RECEIVED

Jul 01 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Honorable Benjamin H. Culbertson, Circuit Court Judge

State of South Carolina ..... Petitioner

v.

M'Andre Cochran ..... Respondent.

Appellate Case No. 2018-001023

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803)734-3727

ATTORNEYS FOR THE STATE

TABLE OF CONTENTS

Page

ISSUE PRESENTED

Did the trial judge commit a clear error of law by granting immunity to Respondent Cochran pursuant to the South Carolina Protection of Persons and Property Act, S.C. Code Ann. §§16-11-410, et seq. (Supp. 2018), where he was not entitled to immunity as a matter of law because he could not validly raise a claim of self-defense, since there was evidence he was not without fault in bringing on the difficulty, and moreover, there was no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury at the time he inflicted the mortal wounds; there was no evidence that he actually was in such imminent danger; and a reasonably prudent man of ordinary firmness and courage would not have entertained the belief that he was in fear of death or serious bodily injury.

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Respondent, M'Andre Racquel Cochran (Cochran), in August 2016, for the June 15, 2016 murder of Emmitt Kelly (2016-GS-22-793, ***R. 123-124***, and possession of a weapon during the commission of a violent crime. 2016-GS-22-794, ***R. 125-126.*** On February 13, 2018, Cochran filed a motion seeking immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. ***R. p. 119***.

The Honorable Benjamin H. Culbertson heard his motion at a May 21, 2018 pretrial hearing. **R.** ***1-117***. Francis A. Humphries, Jr., represented him at this hearing, and Fifteenth Circuit Senior Assistant Solicitor Ricky D. Todd prosecuted the case. Judge Culberson filed an Order Granting Immunity from Prosecution on May 22, 2018.

The State, as Petitioner, timely served and filed a notice of appeal. The State filed the Initial Brief of Appellant on November 20, 2018, and presented the following issue for review:

> Did the trial judge commit a clear error of law by granting immunity to Respondent Cochran pursuant to the South Carolina Protection of Persons and Property Act, S.C. Code Ann. §§16-1 1-410, et seq. (Supp. 2018), where he was not entitled to immunity as a matter of law because he could not validly raise a claim of self-defense, since there was no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury at the time he inflicted the mortal wounds; there was no evidence that he actually was in such imminent danger; a reasonably prudent man of ordinary firmness and courage would not have entertained the belief that he was in fear of death or serious bodily injury; and he did not reasonably need to use deadly force when he stabbed the victim?

Through counsel, David Alexander, Esquire, Cochran filed the Initial Brief of Respondent on May 20, 2019. Following briefing by the parties, the Court of Appeals filed an unpublished *per curiam* opinion affirming the trial judge's order and judgment on March 17, 2021. *See State v. M'Andre Cochran*, 2021-UP-086 (S.C. Ct.App., Mar. 17, 2021), ***App1-3***. The State filed a Petition for Rehearing on April 1, 2021 (***App. 4-13***), which the Court of Appeals

denied on June 15, 2021. ***App. 14***. The State now asks the Court to grant certiorari, reverse the judgment and Order Granting Immunity from Prosecution, and remand for trial.

STANDARD OF REVIEW

On appeal from a trial judge's pre-trial determination regarding a claim of statutory immunity, an appellate court reviews the trial judge's ruling for an abuse of discretion. *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2015); *see also State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review"). The appellate court must affirm the trial judge's immunity determination if it is supported by any evidence *and* not controlled by an error of law. *Curry*, 406 S.C. at 372, 752 S.E.2d at 267; *see also Douglas*, 411 S.C. at 316, 768 S.E.2d at 237. However, the appellate court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence and it will reverse when the decision is controlled by a legal error or lacking in evidentiary support. *See State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010) ("An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law"); *see also Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " (citation omitted)).

ARGUMENT

The trial judge committed a clear error of law by granting immunity to Respondent Cochran pursuant to the South Carolina Protection of Persons and Property Act, S.C. Code Ann. §§16-11-410, *et seq*. (Supp. 2018), where he was not entitled to immunity as a matter of law because he could not validly raise a claim of self-defense, since there was evidence he was not without fault in bringing on the difficulty and, more imprtantly, there

was no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury at the time he inflicted the mortal wounds; there was no evidence that he actually was in such imminent danger; and a reasonably prudent man of ordinary firmness and courage would not have entertained the belief that he was in fear of death or serious bodily injury.

The State submits that the trial judge committed a clear error of law by granting immunity to Respondent Cochran pursuant to the South Carolina Protection of Persons and Property Act, S.C. Code Ann. §§16-11-410, *et seq*. (Supp. 2018). Contrary to the trial judge's ruling, Cochran was not entitled to immunity as a matter of law because he could not validly raise a claim of self-defense, since there was evidence that he was not without fault in bringing on the difficulty. More importantly, there was no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury at the time he inflicted the mortal wounds; there was no evidence that he actually was in such imminent danger; and a reasonably prudent man of ordinary firmness and courage would not have entertained the belief that he was in fear of death or serious bodily injury.

A. Testimony presented at immunity hearing.

The trial judge heard Cochran's motion seeking immunity from prosecution pursuant to the Act (***R. 119***) at a May 21, 2018 pretrial hearing. ***R. 1-117***. Cochran, the only witness who testified in support of his motion, testified that he was separated from his wife of six years, Casandra Cochran. **R.** ***37***. They have three children: a nine year old son and two daughters, ages seven and four. In June of 2016, they lived in a three bedroom mobile home located in Hemingway, South Carolina. The home was in his name and he made the mortgage payments on it. ***R. 8-10; 23***.

In June 2016, he was gainfully employed at AGRU America, a company that makes plastic for landfills. He operated a machine that made composite net material. He typically

worked twelve hour shifts with a partner, Ronnie Smith, but he could work a sixteen hour overtime shift when he needed extra money. The twelve hour shifts were from 7:00 p.m. to 7:00 a.m. He claimed that he could clock out early from an overtime shift. ***R. 11-12; 16***.[1]

He had planned to work an overtime shift from 7:00 p.m. on June 14, 2016, in order to get extra money for his wife's birthday. This normally would have him working from 7:00 p.m. on June 14, 2016 until 11:00 a.m. on June 15th. However, he had not definitely decided how many overtime hours he would work. ***R. 13-17***.

Cochran testified that Casandra was aware of how long his shifts lasted. He also claimed that he had stayed at his house both on June 12 and June 13, 2016. He testified that he had called Casandra around 12:30 a.m. on June 15 to make sure she was home, and she was there. Yet, claimed that he would not call her if he decided to leave an overtime shift earlier than originally planned. ***R. 13-15***. He was tired and he fell and asleep while working. This angered his co-worker, Mr. Smith, who had to awaken him. So, he left work around 5:00 a.m., without calling Casandra and tell her of his change in plans. ***R. 15-17; 36***.

He had not received any texts or calls from Casandra letting him know that someone was with her that night and he only expected to find her and the children at home. He was surprised to see a light brown sedan that he did not recognize parked in the yard when he arrived[2] and the front door was not simply unlocked, it was ajar. This was not normal. He testified that the house

---

[1] He claimed on cross-examination that "you can [leave] anytime you want in overtime." ***R. 34***. He also made the bizarre claim that he would not typically inform his supervisor, Morgan Brunson, that he was leaving early from an overtime shift and said, "We could leave anytime we wanted." ***R. 49***.

[2] Photographs of his yard (Defendant's Ex.s 1-2) reflected that there were three cars in the yard after he drove up in his mother's car: his car, Casandra's car, and the light brown sedan. ***R. 19-20***.

was dark and that his initial reaction was "to protect my family because I had three kids and a wife." ***R. 17-22; 30; 40***.[3] Without turning on any light in the dark house or calling out to any family member, he went into the kitchen and armed himself with a red-handled knife for "[p]rotection because I didn't know who was in my house or whatnot." ***R. 42-43; 45***.

He then silently walked down the hallway and entered his son's bedroom, and he discovered that it was empty. This was "unusual" because Cochran occasionally slept in there. Still, he did not call out to anyone or turn on a light. Instead, he went to his daughters' bedroom and discovered that it, too, was empty. Next, he decided to go to the master bedroom. ***R. 22-25; 30; 41-43***.

So, he silently walked back through his living room and kitchen. He finally called out for Casandra as he approached their bedroom. After she failed to respond, he entered their darkened bedroom. Again, he did not turn on a light, but he could see that two people were in the bed. Upon reaching the foot of the bed, he was confronted by the unknown victim. ***R. 25-28; 30-31; 43-44***. He testified that "a dude jump up out the bed and say, 'Who the fuck is you?' I [was] like, 'Who the fuck is me, who the fuck is you? This is my house,' and then that when he swung at me, [that's] when I defended myself." ***R. 28, lines 9-12***. *See also* ***R. 44-45; 51-52***.

He was admittedly unable to determine whether the victim was armed because the bedroom was dark, but he testified that the victim was taller than him. Asked how the "altercation" ended, he replied, "I just remember him jumping out the window, and I dropped the knife on the carpet like." He denied remembering how many times or where he had stabbed the

---

[3] He admitted on cross-examination that he had not spoken to his parents that day and claimed that he had expected to find his children at home (***R. 36***) and that he had expected to find his children in bed with his wife when he did not find them in their rooms. ***R. 47***. He denied that his parents had often kept them. ***R. 47-48***.

victim. ***R. 28-29*; *45***. He further testified that he was "pretty sure" the victim hit him and that he remained at the house until law enforcement arrived. ***R. 31*; *45; 47***.

On cross-examination, he denied that he and Casandra had a troubled relationship or that they fought a lot. Rather, he said, "It was off and on, but what marriage don't (sic) have up and downs, so. It was all right." ***R. 37***. He also denied that they had spent a significant amount of time apart from one another, even though he had filed for a divorce in 2014. He had listed one year continuous separation in the divorce proceedings, but he claimed on cross-examination that he had sought a divorce because of her "[p]artying too much." ***R. 37-38***.

He later testified that he "occasionally" stayed at his mother's house when he and Casandra had "an altercation." ***R. 50***. Likewise, he initially denied that he had left the house and stayed with his mother the month before the fatal stabbing. However, he soon backtracked and admitted that he had stayed with his mother once or twice. He did not know where his wife was on those occasions. Although he admitted that this was not a normal relationship, he contended they had always been faithful to one another. ***R. 39-40***.

The State's first witness was Michael Thacker, who handles crime scenes and evidence for the Horry County Sheriff's Office. ***R. 53-54***. He first went to the detention center, where he photographed Cochran. The photographs that he took, (State's Ex.s 191-209) were introduced for purposes of the hearing without objection. These photographs showed that Cochran did not have any visible injuries to his head, neck, or hands, but that he did have a "small injury" to one arm. The photographs likewise depicted suspected blood on his hands and on his cheek. Officer Thacker did not interview Cochran. ***R. 54-59***.

Officer Thacker also took photographs of the victim at autopsy (State's Ex.s 140-190), which were also admitted without objection for purposes of the immunity hearing. These photos

depicted suspected blood and a "small injury" on the victim's right inner arm; suspected blood on the inside of his left hand; an injury to the top, back side of his right hand; "a large wound" in the area of his right thumb; an injury to the back of his left hand near his wrist; "some smaller sharp instrument wounds on the outside areas of the pinky finger and on the ring finger" of his left hand; injuries to the inside of his right hand, near where his fingers connect to his palm; an injury to his left rib area; a larger wound to the left chest area; an injury on the right side of his chest;[4] an injury to his right elbow that appeared to be from a "sharp instrument," and suspected blood in the same area; an injury in the area of his scalp; and suspected blood on his legs. The two most significant injuries were those to the victim's chest and most of his injuries were to his hands. ***R. 59-65***.

Morgan Brunson testified that he had been a production supervisor at AGRU America for "about 16 years" and that he supervised Cochran while Cochran worked there. Mr. Brunson signed a disciplinary warning notice for Cochran on June 15, 2016 (State's Ex. 213), for leaving work at 5:02 a.m., without first notifying him as the shift supervisor. ***R. 67-68***. He explained that when an employee works a shift, the employee is required to give the supervisor notice before he or she leaves. Cochran was scheduled to work a twelve hour "auxiliary overtime" shift on June 14th, beginning at 7:00 p.m. and ending at 7:00 a.m. on the 15th. Mr. Brunson had spoken to Cochran earlier that night and Cochran's demeanor appeared normal. ***R. 68-70***. Also, Cochran had otherwise been a "good hard worker." ***R. 71-72***.

Ronnie Smith testified that he had worked at AGRU America for eight years and that he was still working there at the time of his testimony. He works twelve hour shifts. He and

---

[4] Officer Thacker described the wounds to the torso as "sharp injury wounds." ***R. 62, lines 2-7***.

Cochran were "good friends." They typically worked on the same shift and they worked together on a machine requiring three people to operate. ***R. 73-75***. Mr. Smith described Cochran as a "little tired" when he came into work on June 14, 2016. **R. 75**. Mr. Smith asked Cochran, if something was bothering him, and Cochran said no. Mr. Smith "left him alone, and then after a while he came back to [himself], we were laughing, talking, working. At 5:00 a.m., "we [were] taking a roll off, and I turned around he was going to the clock. I say, 'Hey, man, where you going at,' and he just left ... [in a] little trot." ***R. 75, lines 17-25***.

Mr. Smith had expected Cochran to work until 7:00 a.m. All employees had left early before, but Cochran had not mentioned his plan to leave the shift at any time before he left. Also, employees were required to inform their supervisor before leaving a shift early. ***R. 76-77***.[5]

Casandra Cochran testified that she was working from 3:00 until 11:00 p.m. at a beach resort, in June 2016. She did not have her three children and did not even see them on June 14th because they were staying with Cochran's mother. It was normal for his parents to keep the children when both she and Cochran worked at night. ***R. 79-80; 82***. She and her children lived in the three bedroom mobile home that the Cochran's purchased in March or April of 2015. Although their son and daughters had separate rooms, they often slept in the same room or with their parents. ***R. 81***.

Cochran worked twelve hour shifts that "rotated from day shift to night shift." Consequently, he often was not home at night. ***R. 81-82***. Casandra and Cochran generally slept together, but they slept in separate beds at times during their six year marriage, and he would stay at his mother's house when they argued. Also, they had separated when Cochran filed for a

[5] On cross-examination, Mr. Smith admitted that Cochran had fallen asleep during the shift, which caused their machine to stop. However, he did not remember whether they exchanged words about this. ***R. 78***.

divorce in 2014 or 2015. Their separation lasted from May to November in 2015. She stayed in the marital residence and her cousin moved in with her when he moved out of the house. ***R. 82-84***.

Although she and Cochran reunited after their legal separation, she stayed with a female co-worker on June 13 and 14, 2016, because at the time "[w]e were just on and off. It was kind of like a day to day thing." As a result, there was no guarantee that Cochran would come home every night. Nor was she planning on him coming home on June 15th because she had not originally intended to stay there either. ***R. 84-85; 93***. Both she and Cochran were seeing other people at the time and they had discussed this. ***R. 92***. She had been seeing the victim, Emmitt Kelly, for about a month. ***R. 85-86***.

Casandra invited the victim to stay at her residence on June 14, 2016. She told him that she was going to go to sleep but that she would leave the front door unlocked for him. She also spoke with Cochran that night because she had planned to go out and wanted to know if she needed to get their children from his mother's house, instead. ***R. 86-88; 99-100***.[6] As planned, she left the door unlocked for the victim. She was sleeping when he arrived and they never spoke. ***R. 88-89***.

She gave the following account of the fatal attack:

> Emmett tapped me and said, "Somebody's at the door," and I said, "When did you get here," and he said, "Somebody's at the door." By that time he was getting out of bed, and it was pulling me out the bed because we were wrapped in the covers. He stood up. M'Andre came in, and they started fighting. .... I have black, blackout curtains. So it ... was completely dark.

---

[6] His mother was primarily responsible for watching the children on nights when both he and Casandra worked. More importantly, her testimony reflects that Cochran was aware his children were not home when he arrived there on the morning of June 15th. ***R. 87-88***. She clarified on cross-examination that she had spoken to him twice on June 14th: once while she was at work and, later, after she got home. ***R. 98-99***.

R. 89, lines 5-10. She added that:

> They started fighting, like they both were swinging. I was trying to break it up. Emmett said, "What the fuck, he stabbed me or shot me." He jumped out the window. I turn[ed] the light on and M'Andre was standing there.

R. 90, lines 21-24. She immediately ran out the front door trying to find the victim. ***R. 91***.

Cochran was already at the door when the victim awakened her, and she had not heard his footsteps. While she could not see Cochran's face, she knew that he was the man who entered the bedroom. ***R. 89-90***. Also, the victim was standing up when Cochran entered the room, but she could not remember whether the two men had exchanged words. ***R. 91; 102***. Further, she did not see the knife until she turned on the light. She unequivocally testified that the men had been "punching each other." ***R. 92***. Casandra testified that it was unusual for Cochran to leave a shift early and that he only left early if they had planned to do something or he did not feel well. ***R. 92***.

She admitted on cross-examination that she could have told an officer that she and Cochran wanted to work out their marital problems, and she admitted that they had planned to spend her birthday together because Father's Day was either the same day or the next day. She also told law enforcement that he was aware that she was "talking to someone at work but he didn't know the extent of the relationship." ***R. 97***.

Inv. Albert Kohut testified that he was the on-call Investigator for the Horry County Sheriff's Office on June 15, 2016 and that he responded to the Cochran residence that morning. Other deputies and a highway patrolman were on the scene and the victim's body had already been transported by the time he arrived. The other officers who were present informed him of the stabbing. ***R. 105-07***.

Inv. Kohut did not speak to Cochran before Cochran was transported to the Sheriff's Office. ***R. 107-08***. He first photographed the property and exterior of the residence. Then, he photographed the interior of the residence. ***R. 109***. Inv. Kohut testified that most of the blood inside the residence was in the master bedroom, which appeared to be where the stabbing occurred. He likewise found a large pool of blood on the ground outside of the bedroom window, where the victim apparently had landed after jumping from the window. ***R. 110-11***.

Casandra had "quite a bit of blood on her" and her clothing, but Inv. Kohut did not observe any injuries on her and she did not report any to him. ***R. 111-12***. He later took a statement from her and another officer took her clothing. ***R. 113***.

Later on June 15th, Inv. Kohut had Cochran brought from the jail to the Sherriff's Office.[7] After warning Cochran and obtaining a waiver of Cochran's *Miranda*[8] rights, Cochran gave a video and audiotaped statement. Cochran "was remarkably calm until I notified him of the charges." He then became "a little emotional." ***R. 114***.

B. The Order Granting Immunity from Prosecution.

The trial judge filed an Order Granting Immunity from Prosecution the following day. ***R. 120-122***. The trial judge first found that Cochran "was not engaged in an unlawful activity and was attacked 'in another place where he has a right to be' (i.e., his residence)." ***R.121***. The trial judge also found that Cochran was "not entitled to the presumption of 'reasonable fear of imminent peril of death or great bodily injury' granted under [S.C. Code Ann. §16-11-440(A) (Supp. 2018)] since the victim was an invitee and, likewise, lawfully entitled to be in the

---

7 He had previously obtained arrest warrants for Cochran.

8 *See Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant's residence." ***R. 121 n. 3***. See §16-11-440(B)(1). Nevertheless, the trial judge concluded that he was "entitled to the protections granted under ... §16-11-440(C)." ***Id***.

In light of these findings, the trial judge found that Cochran "had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force if he reasonably believed it was necessary to prevent death or great bodily injury to himself." ***R. 121-122***. The trial judge found the following facts had been presented:

> 1) the defendant arrived at his residence at 5:30 a.m.; 2) a car the defendant did not recognize was at the residence; 3) the front door to the residence was open; 4) the defendant's children were not in their bedrooms; and, 4) immediately upon the defendant's entry into his bedroom, he was assaulted by the victim.

Id.

In light of these facts, he concluded that Cochran's "fear of death or great bodily injury was reasonable and, as a matter of law, [Cochran] was entitled to 'stand his ground and meet force with force, including deadly force' to protect himself." Therefore, he was entitled to immunity from prosecution. ***Id***.

C. The Court of Appeals' decision.

The Court of Appeals affirmed pursuant to Rule 220(b), SCACR, finding that "[t]he trial court did not abuse its discretion by granting Cochran immunity because evidence supports the three required elements of self-defense." ***App. 2-3***.

D. Discussion.

The trial judge found that Cochran was "not entitled to the presumption of 'reasonable fear of imminent peril of death or great bodily injury' granted under [S.C. Code Ann. §16-11-440(A) (Supp. 2020)] since the victim was an invitee and, likewise, lawfully entitled to be in the defendant's residence." ***R. 121 n. 3***. See also §16-11-440(B)(1); *State v. Glenn*, 429 S.C. 108,

118, 838 S.E.2d 491, 496 (2019). Accordingly, any claim of immunity was under §16-11-440(C) and Cochran was not entitled to immunity unless he could satisfy the provisions of and all the elements of self-defense, except for the duty to the retreat. *See State v. Jones*, 416 S.C. 283, 300-01, 786 S.E.2d 132, 141-42 (2016) (recognizing "the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence" in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)).

S.C. Code Ann. § 16-11-440(C) (Supp. 2020) provides that:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

This Court explained in *State v. Scott*, 424 S.C. 463, 819 S.E.2d 116, 118 (2018), *reh'g denied* (Oct. 17, 2018), that:

> We focus our analysis on self-defense. As we stated in *Curry*, "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." 406 S.C. at 371, 752 S.E.2d at 266.
>
> There are four elements that must be established to justify the use of deadly force as self-defense. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). Scott bears the burden of proving these elements by the preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The elements are,
>
> > (1) The defendant was without fault in bringing on the difficulty; (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; 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 this particular instance.
>
> *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)).

See also Curry, 406 S.C. at 371, n. 4, 752 S.E.2d at 266 n. 4; *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984).

The burden is on a defendant claiming immunity under the Act to establish that he is entitled to immunity by a preponderance of the evidence, which requires him to demonstrate the existence of all the elements of self-defense except for the duty to the retreat. *See State v. Jones*, 416 S.C. 283, 301, 786 S.E.2d 132, 141 (2016) (recognizing "the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence" in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)). *See also Scott*, 819 S.E.2d at 121-22 (concluding that an individual who proves the elements of self-defense could be entitled to immunity pursuant to the Act in light of the "applicable provision of law" language in section 16-11-450(A), even if other portions of the Act—such as sections 16-11-440(A) or (C)—were not necessarily applicable); *Curry*, 406 S.C. at 371, n. 4, 752 S.E.2d at 266 n. 4 ("It is the fourth element—the duty to retreat—that is excused under the Act and the Castle Doctrine"). "[T]he proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *Duncan*, 392 S.C. at 411, 709 S.E.2d at 665.

The State submits that the trial judge committed clear error by finding that Cochran had met his burden of establishing that he was entitled to act in self-defense. Specifically, the trial judge erred by finding that Cochran was not without fault in bringing on the difficulty.[9] *See*

[9] The State has not conceded this point in the lower courts. On pp. 18-19 of the FBOA, the State asserted that it "Assum[ed] but [did] not conced[ed] that he satisfied the requirement that

Jones, 416 S.C. at 291, 786 S.E.2d at 136 ("Under the Castle Doctrine, '[o]ne attacked, *without fault* on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense'") (citation omitted and emphasis added).

The State does not assert that Cochran was at fault for entering his residence or perhaps in arming himself, after he discovered an unknown vehicle parked in his yard in the early morning hours and the front door of the trailer slightly ajar. However, his own account is that he thereafter stealthily crept through his house, without uttering a sound and without turning on a light or otherwise illuminating the dark residence, until seconds before he entered the marital bedroom. He was thus aware that neither his three children nor anyone else was in any other room in the house. ***R. 22-25; 30; 41-43; 45***. He was further aware that he had not heard any sounds of a disturbance in the bedroom and that he should expect to find the children and Casandra in that bedroom, if he truly believed that they were at home.

Although he knew that the bedroom would be dark because his wife had blackout curtains (***R. 89***), he entered without turning on any light and went up to the foot of the bed, where he could see two people in the bed. *Cochran then initiated a confrontation with the victim*, who jumped up out of bed where he had been sleeping or resting. Cochran then inflicted a fatal knife wound after he and the victim exchanged vulgarities and the unarmed victim swung at him. Therefore, it is not clear that he was without fault, as found by the trial judge. *See State v. Jackson*, 384 S.C. 29, 36, 681 S.E.2d 17, 20-21 (Ct. App. 2009) ("An accused who provokes or

---

he was not at fault in bringing on the difficulty," and it argued in footnote 8 why he was, at least arguably, not without fault.

initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary").

More importantly, there is absolutely no evidence in the record to support the second or third elements of a claim of self-defense. Of specific importance, Cochran was required to prove that 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." *See Dickey*, 394 S.C. at 499, 716 S.E.2d at 101. The record does not support the trial judge's finding that Cochran's "fear of death or great bodily injury was reasonable and, as a matter of law, [and Cochran] was entitled to 'stand his ground and meet force with force, including deadly force' to protect himself."

The trial judge the found that following facts supported this conclusion:

> 1) the defendant arrived at his residence at 5:30 a.m.; 2) a car the defendant did not recognize was at the residence; 3) the front door to the residence was open; 4) the defendant's children were not in their bedrooms; and, 4) immediately upon the defendant's entry into his bedroom, he was assaulted by the victim.

See ***R. 121-22***.

However, these findings do not support the conclusion that the trial judge reached. Nor does any other construction of the record, including Cochran's own version of the confrontation. As discussed, Cochran testimony was that when he entered the marital bedroom, without turning on a light in the room he knew would be dark, all he could see was that there were two people in the bed. When he reached the foot of the bed, he was confronted by the unknown victim. ***R. 25-28; 30-31; 43-44***.

Of importance, Cochran testified that "a dude jump up out the bed and say, 'Who the fuck is you?' I like, 'Who the fuck is me, who the fuck is you? This is my house,' and then that

when he swung at me, [that's] when I defended myself." ***R. 28, lines 9-12***. *See also* ***R. 44-45; 51-52***.

Although he was admittedly unable to determine whether the victim was armed because the bedroom was dark,[10] he testified that the victim was taller than him. Asked how the "altercation" had ended, he replied, "I just remember him jumping out the window, and I dropped the knife on the carpet like." He denied remembering how many times or where he had stabbed the victim. ***R. 28-29***; ***45***.[11] He further testified that he was "pretty sure" the victim hit him and that he remained at the house until law enforcement arrived. ***R. 31***; ***45; 47***.

He testified that this was when he defended himself. However, he did not claim that he thought that he was in "imminent danger of losing his life or sustaining serious bodily injury." Nor does the present record support a reasonable conclusion that "he actually was in such imminent danger." To the contrary, the victim had previously been in bed until Cochran entered the room and initiated a confrontation. *See Jackson*, 384 S.C. at 36, 681 S.E.2d at 20-21.

More importantly, the record is devoid of any evidence, whatsoever, that the victim was armed at any point during the confrontation, or that the victim did anything other than swing at him. Importantly, Cochran could not positively say that the victim actually struck him. Even if

---

[10] Again, the room was only dark because he did not turn on the light.

[11] The photographs admitted as State's Ex.s 140-190 depicted suspected blood and a "small injury" on the victim's right inner arm; suspected blood on the inside of his left hand; an injury to the top, back side of his right hand; "a large wound" in the area of his right thumb; an injury to the back of his left hand near his wrist; "some smaller sharp instrument wounds on the outside areas of the pinky finger and on the ring finger" of his left hand; injuries to the inside of his right hand, near where his fingers connect to his palm; an injury to his left rib area; a larger wound to the left chest area; an injury on the right side of his chest;[11] an injury to his right elbow that appeared to be from a "sharp instrument," and suspected blood in the same area; an injury in the area of his scalp; and suspected blood on his legs. The two most significant injuries were those to the victim's chest and most of his injuries were to his hands. ***R. 59-65***. In other words, the majority of the victim's wounds were defensive wounds.

the victim had struck Cochran, Cochran was aware that he was armed and in no danger of death or serious bodily harm. Accordingly, he was not acting in self-defense when he repeatedly stabbed the unarmed victim. *See*, *e.g.*, *State v. Washington*, 424 S.C. 374, 413, 818 S.E.2d 459, 480 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018); *State v. Bruno*, 322 S.C. 534, 537, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury. On direct examination, his only testimony was that he felt Victim was coming at him with something. He testified, 'It happened so quick, you know. I didn't mean to kill him. I just wanted him to keep away from me'"); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (finding defendant was not entitled to self-defense charge when he presented no evidence showing actual or perceived imminent danger). Likewise, a "reasonable prudent man of ordinary firmness and courage would not have entertained" the belief that Cochran was in danger of death or serious bodily injury, even under Cochran's version of the encounter, since the victim was unarmed.

In *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 568 (2019), *reh'g denied* (May 30, 2019), this Court explained that "while the fact a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity, as the State contends." Yet, *Cervantes-Pavon* does not support the trial judge's ruling in the present case because it is readily distinguishable. First, the Court in *Cervantes-Pavon* found that "the record contains no evidence that Cervantes-Pavon initiated the fight." *Id*. at 452, 827 S.E.2d at 569. On the other hand, there is at least some evidence that Cochran was at fault in bringing on the difficulty.

Second, the victim in *Cervantes-Pavon* had attempted to goad the defendant into a fight on the day before the fatal incident and several times on the day of the confrontation. *Id*. at 446-

47, 827 S.E.2d at 566. There was no such evidence here. Instead, Cochran initiated with the sleeping or resting victim.

Third, the defendant in *Cervantes-Pavon* alleged the victim was trying to strangle him and both the victim and the defendant in that case "were armed with metal pipes at the outset of the fight that ultimately resulted in the stabbing." *Id*. at 451, 827 S.E.2d at 568. Here, the victim had done nothing to bring about the confrontation, other than be where he had a lawful right to be. See *State v. Osborne*, 202 S.C. 473, 478, 25 S.E.2d 561, 563 (1943) ("The defense of self-defense is based upon necessity"). *See also Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 ("If the defense is based upon the defendant's actual belief of imminent danger, a reasonable[,] prudent man of ordinary firmness and courage would have entertained the same belief") (quoting *Wiggin*s, 330 S.C. at 545, 500 S.E.2d at 493). *See also Douglas*, 411 S.C. at 320 n. 7, 768 S.E.2d at 239 n. 7 ("[T]he standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective"); *cf*. *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself"); *State v. Jackson*, 227 S.C. 271, 277, 87 S.E.2d 681, 684 (1955) ("Appellant in defending his person from an unlawful arrest had the right to use so much force as was apparently necessary to accomplish his deliverance and no more"). While the evidence presented may have potentially supported a jury instruction on the law of voluntary manslaughter, see *State v. Cooley,* 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000) ("In general, South Carolina has allowed marital infidelity to support a charge of marital voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation"), it does not support a claim of self-defense.

Therefore, even Cochran's version of the stabbing does not support a finding that he acted in self-defense. Accordingly, the trial judge erred as a matter of law by granting immunity under the South Carolina Protection of Persons and Property Act.

CONCLUSION

Therefore, the State respectfully submits that this Court should reverse the judgment and Order Granting Immunity from Prosecution, and that the case should be remanded for trial.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, SC 29528
(843) 915-8608

July 1, 2021.

By: s/William Edgar Salter, III
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR PETITIONER