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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Letitia H. Verdin, Circuit Court Judge
Court of General Sessions

Opinion No. 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020).
Appellate Case No. 2021-000062

THE STATE, ...RESPONDENT,

v.

JOHN WILLIAM MCCARTY,..... PETITIONER.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MICHAEL D. ROSS
Assistant Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General

South Carolina Office of the
Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

W. Walter Wilkins, III
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err by holding "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role as fact finder" when the trial court found that whether the third party, on whose behalf Petitioner was interceding, was at fault in bringing on the difficulty presented a "quintessential jury question" under the Protection of Persons and Property Act?"

2. Did the Court of Appeals err by ruling, in the alternative, that the trial judge did not err by failing to find Petitioner was immune from prosecution under the Act where Petitioner proved by a preponderance of the evidence that he acted in defense of others?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred in upholding Judge Verdin's use of the phrase "quintessential jury question" in her Order denying immunity when she first weighed the evidence, asked questions on the record, and held Petitioner had not established the elements of self-defense by a preponderance of the evidence.

2. Whether the Court of Appeals properly held Judge Verdin had done her duty as fact-finder by denying immunity and sending the case to the jury after concluding the first element of self-defense – the person the defendant was defending was not without fault in bringing on the difficulty – had not been met by a preponderance.

STATEMENT OF THE CASE

Petitioner John McCarty was indicted for the July 2015 murder of Mitchell Bradley and possession of a weapon during the commission of a violent crime by the Pickens County Grand Jury in December of 2015. (R. 564–570; 2015-GS-39-02275 & -02276). Prior to trial, McCarty sought immunity from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. 16-11-410, *et. seq.* (R. 1–130). Petitioner specifically claimed his use of deadly force was lawful under subsection (A) of the Act because it was in defense of another: Randy Wilson. (R. 112–114). The State disagreed and argued section (A) did not apply; Mr. Bradley was an invited guest. Therefore, McCarty would have to prove two of the elements of Section (C): first that Mr. Wilson was without fault in bringing on the difficulty, and then second, if he proved that element sufficiently, establish a reasonable fear of great bodily injury or death. (R. 115–117, 119).

A full evidentiary hearing was held in February of 2017,[1] but the Honorable Letitia H. Verdin denied McCarty's request for immunity by written Order shortly after. (R. 132–135). She held Petitioner had failed to prove the first element of self-defense: that Mr. Wilson was not without fault in bringing on the difficulty. (R. 134). After proceeding to trial by jury, McCarty was found guilty as charged in October of 2017. (R. 138, R. 541–542). The court sentenced him to thirty years for murder and five concurrent years for the weapons charge. (R. 543–548).

Petitioner timely filed a notice of appeal. McCarty argued Judge Verdin abused her discretion by failing to resolve conflicting evidence presented at his hearing and erred by denying him immunity. The South Carolina Court of Appeals rejected both arguments in an unpublished opinion – without oral argument – in September of 2020, finding Judge Verdin did

[1] The case was prosecuted by Assistant Solicitors Baker Cleveland, Esq., and Britni McCall., Esq.; Petitioner was represented by Robert Newton, Esq. (R. 1).

not err in how she analyzed and held Petitioner had not met his burden. *State v. McCarty*, Op. No. 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020).

The Court of Appeals noted Judge Verdin had cited the correct burden of proof, had carefully considered the evidence, and had not abused her discretion in finding Petitioner failed to prove Wilson had not contributed to the difficulty. In reaching its conclusion, the court specifically found Judge Verdin's order lined up with *State v. Andrews*, 427 S.C. 178, 830 S.E.2d 12 (2019) (in which this Court distinguished *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013)),[2] and found Judge Verdin adhered to this Court's current guidance regarding how to handle immunity hearing determinations when conflicting evidence is presented: "[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; *McCarty*, 2020-UP-269 at 1. The court found Judge Verdin did not abdicate her role as fact finder and made had adequate conclusions. *Id.*

Petitioner filed a petition for rehearing in October of 2020, and the court denied it. He then filed a petition for writ of certiorari on January 19, 2021, and the State made its timely return the next month. This Court granted Petitioner a writ of certiorari in November of 2021. This brief of respondent follows.

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[2] Respondent notes the clear directional developments this Court has released since Petitioner was convicted regarding immunity hearings where conflicting evidence was presented. In *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), mentioned during the immunity hearing in this case, this Court only required a trial judge to consider the elements of self-defense in making its determinations, but did not require specific findings of facts and law to be placed on the record.

More recently, however, this Court issued its findings in *State v. Cervantes-Pavon*, 426 S.C. 442, 452, 837 S.E.2d 564, 569 (2019) and *State v. Andrews*, 427 S.C. 178, 830 S.E.2d 12 (2019). Both established the trial court must make those specific findings on the record in an effort to ensure trial courts were not automatically denying immunity just because conflicting evidence existed. Judge Verdin complied with the logic behind both opinions.

STATEMENT OF FACTS

The Shooting

Jacob Kirk moved to Liberty, South Carolina in 2013 to live with his long-time friends John McCarty and Randy Wilson. The three agreed Kirk would do odd jobs around the place in exchange for a rent-free place to live. The arrangement happily held for two years. Then, on July 15, 2015, Kirk decided to casually invite his 23-year-old brother Mitchell Bradley over to drink with him. By 7:00 PM that evening, the four men were together drinking: McCarty, wine; Wilson, liquor; and the younger boys, beer.[3] McCarty ate dinner and went to bed, while Wilson stayed up to call his niece. That is when things took a turn. (R. 4–24, R. 49–51, R. 85–86).

A misunderstanding soon arose between Kirk and Wilson over food Wilson had left in the microwave. Wilson, annoyed at the interruption, slammed his phone down, pointed at Kirk, and said, "I want you . . . off my property now." After the two had argued for a time, Kirk "shoulder bumped" Wilson, but even though it was an uncontrovertibly non-violent touch, Wilson still decided to call the police. Kirk began gathering his things to leave and Wilson went outside to fix the truck Kirk and Bradley were to leave in. Bradley remained in the background and attempted to calm Kirk down. Although they wanted to leave, neither wanted to drive drunk, so they decided to wait awhile. (R. 13–14, 33, 87–91).

Deputies Williamson and Gibson with the Pickens County Sheriff's Office responded to Wilson's 911 call and observed Wilson, Kirk, and Bradley were intoxicated. Williamson informed Wilson that he had no power under the law to make either of the boys leave because Kirk was a resident of the mobile home and Bradley was his invited guest. Both officers

[3] Jacob Kirk testified Randy Wilson consumed approximately one pint of Southern Comfort liquor, he and Mitchell had consumed approximately ten beers a piece, but did not testify to how much McCarty had had to drink, only testifying he drank homemade wine. (R. 87–88).

remained on scene for twenty minutes but left once they concluded the parties had sufficiently calmed down. As they were leaving, however, Wilson yelled they "would have to come back." Sure enough, the argument immediately escalated as soon as the deputies drove off the property. (R. 79–82, R. 87–88).

Randy Wilson returned to the truck to finish fixing it, and Kirk said, "See, just because it's your property doesn't mean that you get to control everything that goes on here." Wilson threw down his tool, walked up to the porch, and began throwing Bradley's things around. He specifically opened a package of cigarettes, crumpled them up, and threw them all over the porch and the ground. Wilson also began to pour out Bradley's beers. Bradley walked up to him and said, "stop f'ing with my S, Randy." (State's Exhibit 3, State's Exhibit 5, and State's Exhibit 7 (photographs); R. 92–93, R. 106–107).

He then "grabbed" Wilson, who also grabbed him back. Bradley responded by pushing Wilson down a small set of stairs on the trailer's back porch, breaking a bone in Wilson's foot. Wilson moved back to the porch, and Bradley followed. Wilson then slapped another beer out of his hand. Bradley responded by shoving him into a corner. Wilson called for Petitioner McCarty to help him, (who had been asleep), and Bradley began to pop Wilson's face with his open hand, saying, "What you hollering for [Petitioner] for Randy?" Bradley had Wilson in the corner for "20 to 30 seconds," and neither men were hitting one another all that hard. (R. 96).

Instead of attempting to come outside, (Wilson and Mitchell were near the door on the deck), McCarty instead retrieved his 9mm pistol and fired a warning shot into the floor.[4 & 5] This

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[4] "I don't remember him struggling [to get out the door.] He might have pushed it open one time and jumped back in, but it was, like, that quick. I mean, it all happened so fast." "Not a sincere struggle. It was just like one push." (R. 97).

[5] Although Petitioner stated he fired a warning shot before shooting Mitchell, the solicitor asked him on cross-examination whether he told the police that the gun accidentally discharged when

allowed Wilson time to throw a punch and push Bradley off him, down the stairs, and up against the outdoor fridge. (State's Exhibits 2, 4, and 6; R. 16, R. 92–96, R. 106–107).

Petitioner McCarty, however, still fired two additional shots thorough the window and struck Bradley in the torso, immediately killing him. The police had only been gone for five minutes. Wilson, who later found out his only injury was to that of his foot, performed CPR on Bradley and told the officers, "John didn't mean to shoot Mitchell." (State's Exhibit 1). Petitioner did not attempt to render aid to Wilson or Bradley: the officers found him standing quietly in the kitchen. (R. 21, R. 53–55, 60, R. 71, R. 82–83, R. 95–97, R. 100).

Immunity Hearing

Upon the Petitioner's motion for immunity under the Protection of Persons and Property Act, a hearing was held on February 23, 2017, before the Honorable Letitia H. Verdin pursuant to *State v. Duncan.*[6] (R. 1–130). The judge heard testimony from five witnesses, including the Petitioner, and heard closing arguments from both the defense and the prosecution. *Id.* [7]

The State argued Randy Wilson had brought on the difficulty with Mitchell Bradley and that the defense had not met their burden of proving that element of self-defense by a preponderance of the evidence. (R. 118). Bradley had a right to be on the property, as he was an invited guest, and *State v. Curry* applied in determining whether he had a right to be there even though he had been asked to leave. (R. 75–77, R. 115–116). "I don't think there's any proof. I

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he was trying to open the back door. (R. 59). Petitioner responded, "I'm still not sure to this day because I was fighting with trying to get the door open and trying to sit there and get through the door. I had my gun in my hand at the door. That's the same thing as what I told the officer that day. I wasn't sure." (R. 59).

[6] *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

[7] The witnesses were Randy Wilson, John McCarty, Deputies Joey Williamson and Brian Gibson with the Pickens County Sheriff's Office, and Jacob Kirk.

think it's a jury question as to whether Randy is one without fault, whether he had the right to exert self-defense, himself." (R. 77). They argued Wilson engaged in unlawful activity by destroying Bradley's property and doing things to "egg this situation on." (R. 117). "All we've got is two . . . grossly intoxicated individuals engaged in a fist fight from which no injuries . . . no gross threat came from. Yet, Mr. McCarty jumped straight to using deadly force." (R. 117).

The defense argued Section (A) of the Act applied in addition to Section (C). (R. 112–114). Petitioner McCarty had a right to the presumption of reasonable fear as Bradley was not in a place he had the right to be even though law enforcement told the boys they did not need to leave as they were invited guests. "Randy Wilson had every right to ask Mitchell Bradley to leave the house. He should have left at that point." (R. 112). "An invitation to a guest can be revoked at any time." (R. 114). They argued Mitchell Bradley pursued, attacked, and physically assaulted Wilson to the point where McCarty had the right to exercise deadly force in defense of Wilson. (R. 113). That deadly force was the only reasonable alternative to save Wilson from serious bodily injury. (R. 114). "You've heard the testimony about his condition, his weak condition, his weak neck . . . ." (R. 113).

The State argued immunity only applied at this stage if the defense proved Wilson had not done anything to bring on the difficulty and argued they had not done so by a preponderance of the evidence. (R. 118). "I think it could be completely reasonable to say that two people watching two drunks having a fight [] is not reasonable to pull a gun and shoot and kill the one they wanted to lose the fight." (R. 118).

Randy Wilson testified he feared for his life because he had suffered a neck injury years before, and was afraid Bradley pinning him down in the corner of the porch would further exacerbate that injury. (R. 1, R. 4–47). Jacob Kirk testified that mutual combat had occurred, and

that he did not think it was a serious fight: Wilson had incited the argument and had destroyed some of Bradley's property that was on the back porch, which caused Bradley to react and shove Wilson down the steps. Wilson then slapped Bradley's beer out of his hand and climbed the porch stairs again, which caused Bradley to shove Wilson into the corner of the porch. Kirk told the court he was aware of Wilson's prior injuries and would have stepped in to stop the fight if Bradley began to seriously injure Wilson. "I never saw Randy as fragile." (R. 84–109).

The witnesses gave similar testimony in general. However, the witnesses differed on several key points: First, Wilson claimed he had never touched Bradley's property (cigarettes, etc.) while Kirk testified Wilson rummaged through Bradley's things and threw cigarettes around before Bradley pushed Wilson off the steps. (R. 42, R. 92, R. 106–107). State's Exhibits 3, 4, and 7 (photographs) were presented at the hearing in support of Kirk's testimony, showing an open box of cigarettes on the deck and cigarettes on the ground past the deck's steps. Second, Wilson claimed that Bradley restarted the altercation after the police left when he went back to work on the truck. (R. 15). Wilson testified he had accidentally knocked over Bradley's beer and claimed Bradley had then "lost it," grabbing him by the arm, and slinging him around. (R. 14). On the other hand, Kirk testified Wilson had instigated "the entire thing from start to finish." (R. 105).

Kirk and Wilson also disagreed over the degree of danger Wilson faced before Petitioner shot and killed Mitchell Bradley. Wilson testified to the neck injury he sustained in 1980 after being hit by a car, and claimed his neck had prevented him from working. (R. 6). Because of this injury, Wilson testified he feared for his life when Mitchell "began pushing on [his] face" and "twisting [his] neck." (R. 38). McCarty testified he heard Wilson's "life or death" cry for help, and believed deadly force was necessary to save Wilson's life because of this injury. (R. 51, 54).

However, Jacob Kirk testified he did not believe Wilson was as fragile as he said. He had seen Wilson fight McCarty several times in the past and boast of his fighting skills. He even saw McCarty previously put Wilson into a headlock. (R. 98, R. 101). As a result, Kirk did not think either Wilson or Bradley were in danger of sustaining a serious injury. He testified he would have intervened if he thought either of them were. (R. 96, R. 98–99, R. 101.) Wilson was, in fact, able to push Bradley off of him and down onto the refrigerator before McCarty shot him. (R. 96).

Judge Verdin asked both the defense and the State questions as the hearing progressed, demonstrating she understood stand your ground law, the Petitioner's burden of proof, and her duty to find whether Petitioner had met his burden of proving the elements of self-defense. (R. 112–128). She took matters under advisement at the conclusion of the hearing. (R. 128).
The Petitioner renewed his motion for immunity after the State rested at trial but did not ask Judge Verdin to clarify her rulings or address his remaining allegations. (R. 389). Judge Verdin denied his motion, stating, "I stand by my previous ruling." (R. 389).

Judge Verdin's Order Denying Immunity

The Honorable Letitia H. Verdin issued an Order denying immunity on April 11, 2017. (R. 132–135). In it, she established findings of fact and stated her job was to analyze the elements of self-defense and S.C. Code § 16-11-440(C) and then conclude whether Petitioner had convinced her of the truth of the elements by a preponderance of the evidence. (R. 132–135). "[T]he core facts are largely uncontested." (R. 132.) She specified the most recent case that provided trial courts guidance on how to apply Section (C) in the event of conflicting testimony was *State v. Curry*, 752 S.E.2d 263, 266 (S.C. 2013) (R. 134).

She went on to point out how South Carolina law allowed individuals to act in defense of others if "the person being protected would have had the right to kill the assailant in self-

defense,"[8] and rightly established it was Petitioner's burden to prove that he had a right to act in defense of others. (R. 134). "The determination must include an analysis of Wilson's right to act in self-defense, if any, as Wilson was the person the Defendant argues he was attempting to defend." (R. 134). Judge Verdin ultimately concluded Petitioner was not entitled to immunity because she was not convinced Wilson was without fault in bringing on the difficulty; the record showed Wilson instigated the argument and continued to act to egg it on. (R. 134). "Since this issue is dispositive, the Court need not consider the other elements of self-defense." (R. 134).

She *then* began a new paragraph and separately concluded, "[t]he evidence presented conflicting views as to Randy Wilsons's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury." (R. 135). She stated the issue of "whether or not a defendant is without fault in bringing on the difficulty presents a 'quintessential jury question,'" following the current law laid out in *Curry*. (R. 134).

[8] *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997).

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. *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 appellate court reviews an immunity determination for abuse of discretion. *Manning*, 418 S.C. at 45, 791 S.E.2d at 151. Such abuse occurs when a trial court bases its ruling on an error of law, or when it issues factual conclusions that 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, 237–238 (Ct. App. 2014) (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–167 (2007).

ARGUMENT

The Protection of Persons and Property 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); *Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (setting forth the procedure, standard of review, and burden of proof for an immunity determination). By passing the Act, the Legislature intended to allow law-abiding citizens, their families, and others to protect themselves from intruders and attackers without fear of prosecution. S.C. Code § 16-11-420(B). "[N]o person or victim of crime should be required to surrender his personal safety to a criminal . . . ." S.C. Code § 16-11-420(E).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative or bystander would likewise have the right to take the life of the assailant in self-defense." *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 568. "Where a house [or] premises . . . is jointly occupied, used, and possessed by two persons, as by partners, joint tenants, or tenants in common, each joint occupant, being equally entitled to possession, need not retreat when attacked while in the building or premises by the other joint occupant." *State v. Gordon*, 128 S.C. 422, 426, 122 S.E. 501, 502 (1924). An invited guest of a resident has an equal right to be in the dwelling or premises as the resident. S.C. Code Ann § 16-11-440(B).[9] "The 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); *Curry*, 406 S.C. at 371, 406 S.E.2d at 266.

[9] *See generally State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019) (finding the appellant's argument for immunity failed solely on the issue of whether he had a right to be there).

To obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance of the evidence, 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.[10] *Glenn*, 429 S.C. at 108, 838 S.E.2d at 491. 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). A defendant must prove his argument carries the day by "the greater weight of the evidence not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force." Black's Law Dictionary (9th ed. 2009).[11]

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 or she may deny immunity and the case proceeds. *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

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[10] Section (A) sets forth when a person is presumed to have a reasonable fear of imminent death; Section (B) establishes when that presumption does not apply; and Section (C) establishes when a person has no duty to retreat before using deadly force.

[11] A preponderance of the evidence is, "Superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issuer rather than the other." *Id.*

been established if any one element is disproven."). A judge is not required to accept the accused's version of the underlying facts in making his or her determination. *Curry*, 406 S.C. at 371, 752 S.E.2d at 371. If the place of the incident was a place the victim also had an equal right to be when the deadly force was exercised, the defendant is not entitled to the presumption of reasonable fear from Sections (A) and (B) and must apply and analyze not only the elements of self-defense above, but also prove those of Section (C) at his hearing:

> **(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 a defendant convinces the judge that his version of the facts are more believable, by the greater weight of the evidence, the court must grant immunity. *Id.* As long as the appellate court can discern a legally correct basis on which the court relied, it should affirm the trial court. *Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569. "The appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *State v. Winkler*, 388 S.C. 574, 582–583, 698 S.E.2d 596, 601 (2010).

I. Judge Verdin based her denial of immunity on evidence in the record and correctly found Petitioner had not presented enough evidence to convince her that Wilson was without fault in bringing on the difficulty. She analyzed the elements and made her ruling; only then did she address the conflicting evidence.

Mitchell Bradley was neither a criminal, an intruder on McCarty's property, or an attacker; he was an invited guest. Petitioner now argues he is entitled to relief because Judge Verdin abused her discretion by using the now-taboo words "quintessential jury question" in her Order denying immunity. The State disagrees and submits Petitioner's argument is without merit. Judge Verdin first set out the correct burden of proof and rightly considered the evidence before concluding Petitioner had failed to meet his burden. Only then did she conclude the evidence also presented a jury question. As the self-defense element "he was without fault in bringing on the difficulty" is presented first in the list, and Judge Verdin found Petitioner failed to prove it, she did not have the legal duty to analyze the remaining elements of self-defense.[12]

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which an appellate court reviews under an abuse of discretion standard of review." *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. 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. *Jones*, 4116 S.C. at 290, 786 S.E.2d at 136. "[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." *Douglas*, 411 S.C. at 316, 768 S.E.2d at 237–238.

The South Carolina Court of Appeals correctly upheld Judge Verdin's denial of immunity in September of 2020. *State v. McCarty*, 2020-UP-269 at 1. As the fact-finder, she considered the

[12] *Bixby, supra.*

evidence and found McCarty had failed to meet his burden of proof, or, convince her of the truth of his assertion: that Wilson was without fault in bringing on the difficulty. As she correctly analyzed the elements of self-defense and reached a factual and legal conclusion, it was not an abuse of her discretion to then acknowledge the wisdom and necessity of allowing a jury to also wrestle with the evidence at his trial: McCarty's second chance at proving self-defense. "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). If, on the other hand, she *was* to only hear the evidence and then merely conclude a "quintessential jury question" had arisen, that *would* be an error of law under this Court's holding in *Andrews*. However, the correctly Court of Appeals found Judge Verdin made a conclusion after weighing the evidence herself, and properly upheld her Order.

In *State v. Cervantes-Pavon*, this Court held that trial courts are not required to automatically deny immunity just because conflicting evidence exists. *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 469. "The court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act. Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go to trial . . . ." *Id.* Read as a whole, and considering the Order along with Judge Verdin's questions during the hearing, the Order reveals she sat as the fact-finder, weighed the evidence, and applied the correct burden of proof. Her words confirm she understood her role as fact-finder and did not automatically send the case to a jury just because conflicting evidence existed. Instead, her words demonstrate Petitioner failed to convince her that he was entitled to immunity by the greater weight of the evidence. He failed to meet his burden.

Petitioner argues Judge Verdin had a duty to make credibility findings to the extent there was conflicting evidence during the immunity hearings. (Petition at 14). He does not cite legal precedent to back up his credibility findings claim. Although express credibility findings of the type Petitioner demands may be a wise practice, there is no legal duty requiring them and their absence would not constitute an abuse of discretion. Controlling precedent simply provides the circuit court must "sit as the fact finder," "weigh the evidence," and "reach a conclusion."

However, in her denial of immunity, Judge Verdin did implicitly rule on the credibility of the witnesses. The court only heard two versions of events: Jacob Kirk claimed Randy Wilson was at fault, and Randy Wilson claimed Mitchell Bradley was at fault in bringing on the difficulty. "While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts . . . ." *Cervantes-Pavon*, 426 S.C. at 452, 827 S.E.2d at 569. To deny immunity, the court would *have* to find Kirk's version of events more credible than Wilson's.[13] The record shows that both Wilson and Bradley instigated and continued the argument at different times during the evening; however, when the police left, Wilson shouted back at them, "you'll have to come back." This indicated he was anticipating further violence and, sure enough, he did in fact continue the argument immediately after the police departed. He was not without fault in bringing on the difficulty.

Thus, the court's credibility assessment is evident from the words, "We find the Defendant failed to meet his burden because he did not prove Wilson was without fault in bringing on the difficulty." Simply put, the circuit court need not "show its work" as if it were solving a high school math problem. Judge Verdin placed the specific findings of fact and

[13] Petitioner McCarty conceded on cross-examination that he did not know who was at fault in bringing about the conflict. (R. 60).

conclusions of law on the record this Court requires: she identified the element Petitioner did not meet and held Petitioner had not met his burden in meeting it. She demonstrated she weighed the evidence by the questions she asked during the hearing and stated she was not convinced Wilson was faultless because of the conflicting evidence in the record, as stated above. As Judge Verdin's conclusions are supported the record, this Court should not attempt to reweigh the credibility of the witnesses or assess whether the Petitioner really did meet his burden of proof.

In *State v. Andrews*, the parties both presented conflicting accounts of a homicide at an immunity hearing. *Andrews*, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018). It was unclear whether the defendant followed the victim out of the home or whether the victim was forcing his way into the defendant's home when the defendant exercised lethal force. *Id.* at 309, 818 S.E.2d at 230. The trial court held the defendant had failed to meet his burden of proof, noting that inconsistent witness testimony created a jury question. *Id.* at 311, 818 S.E.2d at 231. On appeal, the defendant argued the circuit court had a duty to make credibility findings on the record because conflicting testimony existed. He also argued the circuit erred in ruling the inconsistent testimony made the claim of self-defense a "quintessential jury question." *Id.* at 314–315, 818 S.E.2d at 233.

This Court disagreed with both arguments, finding the "circuit court properly submitted the case to the jury." *Id.* at 316, 818 S.E.2d at 234. In other words, the circuit court's finding that the inconsistent testimony created a "quintessential jury question" did *not* indicate that the court failed to act as a fact-finder at the immunity hearing. Instead, the finding indicated that he was not immune from prosecution *because* the defendant failed to prove his case at hearing. As such, his claim presented a question for the jury. *Id.* at 315, 818 S.E.2d at 234. This case presents an identical situation and should be upheld for the same reason. The circuit court sat as fact-finder,

weighed the evidence, and reached a conclusion in this case. Petitioner has taken portions of the circuit court order out of context and attempts to derive a meaning that is inconsistent with both the plain text of the Order and the court's statements at the hearing. Read as a whole, the circuit court Order applies the correct burden of proof and aligns with controlling precedent.

II. Judge Verdin rightly denied immunity after finding Petitioner failed to prove the first element of self-defense. An individual who provokes or initiates an assault cannot claim self-defense or immunity under the Act.

Petitioner argues he presented enough evidence to be entitled to immunity under the Act at the hearing, and that the Court of Appeals erred in upholding Judge Verdin's denial of immunity. The State disagrees and submits Petitioner's argument is without merit. An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Stated differently, "any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for homicide." *Id.* The State presented evidence that Wilson was rummaging through and throwing Bradley's cigarettes on the ground. While not the worst crime in history, that is still unlawful and "reasonably calculated to produce the occasion." Wilson knew it would stir up anger in Bradley.

Moreover, "the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." *State v. Strickland*, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010) (quoting *State v. Woodham*, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931)). The record demonstrates Wilson raised his voice at Kirk first after Kirk interrupted his phone call to ask about the food in the microwave. He continued to yell at Bradley (*See* Defense Exhibit #2: the 911 call) and provoke him by dumping his beer or beers out, smacking another beer out

of his hand, tossing his cigarettes all over the ground, grabbing Bradley, and, in general, not withdrawing from the altercation. Jacob Kirk testified that "Randy was instigating the entire thing from start to finish . . . by the way that he was speaking to [us], nagging us on physically, verbally." (R. 105–106). Simply put, Wilson started the conflict that ultimately led to Petitioner's use of deadly force. Wilson did not sustain any injuries but for a few scrapes and a broken bone in his foot. (*See* State's Exhibit 1). Wilson was not reasonably in danger of serious bodily harm. Wilson likely failed to meet his burden of proving *any* of the elements of self-defense on behalf of the petitioner. However, here, the Court of Appeals rightly upheld Judge Verdin's holding that Petitioner failed to meet his burden of proving the first element alone: as Petitioner asserted he used lethal force in defense of Wilson, Petitioner had to prove Wilson did not start or instigate the argument with Bradley. Judge Verdin was not convinced.

The Court of Appeals found Judge Verdin had not abused her discretion because the court's ruling had evidentiary support. *McCarty*, 2020-UP-269 at 2. Therefore, the ruling that Petitioner failed to prove his burden regarding element one of self-defense should be upheld. *See, e.g., State v. Jones*, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016) ("Under this Court's deferential standard of review, we hold there is evidence to support the [circuit court's] findings as to each element of self-defense.").

In assessing whether Wilson's conduct "was reasonably calculated to produce the occasion," this Court's opinion in *State v. Strickland*, 389 S.C. 210, 697 S.E.2d 681, is instructive. In *Strickland*, the defendant was charged with murder arising from a family dispute. The defendant was arguing with his wife at her father's trailer. The wife's brother intervened, stating, "I'm not going to have this in my daddy's house." The defendant told the brother to "shut your fucking mouth" at which point the father attacked the defendant. During the ensuing

fight, the defendant killed the brother and injured the father. On appeal, he argued that the circuit court erred in denying his motion for a directed verdict because he established self-defense as a matter of law. *Strickland*, 389 S.C. at 212–213, 697 S.E.2d at 682–683.

This Court disagreed, noting that the defendant was not without fault in bringing about the difficulty. The fact-finder, in this case the jury, could have concluded that the defendant's statement to "shut your fucking mouth" might reasonably be expected to bring on the difficulty. *Id.* at 215, 697 S.E.2d at 684. As such, there was evidentiary support to find he was at fault in bringing about the difficulty.

Like in *Strickland*, this case has evidentiary support to find Randy Wilson was at fault in bringing about the difficulty. Randy's actions are similar to the words used in *Strickland* in that both will provoke conflict. Although in an ideal world someone would shrug off Randy's actions, in the real world one can reasonably expect Randy's conduct to start a fight. Randy had no one to blame for Mitchell Bradley's response but himself. Therefore, the circuit court's ruling had evidentiary support and should be upheld on appeal.

As argued above, once the judge found Petitioner had failed to prove one singular element of self-defense, she was correct to deny immunity right then and there, with no further duty to analyze the rest of the elements of self-defense. *Bixby, supra.* Judge Verdin believed Jacob Kirk's account of Randy Wilson's actions, and implicitly found Wilson had not proven by the greater weight of the evidence that he had nothing to do with starting or instigating the argument with Bradley. Therefore, the Court of Appeals correctly upheld her rulings, finding they were supported by evidence in the record. This Court should do the same.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the Court affirm the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MICHAEL D. ROSS
Assistant Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

W. Walter Wilkins, III
Solicitor, Thirteenth Judicial Circuit

BY: s/Julianna E. Battenfield

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

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina

January 31, 2022

MICHAEL D. ROSS
Assistant Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

W. Walter Wilkins, III
Solicitor, Thirteenth Judicial Circuit

BY: s/Julianna E. Battenfield

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