STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-001795

THE STATE .....RESPONDENT,

v.

WALTER MURREY.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the court erred by denying appellant immunity from prosecution, pursuant to S.C. Code § 16-11-440(C), where appellant was not engaged in unlawful activity in a place he had a right to be, a hotel where he stayed with his co-workers, appellant and his co-workers were threatened by the drug dealing decedent, appellant legitimately felt he and his co-workers faced death or great bodily injury due to the drug dealer's threats and actions and the court erroneously reasoned appellant had a duty to retreat and that "conflicting evidence" made self-defense a jury issue?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge correctly denied Appellant's request for immunity under the Protection of Persons and Property Act because he was not without fault in bringing on the difficulty and had other probable means of avoiding it; and whether the trial judge therefore correctly concluded Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence, correctly finding analysis under S.C. Code § 16-11-440(C) was unnecessary, and correctly finding Appellant had a duty to retreat before using deadly force.

2. Whether the trial judge correctly based his decision to deny Appellant immunity on far more than conflicting evidence alone, including the Appellant and witnesses' credibility and believability, that Appellant had inserted himself into the argument, and that he had other probable means of avoiding the danger. If, however, the trial court *had* based his decision only on the inconsistent testimony, whether he correctly concluded the Appellant failed to meet his burden by a preponderance *because* of the amount of conflicting evidence.

STATEMENT OF THE CASE

Appellant was indicted for murder at the January 11, 2018 term of the Sumter County Grand Jury. R. 2, L. 9–13. He was represented by Michael Routzong, Esquire, and the State was represented by Solicitor Earnest A. Finney, III, and Assistant Solicitor John Meadors. R. 1. Prior to trial, Appellant made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code. Ann. §§16-11-410 to 450 (2015) and the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). R. 4, L. 1–24. On October 14, 2019, after the parties made their arguments, the judge denied Appellant immunity and sent the case to the jury. R. 10, L. 6, R. 137, L. 21–22.

Appellant proceeded to trial by jury on the same day, pursuant to which Appellant was found guilty of murder on October 18, 2019. R. 470, L. 6–11. The Honorable George M. McFaddin, Jr., sentenced him to thirty years' imprisonment. R. 471, L. 1–4. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Walter Murrey ("Appellant") got off probation on May 5, 2017. R. 27, L. 1–7, R. 28, L. 1–13. He chose to move from Georgia to Louisiana, only to change his mind two or three days later. R. 10, L. 22–24. Murrey, age 30, left Louisiana for Georgia on a Greyhound Bus around noon on May 16th; R. 6, L. 18–20, R.10, L. 20–24, R. 11, L. 1–25. Rafael Rodriguez picked him up around 7:00 or 8:00 AM in Augusta on May 17th and drove him to Shaw Air Force Base in Sumter, South Carolina where Rodriguez had gotten him a job hanging drywall. R. 11, L. 1–5. While they were on their way, he was told by another passenger, Caleb Gomez, "there's a lot that goes on at the hotel" and that someone he met there had stolen the money he had given him to buy marijuana. R. 11, L. 24–25.

Murrey, Rodriguez, and Gomez worked from noon to around 5:00 PM that day and then went to the Quality Inn. R. 6, L. 10, R. 7, L. 2. Murrey showered and then asked his new roommate, Anthony Gordon, what had happened to Gomez and he said he "didn't speak on that." R. 14, L. 23–25. Murrey joined his co-workers Cody Shelton, Rodriguez, and Gomez outside his room where a man named Joshua was barbecuing some chicken. R. 13, L. 16, R. 15, L. 21. They were all drinking "a good bit." R. 105, L. 12–25.

Meanwhile, Lashay Andrews was on her way to the Quality Inn with her boyfriend, Brandon Cummings ("victim"). R. 110, L. 8–10. She dropped him off on the backside of the hotel so he could buy weed around 9:15 or 9:20 PM, and then walked to the hotel's restroom. R. 110, L. 16–21, R. 112, L. 2–5, R. 120, L. 4, 7–9 . When she returned to her car five minutes later, she saw Cummings walking down the outdoor steps toward her with Murrey. R. 112, L. 6–20. "[Murrey] was right up behind him." R. 174, L. 20–22.

> I saw – I heard commotion going on, but it's like Brandon. He argues, but he usually just be playing. And I heard the arguing and stuff, and I heard Brandon turning around and he was coming down the steps, but he was walking real fast, and Walter was walking real

> fast behind him . . . . [s]o, Brandon he was saying fuck you, nigga, and then he was like, you know, leave me alone. I'm 'bout to go. So that's when . . . Walter pulled out the gun and shot him the first time in the head. He went down.
>
> I didn't want him to see me in the car, and he shot him . . . and ran off, and that's when I got out of the car. He said stop, man. He was holding his hand up while Walter was trailing behind him cause he was trying to get away from him, but Walter kept trying to walk fast. So, yeah, [Brandon held] . . . his hand up, and that's when he shot him in the head . . . and then [Murrey] ran like on the bottom part of the stairwell.

R. 112, L. 11–25, R. 113, L. 1, 8–14.

Brandon Cummings fell face-first to the ground and died between 9:30 and 9:35 PM, unarmed, having been shot four times. R. 25, L. 20–25, R. 115, L. 1–6, R. 117, L. 9–10.

Nearly two months later, on July 6, 2017, Walter Murrey found himself in an interrogation room. R. 42, L. 12–14. Instead of talking to the police the night of the shooting, he went to bed after getting rid of the gun. R. 32, L. 10–13. He did not call the police, but instead said, "[I] was told the police were called when I was getting ready to call." R. 30, L. 7–13. The police came to his room but he did not answer. R. 33, L. 9–24. When asked why he never talked to the police, he said, ". . . I was tired. Been up for 37 hours." R. 34, L. 4–5. He never told anyone he had a gun prior to the shooting or that he had to shoot Cummings because he was afraid for his life. R. 35, L. 12–13, R. 58, L. 8–9. Instead, he woke up the next morning and went to work, R. 38, L. 1–14, and then returned to Georgia, having been in Sumter a grand total of approximately 30 hours. R. 38, L. 15. Law enforcement had to identify Murrey through his DNA that was recovered from a t-shirt he left at the scene. R. 128, L. 15–25.

Murrey was picked up by the U.S. Marshals in Georgia on May 24, 2017, and he subsequently sat in jail until July 6, 2017 when he finally asked to speak to investigators. R. 38, L. 20–25, R. 39, L. 24–25, R. 42, L. 12–14. He then denied being the shooter for the first forty minutes of the interview, telling law enforcement he was present at the scene but heard shots

once he got to the corner of the breezeway. R. 47, L. 2–3, 18–20, R. 132, L. 4–25. He later admitted that was a lie. R. 50, L. 8–14, R. 134, L. 11–14. When asked whether he felt a need to tell the police he thought he was in danger of suffering serious harm or whether he was scared that he had to kill somebody, he said, "No, that's not how I felt." R. 34, L. 4–5.

STANDARD OF REVIEW

South Carolina trial courts, when so moved, hold pretrial hearings to determine whether a defendant is entitled to immunity from prosecution under the Protection of Persons and Property Act ("the Act"). *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); S.C. Code Ann. §§ 16-11-410 to 450 (2015). The "court's ruling must be based solely on the evidence presented at [the] pretrial hearing . . . ." *State v. Cervantes-Pavon*, 426 S.C. 442, 452–53, 827 S.E.2d 564, 569 (2019). The appellate court reviews an immunity determination for abuse of discretion. *Id*. at 45, 791 S.E.2d at 151. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). "[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237–38 (Ct. App. 2014).

ARGUMENT

The Protection of Persons and Property Act ("The Act") provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2015); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (setting forth the procedure, standard of review, and burden of proof for an immunity determination).

To put it plainly, to obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance, to the trial court's satisfaction, or three of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance "stated simply is that evidence which convinces us as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

> (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; (3) if his defense is based upon his actual belief of imminent danger, a reasonably 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 life or sustaining serious bodily injury than to act as he did in this particular instance.

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

If the judge finds a defendant has failed to satisfy one of the first two elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("It is an axiomatic principle of law that the defense has not been established if any one element is disproven.") However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it

accordingly. S.C. Code §§16-11-440(A) and (B) (2015). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2015); *Jones*, 416 S.C. at 294–97, 301, 786 S.E.2d at 138–39, 142. If he proves all of the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *Douglas*, 411 S.C. at 320, 768 S.E.2d at 239.[1]

For the reasons that follow, the court properly denied Appellant immunity after considering all of the evidence presented and the arguments of the parties. Regardless of whether the trial court "set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of proof and made

[1] At the time of Appellant's October 14, 2019 immunity hearing, our appellate courts had not yet established the requirement that judges place their findings of fact and conclusions of law for each *individual* element of self-defense on the record. *See State v. Glenn*, 429 SC. 108, 117–18, 123, 838 S.E.2d 491, 496, 499 (2019); *State v. Curry*, 406 S.C 364, 375 n.3, 752 S.E.2d 263, 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 *Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)).

The trial court was not required to "follow th[e elemental structure] with precision" at the time, and appellate courts "glean[ed] from [trial court's orders] the necessary findings of fact to support the conclusion that [a defendant] has established the four elements of self-defense. *State v. Scott*, 424 S.C. at 463, 469, 819 S.E.2d 116, 118 (2018).

findings that supported its denial of immunity consistent with a correct application of this Court's precedent." *State v. Andrews*, 427 S.C. 178, 182, 830 S.E.2d 12, 14 (2019).

I.

The trial judge correctly denied Appellant's request for immunity under the Protection of Persons and Property Act because he was not without fault in bringing on the difficulty and had other probable means of avoiding it. He therefore did not meet his burden of proving the elements of self-defense by a preponderance of the evidence and analysis under S.C. Code § 16-11-440(C) was unnecessary. The trial judge correctly held Appellant had a duty to retreat before using deadly force.

The Appellant argues the trial judge improperly found he had a duty to retreat before firing his weapon and killing the victim. The State disagrees with this allegation of error. The trial judge correctly found Appellant had not met elements one and four of self-defense by a preponderance, and, as a result, had a duty to retreat before using deadly force.

Relevant Facts

Prior to trial, Appellant made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code. Ann. §§16-11-410 to 450 (2015) and the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). R. 4, L. 1–24. After the parties made their arguments, the judge denied Appellant immunity and sent the case to a jury. R. 137, L. 21–22. The hearing was held on October 14, 2019. R. 10, L. 6.

Walter Murrey's Testimony

Walter Murrey testified first at the pretrial immunity hearing. R. 3, L. 7–13, R. 10, L. 6. He said that when they were at the barbeque, Brandon Cummings approached their group and asked for a light. R. 15, L. 23–24. He related that even though he had never met Cummings before, R. 52, L. 15–17, he watched him "walk around the hotel both sides up and down the stairs going up to different rooms . . . one time he passed by he put his hands up like as if they were guns going like this, but I, I tried to pay it no mind." R. 16, L. 7–11, 14–16. Someone at the

cookout told him that Cummings was the one who had robbed Caleb Gomez of his marijuana money, but it came out later that it actually might have been Cummings' brother who had robbed him instead. R. 13, L. 2–6, R. 80, L. 13–25, R. 81, L. 1–25. Murrey admitted that he did not have an encounter with Cummings up close at the barbeque but only saw him "walking by us one time making like he was shooting at us." R. 54, L. 5–7.

> When the cookout ended, I went in my room. I disconnected the speaker from my phone. I got my headphones, put my headphones in, and I started talking to a friend on the phone, and I left out of my room. I didn't see the guys. So, I walk[ed] around the backside of the hotel to go to they room where they room is at. When I got to the first back corner, when I turned the corner, right when I turned the corner, Brandon was coming the opposite way.
>
> So we kind of met right on the corner, and he said what's up. I said what's up. He said what's up then. I said I'm just saying hey. I'm on the phone. And he said oh, that's what I thought. So I just kept walking . . . .

R. 18, L. 1–14.

Murrey said the hotel was shaped like a "U" and he had met Cummings on the corner maybe "a door or two doors past my room." R. 19, L. 6–8. He then proceeded around to the back of the hotel where his coworkers' room was. R. 19, L. 13.

> I kept walking. I got around the second corner. I got to Rafael and them room. I knock on they door. And so [there was] a guy come down the opposite side of the breezeway . . . . [I]t sounded like, in a gay voice, he said can I come in your room. That's his exact words. I was like what do you mean.

R. 19, L. 6–16, R. 54, L. 8–25, R. 55, L. 1–25.

"It made me scared." R. 55, L. 15–18. "I felt like, you know . . . he could be a real threat. Especially by his size." R. 67, L. 9–10. He did not know if the man was with Cummings. R. 67, L. 5–7. He then went back to his room a second time. R. 19, L. 21–25.

> When I went in my room, I put the gun in my pocket before I got back out cause I wanted to go to sleep. But then I wanted to make sure the guys was all right with all that happened at the hotel . . . . So when I left out the room, I already went the other way, and I didn't see nobody. So, at this time, I went the opposite way to see if I'll see them. So, that's when I went the opposite way, there's a breezeway coming up on my left.

R. 19, L. 20–25, R. 20, L. 20–24.

When he turned the corner, he saw Gomez backed up against the wall by the stairs and the ice machine talking to Cummings. R. 21, L. 1–3, 23, R. 22, L. 4.

Murrey stepped in and asked him whether he knew Gomez and Cummings said no so Murrey said, "[There is] no sense in arguing with somebody you don't know. Just leave." R. 21, L. 23. Rodriguez and Shelton, both of whom were Murrey's co-workers, were also there. R. 21, L. 4–19. Murrey said he stepped in because he wanted to be the peacemaker. R. 49, L. 7–8.

> [Rodriguez and Shelton] were pretty much behind [Cummings] in different areas, and I was kind of on the side of him and Caleb. So, soon as I walked up I can tell something wasn't right. So, I tried to deescalate whatever was going on.
>
> At that point he started back at Caleb again . . . to make the altercation worse, and I was like do you really know him. And then he said no again but still looking at Caleb like all the way up on him . . . . At that point it got silent for a couple seconds . . . and Rafael said why are you here . . . ?

R. 21, L. 4–25, R. 22, L. 1–10.

> [A] remark was made . . . [and] Brandon exploded saying this is my town. This my hotel. I run this. Y'all not from around here. They don't have no cameras. I'm going to be back. All you gonna hear is gunshots clapping his hands as he walked going past our room toward the back.

R. 22, L. 12–17.

> I was shaking, you know, because he had done been going in his pockets already . . . . [a]t that point, when I got towards the end corner of the building, he had done already disappeared. When I got to the corner, I seen him again coming back, and, fearing for my life. And when I – after I finish shooting, and I notice that he had done went down, I knew that was my opportunity to get to my room and safety . . . .

R. 23, L. 1–11, R. 24, L. 1–4.

When Murrey was asked whether Cummings was walking toward him at the time of the shooting, he said, "[i]t was hard to see. It was dark, but he had to [have] been coming back because he had done passed the corner . . . ." R. 24, L. 5–9. When asked whether he saw

anything in Cummings' hand, he said, "It looks like he had something, but it was so dark, you know, I took him at his word because, if he was telling the truth, that would be my life especially with him saying all you gonna hear is gunshots." R. 24, L. 10–14. He said he believed Cummings was armed. R. 24, L. 18–19.

On cross-examination, Murrey was asked how many rounds he fired and he said "seven rounds. I think I shot at least four or five times" with a .22 caliber gun he allegedly found in a hole in Augusta. R. 25, L. 20–25, R. 26, L. 8–14. He said he threw the gun into the woods after he got to his co-workers' room post-shooting. R. 32, L. 23–24, R. 33, L. 1–2. He admitted he did not talk to the police, or anyone for that matter, about his claim that he had to shoot Cummings to protect himself from May 17 to July 6, 2017. R. 39, L. 12–17, R. 46, L. 19–21. He said he was escorting Shelton, Rodriguez, and Gomez around the hotel because he was the only one armed, R. 36, L. 6, R. 3, L. 12, even though no one else knew he had a gun. R. 58, L. 8–9. "They were right behind me [when the shooting occurred]." R. 35, L. 23, R. 37. 15–17.

He said "[Brandon] say he was leaving or coming back to shoot us. He was on his way back. He had done left." R. 36, L. 20–21. He denied following Cummings and continued to insist he was "walking [his co-workers] to their room." R. 37, L. 1–12. "[J]ust in case he was serious, I walked them to their room so they could be safe before I go to my room." R. 37, L. 11–12. "And you didn't see a gun on Brandon?" "I don't know if he had a gun." R. 59, L. 14–15. "It was dark. I can't see good at night . . . I could see nothing but blurry people." R. 59, L. 14, 18, R. 70, L. 14–23. "I had to take him at his word cause that's my life." R. 59, L. 22. He said he shot "all at once" from ten to twelve feet away. R. 62, L. 18–23.

Caleb Gomez's Testimony

Caleb Gomez testified that he was 23 years old and he was from North Augusta. R. 71, L. 23–25. When asked about Cummings, he said:

> [T]here [was] a guy walking around the . . . hotel, and I asked him if he could give me some bud and he said yea . . . I gave him the money, and then he came into my car after having gone to get it, and he was kind of acting like he didn't . . . want to give it to me . . . he was sending me around in circles circling blocks . . . he was in my car. He wouldn't give me the weed and he wouldn't give me my money back.

R. 73, L. 1–25, R. 74, L. 4–5.

Gomez said he was drunk the night of the shooting and only heard the gunshots because he had said "f this shit" and started going back to his room after his encounter with Cummings. R. 83, L. 6–25, R. 84, L. 20–21. He made a "beeline" for his room and grabbed a bucket just in case he threw up from all of the alcohol. R. 84, L. 17, 22–23. Although he thought Cummings was going to rob, bully or intimidate him the night of the shooting – "Just the way his demeanor, his tone, the way he was looking at me, the way he was mocking us the whole time . . . he literally said he was going to send shots" – he didn't know where Cummings was and "didn't care" when he headed back to his room to go to bed. R. 75, L. 19–24, R. 76, L. 10–11, R. 83, L. 6–25. He said Cummings said he was going to *come back the next day* and "that he'd kill us." R. 82, L. 17–20 (emphasis added). He did not know Murrey had a gun and he did not talk to the police about what he had heard or seen. R. 85, L. 1–2, 5–7.

Rafael Rodriguez's Testimony

Rodriguez testified that he was 31 years old from Aiken. R. 91, L. 1–3. He said when he saw Cummings that night, "the vibe was already there" and Cummings was "all over the hotel." R. 93, L. 2–3, R. 94. L. 9–12. He said he had heard to watch out for "a skinny black male stealing things" in Sumter, and that Cummings made him afraid because of the clapping that

"makes you know that, that somebody's coming for you." R. 95, L. 20–22. Right before the shooting, he heard a threat and heard Cummings clapping his hands. R. 96, L. 11–14, R. 97, L. 10–16. He said he had asked Cummings to go away that night because he was a troublemaker, R. 107, L. 10–18, and that Cummings was in the process of leaving when Murrey followed him. R. 103, L. 14–25. He said he, too, had been drinking that night and was headed back to his room – the opposite way from Cummings – to go to bed when he heard the gunshots. R. 104, L. 14–16, R. 105, L. 12–15. He knew Murrey had shot Cummings but he, too, did not talk to the police that night. R. 97, L. 24–25, R. 100, L. 23–25.

Lashay Andrews' Testimony

Lashay Andrews testified she drove to the Quality Inn that night with her boyfriend, Brandon Cummings, whom she had known since she was a child. R. 100, L. 8–25. She dropped him off on the backside of the hotel so he could buy weed around 9:15 or 9:20 PM, and then walked to the hotel's restroom. R. 110, L. 16–21, R. 112, L. 2–5, 120, L. 4, 7–9 . When she returned to her car five minutes later, she saw Cummings walking down the outdoor steps toward her with Murrey. R. 112, L. 6–20. "[Murrey] was right up behind him." R. 174, L. 20–22.

> I saw – I heard commotion going on, but it's like Brandon. He argues, but he usually just be playing. And I heard the arguing and stuff, and I heard Brandon turning around and he was coming down the steps, but he was walking real fast, and Walter was walking real fast behind him . . . . [s]o, Brandon he was saying fuck you, nigga, and then he was like, you know, leave me alone. I'm 'bout to go. So that's when . . . Walter pulled out the gun and shot him the first time in the head. He went down.
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> I didn't want him to see me in the car, and he shot him . . . and ran off, and that's when I got out of the car. He said stop, man. He was holding his hand up while Walter was trailing behind him cause he was trying to get away from him, but Walter kept trying to walk fast. So, yeah, [Brandon held] . . . his hand up, and that's when he shot him in the head . . . and then [Murrey] ran like on the bottom part of the stairwell.

R. 112, L. 11–25, R. 113, L. 1, 8–14.

She said she had picked Murrey out of a second lineup. R. 124, L. 8–14.

Arguments and the Trial Court's Ruling

The State

The Solicitor argued immunity should be denied as Appellant chose to insert himself into an altercation that did not belong to him, and thus could not prove he was without fault in bringing on the difficulty. R. 135, L. 10–13. He also argued it should be denied because of the credibility issues and inconsistent testimony. R. 127, L. 5–13. "Judge, credibility, believability throughout." R. 127, L. 22. He concluded Murrey had a duty to retreat because even though the victim had been threatening them, he had begun to leave when he was told to do so by Rodriguez. "Numerous issues of credibility . . . it's a matter a jury should decide." R. 130, L. 20–23.

> The defendant [said] initially he was worried, and this was his own home – on alert being at the motel itself. But it wasn't even the victim that committed the robbery. Also the Defendant said that he was going to protect . . . and walk the other individuals to the room. *They* actually testified and said they went the other way through the breezeway.
>
> Clearly inconsistent testimony from the Defendant and his two witnesses who said they went to the breezeway to their room. They weren't following Walter Murrey as he headed down from the incident location from the encounter in the breezeway.

R. 127, L. 10–21 (emphasis added).

He argued Murrey threw his gun away and never attempted to talk to law enforcement. R. 128, L. 1–2. When he finally did talk to them, however, he denied being the shooter and said somebody else "could have done it." R. 128, L. 1–4. He highlighted the fact that Murrey lied about hearing gunshots and lied about the other guys walking with him to the corner right before the shooting when they were actually headed back to their rooms. The Solicitor argued Murrey could have just gone to bed, but instead got mad that the gay man was hitting on him and that made him angry [so he] got the gun. R. 128, L. 15–18. Eyewitness testimony confirmed Cummings said he'd be *back the next day* and said he was leaving. R. 129, L. 10–15 (emphasis added). Murrey shot

Cummings in the back of the head, which is not a defensive position but an offensive one. He concluded the argument by saying there was conflicting evidence regarding where Murrey hid the gun and his shirt after the shooting and that since Murrey had been up for 37 hours, he should have just gone to bed. Instead, however, he chose to insert himself into an altercation that did not belong to him, and was therefore not entitled to immunity. R. 135, L. 10–13.

The Defense

The defense argued that Cummings had threatened the entire group and that Murrey became armed for the protection of himself and others. R. 125, L. 6–25. He said Murrey was not buying or purchasing drugs, was at the hotel legally, and shot Cummings because he feared for his life. R. 126, L. 1–12. The defense argued Murrey's actions were reasonable because he had been up for 37 hours and had the right to defend himself. R. 132, L. 2–12. They argued Lashay Andrews was biased since the victim was her boyfriend and that they had met their burden of proving the elements of self-defense by a preponderance of the evidence. R. 134, L. 9–13.

The Trial Court's Ruling

The judge held he was not going to grant Appellant immunity:

> When I sit here without a jury, I am the fact finder, and then I have the right to rely upon assigning believability, which is credibility. I'm bothered by a lot of parsing of answers and questions by . . . those who testified for the Defendant. I'm troubled by changing versions of what happened. We hear from Caleb Gomez and he ended up his . . . testimony by simply agreeing, yeah, I was drunk that night . . . and you say well, none of this goes to the elements of . . . *Duncan* or the statute. But it goes to the element of credibility and believability.
>
> So I don't know how I can even cross the threshold or get to those elements when I have so much trouble believing so much of what was said that was contradictory at times, several times. And then, at the very end, we have a clash, a very divergent clash of versions of what happened. I don't find that . . . the Defendant met his burden of proof, which wasn't high. It wasn't that high. I would have preferred much straightforward testimony and answers to a lot of questions.
>
> But, if I were to cross over and get past that into the *Duncan* and statutory matters, it . . . troubles me that this happened in a breezeway. Not in, not in his room. Not even near his

> room. **And then it's the . . . statement made by Mr. Meadors that he interjected himself into it . . . I'm not sure he was entirely free of getting involved in this situation,** and to what degree he was involved. So for . . . those reasons . . . I respectfully deny the motion.

R. 136, L. 15–25, R. 137, L. 1–22 (emphasis added).[2]

The defense later renewed their motion under the Protection of Persons and Property Act, R. 439, L. 18–25, R. 440, L. 1–6, 17–25, R. 441, L. 14–16, and the judge again denied it, once again mentioning all of the contradictions in the testimony, and stating:

> I find . . . from the testimony I heard, which may be somewhat contradicted to your client's position, is that, when the shooting occurred, they were going towards the end of the motel, and your client had several opportunities to turn and go back into his room or another room.
>
> He did not. He kept going. I, I find that he had the chance, based on what he said by his testimony, that he could have turned around. He could have stopped, but he didn't do that. And then **I don't find . . . to use those magic three words, that he's, he's met his burden by the preponderance of the evidence on that issue.**

R. 447, L. 9–18, R. 448, L. 12–14 (emphasis added).

The defense then renewed their objection again. R. 447, L. 24–25, R. 448, L. 1–3.

Analysis

A. Appellant Did Not Met His Burden of Proving the Elements of Self-Defense

The Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. "Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). The trial court correctly found Appellant was not without fault in bringing on the difficulty as he was the aggressor. He inserted himself into an argument that was already going on, went and retrieved a loaded handgun, then

[2] The judge also said that even though Appellant had possessed a firearm as a felon that did not necessarily disqualify him from his right to act in self-defense under *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). R. 136, L. 12–14.

followed the victim away from the men he had been arguing with. The trial judge also correctly found Appellant had not shown he had no other probable means of avoiding the difficulty. Appellant went back to his room two times before shooting the victim, and the eyewitnesses who were involved in the argument with the victim before Appellant arrived testified they did not believe they needed to defend themselves against the victim at that precise moment, and were on the way back to their hotel room when they heard gunshots. Therefore, the trial court correctly concluded Appellant had a duty to retreat before using deadly force.

The trial court also correctly found Appellant did not meet his burden because of the amount of inconsistencies in the testimony. Appellant said the victim was advancing toward him when he fired but eyewitness testimony showed the victim was in the process of leaving when Appellant shot him in the back of the head. All of the witnesses except for Lashay Andrews were self-reportedly intoxicated that night. Appellant did not talk to investigators for almost two months, and then when he did, he lied and said he was not the shooter, but had heard gunshots. He later admitted he had lied and admitted to being the shooter. This Court should affirm.

i. Appellant was not without fault in bringing on the difficulty.

Appellant brought on the difficulty because he inserted himself into an altercation that was not his own. Therefore, the trial court correctly concluded Appellant did not prove he was without fault in bringing on the difficulty by a preponderance of the evidence. "[T]he [Castle Doctrine] rule is predicated on the absence of aggression or fault on [the defendant's] part in bringing on the difficulty; the doctrine is for defensive, and not offensive purposes." *State v. Grantham*, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). The *Bryant* court held that a defendant "who provokes or initiates an assault cannot escape criminal liability by invoking self-defense."

State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); *Williams*, 427 S.C. at 250–51, 830 S.E.2d at 906.

Appellant argued he was a peacemaker making peace, who had the duty to defend those around him from great bodily injury. However, the evidence does not support his argument. Appellant injected himself into an argument that was not his own by leaving his room for the second time with a loaded firearm to go look for his co-workers. He knew the victim was still at the hotel and decided to go and find him in order to "defend" his co-workers from him. Finding the victim arguing with his co-workers, Appellant approached and told the victim he did not need to be arguing with Gomez. That made the victim angry. Appellant then followed the victim away from the men he was purportedly defending after Rodriguez told the victim to leave. He executed the victim in a public breezeway nowhere near his co-workers' room or his own room. There was no evidence the victim advanced toward Appellant; the evidence showed Appellant shot the victim first in the back of the head and then three more times. Moreover, the men Appellant was purportedly "defending" testified they were on their way back to their room when they heard gunshots. The trial court correctly concluded Appellant was not without fault in bringing on the difficultly as it was unclear "to what degree he was involved" in the situation.

In *State v. Wigington*, a case with an extremely similar legal and factual framework, this Court found the appellant was not entitled to a self-defense charge because he had injected himself into a verbal argument between the victim and his daughter, thus making him not without fault in bringing on the difficulty. *State v. Wigington*, 375 S.C. 25, 32, 649 S.E.2d 185, 189 (Ct. App. 2007). Just like in this case, the appellant interrupted the argument between the victim and another, his daughter, told the victim he "needed to calm down and let [her] talk," and then was told by the victim "if you put your hands on me again, I'll kill you." *Id.* at 29, 649

S.E.2d at 187. (The appellant had put his hand on his shoulder.) The appellant then left the scene and retrieved a weapon. *Id.*

The appellant in *Wigington* testified he went to get the weapon because he had been the victim of criminal domestic violence at the hands of the victim in years past and he feared for his and his grandchild's safety. *Id*. at 30, 649 S.E.2d at 187. The appellant had the gun in his hand when the victim tried to grab it, at which point the appellant shot and killed him. *Id.* at 30–31, 649 S.E.2d at 187. The victim was unarmed and never advanced toward the appellant. *Id.* at 33, 649 S.E.2d at 189. The court found a self-defense charge was unwarranted because (1) the appellant was not without fault in bringing on the difficulty; and (2) that he had other probable ways to avoid the danger of death or serious bodily injury than to act as he did under the circumstance. *Id.* He also did not show a reasonable person would have feared serious bodily harm or loss of life from the victim's words and actions. *Id.* at 34–35, 649 S.E.2d at 189–90.

Unlike in *Wigington*, the Appellant here had not had prior contact with the victim so there was not any prior bad blood between them. Instead of retrieving his weapon because he had been the target of prior violence at the hands of the victim, he retrieved his weapon because he was afraid of the gay man he had encountered, had been up for 37 hours, and was angry that the victim had been arguing with his friends. The victim did not attempt to grab the gun from Appellant's hands and the victim never presented a firearm to Appellant. Like in *Wigington*, the victim was unarmed and testimony varies regarding whether the victim even ever advanced toward Appellant. Appellant went back to his room two times before he shot the victim and there was no evidence the victim was actually going to attack Appellant. Lashay Andrews testified the victim was telling him to leave him alone because he was "'bout to go." Therefore, like in

Wigington, this Court should uphold the trial court's finding that (1) Appellant was not without fault in bringing on the difficulty; and (2) that he had other probable ways to avoid the danger.

By contrast, in *State v. Dickey*, the court held the defendant had *no* duty to retreat because he was in the process of lawfully ejecting the highly intoxicated, aggressive victims from the property for which he was a security guard when they began advancing toward him for the purpose of assaulting him. *State v. Dickey*, 394 S.C. 491, 500–03, 716 S.E.2d 97, 101–02 (2011). The court found he fired in good faith and in self-defense as he was without fault in bringing on the difficulty and as the appellant only drew his gun after they began advancing toward him, one reaching in his pockets for what the appellant believed was a gun. *Id.* at 101–02, 716 S.E.2d at 500–01. Other factors considered by the court were the fact that there was a great disparity in the physical statute and capabilities between the victim and defendant and the fact that the defendant immediately called 911 before and after the shooting. *Id.*

Here, all of the witnesses except Appellant testified the victim was in the process of leaving when Appellant shot him. Appellant himself was not sure whether the victim was advancing toward him. "It was hard to see. It was dark, but he had to [have] been coming back because he had done passed the corner . . . ." When asked whether he saw anything in the victim's hand, he said, "It look[ed] like he had something, but it was so dark, you know, I took him at his word because, if he was telling the truth, that would be my life especially with him saying all you gonna hear is gunshots." Appellant admitted he couldn't "see good at night" and only saw "nothing but blurry people." Our Supreme Court correctly upheld the trial court's decision to grant immunity in *Dickey* because the evidence was uncontroverted that the victims were advancing toward the appellant when he fired and that the victim was without fault in

bringing on the difficulty. Here, the trial court correctly concluded that Appellant failed to prove either element and rightly denied immunity.

ii. Appellant had other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in that particular instance.

Not only did Appellant fail to prove element 1 of self-defense, he also failed to prove element 4. Therefore, the trial court correctly denied immunity. To prove element 4 of self-defense, a defendant must prove he had "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance" by a preponderance of the evidence. *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). If he has a way to retreat that would not increase his danger of being killed or suffering serious bodily injury, he must do so. *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). Granted, a defendant does not have to wait for his assailant to "get the drop on him" before employing force to defend himself. *State v. Harris*, 382 S.C. 107, 114, 674 S.E.2d 532, 536 (Ct. App. 2009); *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). However, it must be "apparent, or reasonably apparent [that] his assailant is taking steps to get the drop on him" before he takes steps himself. *Id.*

Here, Appellant went back to his room two times before retrieving the loaded firearm and there is no evidence showing the victim even knew where the Appellant's room was. Appellant could have simply remained in his room and successfully avoided all further conflict with the victim. Instead, Appellant went and searched for and found the victim a second time. The only evidence that goes toward whether retreating would have increased his danger of being killed or suffering serious bodily injury came from the Appellant's own testimony, and he himself was

unsure of whether the victim was actually advancing toward him when he fired his weapon. The right to fire in self-defense never arose, and the victim never presented a weapon. In fact, he was unarmed. It was not apparent or reasonably apparent that the victim was taking steps to get the drop on him because he was in the process of leaving and his argument had not even been with Appellant. Therefore, Appellant was not entitled to "take steps" himself.

The defense featured *State v. Rash* in their Initial Brief in order to show the Appellant had the right to act on appearances. *Rash*, 182 S.C. at 50, 188 S.E. at 458. However, even though the *Rash* court held "an accused has the right to act on appearances," and the "law does not hold [an accused] to a refined assessment of the danger," the court *upheld* the appellant's conviction for manslaughter. *Id.* at The victim in *Rash* had a reputation for violence with a special affinity for cutting people with a knife and that reputation was known to the appellant. *Id.* at 438. The record showed the victim was extremely under the influence when he cursed the appellant, a police officer, and produced a knife. *Id.* at 437. Our Supreme Court upheld appellant's conviction for shooting and killing the victim because the evidence differed greatly as to what happened after the victim produced a knife. *Id.* Did the victim's wife and daughter wrestle the knife away? Did the victim advance toward the appellant? It was unclear. *Id.* The court held the appellant did *not* reasonably act on appearances and upheld his conviction. *Id.*

In *State v. Fuller*, our Supreme Court found the trial judge erred in not charging the jury that the appellant had no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily harm. *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. The court also found the trial judge should have charged the jury that "words accompanied by hostile acts may establish self-defense." *Id.* The victim approached the appellant first and asked him what he was "trying to do to that white lady," after appellant asked the woman to move her vehicle that was

blocking an entrance to a road. *Id*. at 441, 377 S.E.2d at 329–30. After the victim told the appellant "he was going to take care" of him, the victim grabbed the appellant by the throat, and said "that is why we have got to take care of niggers like you." *Id.* The appellant fired a warning shot and attempted to drive away but came to a dead end. *Id.* at 442, 377 S.E.2d at 330. As he attempted to turn his vehicle around to leave, the victims opened the trunk of their car, blocked him in, then chased him in their vehicle. *Id.* at 442, 377 S.E.2d at 330. They then rammed appellant's vehicle with their truck in order to prevent him from getting out of the car, saying "we're going to take care of you." 297 S.C. at 442, 444, 337 S.E.2d at 330–31. The appellant testified he did not believe it was safe to leave his car and run from the scene because he likely would have been run over by the victim. *Id.* Appellant cautioned the men to stay in their car, but they began to exit, and, after he "saw something shiny" in one of the men's hands, he fired four shots at the men and killed them both. *Id.* No gun was recovered from the victims' truck. *Id.* The court held the appellant was entitled to a self-defense charge. *Id.* at 445, 377 S.E.2d at 331.

Here, there were no hostile acts that accompanied the victim's threatening words. Four men surrounded the one victim in the breezeway, which likely caused the victim to issue threats in order to get the men to back off. There is no evidence the victim said anything to Appellant right before the shooting except "leave me alone. I'm 'bout to go." Here, unlike in *Fuller*, Appellant approached the victim and inserted himself into the argument he was having with Caleb Gomez. The victim never put his hands on Appellant nor advanced toward him in any manner. There is no evidence to show Appellant had no other means to avoid the "danger." Therefore, the trial court correctly concluded Appellant had not met element 4 of self-defense and correctly denied immunity.

B. Section (C) of S.C. Code § 16-11-440 Applies

Here, the trial court correctly found Section (C) of the Act applied. Appellant was not within his residence, dwelling, or an occupied vehicle when he shot the victim. Instead, he was standing in a public breezeway of the hotel, nowhere near his room or any vehicle. Therefore, he was not entitled to a presumption of fear of imminent peril and the trial court correctly analyzed the facts under Section (C). As a result, he was required to prove that he believed he was in imminent danger of losing his life or sustaining serious bodily injury and that his belief was reasonable at the hearing in order for the judge to find he had no duty to retreat. However, the judge did not get to this part of the analysis, nor was he required to, because Appellant failed to prove two elements of self-defense. However, if this Court finds the judge did need to analyze Section (C), the trial judge did impliedly find the elements of Section (C) were not met as it was not clear the Appellant was actually attacked and concluded his belief of imminent danger was not reasonable, properly sending the case to the jury. This Court should affirm the trial court.

II.

The trial judge correctly based his decision to deny Appellant immunity on far more than conflicting evidence alone, including the Appellant and witnesses' credibility and believability, that Appellant had inserted himself into the argument, and that he had other probable means of avoiding the danger. However, even if the trial court had based his decision only on the conflicting evidence, he correctly concluded the Appellant failed to meet his burden by a preponderance *because* of the amount of conflicting evidence.

The defense argues the trial court sent the case to the jury based only on the fact that there was conflicting evidence presented at the hearing. The State disagrees with this allegation of error. As was discussed, the judge primarily sent the case to the jury because Appellant inserted himself into an argument that was not his own, thereby making him without fault in bringing on the difficulty; he failed to prove element 1 of self-defense by a preponderance of the evidence. The judge also found he did not prove element 4 of self-defense by a preponderance,

finding the Appellant had a duty to retreat because he had several, probable opportunities to avoid the danger by simply going back to his room. He also impliedly found the elements of Section (C) were not met as it was not clear the Appellant was actually attacked and concluded his belief of imminent danger was not reasonable, properly sending the case to the jury.

However, even if the judge had only found Appellant did not meet his burden because of the conflicting testimony, he properly ruled that Appellant had not met his burden *because* of the inconsistencies and this Court could affirm on that ground alone. The judge did not automatically send the case to the jury just because there were discrepancies. He made it clear the inconsistencies put the element of whether the Appellant was attacked under Section (C) of the Act into play because eyewitnesses testified the victim was in the process of leaving when the Appellant followed him and shot him, whereas the Appellant testified the victim was headed toward him when he shot him. When the judge analyzed the totality of the above evidence, and coupled it with the fact that all of the witnesses except Lashay Andrews were severely intoxicated when the shooting occurred, putting their credibility and believability in question, he correctly and specifically concluded the Appellant had not met his burden. The trial judge, as the fact-finder, appropriately weighed all of the evidence and based his detailed ruling on far *more* than conflicting evidence. Appellate courts may not reweigh evidence or second-guess witness credibility determinations; they must simply determine whether there is *any* evidence that supports the trial court's ruling. Here, the record shows there is evidence to support the judge's ruling. This Court should affirm the trial court.

Analysis

It is a trial court's job at an immunity hearing to determine whether the defendant has proven he is entitled to immunity by a preponderance. *Cervantes-Pavon*, 426 S.C. at 449, 827

S.E.2d at 567. Often situations arise where the victim and defendant have witnesses whose testimony conflicts substantially, and a judge, as the fact-finder, must weigh the evidence and reach a conclusion based on all of the evidence presented, and not automatically deny immunity just because conflicting evidence exists. *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13; *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569.[3] However, a defendant is most likely not entitled to immunity under the Act where defendant and eyewitness testimony is in direct conflict regarding whether the defendant was attacked because it makes it highly unlikely he will be able to carry his burden by a preponderance. *Curry*, 406 S.C. at 372–73, 752 S.E.2d at 267; *Andrews*, 427 S.C. at 182, 830 S.E.2d at 13–14. His job is to prove he acted in self-defense.

If a defendant himself gives contradictory statements, that creates an issue as to his credibility and believability, further subtracting from the amount of evidence that weighs in favor of his claim of self-defense. *State v. Butler*, 407 S.C. 376, 380, 755 S.E.2d 457, 459 (2014). The trial court, most notably, is not required to accept the accused's version of the facts at the immunity hearing. *Curry*, 406 S.C. at 266, 752 S.E.2d at 371. "The court must sit as the fact-finder at th[e] hearing, weigh the evidence presented, and reach a conclusion under the Act." *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. As long as the judge makes it clear that he is basing his decision to find the defendant has not proven entitlement to immunity by a preponderance *because* of the amount of conflicting evidence, and it can be inferred from the

[3] Respondent acknowledges and highlights the difference between *Curry*'s "quintessential jury question" factual scenario and the cases that followed it, namely *Cervantes-Pavon* and *Andrews*, which clarified a trial judge's responsibilities at an immunity hearing when there is conflicting evidence presented. *Curry*, 406 S.C. at 372, 406 S.E.2d at 267; *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569; *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13.

"[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." *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13.

record that all of the elements of self-defense and the appropriate section of the Act were analyzed by the judge (if applicable), if his decision is grounded in factual and legal conclusions that have any evidentiary support, appellate courts must leave the decision undisturbed.[4] *Jones*, 416 S.C. at 290, 786 S.E.2d at 136.

Appellate courts do "not re-evaluate the facts based on [their] own view of the preponderance," nor second-guess the trial court's assessment of witness credibility, but simply determine whether the trial court's ruling is supported by any evidence. *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009). "[T]he circuit court [must make] numerous factual findings based on its view of the evidence and credibility determination of the witnesses . . . . Although the testimony and evidence regarding the sequence of events is conflicting and muddled, the court generally defers to the credibility findings of the circuit court." *State v. Scott*, 420 S.C. 108, 115, 800 S.E.2d 793, 797 (Ct. App. 2017) (*modified on other grounds by State v. Scott*, 424 S.C. 463, 819 S.E.2d 116 (2018)). "[T]he circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 652–53, 661 S.E.2d 791, 796 (2008).

In *State v. Curry*, our Supreme Court upheld the trial court's decision to deny the defendant immunity because the testimony from the victim and defendant's witnesses varied substantially. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265.[5] The defendant's testimony that he

[4] "[W]hile the circuit court may not have 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." *Andrews*, 427 S.C. at 182, 830 S.E.2d at 14.

[5] The defendant moved for immunity under the Act at the directed verdict stage as *Duncan* had not yet been released when the hearing was held. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265.

pulled a gun because he believed the victim was lunging at him did not match the evidence, which showed the victim was shot six times in the back, and the defendant told investigators he "blacked out" during the shooting. *Id.* Our Supreme Court clarified its holding in *Curry* in *State v. Andrews*, finding that courts should not automatically deny immunity in cases with conflicting evidence, but should specifically make a finding that the defendant was not entitled to immunity *because* the conflicting evidence did not permit him to meet his burden of proof. *Andrews*, 427 S.C. at 178, 830 S.E.2d at 12 (immunity denied in a murder and possession of a weapon during the commission of a violent crime case when the appellant testified he shot the victim on the threshold of his home because he was attempting to reenter his home while eyewitnesses testified the victim was in the process of leaving when he was shot) (emphasis added).

However, even though it held that a case should not be submitted automatically, the *Andrews* court still upheld the trial court's decision to deny immunity at the pretrial hearing because the trial court properly placed on the record the defendant had not met his burden to prove the elements of self-defense by a preponderance *because* of the conflicting evidence. *Id.* at 180, 830 S.E.2d at 12–13 (emphasis added.) The record demonstrated the judge impliedly analyzed each element in making his decision. *Id.*

Almost identically, in this case, one of the reasons the trial court denied the Appellant immunity was because the testimony from the victim and defendant's witnesses varied substantially. The Appellant's testimony that the victim was coming toward him when he shot him did not match eyewitness testimony from Lashay Andrews that the victim was walking away from the Appellant when he was shot in the back of the head. The Appellant did not talk to investigators for two months, making his testimony less reliable as it was, but when he finally did talk to them, he initially lied and said he was not the shooter, only admitting he was almost

an hour into the interview. He initially said he "heard gunshots" but later admitted that that, too, was a lie. Therefore, this Court should similarly uphold the trial court's denial of immunity as the Appellant did not meet his burden of proving the elements of self-defense.

Perhaps most persuasively, this Court upheld the trial court's denial of immunity in *State v. Marshall*, a case decided two months before Appellant's trial. *State v. Marshall*, 428 S.C. 11, 832 S.E.2d 618 (Ct. App. 2019). In *Marshall*, this Court found the appellant did not meet his burden of proving he was entitled to immunity by a preponderance *because* of the amount of conflicting testimony and evidence presented, not because conflicting testimony existed in general. *Id.* at 20–21, 832 S.E.2d at 623 (emphasis added). As the court is not required to accept the movant's version of the facts, the court found the conflicting evidence showed the appellant could not establish he was without fault in bringing on the difficulty by a preponderance. *Id.* The appellant had gotten into an argument with the male victim. *Id.* at 14–15, 832 S.E.2d at 620. An argument had ensued between the victim and his girlfriend where he had gotten on top of her, put his hands around her throat, and positioned himself to strike her. *Id.* at 14, 832 S.E.2d at 620. The appellant told the victim to leave and he did, but the appellant followed him out of the apartment. *Id.* The appellant later saw the victim attempting to re-enter the apartment, so he approached him and the victim shoved him to the ground twice, knocking him into a tree, and striking him in the face while on top of him. *Id.* at 15, 832 S.E.2d at 620. The appellant was not physically able to get the victim off of him, and he testified he was afraid for his life and the life of the girlfriend. *Id.*

Nevertheless, the trial court denied immunity and this Court upheld that decision because there were too many inconsistencies in the testimony, causing the appellant to fail to prove self-defense by a preponderance. The inconsistencies included the distance they were apart when he

shot the victim, whether the appellant had had his glasses on when he fired, whether he was standing when he fired, whether he put the gun's clip in during the prior argument or after the victim shoved him, whether he fired continuously or stopped then resumed, and the major differences in the girlfriend's testimony versus the appellant's. *Id.* at 17, 832 S.E.2d at 621.

Correspondingly, in this case, the trial judge denied immunity because the quantity of conflicting evidence caused the Appellant to fail to meet his burden of proving all of the elements of self-defense, not merely because conflicting evidence existed. Lashay Andrews testified the Appellant was "right up behind him" when he shot Cummings, but the Appellant testified he was ten to twelve feet away when he shot him. Most notably, the Appellant testified he retrieved the gun *to* escort and *was* protecting and escorting his co-workers to their room when he shot Cummings, whereas they testified they were on their way back to their rooms while the Appellant followed Cummings the opposite way down the breezeway toward Andrews' car. Appellant testified he was in fear for his life because Cummings told him he would come back and shoot him that night, whereas eyewitness testimony revealed Cummings told them he would return *the next day*. Appellant's statement that Cummings was on his way back toward him directly conflicts with all of the witnesses' statements that Cummings was in the process of leaving when Appellant shot him. This Court should affirm the trial court's decision to deny immunity as Appellant failed to prove the elements of self-defense and/or Section (C) by a preponderance of the evidence.

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,

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Columbia, South Carolina

July 1, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-001795

THE STATE .....RESPONDENT

v.

WALTER MURREY.....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."

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