STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2019-001912

THE STATE, ...RESPONDENT

v.

CALVIN D. FORD, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General
S.C. Bar No. 101357

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, 15th Judicial Circuit

P.O. Drawer 1276
Conway, South Carolina 29528
(843) 915-8608

ATTORNEYS FOR RESPONDENT

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II. In the alternative, if this Court determines that the witness's statement was self-incriminating, did the circuit court err 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?

III. Did the circuit court err 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?

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

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VII. In light of Appellant's sentence of life imprisonment without the possibility of parole for murder, did the trial judge's imposition of a five-year sentence for possession of a weapon during the commission of a violent crime violate 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the court erred when it did not permit Appellant to call his co-defendant, Aliga Campbell, as a witness at his immunity hearing after Campbell's counsel informed the court that he advised Campbell to invoke the Fifth Amendment.

II. Whether the court erred when it did not permit Appellant to call his private investigator to introduce co-defendant Aliga Campbell's written statement because, although Campbell was rendered an unavailable witness, the written statement was not against his penal interest.

III. Whether the court erred when it declined to apply the Protection of Persons and Property Act to Appellant's immunity claim.

IV. Whether the court erred when it admitted the entirety of State's Exhibit 61 during the State's redirect examination of eyewitness Sherika Gore when Appellant's cross-examination of Gore revealed prior statements elicited to imply recent fabrication.

V. Whether Appellant's five-year sentence for possession of a weapon during the commission of a violent crime should be vacated, and the conviction affirmed, where the court sentenced Appellant in violation of S.C. Code Ann. § 16-23-490(A).

STATEMENT OF THE CASE

In June 2017, the Horry County Grand Jury indicted Appellant Calvin D. Ford for the July 23, 2016 murders of Jamal Burgess and Dameion Alston, for the possession of a weapon during the commission of a violent crime (PWDCVC), and for the unlawful possession of a firearm by a person convicted of a violent offense. (R. pp. 906-14). Jonny McCoy, Esquire, represented Appellant on the charges. (R. p. 1). Senior Assistant Solicitors Joshua Holford and Mary-Ellen Walter prosecuted the case on behalf of the Fifteenth Circuit Solicitor's Office. (R. p. 1).

By and through counsel McCoy, Appellant filed a motion for immunity from prosecution pursuant to S.C. Code Ann. § 16-11-450. (R. pp. 879-901). The Honorable Benjamin Culbertson conducted an immunity hearing on March 5, 2019. (R. p. 1-195). Judge Culbertson denied Appellant's motion in a Form 4 Order filed the following day. (R. pp. 902-903).

From November 4 through 8, 2019, the State jointly tried Appellant with co-defendant Aliga Campbell. (R. p. 196). The Honorable Paul M. Burch presided. (R. p. 196). The jury convicted Appellant of the murder of Jamal Burgess as well as of both weapons charges. (R. p. 876, lines 12-23). As to the second murder indictment, the jury found Appellant not guilty. (R. p. 876, lines 9-11). Judge Burch sentenced Appellant to life imprisonment for the murder, to five concurrent years for PWDCVC, and to another concurrent five years for the unlawful possession of a firearm by a person convicted of a violent offense. (R. p. 878, lines 17-23).

Appellant timely served a notice of appeal of his convictions and sentence on November 13, 2019. (R. p. 905). By and through appellate counsel, he subsequently submitted a Brief of Appellant. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant's convictions arise from a shooting that interrupted a birthday party held on the night of July 23, 2016, in a residential area adjacent to Mr. Joe White Avenue in Myrtle Beach. (R. p. 236, lines 19-21; R. p. 239, line 11 – p. 240, line 24; R. p. 691, lines 19-24).[1] The shooting occurred on Warren Street, known to locals as Dudley Row. (R. p. 222, line 11 – p. 225, line 5). Officers were dispatched and arrived at the area right at 9:00 p.m. (R. p. 244, line 1 – p. 245, line 3). They found a large crowd and two gunshot wound victims in a driveway on Warren Street. (R. p. 241, line 2 – p. 242, line 17). Officers were unable to locate a weapon anywhere on the scene. (R. p. 264, line 4 – p. 265, line 10; R. p. 282, lines 13-25). They did, however, locate five 380 cartridge casings, a single nine millimeter cartridge casing, and one bloodied projectile. (R. p. 296, line 19 – p. 297, line 1). The nine millimeter casing lay separate from the 380 casings. (R. p. 309, lines 4-9). The 380 casings appeared "in close quarters to each other, almost in a line. It appeared someone was either walking towards or retreating back from that scene while they were being fired." (R. p. 310, line 22 – p. 311, line 11). Four of the five 380 casings were determined to have been fired by the same firearm; the fifth contained "some markings" that made the firearms analyst "think it could have been fired by the same firearm" as well, but the results were technically inconclusive. (R. p. 373, lines 12-18). The fired projectile was "most consistent with a 380 auto caliber bullet." (R. p. 374, lines 15-25). The same analyst opined that there were at least two guns involved in the shooting, "but there could have been four." (R. p. 374, lines 15-25).

Some partygoers were willing to speak with investigators. (R. p. 408, lines 4-25). Darlene Young testified she hugged the two victims when she arrived at Warren Street and did

[1] For purposes of the final brief, all transcript citations appearing in Respondent's Statement of Facts pertain to the transcript of the November 2019 trial proceedings.

not feel a gun on either one of them during the hug. (R. p. 333, line 9 – p. 334, line 6). She did not see Appellant and his co-defendant Aliga Campbell arrive, but noticed Appellant walk up and stand with other partygoers. (R. p. 336, lines 1-25). She could not say whether Appellant approached the victim, Jamal Burgess, or whether Burgess approached Appellant, but she did see Burgess "put his arm around [Appellant's] neck" and watched them walk from the porch together, talking. She believed they were solving an issue between them. (R. p. 337, lines 1-20). Once they reached the street, she heard Appellant say, "If I want something done to you I could have been had it done to you," to Burgess. (R. p. 337, line 23 – p. 338, line 8). The second victim, Dameion Alston, stood nearby. (R. p. 338, lines 23-25). Alston "was trying to eliminate the problem" between Appellant and Burgess, who were "having words." (R. p. 338, lines 2-11). Burgess was "moving his hands" as he spoke with Appellant. (R. p. 340, lines 14-19). Then, she saw "fire come out of a gun and hit" Burgess. (R. p. 340, lines 23-24). She testified that Appellant pulled a gun "out of one of his pockets" and she saw the fire from the gunshot. (R. p. 341, lines 2-5). Burgess had his hands in the air as this happened. (R. p. 341, lines 23-25). She did not see either victim with a gun. (R. p. 341, lines 19-22). After the witness saw Burgess get hit with a bullet in his right side, she ran. (R. p. 342, lines 12-24). She heard more shots as she ran to get out of the way. (R. p. 343, lines 10-18).

Another eyewitness, Sherika Gore, testified that she was talking to people at the party when she noticed Appellant walk up from across Mr. Joe White Avenue and approach Burgess. (R. p. 593, lines 10-13; R. p. 595, lines 16-20). He and Burgess "kind of walked off and they started talking." (R. p. 595, lines 18-20). She could not hear their conversation. (R. p. 596, lines 22-25). "From the outside looking in it seemed like whatever issues that they had[,] that they were trying to resolve them." (R. p. 600, line 25 – p. 601, line 1). Eventually, however, their

voices became raised. (R. p. 597, lines 3-12). When she "looked next, the only thing [she saw] was [Appellant] take out a gun and fire it." (R. p. 598). She saw "fire come from the barrel." (R. p. 598, line 19). It appeared that Appellant pulled the gun from his waist; she did not see Appellant bend down to the ground. (R. p. 598, lines 6-10). She heard multiple shots as she turned away to find her children. (R. p. 599, lines 2-9). After the shooting, she did not see a gun, did not see anyone pick up a gun, nor did she hear anyone talk about a gun. (R. p. 602, line 21 – p. 603, line 25). She also did not see a gun on Burgess that day. (R. p. 594, lines 1-2; R. p. 621, lines 7-24). She allowed Burgess to hold her three-month-old daughter earlier that evening, which she would not have allowed had she seen a gun in Burgess' waistband. (R. p. 591, lines 1-8; R. p. 593, line 17 – p. 594, line 6).

A third eyewitness, Felicia Williams, testified she was at the party and saw Appellant and the two victims standing in the street talking. (R. p. 639, lines 2-19). She heard a bottle break on the ground and looked over to see Burgess move Alston "out of the way" and then saw Appellant "take the gun up off his side and pull it out and shoot." (R. p. 640, line 1 – p. 641, line 3). She did not see anyone else with a gun, and she never saw Appellant bend to the ground to retrieve a gun. (R. p. 641, lines 4-12). She witnessed Appellant fire a shot at Burgess and she "took off running." (R. p. 641, lines 13-17). She heard "maybe three or four" shots fire. (R. p. 642, lines 10-13).

The State also presented testimony at trial recounting what Appellant offered at his pre-trial immunity hearing. At that hearing, Appellant testified that he was there when Alston dropped a gun. Appellant testified that he picked up that gun, fired it at Burgess, and dropped it in a pond as he fled from the scene. (R. p. 544, line 12 – p. 546, line 12). Appellant testified that he saw Burgess with a gun, that Burgess fired at him, and that he fired back. (R. p. 546, lines 13-

20). Appellant also testified that Burgess and Alston, the two victims, "were tussling over a gun" when Alston's gun dropped and Appellant "picked it up and fired." (R. p. 546, lines 20-23). Officers were unable to corroborate that testimony. (R. p. 545, lines 19-23).

Appellant countered the State's case with a series of witnesses at trial. Appellant's mother testified that she saw Burgess out in front of her house the day before the shooting, but neither she nor Appellant thought anything of it. (R. p. 674, lines 1-17). Patrick "PJ" Brave testified that Burgess called him early on the day of the shooting to tell him he was going to "talk to that boy about the situation we had about his teeth being knocked down" for the purpose of resolving it. (R. p. 680, line 12 – p. 681, line 21). During that call, Brave warned Burgess not to go to the party by himself. (R. p. 681, lines 20-5). The officer who interviewed Brave next testified that Brave told her he heard Burgess had a gun. (R. p. 684, lines 6-14). To further corroborate Appellant's self-defense claim, Appellant had the officer reiterate that Appellant testified at his earlier immunity hearing that he saw Burgess reach for a gun in his waistband. (R. p. 684, line 15 – p. 685, line 1). The officer believed that Appellant testified at that hearing that he was afraid that Burgess was going to shoot him. (R. p. 686, lines 3-8).

Appellant also presented testimony from his first cousin, Everett Ford. (R. p. 687, lines 5-7). Ford was at the incident and testified that when he saw Burgess at the party that night, he appeared "aggressive" and that "[s]omething was wrong with him." (R. p. 695, lines 1-17). Ford watched Burgess "flag" Appellant over to him at the party. (R. p. 696, lines 8-12). He testified that Burgess "grabbed" Appellant, "aggressively" placing his arm around him, and they had words. (R. p. 696, lines 10-25; R. p. 698, lines 7-15). As Alston tried to break them apart, Burgess "came up with his gun and pulled and he fired" at Appellant. (R. p. 699, lines 1-14). Ford thought Burgess shot Appellant because Appellant "went down a little bit." (R. p. 700,

lines 16-24). Ford began to run away as he heard gunshots from multiple guns. (R. p. 701, lines 15-23). Ford believed Appellant retrieved a gun "off the ground or something" when Alston was trying "to diffuse the situation," because he did see Appellant with a gun after hearing the initial shot. (R. p. 702, lines 1-17).

Ford also testified that four years prior, Burgess hit Appellant in the face with a gun and "knocked his teeth out." (R. p. 688, lines 8-19; R. p. 707, line 10). He testified that after that incident, he and Appellant "stayed away from" Burgess, who was "known to have a gun." (R. p. 689, lines 6-15). Another one of Appellant's witnesses, Jerome Thompson, testified that he was in prison with Burgess, and Burgess told him that when he got out he was going to go home and kill Appellant. (R. p. 721, lines 2-12). Thompson clarified that the conversation happened ten years prior to the shooting, and he had never shared this information before. (R. p. 723, lines 15-24).

Yet another of Appellant's witnesses, Maurice Vereen, testified that he was at the party prior to the shooting, that he could not recall being there during the shooting, and that he "can't say" that he saw a gun on Burgess that day. (R. p. 728, lines 2-6). But he also provided a statement to Appellant's private investigator stating he saw Burgess "appear to pull at his waist, waistband where his handgun was located, then shots were fired[.]" (R. p. 727, lines 2-25).

Finally, another resident of Warren Street, Walter Stanley, testified on Appellant's behalf that he saw Appellant approach Burgess, they headlocked, Appellant broke away, "and that's when [Burgess] pulled the hand revolver and fired after" Appellant. (R. p. 738, lines 2-23). He testified that Appellant ducked and then came up with his own gun and fired, striking Burgess. (R. p. 738, lines 23-25).

STANDARD OF REVIEW

The abuse of discretion standard of review applies. "In criminal cases, this Court review errors of law only. . . . To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law." *State v. Nelson*, 380 S.C. 226, 228-29, 669 S.E.2d 595, 596 (Ct. App. 2008). "The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012). This Court also applies the abuse of discretion standard to a trial court's immunity determination. *State v. Andrews*, 424 S.C. 304, 313, 818 S.E.2d 227, 232 (Ct. App. 2018) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)), *aff'd as modified*, 427 S.C. 178, 830 S.E.2d 12 (2019). Under this standard, the "appellate court is bound by the trial court's findings unless they are clearly erroneous." *State v. Nelson*, 380 S.C. at 229, 669 S.E.2d at 596. "[T]he abuse of discretion standard of review does not allow this Court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014). The admission of erroneous evidence must also be prejudicial to warrant reversal. *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

In addition, the portion of Issue III addressing Appellant's weapons charges in conjunction with S.C. Code Ann. § 16-11-440(C) is governed by the *de novo* standard attaching to matters of statutory interpretation. *State v. Sweat*, 379 S.C. 367, 373, 665 S.E.2d 645 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). "Citing both section 14–3–330 and South Carolina Constitution, Article V, Section 5, the Supreme Court has held an appellate court may decide novel questions of law with no particular deference to the lower court." *Id.* at 373, 665 S.E.2d 645, 648-49 (internal quotation omitted).

ARGUMENT

I. The court did not err when it limited Appellant from calling his co-defendant as a witness at his immunity hearing after the co-defendant's counsel informed the court that he advised the co-defendant to invoke the Fifth Amendment.

Appellant called his co-defendant, Aliga Campbell, to testify at Appellant's pre-trial immunity hearing held pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et. seq.*. (R. p. 108, lines 22-25). Campbell's attorney at that time informed the court that he had advised Campbell, and would continue to advise Campbell, "to invoke his rights under the Fifth Amendment not to give any testimony at all." (R. p. 109, lines 7-13). Campbell was indicted in this double homicide as a co-defendant, and was tried jointly with Appellant. (R. p. 109, lines 13-14; R. p. 196). Appellant's counsel posited it would be "fine for record sake" if Campbell took the stand solely to invoke the Fifth Amendment. (R. p. 110, lines 13-15; p. 111, lines 4-10). The circuit court disagreed and found that he could not compel Campbell to testify at Appellant's immunity proceeding because he had "Campbell's rights to protect as well." (R. p. 109, lines 16-24; R. p. 112, lines 4-9; *see* R. p. 111, lines 15-18; R. p. 116, lines 12-13).

In part, the Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. Art. I, § 12. The circuit court adequately recognized co-defendant Campbell's right in this instance by not compelling him to testify, even just to invoke the Fifth Amendment. *See State v. McGuire*, 272 S.C. 547, 550-51, 253 S.E.2d 103, 105 (1979) ("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"). "It is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation." *State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997). "Most courts

addressing the issue hold that it is improper for the prosecution to put an accomplice on the stand for the purpose of wringing from him a refusal to testify on the ground of privilege." *Id.* at 151, 493 S.E.2d at 823. The court in *Hughes* held that neither party may call a witness solely for the sake of having that witness invoke the Fifth Amendment privilege against self-incrimination in front of the jury. *Id.* at 153, 493 S.E.2d at 824.

Hughes modified the prior holding in *State v. Perry*, 279 S.C. 539, 309 S.E.2d 9 (1983), to the extent *Perry* "may be read to **require** the calling of a witness **solely** for the sake of invoking his or her Fifth Amendment privilege." 328 S.C. at 154, 493 S.E.2d at 825 (emphasis modified from original). The *Hughes* court reasoned:

> [M]any courts have found no abuse of discretion in a trial court's refusal to permit defense counsel to call a codefendant to the stand solely to require them to assert the privilege in the presence of the jury. Finally, **it has been recognized that when a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand.**

Id. at 152, 493 S.E.2d at 824 (collecting cases) (emphasis added).

The circuit court did not abuse its discretion in refusing to allow Campbell to take the stand in this instance. The court sat as the factfinder at the pre-trial immunity hearing and was not permitted to draw any negative inference from Campbell's invocation of the privilege against self-incrimination. *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019), *reh'g denied* (May 30, 2019); *State v. Hughes*, 328 S.C. at 150, 493 S.E.2d at 823. Moreover, as the circuit court adequately noted, Campbell faced a joint trial with Appellant. (*See* R. p. 196). Any testimony delivered by Campbell at the immunity hearing would create a prior testimonial statement which could then be used against his interest at his later jury trial, and which could affect his later decision to testify. *See generally*, Rule 613, SCRE.

In any event, any error in the circuit court's refusal to require Campbell to personally invoke the Fifth Amendment was harmless beyond a reasonable doubt because it "would have been cumulative to other testimony admitted" at the immunity hearing. *State v. Hughes*, 328 S.C. at 153, 493 S.E.2d at 824 (citing *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985), *cert. denied* 471 U.S. 1120, 105 S.Ct. 2368 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)). The crux of Campbell's statement was that the victim, Burgess, began talking to Appellant as soon as Appellant arrived at the party. At some point, their discussion escalated and someone tried to intervene. Campbell stated Burgess shot first and Appellant fired back in self-defense, only after picking up the intervener's gun which had fallen to the ground. (R. pp. 900-901, Motion for Immunity, Ex. 4). Assuming *arguendo*, as Appellant has done, that Campbell's testimony would have aligned with the statement he provided, this testimony was cumulative to that delivered by both Appellant and Appellant's cousin Everett Ford.[2] (*Compare* R. pp. 900-901, Motion for Immunity, Ex. 4 *and* R. p. 22, line 2 – p. 29, line 10; R. p. 59, line 18 – p. 73, line 3). Campbell's testimony would also have continued to contradict that of the State's eyewitnesses who did not see a gun on Burgess. (*Compare* R. pp. 900-901, Motion for Immunity, Ex. 4 *and* R. p. 127, lines 18-19; R. p. 132, line 6 – p. 135, line 13; R. p. 154, line 18 – p. 157, line 25). Thus, Campbell's testimony could not have affected the outcome of the immunity hearing. Either he would have invoked the Fifth Amendment, or his proposed testimony would continue to facilitate the jury question established within in Respondent's discussion of Issue III below.

[2] The testimony presented at the immunity hearing is outlined in detail in Respondent's discussion of Issue III below. *Infra at Final Brief of Respondent*, pp. 16-23.

II. The court did not err in refusing to permit Appellant to call his private investigator to introduce co-defendant Aliga Campbell's written statement because, although Campbell was rendered an unavailable witness, the written statement was not against his penal interest.

After consenting to Campbell's invocation of the Fifth Amendment, Appellant's counsel informed the court that he intended to call his private investigator to the stand for the purpose of introducing a sworn statement Campbell provided the private investigator two weeks after the shooting. (R. p. 110, lines 4-25). Counsel argued that the statement was admissible through his private investigator as an exception to the rule against hearsay because Campbell, the declarant, became unavailable after invoking the Fifth Amendment, and because Campbell's statement was a statement against interest. (R. p. 110, lines 22-25; R. p. 112, line 11 – p. 114, line 12). The circuit court disagreed that Appellant's cited exceptions to the rule against hearsay applied. Though Campbell was unavailable because he asserted his Fifth Amendment privilege, the statement Campbell made was not against his own interest as required by Rule 804(b)(3), SCRE. (Mar. 2019, R. p. 107, line 1 – p. 117, line 9).

The trial court did not err in declining to allow the private investigator to testify for the purpose of bringing in the sworn statement Campbell made. Given co-defendant Campbell's unavailability as a witness, Campbell's statement would have to be "at the time of its making so far contrary to [his] pecuniary or proprietary interest, or 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; *see* Rule 804(a), SCRE (a witness is unavailable where the declarant witness is "exempted by ruling of the court on the ground of privilege from testifying"). The case law relied upon by Appellant makes clear that the statement sought to be introduced must be incriminating as to the declarant. *State v. McDonald*, 343 S.C. 319, 324-25, 540 S.E.2d 464, 466-67 (2000) (admissions of out-of-court declarant,

McPhail, who invoked the Fifth Amendment, were admissible statements against interest because they were sufficiently corroborated by three other witnesses, Jackson, Mungo and Hawkins, who each on separate occasions heard McPhail admit to the offense); *State v. Forney*, 321 S.C. 353, 358-59, 468 S.E.2d 641, 644-45 (1996) (co-defendant's self-incriminating statements inadmissible absent sufficient corroboration); *State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) (self-incriminating statements made by minors who invoked Fifth Amendment privilege admissible as statements against interest); *see also Bruton v. United States*, 391 U.S. 123, 126-137, 88 S.Ct. 1620, 1622-28 (1968) (holding a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt).

Campbell's statement, however, was not adverse to his own interests. (R. pp. 900-901, Motion for Immunity, Ex. 4). The statement describes that Burgess, one of the victims, told Campbell to call Appellant "and tell him to come the party." (R. p. 900, Motion for Immunity, Ex. 4 at p. 1). Campbell "tried to call [Appellant] but he didn't answer," and then Appellant walked up to the party a few minutes later. (R. p. 900, Motion for Immunity, Ex. 4 at p. 1). Then, Campbell told Appellant that Burgess wanted to talk to him. (R. p. 900, Motion for Immunity, Ex. 4 at p. 1). Campbell then described what he witnessed between Appellant, Burgess, and the second victim Alston. (R. p. 901, Motion for Immunity, Ex. 4 at p. 2). The statement can be construed as including incriminating information about Burgess, who Campbell described as "angry talking about [Appellant]" and as one of the shooters. (R. pp. 900-901, Motion for Immunity, Ex. 4). The statement can also be construed as including incriminating information

about Appellant, who Campbell described as the other shooter. (R. pp. 900-901, Motion for Immunity, Ex. 4). But the statement cannot fairly be construed as "so far tend[ing] 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. The statement described Campbell as merely present at the scene. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) ("Mere presence at the scene is not sufficient to establish guilt as an aider or abettor."); *compare State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977) ("presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle").

Because the Campbell's statement was not sufficiently adverse to his penal interest, the statement was not admissible via the hearsay exception for statements against interest made by an unavailable witness. Further, because the statement did not "tend[ ] to expose the declarant to criminal liability," the circuit court did not need to consider whether "corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3).

III. The trial court did not err in declining to apply the Protection of Persons and Property Act.

In issues III, IV, and V, Appellant argues that the court issued an insufficient and erroneous denial of Appellant's motion for immunity from prosecution, and further erroneously concluded that the Protection of Persons and Property Act (the Act) did not apply to Petitioner's charges for unlawful possession of a firearm by a person convicted of a violent offense and for possession of a weapon during the commission of a violent crime. Respondent submits that the evidence presented at the immunity hearing created a question of fact such that all charges were appropriately submitted to a jury to determine whether Appellant was entitled to utilize a firearm in self-defense at the time of the shooting. Therefore, the circuit court did not err in denying Appellant's immunity claim. Further, given the court's resolution of the motion, it did not commit reversible error in concluding the Act did not apply to Appellant's accompanying weapons charges.

A. The court did not err when it found that Appellant did not establish, by a preponderance of the evidence, that the evidence presented at the evidentiary hearing entitled him to immunity from prosecution pursuant to the Protection of Persons and Property Act.

On March 5, 2019, the court conducted an immunity hearing in response to Appellant's motion for immunity from prosecution pursuant to S.C. Code Ann. § 16–11–450. (R. pp. 879-901, Motion; R. p. 8, lines 22-25). After a full hearing and arguments by counsel, the court found Appellant had not demonstrated by a preponderance of the evidence that he was entitled to immunity under the Act, and that the case would proceed to a jury trial where the State would have to disprove the elements of self-defense beyond a reasonable doubt. (R. p. 194, lines 7-20). The court issued a Form 4 Order the following day memorializing its decision. (R. pp. 902 at 2).

At the time of Appellant's March 5, 2019 immunity hearing, "the Act require[d] a pretrial determination using a preponderance of the evidence standard[.]" *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. at 370, 752 S.E.2d at 266). Our appellate courts had not established additional requirements regarding the specificity of a court's ruling following the immunity hearing. *See State v. Manning*, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) (affirming outcome of immunity determination absent testimonial hearing, when facts were undisputed and each party presented legal argument); *State v. Curry*, 406 S.C at 375 n.3, 752 S.E.2d at 268 n.3 (2013) (noting "the Act is silent on the procedure to follow when an accused seeks immunity and *Duncan* interprets the Act to require a pretrial determination by the trial court") (citing *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Subsequently, on March 27, 2019, the South Carolina Supreme Court decided *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019), which instructed the circuit court "must sit as the fact-finder at [the immunity] hearing, weigh the evidence presented, and reach a conclusion under the Act." 426 S.C. at 451, 827 S.E.2d at 569; *see State v. Andrews*, 427 S.C. at 180, 830 S.E.2d at 13 (filed June 19, 2019) (reiterating the impact of *State v. Cervantes-Pavon*, *supra*, and acknowledging that "[w]hen the Act was passed, the process for requesting immunity from prosecution was unclear"). And, on December 18, 2019, that court decided *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019), which noted that "the circuit court must necessarily consider the elements of self-defense" and "in announcing its ruling, should at least make specific findings on the elements on the record." 429 S.C. at 123, 838 S.E.2d at 499, *reh'g denied* (Mar. 12, 2020).

The requirements for a circuit court's immunity determination have evolved since the date that the court denied Appellant's motion for immunity from prosecution. However, for the

reasons that follow, the court properly resolved Appellant's claim after considering all of the evidence presented and the arguments of the parties, which specifically addressed the elements of self-defense. Regardless of whether the circuit court "set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent." *State v. Andrews*, 427 S.C. at 182, 830 S.E.2d at 14; *see also State v. Marshall*, 428 S.C. 11, 19, 832 S.E.2d 618, 622 (Ct. App. 2019) ("We find the circuit court did not abuse its discretion in holding Marshall was not entitled to immunity because he failed to prove the elements of self-defense by a preponderance of the evidence due to inconsistencies in the record.").

i. Appellant's evidence in support of immunity from prosecution

Appellant testified at the immunity hearing. He described an incident occurring five years prior to the shooting where Burgess put his arm around Appellant's shoulders and hit Appellant in the face with a gun. (R. p. 63, line 18 – p. 64, line 25). Appellant fell and spit out teeth and Burgess walked over to him and threatened to shoot him if he did not move. (R. p. 60, lines 14-16). Appellant responded by jumping up and grabbing Burgess and then running away. (R. p. 60, lines 16-20). Appellant testified he never spoke to Burgess after this and planned to let the incident go because Appellant did not want to go back to jail. (R. p. 62, lines 1-11). He testified he remained fearful of Burgess. (R. p. 63, lines 21-25). He also testified he had heard Burgess was "always shooting people and shooting at people." (R. p. 64, lines 1-2).

Appellant testified Burgess had been released from jail a couple of days before the shooting. Others told Appellant "he was getting ready to come home and they were just saying he was coming home to kill three people," allegedly including Appellant. (R. p. 64, line 24 – p.

65, line 3). Appellant did not know if he believed the threat at the time. (R. p. 65, lines 4-7). Appellant testified that he knew Burgess had a gun. (R. p. 66, line 15). Appellant testified that Burgess did not usually come over near his house, but others told Appellant that they saw Burgess riding by his house on a moped the night before the shooting. (R. p. 66, lines 4-24). Appellant's mother testified that she saw Burgess sitting on a moped in front of their house that day. Other than recognizing that Burgess must have been released from prison, she did not think anything of the sighting. (R. p. 7, line 24 – p. 8, line 16). He pulled away and she never saw him again. (R. p. 8, lines 15-24).

The next night, Appellant accepted an invitation to a birthday party on Warren Street. (R. p. 68, line 3 – p. 70, line 6). Appellant testified that as soon as he walked up to the party, he heard Burgess was looking for him, and Burgess indeed approached him. Appellant testified he "felt scared kind of." (R. p. 70, lines 5-11). Appellant recounted:

> And well, he walked up to me and I was like, I was like what you want. And he was like, man I want to holler at you. And he put his arm around me aggressively like hey why you telling people that you saved me from these guys in Popular. And I was like, man I'm not telling people that. I don't know what you talking about. And he was like, yes the F you is. I was like man I didn't come over here for that. I'm not telling nobody nothing. I'm not saying nothing about you. He was like, yes the F you is. My partner's coming telling me you saying this and you saying that. And I was like man, listen man, I didn't come over here for that. I ain't telling nobody nothing. And he was like, yes the F you did, I should shoot you. And that's when I was like, man why you gone shoot me for, we can fight. We can fight.

(R. p. 70, line – p. 71, line 1).

Appellant testified that a third person, Damian Alston, walked up to intervene as Appellant insisted that he and Burgess "could fight." (R. p. 71, lines 1-3). Appellant furthered that Burgess refused to fight, and Appellant responded, "because you know I'll beat you up." (R. p. 71, lines 3-6). Appellant testified that this is when Burgess "grabbed his gun" and began

"tussling" with Alston, who was trying to intervene. (R. p. 71, lines 6-9).

> And that's when like – when they was tussling [Alston's] gun dropped. I pick up the gun. [Burgess] pushed [Alston] and turned his gun, pointed at me and fired and I fired back. But I run like firing. And he's shooting at me and I run . . . off like behind the house.

(R. p. 71, lines 9-16).

Appellant testified he did not bring a gun with him to the party. (R. p. 75, lines 14-20). Appellant testified he saw a gun on Burgess' waist before Burgess pulled it out to fire. (R. p. 72, line 22 – p. 73, line 3). Appellant also testified that as the incident played out there was "no question that [Burgess] would hurt" him. (R. p. 73, line 19 – p. 74, line 5). Appellant said that if he had not fired, he'd "probably be dead." (R. p. 76, line 13).

However, on cross-examination, Appellant waffled. He testified he never reported the incident where Burgess knocked out his teeth, electing instead to avoid Burgess. (R. p. 80, lines 3-24). Appellant also failed to report the threat Burgess allegedly made to kill him. (R. p. 85, lines 2-12). When asked why, if he was fearful of Burgess, he would walk over to him that night at the party, Appellant testified he didn't "think it was nothing aggressive." (R. p. 82, lines 2-22). Appellant's testimony became inconsistent. He stated that he was afraid for his life because Burgess was known to be armed and violent, but he was not afraid when he met up with Burgess because he "didn't think it was nothing serious" at the time. (R. p. 103, line 7 – p. 104, line 13). He said he was not looking for a gun on Burgess' person despite believing him to be armed and violent. (R. p. 103, lines 20-21). He restated that he was not afraid when Burgess walked up to him at the party "didn't think [he] did anything to make [Burgess] angry." (R. p. 107, lines 10-14). But when led by his own counsel, Appellant altered his rendition, stating, "I mean, I mean, I was scared because I didn't know why he wanted to talk to me because he didn't talk to me. I mean, if that's what you're asking." (R. p. 107, lines 15-20).

Appellant elsewhere testified that Burgess "was still standing shooting" at Appellant as Appellant ran away. (R. p. 101, lines 15-16). He testified he was armed with a nine millimeter, and that he knew this because he was familiar with guns. (R. p. 95, line 13 – p. 96, line 14). He stated he really only looked at the gun that he had because it jammed. (R. p. 95, lines 17-20). In contrast, Appellant also testified that he saw Burgess reaching for a gun but that he did not know what kind of gun it was. (R. p. 102, lines 6-19).

Appellant's cousin Everett Ford testified that when Appellant walked up to the party where the shooting occurred, Burgess, the victim, called Appellant over to him. (R. p. 22, lines 2-24). Burgess put his arm around Appellant in a manner Ford characterized as aggressive, and Appellant rejected the gesture. (R. p. 23, lines 6-11). Ford testified he walked up on their conversation and heard Burgess giving Appellant "attitude." (R. p. 23, line 14 – p. 24, line 5). Ford also testified that Appellant moved away from Burgess' arm because Burgess "had knocked his teeth out like that before the same way." (R. p. 24, lines 11-12). Ford said Appellant sustained that injury after an incident with Burgess five years earlier in 2014. (R. p. 26, lines 14-16). According to Ford, Burgess was "known for" putting "his arm around you and hit[ting] you with a gun" though Ford had never witnessed it. (R. p. 24, line 7 – p. 25, line 23). Turning back to the night of the shooting, Ford testified:

> Basically, they were kind to each other. Jamal [Burgess] put his arm around him and been like, yo let me talk to you. Just like that. [Appellant] moved his arm and be like, yo you can talk to me without putting your arms around me. He be like, you be telling people such, and such, and such, you saved me, this that, this that, this that. And [Appellant] was on some junk like, man I didn't tell nobody nothing like that, you feel me. I didn't tell no body like that.

(R. p. 27, lines 1-8).

While Ford did not make it clear what the victim and Appellant were discussing, he next testified that Damian Alston approached them and worked "to diffuse the situation." (R. p. 28, lines 6-9).

> After that, when all this was going on – it happened fast – when all this was going on the whole time you get in front of somebody, in the middle of somebody, the whole time [Burgess] was basically reaching for his gun. He eased his gun out, whatever like that. He eased his gun out and messed around and after that [Alston] been like, chill man what you doing, like chill what you doing. He was like in between the two. He been like chill what you doing, chill what you doing. After that, you know like a few other people came and tried to like chill, chill. It happened real fast and [Alston] dropped his gun. . . . And in the whole process of this right here he just – [Burgess] came up and he fired.

(R. p. 28, lines 6-25).

Ford saw Appellant reach down and pick up a gun and start running and firing. Burgess fired back in return. (R. p. 29, lines 6-10). On cross-examination, Ford testified he did not see Appellant come to the party with a gun; he saw Appellant "pick it up off the ground." (R. p. 38, lines 4-18).

However, Ford's testimony bore discrepancies with the statement he gave to law enforcement following the shooting. When pressed, Ford testified that even though Burgess had knocked Appellant's teeth out years prior and they did not see eye to eye, "[n]othing ever happened" between them prior to the shooting. (R. p. 40, lines 16-23). He testified that the typewritten statement he wrote and signed stated that Burgess put his arm around Appellant "like they were friends." (R. p. 39, line 9 – p. 40, line 14). Ford did not include in his statement anything about Alston dropping a gun and Appellant picking it up. (R. p. 41, lines 7-18). The statement said Appellant picked up a gun and shot. (R. p. 42, lines 10-3). Earlier, Ford testified Burgess "always had a gun." (R. p. 21, lines 17-19). On cross-examination, he added that "a few

people had guns" at the party that night in addition to Burgess and Alston. (R. p. 46, line 20 – p. 47, line 8).

ii. State's evidence in opposition to immunity

In response, the State presented testimony from Elizabeth Holoman, who lived at the house where the party was taking place. She testified that she came home to find partygoers in her yard, and Burgess helped her carry some packages from her car to her home. (R. p. 126, line 12 – p. 128, line 4). She did not see a gun on Burgess. (R. p. 127, lines 18-19). She was inside when the shots rang out. (R. p. 128, lines 5-12).

Next, the State presented eyewitnesses Felicia Williams and Sherika Gore. Williams testified that while she was at the party conversing with others:

> I heard a glass drop and it caught my attention. So, you know, I stood back from the car to see what was going on. I seen [Appellant] pull out a gun and him and [Burgess] --- well, actually I seen --- let me go back, I'm sorry. . . . when I pulled on the road, [Appellant] and [Burgess] were already talking to each other. And [Alston] was in the middle of them. And I seen [Burgess'] hand go like this [sweeping motion], because after the glass bottle dropped, I seen [Burgess'] hand go like this to move [Alston]. That's when I seen [Appellant] pull out the gun and once the first shot went off I took off running into [the] house.

(R. p. 132, lines 6-22).

She did not know if it was an argument or not. She "could hear the conversation, but it wasn't any loud talking or aggression or anything like that to say it was an argument." (R. p. 147, lines 17-24). She testified she remembered Appellant saying he would fight. (R. p. 144, lines 6-13). Williams clarified she saw Burgess' hands in the air moving Alston away from the discussion, and saw Appellant draw a gun up from "off of his body." (R. p. 132, line 18 – p. 135, line 5). She did not see Appellant bend down to pick up a gun, nor did she see a gun on Alston or Burgess. (R. p. 135, lines 6-13; R. p. 146, lines 10-14). Williams did not see any guns on the ground near the victims after the shooting. (R. p. 138, line 1 – p. 139, line 8).

Furthermore, Williams testified that Everett Ford was not at the party that night. (R. p. 136, lines 1-9). Everett Ford had, however, contacted her the Friday prior to the immunity hearing to tell her not to allow anyone to coerce her into stating something that was not true. (R. p. 136, lines 18-25). Williams was a reluctant witness who did not want to testify against Appellant. (R. p. 136, lines 23-24). Williams admitted she previously sent a message to Appellant about the incident stating "it could have gone either way out there." (R. p. 149, lines 6-22). Williams pointed out, however, that Appellant "said he shot first" in his return message, and that she did not see Burgess with a gun. (R. p. 149, line 25 – p. 150, line 5; R. p. 151, lines 17-18; R. p. 152, lines 2-12).

The next eyewitness, Sherika Gore, testified that Burgess wore sagging pants at the party that night. She did not see a gun on him. (R. p. 154, line 18 – p. 155, line 13). She let him hold her young daughter and would not have allowed him to do so had she seen a gun in his waistband. (R. p. 155, lines 4-10; R. p. 166, lines 4-25). She recalled seeing Appellant and Burgess talking "off in the road" and when she looked up again she saw "Appellant with a gun" so she ran. (R. p. 156, lines 8-11). She testified the conversation "wasn't loud because if they were arguing then it would have gotten the attention of

everyone." (R. p. 157, lines 12-15). Though Gore testified she did not recall it, Gore told law enforcement in an earlier recorded statement that the conversation between Appellant and Burgess became heated. (R. p. 161, line 15 – p. 163, line 25). She did not know where Appellant got the gun from, and she did not see anyone else with a gun. (R. p. 157, lines 16-25). Like Williams, Gore did not see Everett Ford at the party. (R. p. 159, lines 4-10).

The State also presented testimony from officers who responded to the scene. They did not locate a gun or shell casings near either victim. (R. p. 171, lines 12-25; R. p. 175, lines 16-

25). They did, however, locate five 380 caliber shell casings arranged in a linear fashion along the edge of the road. (R. p. 179, line 8 – p. 180, line 16; Mar. 2019 State's Ex. 5). They also located just one nine-millimeter shell casing "approximately in the center of the roadway right in front of the driveway where the shooting incident took place." (R. p. 182, lines 12-20). Burgess sustained one fatal gunshot wound, while Alston sustained three. (R. p. 184, lines 7-8).

iii. Arguments of the Parties

At the conclusion of the testimony, the State argued that the court should deny Appellant's motion because witnesses described Appellant as the person who fired the first shot, because witnesses did not see Burgess with a gun, and because Appellant testified he fired a nine-millimeter handgun as he was running away, but the evidence showed five 380-caliber shell casings situated in a linear fashion along the roadway where Appellant escaped. The State further argued that the case was ripe for a jury's decision due to the conflicting evidence delivered by each party's witnesses. (R. p. 186, line 17 – p. 188, line 17).

Appellant argued that he established, by a preponderance of the evidence, that he did not provoke the deadly assault. Counsel focused on Appellant's prior experience with Burgess, noting that he had "his teeth knocked out in the same manner and the same way" by Burgess four years earlier. Counsel also focused on Appellant's learning Burgess had just been released from jail and had told others that he was coming home to kill Appellant. Counsel argued that a photograph of Burgess taken the day of the shooting showed the stock of a gun in his waistband. Counsel argued that he had established, by a preponderance of the evidence, that Appellant had a right to fire in self-defense because he was approached by Burgess at the party, he saw Burgess with a gun, and he picked up a fallen gun and fired in response to a reasonable fear of imminent death or serious bodily injury. (R. p. 188, line 19 – p. 195, line 4).

iv. Appellant did not meet the Standard for Immunity from Prosecution

The court did not err when it found that Appellant had not shown, by a preponderance of the evidence, that he was immune from prosecution, and that the State would be required to disprove the elements of self-defense beyond a reasonable doubt at trial. (R. p. 195, lines 7-20). As the court implicitly found, the evidence and the arguments by the State established a proper jury question as to whether Appellant was entitled to act in self-defense, and had no duty to retreat, when he was attacked in a place he had the right to be.

Because Appellant was attending a party at the time of the shooting, his immunity claim derived from S.C. Code Ann. § 16-11-440(C), which applies to persons not engaged in an unlawful activity and who are attacked in another place where they have a right to be. Accordingly, Appellant had "the right to stand his ground and meet force with force, including deadly force, **if** he reasonably believe[d] it [wa]s necessary to prevent death or great bodily injury to himself or another person[.]" *Id.* (emphasis added). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. For the Act to apply, "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. This includes all elements of self-defense, save the duty to retreat." *State v. Curry*, 406 S.C. at 371, 752 S.E.2d at 266; *State v. Glenn*, 429 S.C. at 119, 838 S.E.2d at 497 (when § 16-11-440(C) applies, "it replaces the duty to retreat element required to establish self-defense").

The standard of review for this pre-trial determination is by a preponderance of the evidence. *State v. Duncan*, 392 S.C. at 411, 709 S.E.2d at 665. "[T]he 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. at 181, 830 S.E.2d at 13. "A preponderance of the evidence stated simply is that evidence which convinces as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). Thus, a motion for immunity from prosecution should be denied where testimony from the accused "varied 'substantially'" from that given by the State's witnesses. *State v. Douglas*, 411 S.C. at 318, 768 S.E.2d at 239 (quoting *Curry* at 369, 752 S.E.2d at 265). "When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." *State v. Butler*, 407 S.C. 376, 382, 755 S.E.2d 457 460 (2014).

Appellant bore the burden of convincing the circuit court that (1) he "was without fault in bringing on the difficulty," (2) he "actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger," and (3) "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (discussing elements of self-defense). As to the third prong, if Appellant "actually was in imminent danger, the circumstances [must have been] 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." *Id.*

Appellant's case for self-defense was not convincing of its truth due to substantial variances between Appellant's testimony and that delivered by the State's eyewitnesses, and because the location and caliber of the shell casings at the scene also conflicted with Appellant's testimony. These inconsistencies create cause to question Appellant's credibility and support the court's finding that Appellant's self-defense claim presented a question of fact for the jury. *See State v. Marshall*, 428 S.C. at 19, 832 S.E.2d at 622-23.

For the reasons the State set forth before the circuit court, the factfinder could conclude

from the evidence presented that Appellant was at fault in bringing about the difficulty. According to the State's eyewitnesses, Appellant was the only one with a gun. (R. p. 132, lines 13-23; R. p. 135, lines 6-13; R. p. 157, lines 16-25). Felicia Williams saw Burgess with his hands in the air when Appellant presented a gun. (R. p. 132, lines 13-23; R. p. 132, line 18 – p. 135, line 5). Further, neither Sherika Gore nor Elizabeth Holoman saw a gun on Burgess when they interacted with him prior to the shooting. (R. p. 127, lines 18-19; R. p. 155, lines 1-10). He was wearing his pants in a manner that revealed his waistband. (R. p. 155, lines 11-13).

Appellant's testimony failed to carry his immunity claim for other reasons. As the State pointed out, the physical evidence pointed contradicted Appellant's testimony that Burgess "was still standing shooting" as Appellant ran away. (R. p. 101, lines 14-16). Appellant testified that once Burgess fired at him Appellant "fired back" as he ran away. (R. p. 71, lines 11-13). Appellant stated, "But I run like firing." (R. p. 71, line 12). Appellant also maintained he picked up and shot a nine-millimeter. (R. p. 95, line 13 – p. 96, line 14). However, officers found only one nine-millimeter shell casing on the scene, and it was found "approximately in the center of the roadway right in front of the driveway where the shooting incident took place." (R. p. 182, lines 12-20). This placement is highly distinguishable from the series of five 380-caliber shell casings lined up down the roadway. (R. p. 179, line 8 – p. 180, line 16; R. p. 182, lines 12-20; Mar. 2019 State's Ex. 5 and 6). The linear pattern of the multiple 380 shell casings indicates a person shooting while running, rather than shooting while standing still, and offers a plain contradiction to Appellant's immunity claim.

The second and third elements necessary to establish an immunity claim regard whether Appellant reasonably and actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. While Appellant relied on his past experience with Burgess to

show he reasonably feared Burgess at all times, his own testimony lessened the veracity of this claim. Appellant twice testified during his immunity hearing that he was not afraid when Burgess approached him at the party. (R. p. 103, line 7 – p. 104, line 13; R. p. 107, lines 10-14). Appellant also testified that, at the time, he did not know that he believed the rumors he heard about Burgess planning to kill him. (R. p. 65, lines 4-7). Appellant also testified that he responded to Burgess' assertions at the party by telling him, "you know I'll beat you up." (R. p. 71, lines 3-6). This testimony indicates Appellant willingly sparred with Burgess and suggested they physically fight. According to Appellant, this was the comment that spurred Burgess' reach for a gun. (R. p. 70, line 22 – p. 71, line 6). When coupled with the fact that the State's eyewitnesses only saw Appellant with a gun, this evidence does not support a finding that Appellant reasonably and actually believed he was imminent danger during this interaction.

The whole of the testimony describing the degree of heat between Burgess and Appellant also varied. Felicia Williams testified the conversation she witnessed between Burgess and Appellant was neither "loud" nor an "argument" nor "aggression or anything like that." (R. p. 147, lines 17-24). Sherika Gore testified the conversation "wasn't loud because if they were arguing then it would have gotten the attention of everyone." (R. p. 157, lines 12-15). Appellant's cousin Everett Ford initially told police that Burgess put his arm around Appellant at the party in a friendly manner. (R. p. 39, line 9 – p. 40, line 14). Ford testified at the immunity hearing that "they were kind to each other" when they first met up at the party. (R. p. 17, lines 1-2). Ford's testimony at other times mirrored that of Appellant who described Burgess' gesturing as aggressive. (R. p. 23, lines 6-11; R. p. 70, line – p. 71, line 1). Ford's testimony was otherwise circumspect, as the State's eyewitnesses did not see him at the party. (R. p. 136, lines 1-9; R. p. 159, lines 4-10). More, Ford also testified he never witnessed any of the prior incidents which

led to Burgess allegedly being known for putting "his arm around you and hi[tting] you with a gun." (R. p. 24, line 7 – p. 25, line 23). Again, the record would support a factfinder's conclusion that Appellant was at fault in bringing about the difficulty, and was not reasonably in fear of imminent death or serious bodily injury, but rather that he pulled a gun during a verbal jousting match.

Given the multiple interpretations flowing from the evidence presented, the trial court accurately found that Appellant did not meet the preponderance of the evidence standard and appropriately submitted the case to the jury. The eyewitness and physical evidence presented by the State at the immunity hearing undermined Appellant's own presentation and left his immunity claim unconvincing as to its truth. Accordingly, "Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *State v. Curry*, 406 S.C. at 372, 752 S.E.2d at 267. This Court should affirm the decision of the trial court as it applied the proper standard of review and reached the correct result.

B. The court did not err when it found that the Protection of Persons and Property Act did not apply to Appellant's weapons charges.

The court also found that the Protection of Persons and Property Act (the Act) did not provide immunity from prosecution for the indicted crimes of unlawful possession of a weapon by a person convicted of a violent offense and possession of a weapon during the commission of a violent crime. (R. p. 902-903; R. p. 124, lines 4-21).

"When addressing novel questions of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right." *State v. Sweat*, 379 S.C. at 373, 665 S.E.2d at 649. "The cardinal rule of statutory interpretation is to

determine the intent of the legislature." *Id.* at 374, 665 S.E.2d at 649. "All rules of statutory construction are subservient to the one that 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." *Id.*

The Act was passed with the intent of codifying the common law Castle Doctrine, which "recognizes that a person's home is his castle," and further intended "to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). Appellant's immunity claim derives from subsection C of the Act. That subsection states: "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 . . . ." S.C. Code Ann. § 16-11-440(C). The Act, however, cannot apply to the weapons charges in this case. The plain language of this statute precludes immunity from prosecution for one charged with unlawful possession of a weapon by a person convicted of a violent offense if the evidence shows that the defendant claiming immunity under the Act was **unlawfully armed prior to** the incident. If the evidence supports a finding that Appellant was in constructive possession of a firearm prior to such time as he became in imminent fear of death or serious bodily injury, the Act will not apply to the unlawful carry charge. *See id.*; S.C. Code Ann. § 16-23-500 ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State.").

Most recently, our supreme court has interpreted § 16-11-440(C) to additionally require the application of a proximate cause analysis "to the subsection's unlawful activity element." *State v. Glenn*, 429 S.C. at 120, 838 S.E.2d at 497 (citing *State v. Burriss*, 334 S.C. 256, 262, 513

S.E.2d 104, 108 (1999) ("[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."); *State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) ("[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.")). In *Glenn*, the court found the circuit court correctly considered the evidence and "found Glenn was not engaged in any unlawful activity—despite the fact he was carrying an illegal weapon at the time of the shooting—because his possession was not the proximate cause of the incident." *Id.* at n.4, 838 S.E.2d at n.4. The court also instructed the circuit court to "determine whether Glenn's alleged trespass was proximately related to the shooting." *Id.* at 123, 838 S.E.2d at 499.

By syllogism, the evidence supports the court's refusal to apply the Act to Appellant's unlawful possession charge because Appellant did not establish, by a preponderance of the evidence, that he was not engaged in an unlawful act in a place where he had the right to be. The evidence received at the immunity hearing raised a question of fact as to whether Appellant was in possession of a firearm prior to the escalation of the altercation with the victim. Appellant left the party earlier that evening, went home, and came back just prior to the shooting. (R. p. 87, line 2 – p. 89, line 2). The State's eyewitnesses did not see a gun on anyone other than Appellant. (R. p. 135, lines 9-12; R. p. 138, line 1 – p. 139, line 8; R. p. 157, lines 19-25). These witnesses failed to see Appellant pick up a fallen gun as he had claimed. (R. p. 135, lines 6-8; R. p. 157, lines 16-18). Felicia Williams testified she saw Appellant "pull out a gun." (R. p. 132, lines 8-9). Williams further testified Appellant sent her a message after the incident stating "he shot first." (R. p. 150, lines 4-5).

Though contrary to Appellant's version of events, one could conclude that he was armed

when he arrived at the party the second time, which was immediately prior to the shooting. Converse to the circuit court's finding in *Glenn*, these facts support a conclusion that Appellant's unlawful possession of a firearm was the proximate cause of the incident. 429 S.C. at 120 n.4, 838 S.E.2d at 497 n.4. The court did not err in finding the Act did not apply to that charge. Furthermore, for reasons previously discussed, Appellant did not establish by a preponderance of the evidence that he was without fault in bringing about the difficulty and had an actual and reasonable fear of imminent death or serious bodily injury. For this reason, the court also properly ruled that the Act likewise precluded Appellant from immunity from prosecution for possession of a weapon during the commission of a violent crime.

IV. The trial court did not err when it admitted the entirety of State's Exhibit 61 during the State's redirect examination of eyewitness Sherika Gore because Appellant's cross-examination of Gore revealed prior statements elicited to imply recent fabrication.

Appellant posits the trial court erroneously admitted hearsay testimony when, during the redirect examination of eyewitness Sherika Gore, it permitted the State to play the entirety of the seven minute and twenty-six second statement Gore made the day after the shooting. (R. p. 626, line 2 – p. 627, line 22; State's Ex. 61). It did so over Appellant's objection. (R. p. 626, lines 21-25).

The trial court did not err in admitting Gore's statement. During Appellant's cross-examination of Gore, counsel revealed various inconsistencies among that recorded statement, (State's Ex. 61 (on file with Court); R. p. 620, lines 9-11), the testimony Gore delivered at Appellant's earlier immunity hearing, (R. pp. 153-67), and her direct examination at trial, (R. pp. 589-604). The State offered the entirety of the statement to rebut counsel's "allegation of recent fabrication" and counsel's use of the same interview during Gore's cross-examination. (R. p. 627, lines 1-5). The court properly premised its admission of the entire statement on "all the testimony that's been given up to this point." (R. p. 546, lines 8-13).

Pursuant to Rule 801(d)(1)(A)-(B), 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

> (A) inconsistent with the declarant's testimony, or
>
> (B) 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)(A)-(B), SCRE.

When a party offers a prior consistent statement, the following elements must be satisfied before the prior consistent statement can be admitted into evidence:

> (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001).

Here, the State sought to admit Gore's statements which had by that time become inconsistent with her cross-examination testimony, Rule 801(d)(1)(A), SCRE, and to rebut the concept imposed by Appellant's counsel that Gore fabricated or improperly collaborated with another State's eyewitness prior to testifying.

A. Gore's Testimonies

Appellant's cross-examination of Gore caused her to admit that she provided an inconsistent statement regarding Appellant's arrival at the party. In her recorded statement, Gore told investigators Appellant arrived in his white two-door car. (State's Ex. 61 at 6:53 to 7:10). At trial, Gore agreed that Appellant walked to the party "across 10th" Avenue, and also that she did not know "how he got there." (R. p. 619, line 15 – p. 620, line 8; R. p. 595, lines 13-25). On this point, Appellant's counsel did more than test Gore's memory. He hounded, "What's the truth?" (R. pp. 620, lines 15-25). Gore worked to defend her honor, testifying, "The truth is that [Appellant] shot [Burgess]. So some things [in my prior testimony] might have been wrong. I'm – I might have, might have not said something or I might have said something, but I was emotionally drained and I went through a lot." (R. p. 621, lines 1-6). Gore suggested counsel "better go with" the recorded statement because she gave

it the day after the shooting. (R. p. 620, lines 9-11). Counsel for Appellant did not play the statement.

Importantly, Appellant bookended his cross-examination by engaging Gore in a pair of exchanges to imply that Gore collaborated with friend and eyewitness, Felicia Williams, regarding the testimony they would offer on behalf of the State. First, counsel questioned Gore about whether she informed the State that she was friends with Williams. (R. p. 606, lines 5-10). Gore consistently answered that the State never asked her about Felicia. (R. p. 606, lines 7, 11). Appellant questioned Gore on the collateral matter of whether she considered Felicia her "best friend" or a "dear friend," and whether she had posted that to her Facebook account. (R. p. 606, line 12 – p. 608, line 12). Gore classified Williams as a "friend." (R. p. 526, lines 1-13). Later, Appellant questioned whether Gore "and Felicia Williams ever discussed [their] version of events[.]" (R. p. 618, line 25 – p. 619, line 2). Gore denied this and testified, "we've never gone over what we – what our testimonies if that's what you're getting at." (R. p. 619, lines 3-12). Counsel persisted, asking whether she had "ever talked about what [she] saw that night[.]" (R. p. 619, line 13). Gore answered, "We have. Everybody has." (R. p. 619, line 14).

Appellant also utilized a transcript of the immunity hearing to demonstrate that Gore's testimony at that hearing was inconsistent with her recorded statement and with her trial testimony. At the immunity hearing, Gore testified that she saw Appellant *with* a gun and ran, not that she saw shots being fired. (R. p. 156, lines 8-11; R. p. 158, lines 1-4; R. p. 609, line 22 – p. 612, line 18). She also testified during the immunity hearing that she did not see Appellant retrieve the gun. (R. p. 157, lines 16-18). Yet Gore's recorded statement, taken the day after the shooting, stated she "one hundred percent" saw Appellant shooting the gun and "the flash out the barrel" as shots were fired. (State's Ex. 61 at 1:55 to 2:05 and at 5:17 to 5:35). At trial, as in her

recorded statement, but not as at the immunity hearing, Gore delivered testimony that she saw Appellant "**take out** a gun and fire it." (R. p. 598, lines 3-19 (emphasis added)). Gore maintained on cross-examination at trial that she "first saw the gun being fired" and then "ran into [the] house." (R. p. 609, line 24 – p. 610, line 1). Gore testified, "I saw [Appellant] take out a gun. It looked like he was about to fire towards [Burgess]. . . . He, he had a gun. Either way it went I seen him with a gun." (R. p. 612, lines 1-18). She later testified during cross-examination that she "didn't remember then but [she] remembered[ed] now" that she saw Appellant pull out a gun. (R. p. 618, lines 4-18).

Turning back to the recorded statement, Appellant tested Gore at an earlier point in her cross-examination by asking whether she remembered if she stated that Appellant came to the party to confront Burgess. (R. p. 615, lines 2-13; R. p. 616, lines 20-21). During Gore's direct examination she testified, "From the outside looking in it seemed like whatever issues that they had that they were trying to resolve them, I didn't hear anybody yelling or anything crazy." (R. p. 600, line 25 – p. 601, line 2). Her recorded statement said it looked like Appellant "came over there to talk to [Burgess]." (State's Ex. 61 at 3:20 to 3:30). Counsel for Appellant played the statement beginning at 3:33 on the recording. (R. p. 616, lines 17-21). Gore testified with a refreshed recollection that she told the interviewer, "I think he came over there to talk to him but I'm not a hundred percent sure." (R. p. 616, line 24 – p. 617, line 1). Gore noted counsel's re-characterization of the audio recording. She testified, "But you said I said he came over there to confront him. I said I think he came over there to talk to him[.]" (R. p. 616, line 24 – p. 617, line 1).

B. The Admissibility of the Recording on Redirect Examination

The trial court appropriately admitted the recording as a statement that proved

inconsistent with portions of Gore's immunity hearing testimony and cross-examination at trial. Rule 801(d)(1)(A), SCRE. Under Rule 106, SCRE, "[w]hen a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." However, "[o]nly that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced." *State v. Taylor*, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998); *see also State v. Gay*, 343 S.C. 543, 550-51, 541 S.E.2d 541, 545 (2001) (trial judge properly redacted murder defendant's police statement to exclude references to individual with whom the victim lived because redacted portion did not explain or clarify the portion that was admitted and which outlined how defendant knew the victim, and the redacted material would be improper evidence of third party guilt). "Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004) (citing *State v. Taylor*, 333 S.C. at 171, 508 S.E.2d at 875).

Pursuant to this rule of completeness, the State was permitted to introduce Gore's recorded statement to the extent it explained or clarified "all the testimony that's been given up to this point" about the contents of the recording. (R. p. 627, lines 8-13). When confronted, Gore testified to go with the statement she made three years ago: "I've gone over my, my statement that I made. Some things I refreshed on. I think that if you're going to point to anything you should point to three years ago because that would have been the, the most freshest of my memory." (R. p. 615, line 2 – p. 700, lines 17-23). Gore additionally asserted that counsel mischaracterized her statement about the reason Appellant came to the party. (R. p. 616, line 24

– p. 617, line 1). After defense counsel relied on the import of Gore's prior statements, the rule of completeness required that the State be permitted to inquire into the full substance of the initial recorded statement on redirect examination for the purpose of clarifying just exactly what Gore said most contemporaneous to the shooting. *State v. Patterson*, 367 S.C. 219, 225-28, 625 S.E.2d 239, 242-44 (2006) ("On cross-examination, defense counsel elicited from Richardson that she believed the accuracy of her account of the murder to police was very important. . . . The defense put Richardson's statement to police at issue, and fundamental fairness required the entire statement be admitted into evidence" during the State's redirect examination).

Additionally, after establishing that Gore knew her friend Felicia Williams was also at the party, Appellant's counsel charged Gore with fabrication or improper motive by questioning Gore about whether she had spoken with Felicia Williams about what their "version of events" would be. (R. p. 605, line 25 – p. 608, line 23; R. p. 609, line 25 – p. 619, line, 13). Gore answered during cross-examination that she and Williams had talked, and further that "[e]verybody ha[d]" talked about what they saw that night. (R. p. 619, lines 13-14). Thus, as the State argued, its purpose for admitting the remainder of the record was meant to address the alleged fabrication or improper motive interjected by counsel during cross-examination and was admissible pursuant to Rule 801(d)(1)(B), SCRE. *State v. Saltz*, 346 S.C. at 121-22, 551 S.E.2d at 244; *compare State v. Foster*, 354 S.C. 614, 623-24, 582 S.E.2d 426, 431 (2003) (finding witness' prior consistent statement inadmissible to rehabilitate the witness when the cross-examining attorney only asked whether the witness had given a statement consistent with her testimony that day) (citing *Tome v. United States*, 513 U.S. 150, 157-58, 115 S.Ct. 696, 701 (1995) ("Rule [801(d)(1)(B)] speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.")).

Of course, the statement the State sought to introduce must also "have been made prior the alleged fabrication, or prior to the existence of the alleged improper influence or motive." *State v. Saltz*, 346 S.C. at 122, 551 S.E.2d at 244. As to this timing element, Gore's recorded statement predates both courtroom testimonies. It was taken the day after the shooting and thus predates the context in which counsel interjected the alleged fabrication, improper influence, or motive for Gore to discuss her "version of events" with others. *State v Nelson*, 380 S.C. at 231, 669 S.E.2d at 598 (consistent statement properly admitted to rebut alleged improper motive when the declarant's "motive did not arise until after the statement was made"); *State v. Fulton*, 333 S.C. 359, 374, 509 S.E.2d 819, 827 (Ct. App. 1998) (holding prior consistent statement offered for rebutting express or implied charge of recent fabrication "must predate any alleged improper influence or motive").

In at least one prior similar case, this Court has affirmed the circuit court's admission of an entire prior consistent statement "made prior to any contact with the judicial system" after "defense counsel raised the issue of improper influence or 'coaching' by asking [the] Victim whether she 'practiced' before testifying and whether anyone had told her what to say." *State v. Jeffcoat*, 350 S.C. 392, 397-98, 565 S.E.2d 321, 324-25 (Ct. App. 2002). The Court should similarly affirm the State's redirect examination introduction of the statement in this case.

But even assuming error, harmless error applies. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotation and citation omitted).

In *Saltz*, our supreme court noted that introduction of a prior consistent statement pursuant to Rule 801(d)(1)(B), SCRE will not be harmless "merely because it is cumulative" because of the cumulative effect "has been held to "enhance[ ] the devastating impact of improper corroboration." 346 S.C. at 124, 51 S.E.2d at 246. However, in *State v Jarrell*, this Court subsequently found that "concern is diminished" when the statement was "was cumulative to three other witnesses who testified almost identically." 350 S.C. 90, 101, 564 S.E.2d 362, 368 (Ct. App. 2002). Here, like *Jarrell*, two other witnesses delivered testimony virtually indistinguishable from the contents of Gore's recorded statement. In the statement, Gore says she saw Appellant and Burgess talking, that she began to hear yelling and determined they were arguing, and she saw Appellant shoot a gun. She only saw Appellant fire and saw sparks emitting from the gun. (State's Ex. 61).

Darlene Young testified she was standing near the party when she saw Appellant arrive and engage in a conversation with Burgess. She heard Appellant and Burgess talking, but did not know what about. (R. p. 336, line 15 – p. 337, line 20). Young testified "[i]t didn't look aggressive at all." (R. p. 337, line 11). Young saw the second victim Damien Alston try to break them up. (R. p. 340, lines 2-19). She saw Burgess with his hands in the air and then she saw "fire come out of a gun and hit" Burgess. (R. p. 340, lines 14-24). Young testified Appellant drew a gun from one of his pockets. She did not see Appellant bend down to the ground. And she did not see either victim pull out a gun. (R. p. 341, lines 3-25). Young's testimony is also substantially similar to that delivered by Felicia Williams. Williams saw Appellant, Burgess, and Alston standing together at the party. She was not paying them any attention until she heard a glass bottle drop. (R. p. 639, lines 2-25). She turned to see the three men talking in the road. She saw Alston "in the middle" and she saw Burgess "take his arm and move [Alston] out the way."

(R. p. 640, lines 7-16). Then Williams, like Young and Gore, saw Appellant "take the gun up off his side and pull it out and shoot." (R. p. 640, lines 15-17). As an additional consideration, Appellant's counsel played a portion of the statement to refresh Gore's recollection during cross-examination. (R. p. 616, lines 17-21). At seven minutes and twenty-six seconds, Gore's statement was fairly brief. (State's Ex. 61).

With the recording being nearly identical to two other eyewitness testimonies, and with a portion of unknown length having already been admitted through cross-examination, the inclusion of the whole of State's Exhibit 61 on redirect examination could not have reasonably affected the result of the trial.

V. Appellant's five-year sentence for possession of a weapon during the commission of a violent crime should be vacated because it was issued in violation of S.C. Code Ann. § 16-23-490, but the conviction should be affirmed.

The jury found Appellant guilty of murder, unlawful possession of a firearm by a person convicted of a violent offense, and possession of a weapon during the commission of a violent crime. (R. p. 876, lines 12-22). The court issued a life sentence for the murder conviction. (R. p. 912). The court then sentenced Appellant to five years for each weapons charge. (R. pp. 878, 909 and 915).

A conviction for possession of a weapon during the commission of a violent crime carries a five year penalty "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490(A). "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." *Id.* South Carolina has defined murder as a violent crime. S.C. Code Ann. § 16-1-60. The life sentence does not carry the possibility of parole. S.C. Code Ann. § 16-3-20(A).

Appellant should not have received a sentence for the weapons charge in addition to receipt of a life sentence without parole, and Respondent respectfully asks this Court to vacate the five-year sentence.[3] *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016) (affirming conviction and vacating illegal sentence for weapon charge where defendant also sentenced to life for murder). The conviction, however, should be affirmed for the remainder of the reasons reflected within this brief in response. *State v. Sledge*, 428 S.C. 40, 60, 832 S.E.2d 633, 644 (Ct. App. 2019) (affirming weapons and murder convictions but vacating improper sentence on weapons charge).

[3] Appellant made no objection to the sentence for the weapons charge. (R. p. 878, line 17 – p. 879, line 5). Respondent, however, concedes that Applicant is entitled to the proper sentence regardless of the failure to preserve this issue for appellate review. *State v. Plumer*, Op. No. 5806 at 24 (S.C. Ct. App. filed Mar. 3, 2021) (Shearouse Adv. Sh. No. 7 at 13).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General
S.C. Bar No. 101357

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY: s/Donald J. Zelenka
Donald J. Zelenka
S.C. Bar No. 5758

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 14, 2021

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2019-001912

THE STATE, ...RESPONDENT

v.

CALVIN D. FORD, ...APPELLANT.

CERTIFICATE OF COMPLIANCE

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

This 14th day of June 2021.

s/Donald J. Zelenka
Donald J. Zelenka
Deputy Attorney General
S.C. Bar No. 5758

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305