll. 12-24. Judge Burch sentenced Appellant to life imprisonment without the possibility of parole for murder. R. 878 ll. 17-19; R. 912. Further, he sentenced Appellant to five years imprisonment for each of the weapons convictions. R. 878, ll. 19-23; R. 909; R. 915.

On November 13, 2019, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The circuit court erred in allowing the lawyer for a witness whom Appellant wanted to call during the hearing on his request for immunity pursuant to the Protection of Persons and Property Act to invoke the witness's privilege against self-incrimination pursuant to the Fifth Amendment where (1) the privilege is personal and must be invoked by the person to whom the privilege belongs, (2) there was no evidence that the witness would have invoked the privilege had he been asked, and (3) the evidence in the record showed the witness could not have invoked the privilege as his testimony was not self-incriminating.

Standard of review

In a case reviewing a trial court's decision to hold a party in contempt for asserting his privilege against self-incrimination where the trial court determined the party's assertion was in error, this Court explained an appellate court would reverse a trial court's decision regarding contempt only if it were without evidentiary support or were an abuse of discretion. First Union Nat. Bank v. First Citizens Bank and Trust Co. of South Carolina, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) (citing Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988)).

Similarly, when reviewing whether an individual waived his privilege against self-incrimination when speaking with law enforcement, the appellate courts review the trial court's decision using an abuse of discretion standard. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). Specifically, "[o]n appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." Id. "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate 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. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Generally, in criminal cases, appellate courts review errors of law only and are bound by the trial court's findings of fact unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, appellate review is limited to determining whether the trial court abused its discretion. Id. A trial court abuses its discretion when its decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

Relevant facts

During the hearing on Appellant's request for immunity pursuant to the Protection of Persons and Property Act, defense counsel called Aliga Campbell as a witness. R. 108, ll. 24-25. Attached to Appellant's motion for immunity was a sworn statement by Campbell. R. 879. On August 10, 2016, Campbell described how he and Jamal Burgess, the deceased, had a heated discussion prior to Appellant's arrival at the party where the fatal shooting later occurred. R. 879. Burgess admitted to Campbell that he knocked out Appellant's teeth on a prior occasion. R. 879. Pursuant to Burgess's request, Campbell called Appellant about his arrival at the party, but Appellant did not answer. R. 879. Minutes later, Appellant arrived, and Campbell told Appellant that Burgess wanted to talk to him. R. 879. When Appellant did not walk to Burgess, Burgess approached him. R. 879.

Campbell described Burgess as "whipping out his gun" "the whole time." R. 879. According to Campbell, when Burgess pushed Dameion Alston to the side, Alston's gun fell to the ground. R. 879. Burgess then "whipped out his gun, turned and fired." R. 879. Appellant picked up Alston's gun and "fired back at Burgess in self-defense." R. 879. Campbell was

clear, "Burgess fired first. It was self-defense." R. 879. Campbell believed Burgess was going to kill Appellant. R. 879. "Burgess was waving the gun all around and shooting at everyone." R. 879.

Finally, Campbell explained that the day before the shooting Burgess rode by his house where he and Appellant were outside. R. 879. Burgess saw the two men and pulled up his shirt to show them his gun in his waistband. R. 879. Campbell "took this as a threat and a warning against [Appellant] and anyone with [Appellant]." R. 879.

While the parties were waiting for Campbell to arrive in the courtroom from lock-up, Eric Fox, Mr. Campbell's attorney, advised the presiding judge that although Campbell was not a defendant for purposes of the hearing on Appellant's immunity request, Campbell was a co-defendant in the case. R. 109, ll. 7-8. Fox "advised and would advise Mr. Campbell again to invoke his rights under the Fifth Amendment not to give any testimony at all." R. 109, ll. 10-13. According to Fox, Campbell was "still indicted in a double homicide that [was] still pending." R. 109, ll. 13-14.

When the judge indicated he was not going to "compel him to testify," defense counsel argued he did not think Fox objected to Campbell being called and that it was a "procedural matter." R. 109, ll. 19-20. Fox then informed the presiding judge that he objected to Campbell testifying in any way. R. 109, ll. 21-24. Defense counsel explained that Campbell provided "a sworn statement and a written affidavit," two weeks after the shooting and over a year prior to his arrest. R. 110, ll. 1-13. Further, defense counsel indicated that he wanted to call Campbell as a witness "for record sake" even if he wished "to plead the Fifth Amendment." R. 110, ll. 14-15. The judge framed the question as whether defense counsel could call Campbell "as a witness over his attorney's objection." R. 111, ll. 1-3. Defense counsel explained that it was necessary

for Campbell to be called to the stand and assert his privilege if that is what he chose to do. R. 111, ll. 4-10. The judge questioned whether he would permit "Campbell take the stand to assert his Fifth Amendment right when his attorney says, no I'm invoking it now, he doesn't take the stand." R. 111, ll. 15-17. The judge noted defense counsel sought to call Campbell as a witness during "a motion hearing," not "a criminal trial." R. 111, ll. 17-18. The solicitor opined, "I actually don't think it's proper to call someone just to invoke their Fifth Amendment." R. 111, ll. 20-21. In light of Fox's invocation of the privilege for Campbell, the judge would not permit defense counsel to call Campbell as a witness. R. 110, ll. 17-21; R. 112, ll. 4-6; R. 116, ll. 11-20.

Discussion

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[1] "The essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406 U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty").

Personal right

"The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated" by the Supreme Court of the United States. Couch v. United States, 409 U.S. 322, 327 (1973). "By its very nature, the privilege is an intimate and personal one." Id. The Supreme Court held that it is an "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be

[1] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12.

invoked by the individual whose testimony is being compelled." Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986) (rejecting the notion that an attorney can invoke an individual's privilege against self-incrimination).

The South Carolina Supreme Court explained that "[a] judge may not invoke a witness's Fifth Amendment privilege." State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104-105 (1979). Further, the Court explained that "it is well settled that a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put." Id. at 550-551, 253 S.E.2d at 105. "[T]he privilege against self-incrimination is personal and may not be invoked by, or on behalf of, a third person." State v. Hughes, 328 S.C. 146, 150, 493 S.E.2d 821, 822 (1997). The Court held it was error for a trial judge to permit a witness to claim his Fifth Amendment privilege before taking the stand. State v. Perry, 279 S.C. 539, 540, 309 S.E.2d 9, 10 (1983). In light of the prohibition on calling a witness solely for the sake of invoking his or her Fifth Amendment privilege, the Court explained a witness may invoke the privilege during an in camera hearing. Hughes, 328 S.C. at 153 n.4, 493 S.E.2d at 824 n.4.

Here, the presiding judge erred by allowing Campbell's lawyer to invoke the privilege against self-incrimination on Campbell's behalf. The privilege was personal to Campbell, and it could be invoked only by Campbell. Additionally, the language used by Campbell's lawyer was illuminating and important for the analysis of this issue on appeal. The lawyer informed the judge that he "advised and would advise Mr. Campbell again to invoke his rights under the Fifth Amendment not to give any testimony at all." R. 109, ll. 10-13. Simply, the lawyer related only what he had advised Campbell to do. He never informed the court that Campbell wanted to invoke the privilege. Thus, even if the law were to permit the lawyer to invoke the privilege on

Campbell's behalf based on some agency theory, there was no evidence in the record that Campbell actually wanted to invoke his right against self-incrimination.

Not self-incriminating

Furthermore, the record revealed that Campbell's testimony would not have been self-incriminating. Campbell's lawyer never indicated – or even suggested – that Campbell would testify differently from the statement he provided to Appellant's private investigator just weeks after the shooting. Campbell did not admit to any illegal conduct in the statement he provided.

The privilege is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that

he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to the South Carolina Supreme Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118. "[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119.

Campbell's statement provided no self-incriminating information. Importantly, as will be discussed infra, the trial judge found the statement was not against Campbell's penal interest

when he determined defense counsel could not call the investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE. At most, it was an admission that Campbell was present at the scene of a shooting. Merely being present at the scene of a crime is not incriminating – even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). It was incumbent upon the circuit court to determine whether requiring Campbell to answer certain questions would reveal incriminating information about Campbell. The judge erred by failing to pursue this undertaking.

II. In the alternative, if this Court determines that the witness's statement was self-incriminating, the circuit court erred by refusing to permit defense counsel to call his investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE, where the witness was unavailable due to the invocation of his privilege against self-incrimination, the witness's statement was corroborated by other testimony, and the cumulative nature of the witness's statement enhanced his probative value to render its exclusion not harmless beyond a reasonable doubt.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

When the presiding judge indicated he would permit Campbell's lawyer to invoke the Fifth Amendment privilege against self-incrimination for Campbell, defense counsel expressed his desire to call his private investigator to testify to the contents of Campbell's statement. R. 110, ll. 4-16; R. 110, ll. 22-25; R. 112, l. 23 – R. 113, l. 1. Specifically, counsel argued that his investigator should be permitted to testify to Campbell's prior statement pursuant to Rule 804(b)(3), SCACR. R. 113, ll. 8-13; R. 114, ll. 1-6. The judge agreed that Campbell was not available because of the assertion of his privilege against self-incrimination; however, the judge determined the statement was not against Campbell's interest. R. 113, ll. 14-21; R. 113, ll. 24-

25; R. 114, ll. 8-9. The state objected, and the judge sustained the objection. R. 115, l. 22 – R. 116, l. 7.

Appellant incorporates by reference the contents of the proposed statement as discussed in Issue I, supra.

Discussion

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible. Rule 802, SCRE. However, the South Carolina Rules of Evidence permit hearsay "if the declarant is unavailable as a witness" and the "statement which was at the time of its making … so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. However, "[a] statement tending the expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE. "'Unavailability of a witness' includes situations in which the declarant … is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 804(a)(5), SCRE. "To bring evidence within [the Rule 804(b)(3), SCRE] exception, Defendant must show that the proffered statements were made by an unavailable declarant, that the statements exposed the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements." State v. McDonald, 343 S.C. 319, 323, 540 S.E.2d 464, 466 (2000).

Although the Court refused to adopt a specific test to determine whether a statement has been sufficiently corroborated, the Court made clear that "the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statements' contents, but rather to the making of the statement." State v. McDonald, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000). Further, the Court recognized that "[i]n many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration." Id.

In State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992), the South Carolina Supreme Court examined this issue. At Doctor's trial, an individual testified that Doctor and two other boys approached him in a shopping mall parking lot and demanded his keys. State v. Doctor, 306 S.C. 527, 528, 413 S.E.2d 36, 37 (1992). When the individual refused, Doctor pointed a gun at his head. Id. The individual handed over his keys and the three young men drove away in the car. Id. At the trial, Doctor called a sixteen-year old boy to testify. Id. He admitted that he and two other minors committed the theft, and denied that Doctor was involved. Id. According to the boy, he and two others found the keys on the floorboard and did not use a gun. Id. The boy had plead nolo contendere to the crime in Family Court. Id.

The defense also called two minors to testify, who were implicated by the sixteen-year old. Id. at 529, 413 S.E.2d at 37. Both asserted their Fifth Amendment privilege against self-incrimination. Id. The defense then proffered the testimony of his investigator, who stated that "both the nontestifying minors, separately and in the presence of family members, confessed to the theft." Id. According to the investigator, the confessions "were identical in detail to the in-court confession of the testifying minor." Id. Nevertheless, the judge excluded the investigator's testimony as hearsay. Id.

The Court held the two minors were made unavailable by their assertion of their privilege against self-incrimination. Id. at 530, 413 S.E.2d at 38. Further, the Court held the statements were sufficiently corroborated in that all three minors related identical versions of the crime. Id. Finally, the two out-of-court confessions were further corroborated by the testimony of the three witnesses who saw the three confessing minors in the car without Doctor prior to the removal of the stereo. Id.

Additionally, the Court rejected the state's argument that the exclusion of the testimony by the investigator was harmless error as it was merely cumulative of the testifying minor's confession. Id. The Court noted that it was the "redundancy of the details" that made the testimony so valuable to the defendant. Id. The testifying minor's testimony was contradicted by the alleged victim's testimony, and the testifying minor's credibility was attacked on cross-examination by the state. Id. "When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative." Id.

In another similar case, the South Carolina Supreme Court reversed a trial judge's exclusion of statements by two witnesses that tended to exculpate the defendant in State v. McDonald, 343 S.C. 319, 324-325, 540 S.E.2d 464, 466-467 (2000). Hawkins and Thorson were in the driveway of a residence when a group of men approached them. Id. at 321, 540 S.E.2d at 464. Thorson claimed McDonald, "who was not wearing a mask, approached the car from the rear, brandished a sawed-off shotgun and placed it to Thorson's head, demanding money." Id. at 321, 540 S.E.2d at 465. Thorson claimed "the gun fired," killing Hawkins. Id. Thorson sped away. Id. Robert Jackson also claimed that McDonald fired the fatal shot;

however, he indicated McDonald was wearing a black mask and he was able to identify him by his clothing. Id. Robert Jackson and Thorson agreed that McPhail was present at the scene. Id.

Timmy Jackson testified that immediately after hearing a gunshot, he saw McPhail standing near the car with a sawed-off shotgun. Id. at 322, 540 S.E.2d at 465. Timmy Jackson also testified that McDonald was not at the scene immediately after the shooting. Id. When the defense called McPhail to testify, he asserted his Fifth Amendment privilege. Id. Thereafter, the defense proffered testimony from Timmy Jackson that McPhail told him that he shot Hawkins because he refused to hand over his money. Id. The trial judge excluded the testimony, finding it was inadmissible testimony. Id.

In addition to Timmy Jackson's testimony, the defense proffered the testimony of (1) an individual who claimed McPhail admitting shooting Hawkins because he refused to pay for drugs and (2) a fellow who was in jail at the same time as McPhail and overheard McPhail tell an unidentified person that he shot the deceased and that McDonald was not involved. The trial judge excluded the testimony of these individuals on the basis of hearsay as well. Id.

The Court reversed the trial judge and held "the statements purportedly made by McPhail [were] clearly corroborated and should have been admitted at trial." Id. at 324, 540 S.E.2d at 466. The Court explained that Timmy Jackson and Gary Hawkins indicated the motive for the shooting was the failure of the deceased to provide McPhail with money, which was the substantially same as the testimony from Thorson and Robert Jackson. Id. "The content of the statements indicates that the speaker had extensive knowledge of details of the crime." Id. Further, even the state's witnesses placed McPhail at the scene of the crime and Timmy Jackson placed a sawed-off shotgun in McPhail's hand within seconds of the shooting. Id. Finally, "three different witnesses claim[ed] to have heard McPhail make similar statements on three

separate occasions." Id. at 325, 540 S.E.2d at 466-467. The Court held the statements were sufficiently corroborated; therefore, the trial court's suppression of the statements was an abuse of discretion as it was controlled by an error of law. Id. at 325, 540 S.E.2d at 467.

In contrast, the South Carolina Supreme Court affirmed a trial judge's exclusion of a co-defendant's statements admitting to shooting a police officer where the statements lacked corroborating evidence of trustworthiness. State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 644-645 (1996). Three of the incriminating statements made by the co-defendant were to jailhouse informants. Id. The Court held these statements did "not clearly indicate they were trustworthy." Id. at 359, 468 S.E.2d at 645. Two other statements, one given to an investigating officer and one to a prison guard, did not exculpate Forney. Id. at 360, 468 S.E.2d at 645. Rather, these statements only inculpated the co-defendant. Id.

Campbell was an unavailable witness because the presiding judge permitted Campbell's counsel to invoke his privilege against self-incrimination. See Rule 804(a)(1), SCRE; Doctor, 306 S.C. at 530, 413 S.E.2d at 38.

While Appellant argued that Campbell's proposed testimony was not self-incriminating, see supra Issue I, the judge permitted Campbell's attorney to invoke the privilege against self-incrimination. Thus, the judge found Campbell's testimony would have incriminated Campbell. Otherwise, Campbell would not have been permitted to invoke the privilege. Appellant admits the judge's ruling on the Fifth Amendment issue contradicts his ruling that Campbell's proposed testimony was not against his penal interest, but he raises this issue in the alternative. In the event this Court determines Campbell's proposed testimony was self-incriminating because he admitted to being present at the time of the shooting or that he called Appellant immediately prior to Appellant arriving at the party, then the proposed testimony was ipso facto against his

penal interest, and presiding judge erred by not allowing Appellant to present Campbell's statement through his investigator.

Furthermore, Campbell's statement was corroborated sufficiently under Rule 803(b)(4), SCRE, to require admission. Campbell's statement was almost identical to the testimony of Appellant and Everette Ford. While there were too many similarities to list them all, the important corroborating details are as follows. Campbell described Appellant and Burgess having a conversation, which was also described by Everette and Appellant. R. 879; R. 23, ll. 4-23; R. 70, ll. 9-25. Campbell explained how Damieon Alston tried to break up the confrontation, just as Everette and Appellant explained. R. 879; R. 28, ll. 6-9; R. 70, ll. 1-3. Next, Campbell told how Alston dropped his gun during the scuffle, which was exactly what Appellant and Everette said happened. R. 879; R. 28, ll. 18-23; R. 71, ll. 7-10. According to Campbell, Everette, and Appellant, Burgess fired first. R. 879; R. 28, l. 24 – R. 29, l. 4; R. 71, ll. 11-12. All three indicated Appellant picked up Alston's gun and returned fire. R. 879; R. 29, ll. 5-10; R. 71, ll. 10-12.

Just as in Doctor and McDonald, the excluded statement by Campbell was sufficiently corroborated by the evidence in the record at the time – the testimony of Everette and Appellant. Furthermore, the cumulative nature of Campbell's statement did not render the error harmless. As the Court explained in Doctor, it is the "redundancy" of the details that makes the testimony so valuable. The state called into question the credibility of Appellant and his cousin, Everette, which amplified the importance of Campbell's statement. The presiding judge erred by refusing to permit Appellant to present Campbell's statement through his investigator pursuant to Rule 804(b)(3), SCRE.

III. The circuit court erred by failing to make specific findings of fact and conclusions of law on the elements of self-defense and the relevant statutory provision where Appellant sought immunity from prosecution under the Protection of Persons and Property Act.

Standard of review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate 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). "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. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Relevant facts

At the conclusion of the hearing, Judge Culbertson denied Appellant's motion for immunity from prosecution. R. 195, ll. 8-9. He stated simply that "the defense ha[d] failed to prove by a preponderance of the evidence that they are in - - or that he is entitled to immunity in this case." R. 195, ll. 9-12. He repeated that he found Appellant "failed to prove immunity under the statute 16-11-450 by [a] preponderance of the evidence." R. 195, ll. 15-18. By an order filed on March 6, 2019, Judge Culbertson indicated Appellant "failed to prove by a preponderance of the evidence that he is entitled to immunity from prosecution under S.C. Code Ann. § 16-11-450" for the murder of Burgess. R. 902. Thus, the judge denied the motion for immunity. R. 902.

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent

was 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 found it "proper for law-abiding citizens to protect themselves, their families, *and others* from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves *and others*." S.C. Code Ann. § 16-11-420(B) (emphasis added). 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). Finally, the General Assembly explained "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." 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). The Court explained that "another applicable provision of law" found within the Act "includes the common law of self-defense." State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019). Further, the Court held that "[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).

"This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Glenn, 429 S.C. at 18, 838 S.E.2d at 496 (internal quotation omitted). "Accordingly, a trial court should first consider whether the defendant has proved the

elements of self-defense by a preponderance of the evidence. If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id.

The Act 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). Thus, "in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because the provision was enacted to extend the protections of the Castle Doctrine to other places where he has a right to be." Id. at 118-119, 838 S.E.2d at 496. "Where this section is applicable, it replaces the duty to retreat element required to establish self-defense." Id. at 119, 838 S.E.2d at 497. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

The Supreme Court explained that "[w]hile … written orders are not always practical given the timing of the immunity hearing, the circuit court, in announcing its ruling, should at least make specific findings on the elements on the record." State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019). Earlier the Court had said, "While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases

necessarily involve." State v. Cervantes-Pavon, 426 S.C. 442, 452 n.4, 827 S.E.2d 564, 569 n.4 (2019).

The judge's minimalist ruling left unclear how, or if, the judge actually resolved any conflicts in the evidence. However, the state argued that the question of self-defense was "a question for the jury" because there were "witnesses on both sides." R. 188, ll. 12-17. According to the state, there was "certainly a jury question here" because it was "for the jury to determine which side or which witnesses to believe or not to believe." R. 188, ll. 12-17. To the extent the judge ruled in accordance with the state's argument, which is difficult to decipher from the austere order, the judge committed an error of law. The South Carolina Supreme Court recently made clear that circuit court judges confronted with the question of immunity must resolve conflicts in the evidence. The Court explained that "just 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." Cervantes-Pavon, 426 S.C. at 451, 827 S.E.2d at 569. "Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019).

Unlike the ruling presented in Andrews, 427 S.C. at 182, 830 S.E.2d at 14, where the Supreme Court determined the circuit court's ruling was "adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of th[e] Court's precedent," the ruling issued by Judge Culbertson is devoid of any findings of fact or conclusions of law. Although Appellant concedes the judge's oral pronouncement cited the correct burden of

proof, he failed to recite any facts or case law to support or explain his ruling. In his oral pronouncement *and* in his written order, the judge cited only the Act, failing to mention common law self-defense at all. The Supreme Court found a similar ruling required reversal of the circuit court's denial of immunity and remanded the case for a new immunity hearing. See Glenn, 429 S.C. at 123, 838 S.E.2d at 499. Likewise, Appellant is entitled to a new immunity hearing.

IV. The presiding judge erred when he determined the Protection of Persons and Property Act "does not provide immunity from prosecution" for the crimes of possession of a firearm by a felon and possession of a weapon during the commission of a violent crime.

Standard of Review

The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

Relevant Facts

The presiding judge found the Protection of Persons and Property Act "does not provide immunity from prosecution" for the crimes of possession of a firearm by a felon and possession of a weapon during the commission of a violent crime. R. 902; see also R. 124, ll. 4-10. No reasoning was provided.

Discussion

As mentioned previously, section 16-11-450(A) of the South Carolina Code provides that "[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…." Presumably, the judge found the Act did not apply to the charges related to the firearm because those charges did not involve the use of "deadly force." A narrow reading of only section 16-11-450(A) of the Act could lead to the conclusion reached by the presiding judge. However, our state's rules of statutory interpretation will not tolerate such an absurd result. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529

S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Id.

As our Supreme Court noted in State v. Jones, 416 S.C. 283, 296, 786 S.E.2d 132, 139 (2016), "the Legislature clearly enunciated its intent and reasons for promulgating the Act in section 16–11–420." The complete text of S.C. Code Ann. § 16-11-420 provides:

> (A) It is the intent of the General Assembly 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.
>
> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
>
> (C) **The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.**
>
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.

> (E) 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.**

(emphasis added).

In order to accomplish the objectives set forth in section 16-11-420, the Legislature enacted section 16-11-440. Jones, 416 S.C. at 296, 786 S.E.2d at 139. This section "identifies the circumstances for which a person may invoke the protection of the Act." Id. Specifically, subsection (C) of section 16-11-440 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). Thus, while the legislature contemplated the potential use of deadly force under subsection (C) of the Act, it did not specifically require it.

The judge's interpretation of the Act would improperly limit it to only the use of deadly force, even when a lesser force is sufficient to repeal the threat. Such an interpretation is inconsistent with the language in section 16-11-440(C) and would undoubtedly infringe on the person's Second Amendment right to bear arms, which was specifically identified in section 16-11-420(C) as a foundational basis for the Act. See Jones, 416 S.C. at 297-98, 786 S.E.2d at 140; District of Columbia v. Heller, 554 U.S. 570, 628 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right."). Moreover, the prospect of requiring the use of deadly force or risk criminal liability for otherwise reasonably acting in self-defense to repel an attack is an affront to basic principle that "[a]s a society . . ., our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence."

Willis v. Wu, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004) (quoting Blake v. Cruz, 698 P.2d 315, 321–22 (Idaho 1984)).

Furthermore, if Appellant were entitled to immunity for the murder, and Appellant respectfully submits that he was, see Issue V, infra, then the ancillary charges of possession of a weapon during the commission of a violent crime and unlawful possession of a weapon by a person convicted of a violent crime must give way as well. The weapons charges are companions to the murder and cannot stand independent of it. Logically, one immune from prosecution for a murder could not be prosecuted and convicted for the accompanying weapons charges. Without the murder, there could be no violent crime during which Appellant possessed the gun. A finding of immunity would necessitate a finding that Appellant possessed the gun for self-protection as a matter of law, creating a bar to the prosecution for unlawful possession of a weapon by a person convicted of a violent crime. In sum, the language and purpose of the Act, and common sense, dictate that the Act does provide immunity from prosecution for companion charges and does not require the use of deadly force for each individual offense.

V. In the alternative, if this Court determines the presiding judge's ruling on the question of immunity was sufficient, the judge erred in denying immunity from prosecution where the evidence demonstrated Appellant satisfied the elements of common law self-defense and the Act.

Standard of review

As previously mentioned, "[a] claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate 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). "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. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Relevant facts

Previously, in 2014, Burgess had grabbed Appellant around his shoulders and knocked out Appellant's teeth by hitting him in the mouth with a gun. R. 24, ll. 11-18; R. 26, ll. 3-6; R. 60, ll. 10-13; R. 60, ll. 24-25. After being hit, Appellant fell to the ground, spitting out teeth and blood. R. 60, ll. 14-15. Burgess stood over Appellant, threatening to shoot him. R. 60, ll. 15-16. Appellant managed to jump up and grab Burgess with the assistance of another person. R. 60, ll. 16-20. Appellant ran from Burgess. R. 60, ll. 19-20. Thereafter, Appellant was afraid of Burgess and kept his distance. R. 61, l. 24 – R. 62, l. 4; R. 62, ll. 10-11; R. 63, ll. 14-25; R. 82, l. 25; R. 107, ll. 7-9. Further, Appellant was aware that Burgess was "always shooting people and shooting at people." R. 64, ll. 1-2.

During the middle of July 2016, Appellant learned that Burgess, who was incarcerated that the time, told Monique Brown that he planned to kill three people when he was released, and

Appellant was one of those people. R. 64, l. 22 – R. 65, l. 7; R. 84, ll. 3-24. Burgess was released from prison around July 21, 2016. R. 65, ll. 12-15.

On July 22, 2016, Emily Ford, Appellant's mother, saw Burgess sitting on a moped in front of the home she shared with her son. R. 8, ll. 9-19; R. 9, ll. 14-20. Appellant also learned that Burgess was riding his moped in front of Appellant's grandfather's house. R. 66, ll. 1-6.

The following day, Everette Ford, Appellant's cousin, attended a party on Warren Street, also called Dudley Street. R. 18, l. 1 – R. 19, l. 21. He arrived around the same time as Appellant. R. 22, ll. 4-7; R. 69, ll. 13-15. Burgess put his arm around Appellant in an aggressive way, just as he did in 2014. R. 23, ll. 4-11; R. 70, ll. 15-24; R. 71, l. 22 – R. 72, l. 2. Burgess, who was armed with a gun at his waist, then confronted Appellant about some rumors and gossip. R. 23, ll. 15-23; R. 72, ll. 22-25. Appellant "felt dread" and fear in that moment. R. 70, ll. 10-11. Appellant pulled out of Burgess' hold. R. 24, ll. 9-14.

Burgess told Appellant he "should shoot" him. R. 70, ll. 24-25. When the confrontation between Appellant and Burgess escalated, Damieon Alston arrived and tried to diffuse the situation. R. 28, ll. 6-9; R. 43, ll. 14-15; R. 71, ll. 1-3. While Alston was trying to calm Burgess, who was reaching for his gun, Alston's gun dropped to the ground. R. 28, ll. 12-23; R. 29, ll. 16-19; R. 66, ll. 6-10; R. 93, l. 24 – R. 94, l. 3. Burgess then fired his gun. R. 28, ll. 24-25; R. 71, ll. 10-12. In fear of losing his life, Appellant then picked up Alston's gun, which was a 9-millimeter and returned fire while running away. R. 29, ll. 6-8; R. 71, ll. 10-12; R. 73, ll. 14-21; R. 75, ll. 1-2; R. 75, ll. 12-13. Burgess continued firing as Appellant ran. R. 29, ll. 9-10; R. 71, ll. 12-13; R. 101, ll. 9-16; see R. 138, ll. 21-25 (a state's witness testifying that Burgess was still alive after being shot); R. 158, ll. 16-18 (same); R. 171, ll. 1-6 (police officer testifying that Burgess was alive when he arrived).

Everette and Appellant explained that Burgess "always had a gun." R. 21, l. 19; R. 36, l. 16; R. 66, l. 13. However, the state presented several witnesses who claimed to not see a gun on Burgess on the night of the party. See e.g., R. 127, ll. 18-19; R. 135, ll. 11-12; R. 155, ll. 6-8; R. 157, ll. 21-22.

Felicia Williams claimed she heard a glass bottle drop, which drew her attention to a confrontation between Appellant and Burgess. R. 132, ll. 6-8; R. 134, ll. 15-22; R. 142, ll. 10-12. She saw Alston in the middle of Appellant and Burgess. R. 132, ll. 12-13. Reluctantly, Williams admitted that she told police that there may have been a "beef" between Appellant and Burgess because Burgess knocked Appellant's teeth out. R. 143, ll. 10-17. Further, Williams admitted to hearing Appellant say, "I'll fight, I'll fight but I ain't gonna shoot." R. 143, ll. 21-24. Burgess pushed Alston to the side. R. 132, ll. 14-15; R. 132, ll. 18-22; R. 144, ll. 14-17. Then, she claimed, Appellant pulled out a gun from off his body. R. 132, ll. 15-16; R. 135, ll. 2-5. "[O]nce the first shot went off [she] took off running into Dudley's house." R. 132, ll. 15-17. Williams also admitted that she was "not sure" if Burgess fired a gun. R. 146, l. 21 – R. 147, l. 2. Williams even admitted that she was uncertain whether Burgess had a gun because she was not "looking at him like that." R. 148, l. 22 – R. 149, l. 1.

Importantly, Williams testified that "it could have went either way out there." R. 149, ll. 9-19. In fact, Williams told Appellant after the shooting that if he had not killed Burgess, then Burgess would have killed him. R. 150, ll. 19-20. She surmised that "[s]omebody was going to get killed that night regardless." R. 150, ll. 20-21.

Sherika Gore also attended the birthday party. R. 154, ll. 2-4. She saw Appellant and Burgess in the road, talking. R. 156, ll. 8-9. She was not paying close attention to them. R. 156, ll. 9-10. However, when she "looked up," she saw Appellant "with a gun." R. 156, ll. 10-11.

Upon seeing this, she ran. R. 156, l. 11; R. 158, ll. 3-4. Although she saw Appellant with a gun, she did not see where he got the gun. R. 157, ll. 16-18.

When the police arrived, they found "a huge crowd of people." R. 170, l. 1; R. 172, ll. 14-16; R. 174, l. 6. The police discovered six cartridge casings at the scene. R. 179, ll. 8-16. Five were 380 cartridge casings and one was a 9-millimeter cartridge casing. R. 179, ll. 19-20. "The 380's were on the east side of the roadway. Some of the cartridge casings [were] very, very close to the roadway. Some [were] in the dirt, some [were] on the roadway, but they were very close together in sort of like a line going up beside the road." R. 179, l. 23 – R. 180, l. 2. The 9-millimeter cartridge casing was in the center of the roadway. R. 182, ll. 11-20. There were no other casings around it. R. 182, ll. 17-20.

An autopsy revealed Alston sustained three gunshot wounds, and Burgess sustained a single gunshot wound. R. 184, ll. 16-21. No projectiles were recovered from the bodies. R. 185, ll. 15-16.

The state argued Appellant failed to show that he was without fault in bringing on the difficulty. R. 121, ll. 20-22. Although conceding that Appellant had a legal right to be at the party, the state argued Appellant brought on the difficulty by attending the party. R. 122, ll. 1-18. According to the state, Appellant "was, in fact, the aggressor." R. 187, ll. 1-2. To support this argument, the state pointed to its witnesses who indicated Appellant "fired the first shot." R. 187, ll. 10-13.

Next, the state argued for immunity not to apply because Appellant was prohibited from carrying a handgun and was "engaged in a fight by his own words" prior to shooting Burgess. R. 122, l. 22 – R. 123, l. 7. Defense counsel countered that according to binding precedent, a person can be acting lawfully even if he is in unlawful possession of a weapon if he is entitled to

arm himself in self-defense at the time of the shooting. R. 123, ll. 13-19. Here, Appellant "was entitled to arm himself once he saw [Burgess] reaching for a gun." R. 123, ll. 19-21.

Defense counsel countered that Appellant's conduct was not the type that would provoke a deadly assault. R. 189, ll. 11-13. Appellant was grabbed by a man, who knocked his teeth out during a previous confrontation. R. 189, ll. 14-19. Further, Appellant was aware that Burgess had been in jail until just days before the encounter. R. 189, ll. 19-20. Due to their prior interactions and Burgess's reputation, Appellant knew he was dangerous. R. 189, ll. 21-22. Importantly, Appellant knew Burgess told at least one other person that he intended to kill Appellant when he was released from jail. R. 189, ll. 22-24. Appellant also testified that he saw a gun on Burgess waist, and a photograph submitted during the hearing showed "something" along the waistband. R. 190, l. 19 – R. 191, l. 5; Defendant's Exhibit #1; Defendant's Exhibit #2. Thus, Appellant was in actual fear of Burgess and his fear was reasonable. R. 194, ll. 1-25.

Defense counsel also questioned the credibility of the state's two lay witnesses, who "backtracked" on the stand. R. 191, ll. 12-13. One witness admitted that if Appellant had not shot Burgess, then Burgess would have shot him. R. 191, ll. 14-17. Further, Appellant told Burgess not to shoot, but the two could fight. R. 193, ll. 19-20.

Without elaboration, Judge Culbertson denied Appellant immunity from prosecution. R. 195, ll. 8-18; R. 902.

Discussion

As mentioned supra, 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). Under the Act, "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he

has a right to be … 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." S.C. Code Ann. § 16-11-440(C). The phrase "another applicable provision of law" found within the Act "includes the common law of self-defense." State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019). "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). Thus, a person who proves by a preponderance of the evidence that he satisfied (1) the elements of common law self-defense *or* (2) the elements of the Act is entitled to immunity from prosecution.

According to the Supreme Court, "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." Glenn, 429 S.C. at 118, 838 S.E.2d at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Thus, "in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because the provision was enacted to extend the protections of the Castle Doctrine to other places where he has a right to be." Id. at 118-119, 838 S.E.2d at 496. "Where this section is applicable, it replaces the duty to retreat element required to establish self-defense." Id. at 119, 838 S.E.2d at 497. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

Self-defense

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); see also State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The South Carolina Supreme Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense

arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[2] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety 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.

[2] The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. 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. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. 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 physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This 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 to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to this Court, Douglas was not at fault in bringing 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.

Appellant was not at fault in bringing on the difficulty. Appellant was a guest a birthday party. As soon as he arrived at the party, he was accosted by Burgess. Appellant and others tried to calm Burgess, but he was relentless in his pursuit of Appellant. Contrary to the state's position that Appellant's possession of a gun meant he was at fault in bringing on the difficulty, all the evidence

in the record showed either Appellant armed himself in self-defense or that his possession of the firearm illegally was not reasonably calculated to produce the occasion that resulted in the difficulty. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting").

Furthermore, witnesses for the state and defense testified that Burgess knocked out Appellant's teeth. This evidence showed Burgess was an aggressor in the past was the probable aggressor in this instance. See State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998) (explaining that evidence that the accused and the decedent had previous difficulty is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor).

Next, according to Appellant and his cousin, Appellant was in actual imminent danger because Burgess was armed, pulled his gun, and fired at Appellant. The state's own witness agreed that either Burgess or Appellant would have died that night. See State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (explaining that a defendant's statement it was either "her or me" after the defendant disarmed the victim established the defendant believed he was in imminent danger). Further, this witness admitted to hearing Appellant beg Burgess not to shoot, but to fight instead. There would be no need for Appellant to ask Burgess not to shoot if Burgess were unarmed. The photograph of Burgess from that night, as authenticated by a state's witness, showed something black at his waistband. This object appeared to be a gun. See Starnes, 340 S.C. at 320, 531 S.E.2d at 912 (holding a person has the right to act on appearances). Yet, more evidence to support Appellant's position that Burgess was armed. Finally, the police discovered two different calibers of shell casings, which demonstrated there were two shooters. These circumstances, coupled with Appellant's knowledge of Burgess's prior conduct toward Appellant, toward others, and threats

against Appellant, were the type of circumstances that would warrant a reasonable man to strike the fatal blow.

Even if this Court determines the evidence did not show Appellant was in actual danger, Appellant believed he was, and his belief was reasonable. Appellant testified unequivocally that he feared for his life when he fired the shot at Burgess. The totality of the evidence showed his fear was reasonable. In addition to the prior incident in which Burgess knocked out Appellant's teeth with a gun, Burgess was released recently from prison where he had told another person that he was going to kill Appellant when he was released. See State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000) (addressing instances of violence on the part of the deceased)

Finally, Appellant had no other probable means of avoiding the danger. Appellant fired after being fired upon and ran as quickly as he could from the danger. He was not required to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989).

The Act

Turning to the Act, in deciding whether a defendant satisfies section 16-11-440(C), the court must ascertain whether, at the time of the incident, he was not engaged in an unlawful activity and was attacked in another place where he had a right to be. Previously, the Court "recognized … the irrationality of foreclosing immunity based on the location of the incident provoking the use of self-defense." Glenn, 429 S.C. at 119, 838 S.E.2d at 497. Additionally, the Court required circuit courts to undertake a proximate cause analysis for the Act's requirement that a person be in a place where he had a right to be. Id. at 119-120, 838 S.E.2d at 497. Finally, the Court indicated that "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id. at 120, 838 S.E.2d at 497.

The South Carolina 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. On the evening of November 1, 2012, 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. 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 once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. 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 the apartment 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 that 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 Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

If this Court were to determine that Appellant failed to satisfy the duty to retreat element of self-defense, then Appellant respectfully requests this Court hold he satisfied the elements of section 16-11-440(C). As discussed supra, Appellant satisfied the first three elements of self-defense;

therefore, if he were not engaged in an unlawful activity and was attacked in another place where he had a right to be, then he is entitled to immunity under the Act.

First, Appellant was attacked in a place where he had a right to be. The state conceded this point during the hearing, and the judge found that Appellant had a legal right to be there. R. 122, ll. 7-11. If the state were to argue differently on appeal, the state could not demonstrate that Appellant's attendance at the birthday party for his brother proximately caused Burgess's death.

Second, Appellant was not engaged in an unlawful activity. At the hearing, the state recognized case law providing that "unlawful carrying of a pistol in and of itself is not an unlawful act that would preclude someone from relying on stand your ground." R. 122, l. 22 – R. 123, l. 1. However, the state argued that Appellant "is prohibited from carrying a handgun so he's not just unlawful carrying but he's a prohibited person engaged in a fight by his own words." R. 123, ll. 2-7. To the contrary, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Burriss, 334 S.C. at 262, 513 S.E.2d at 108. Furthermore, the state could not show Appellant's carrying of a firearm was the proximate cause of Burgess's death.

Appellant was entitled to immunity from prosecution pursuant to self-defense and the elements of the Act. The presiding judge erred in ruling otherwise.

VI. The trial judge erred by allowing the state to introduce a prior consistent statement of its star witness where there was no express or implied charge of recent fabrication or improper influence or motive because defense counsel simply impeached her with other prior inconsistent statements.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

Relevant facts

During his cross-examination of Sherika Gore, defense counsel questioned whether she saw Felicia Williams at the party. R. 604, l. 25 – R. 605, l. 2. Gore insisted Williams was at the party before and after the shooting. R. 605, ll. 3-14. When Gore talked to the police, she never mentioned Williams. R. 606, ll. 2-7. She explained she "was never asked that." R. 606, l. 7. Gore admitted she and Williams were friends. R. 606, l. 13 – R. 608, l. 12. Additionally, Gore told the police that Appellant arrived in a white two-door car, but at the time of trial, she claimed Appellant walked to the area. R. 619, l. 15 – R. 620, l. 14. Gore did not really care about any inconsistencies in her statements as she claimed that what she was saying was "the truth." R. 620, l. 18 – R. 621, l. 6. For Gore, the only truth that mattered was that Appellant shot Burgess, and it was irrelevant whether she gave inconsistent statements on how Appellant arrived to the area: "He was there, if he walked, road [sic] a bike, drove a bus." R. 621, ll. 1-6.

Defense counsel also questioned Gore about her testimony during the hearing on Appellant's request for immunity. R. 610, ll. 2-22. During the hearing, Gore indicated that when she saw Appellant with a gun, she ran, which was different from her testimony during the trial that she actually saw Appellant shoot the gun. R. 610, l. 11 – R. 612, l. 18. Eventually, Gore seemed to admit that her testimony during direct examination was not accurate because she did not see Appellant fire the gun. According to Gore, "Well, does it matter? I seen him with a gun." R. 612, ll. 1-18; R. 613, ll. 8-9.

Additionally, defense counsel used Gore's testimony during the immunity hearing to impeach her with an inconsistent statement on whether she saw where Appellant allegedly retrieved a gun. R. 617, l. 4 – R. 618, l. 18. Gore claimed that she did not remember at the time of the hearing, but she remembered at the time of the trial. R. 618, ll. 17-18.

Further, defense counsel questioned Gore's ability to give accurate testimony about her observations of the conflict between Burgess and Appellant. R. 613, ll. 17-24; R. 614, ll. 7-9. When Gore indicated she did not remember making certain statements to police, defense counsel used portions of her recorded statement to refresh her recollection. R. 615, l. 6 – R. 616, l. 21.

Defense counsel asked if Gore and Williams "ever discussed [her] version of events [and if they had] told each other what [they] thought happened." R. 618, l. 25 – R. 619, l. 2. Gore denied any such conversations. R. 619, ll. 3-12. Gore claimed she never went over her testimony with Williams. R. 619, ll. 8-12. However, she admitted that she and "[e]verybody" had discussed the shooting. R. 619, ll. 13-14.

On re-direct examination, the solicitor moved to introduce Gore's interview with police as an exhibit. R. 626, ll. 17-20. When defense counsel objected, the state claimed "there ha[d] been an allegation of recent fabrication by the Defense." R. 626, l. 21 – R. 627, l. 2. The state

provided no specifics to support this claim. Boldly, the state claimed that because defense counsel "used portions of the interview to cross-examine the witness … the state [was] permitted by the rules of evidence to play the prior consistent statement." R. 627, ll. 2-5. Despite defense counsel's continued objection, the judge allowed the state to introduce the recording of Gore's interview with police "considering all the testimony that's been given up to this point." R. 627, ll. 8-9.

Thereafter, the jurors heard Gore's prior consistent statement to police in which she accused Appellant of killing Burgess. State's Exhibit #61. Importantly, she told the police she saw "fire from the barrel," which was consistent with her trial testimony, and inconsistent with her testimony at the pre-trial hearing. State's Exhibit #61.

Discussion

"Hearsay is not admissible except as provided by [the Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE.

> A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. "Rule 801(d)(1)(B) changed the common law in South Carolina where proof of a prior consistent statement had been admissible to rehabilitate a witness who had been impeached with a prior consistent statement." State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003).

The Supreme Court has made clear "[t]he plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence." State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001). "Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.'" Id.

The trial judge erred by allowing the state to introduce Gore's prior consistent statement, which was her interview with police, where there had been no express or implied charge of recent fabrication or improper influence or motive. Defense counsel certainly called Gore's credibility into question by noting that she was not paying attention to the conflict between Burgess and Appellant. Further, defense counsel called into question whether the jurors could believe Gore because she testified differently at the trial than she had during the immunity hearing. Finally, defense counsel gave the jurors reason to doubt Gore's account where she testified inconsistent with several statements she made to the police. However, defense counsel never expressly or impliedly accused Gore of recent fabrication or improper influence or motive. Defense counsel engaged in simple impeachment, which prohibited the state from introducing Gore's prior consistent statement.

The error was not harmless beyond a reasonable doubt because allowing Gore's prior consistent statement improperly bolstered the testimony of one of the state's key witnesses, which exactly what the rule intends to prohibit. Gore claimed she was an eyewitness to the shooting, which made her a pivotal witness for the state. Gore's testimony, which was bolstered by her prior consistent statement, helped the state defeat Appellant's claim of self-defense because she insisted Burgess was unarmed and that Appellant fired the first shot. Allowing the

state to show the jury that Gore gave consistent statements to police on crucial matters heightened her credibility in the eyes of the jury on all matters, even those not given to police during her interview.

VII. In light of Appellant's sentence of life imprisonment without the possibility of parole for murder, the trial judge's imposition of a five-year sentence for possession of a weapon during the commission of a violent crime violated the plain language of section 16-23-490(A) of the South Carolina Code, which forbids such a sentence when the defendant is sentenced to life imprisonment.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing 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." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Relevant facts

"On the murder, the conviction on 2017-2914," Judge Burch ordered Appellant "be confined to the State Department of Corrections for a term of life." 878, ll. 17-19; R. 912. "On 2017-2915, possession of a weapon during a violent crime," he sentenced Appellant to "five years concurrent." R. 878, ll. 19-21; R. 915. In short, Judge Burch sentence Appellant to life imprisonment without the possibility of parole for murder and to five years imprisonment for

possession of a weapon during the commission of that murder. Defense counsel did not object to the illegal sentence.

Discussion

Appellant's five-year sentence for possession of a weapon during the commission of a violent crime was unlawful based on a plain reading of the statute. According to the relevant statute,

> [i]f a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. **This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime**.

S.C. Code Ann. § 16-23-490(A) (emphasis added). Under the plain language of the statute, Appellant should not have been sentenced to five years for possession of weapon during the commission of a violent crime. See State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense). Therefore, the trial court erred as a matter of law in sentencing Appellant to five years for the weapons offense.

Appellant concedes trial counsel failed to object to the illegal sentence. However, Appellant respectfully requests this Court excuse the lack of error preservation and vacate the sentence based upon the plain language of the statute. See State v. Hewins, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) (addressing the merits of an issue in the interest of judicial economy); Treece v. State, 365 S.C. 134, 136 n.1, 616 S.E.2d 424, 425 n.1 (2005) (reaching a sentencing issue in the interests of judicial economy); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 599, 553 S.E.2d 110, 119 (2001) (deciding an issue "[f]or the sake of judicial economy and

to prevent further litigation between the parties"); Southern Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (explaining that "since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now").

In State v. Sledge, 428 S.C. 40, 59, 832 S.E.2d 633, 644 (Ct. App. 2019), this Court vacated Sledge's five-year sentence for possession of a weapon during the commission of a violent crime because he had been sentenced to life without parole for murder. This Court recognized that Sledge had not objected to the sentence at the trial court. Sledge, 428 S.C. at 59, 832 S.E.2d at 644. Citing precedent to support reaching an unpreserved sentencing error, this Court held the issue could be addressed in the interest of judicial economy. Id. There, the state acknowledged that Sledge's sentence "should be vacated because it was issued in violation of the statute and further concede[d] Sledge [was] entitled to the proper sentence regardless of issue preservation." Id.

Johnston was sentenced to ten years imprisonment and a fine for conspiracy. State v. Johnston, 333 S.C. 459, 460, 510 S.E.2d 423, 424 (1999). On appeal, Johnston challenged the trial court's authority to impose a prison sentence of ten years for conspiracy. Id. at 461, 510 S.E.2d at 424. Pursuant to the relevant statute, the maximum sentence for the conspiracy conviction was one-half the penalty for the substantive offense. Id. at 461, 510 S.E.2d at 424. Accordingly, the maximum sentence the court could impose was five years. Id. at 462, 510 S.E.2d at 424. The Supreme Court vacated Johnston's sentence and remanded for re-sentencing despite Johnston's failure to object to the sentence at the trial level. Id. at 463-464, 510 S.E.2d at 425-426. The Court explained the state conceded the trial court committed error by imposing an excessive sentence, but contended the "appropriate remedy [was] through the Post Conviction

Relief Act." Id. at 463-464, 510 S.E.2d at 425. The Court rejected the state's contention and vacated Johnston's sentence. Id. at 463-464, 510 S.E.2d at 425-426. See also State v. Vick, 384 S.C. 189, 201-202, 682 S.E.2d 275, 281-282 (Ct. App. 2009) (vacating an unpreserved sentence for kidnapping where the sentence violated the plain language of the statute because the defendant was also convicted of murder, the state conceded error, and all involved that if the issue were not reviewed on direct appeal, it would "in all likelihood be addressed in a post-conviction relief proceeding"); State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (addressing an erroneous sentencing issue despite the lack of error preservation on the basis of judicial economy).

Similarly, this Court should address the merits of the issue in the interest of judicial economy. Without question, Appellant could raise this issue in an application for post-conviction relief as a claim of ineffective assistance of trial counsel for failing to object to an improper sentence. Based upon the clear statutory language and the abundance of case law on the matter presented, Appellant's sentence for possession of a weapon during the commission of a violent crime is improper. Thus, judicial economy weighs heavily in favor of this Court addressing the merits of the claim at this time. Appellant respectfully requests this Court address the merits of the issue and vacate his sentence for possession of a weapon during the commission of a violent crime.

CONCLUSION

As to Issues I, II, III, and IV, Appellant respectfully requests a new immunity hearing related to murder, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime. As to Issue V, Appellant respectfully requests this Court hold he is entitled to immunity from prosecution concerning murder, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime. As to Issue VI, Appellant respectfully requests this Court reverse Appellant's convictions and order a new trial. Finally, as to Issue VII, Appellant respectfully requests this Court vacate his sentence of five years for possession of a weapon during the commission of a violent crime.

s/*Susan B. Hackett*
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ATTORNEY FOR APPELLANT

This 9th day of June, 2021.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 9, 2021

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