THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
George C. James, Jr., Third Judicial Circuit Judge

Case No.: 2010-GS-43-1239
Appellate Case No.: 2012-212546

The State of South Carolina, ...Respondent,

v.

Christopher Wayne Gainey, ...Appellant.

FINAL BRIEF OF APPELLANT

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Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT APPELLANT WAS IMMUNE FROM PROSECUTION FOR USING DEADLY FORCE UNDER THE PROTECTION OF PERSONS AND PROPERTY ACT WHEN APPELLANT WAS NOT ENGAGED IN UNLAWFUL ACTIVITY AND WAS ATTACKED WITH DEADLY FORCE AND FEARED FOR HIS LIFE IN A PLACE WHERE HE HAD THE RIGHT TO BE?

STATEMENT OF THE CASE

On October 28, 2010 the Grand Jurors of Sumter County returned an indictment charging the Appellant, Christopher Wayne Gainey, with attempted murder (Indictment No. 2010-GS-43-1239). On July 16, 2012, the State called the Indictment for trial. After selection of the jury, but prior to the swearing of the jury, Appellant made several pre-trial motions, one of which was to dismiss the indictment on the basis that he was immune from prosecution under the Protection of Persons and Property Act. S.C. Code § 16-11-440(C) (Supp. 2010).

On July 17, 2012, the Court denied Appellant's motion to dismiss the indictment based on immunity. The Appellant immediately appealed the denial of the motion.

FACTS

On or about July 11, 2010, the Appellant, Christopher Wayne Gainey, his common-law wife, Kimberly Compton, her brother James Michael Compton, the alleged victim in this case, and a family friend, Christopher Hunter had gathered at the home of the Appellant and began drinking alcohol. (R. p. 16, line 3-18, line 1). After the parties had consumed all of the alcohol in the home, they decided to go to Scott's Place, a local

bar, so that they could continue to drink alcohol. (R. p. 18, line 24–p. 20, line 19). James Michael Compton drove the parties to the bar in his truck.

At Scott's Place the group of friends continued to heavily consume alcohol to the point that by the time they left the bar, Kimberly Compton and Christopher Hunter were both passed out and were asleep in the back of the truck. (R. p. 20, line 20–p. 23, line 12). Throughout the night of drinking, James Michael Compton began to tell Appellant how he used to hate him and wanted to kill him while alternately squeezing appellants neck and hugging him. (R. p. 23, line 13–p. 25, line 14). Appellant and Compton eventually left the bar after being refused services and Compton drove the parties to Appellant's home with Kimberly Compton and Christopher Hunter still asleep in the back seat of the truck. (R. p. 25, line 15–p. 26, line 13).

Appellant testified that when the parties arrived at Appellant's home, Appellant exited the vehicle and attempted to go into his home. James Michael Compton followed him, and when Appellant was on the steps to enter the door, James Michael Compton began to threaten Appellant, and ripped off a large wooden piece of board from the stairs railing. (R. p. 26, line 25–p. 29, line 23). Appellant then turned his back attempting to enter his home and avoid Compton, and was then struck twice in the back with the wooden board. Appellant, now in fear for his life, picked up a piece of the board to defend himself from the railing broken off by Compton. (R. p. 30, line 24–p. 31, line 23). During the fight, Appellant was struck at least two times by Compton. Appellant retaliated striking Compton in the head at least three times.

Kimberly Compton, a witness for the state, testified at the hearing that she heard an argument between the Appellant and James Michael Compton, but couldn't really say

what happened. That she saw Appellant hit James Michael Compton one time with the board and did not know if James Michael Compton ever hit Appellant with a board.

On July 13, 2010, three days after the incident, Kimberly Compton gave law enforcement a written statement indicating that Appellant and James Michael Compton were getting along fine but when she tried to get into the house, they started arguing and she saw James Michael Compton being hit and falling. She indicated that she then crouched over James Michael Compton and Appellant was still hitting her and him and that James Michael Compton had a gash on his head that was bleeding.[1]

On the night of the incident, Kimberly Compton told Deputy Wayne Browder, one of the responding officers, "I didn't know what happened." (R. p. 98, lines 24 – p. 99, line 4). Deputy Robert Burnish, another responding officer, testified that on the night of the incident, Kimberly Compton was too intoxicated to give a statement. (R. p. 108, lines 3-6).

ARGUMENT

I. BECAUSE APPELLANT WAS NOT ENGAGED IN UNLAWFUL ACTIVITY AND WAS ATTACKED WITH DEADLY FORCE AND FEARED FOR HIS LIFE IN A PLACE WHERE HE HAD THE RIGHT TO BE THE TRIAL COURT ERRED IN FAILING TO FIND APPELLANT IMMUNE FROM PROSECUTION FOR USE OF DEADLY FORCE.

The S.C. Protection of Persons & Property Act, S.C. Code Ann. § 16-11-440 (C), provides, in pertinent part:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of

[1] At trial, Kimberly Compton clarified her written statement and said that she only saw Appellant hit James Michael Compton once with the board and the other times that she said Appellant was hitting James Michael Compton it was not with the board, but Appellant was kicking James Michael Compton. Kimberly Compton further clarified her written statement by stating that James Michael Compton was not on the ground when Appellant hit him the one time with the board.

> business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

A person who uses deadly force as permitted by §16-11-440 is justified in using deadly force and is immune from criminal prosecution except in limited circumstances involving law enforcement officers. S.C. Code Ann. §16-11-450 (A). In enacting the Act, one of the findings of the General Assembly was that" it is proper for law abiding citizens to protect themselves from attackers without fear of prosecution for acting in self-defense of themselves and that no person or victim of a crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. §16-11-420.

In asserting a defense under the act, a Defendant is entitled to a pre-trial determination of immunity at which time the Defendant must establish by the preponderance of the evidence that he is entitled to immunity under the act. State v. Duncan, 392 S.C. 404, 407, 709 S.E.2d 662, 663 (2011), reh'g denied (June 8, 2011). A 'preponderance of the evidence' stated in simple language is that evidence which convinces as to its truth. Frazier v. Frazier, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955). An order granting or denying a motion to dismiss under the act is immediately appealable, as it is in the nature of an injunction. Duncan, 392 S.C. 404, 407, 709 S.E.2d 662, 663 (2011), reh'g denied n.2 (June 8, 2011).

In this case, the lower court erroneously found that Appellant did not establish by the preponderance of the evidence that he was entitled to immunity. The lower court concluded that although Appellant's testimony that he was attacked with deadly force at his home and feared for his life was "extremely credible", Appellant's testimony was

contradicted by the prior written statement by Kimberly Compton, giving the court "some question about whether or not he's telling the whole truth or whether or not he remembers the whole truth." (R. p. 183, lines 11–25).

The Court reached this conclusion even though Kimberly Compton's sworn trial testimony did not contradict Appellant's testimony, and the un-contradicted evidence was that on the night of the incident she stated to law enforcement that " I didn't know what happened." (R. p. 98, line 7–p. 99, line 4). Furthermore, one of the officers responding to the scene testified that on the night of the incident she was too intoxicated to give a statement. (R. p. 108, lines 3–6).

In criminal cases, the appellate court sits to review errors of law only, State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001), and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000), State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The trial court's finding that Appellant did not prove by a preponderance of the evidence that he was entitled to immunity was clearly erroneous based on the evidence presented, and should be reversed.

The evidence is undisputed that Appellant was not engaged in an unlawful activity, and was attacked in a place that he had the right to be, and that he met deadly force with deadly force based upon a reasonable belief that it was necessary to prevent his death or great bodily injury. The Appellant testified that after returning home after a night out drinking with the group, the victim attacked him using deadly force. In response, and in fear for his life, Appellant struck the alleged victim with a wooden board until the threat and attack ended.

Testimony of Appellant

Q. All right. And once he did that, what happened?

A. Well, he grabbed the board. And at that point my immediate thought was just go inside, I can go inside, close the door on him and, you know, that's that. So I turned by back, went to open the door, and that – and he hit me from behind, with my back turned to him. And I do have—got—I did sustain injuries from that.

And, you know, for – I haven't been able to talk about this because I haven't been able to say anything to anyone since the night that it happened.

Q. So you said when you turned your back, he hit you?

A. Yes, sir, he did.

Q. Where did he hit you at?

A. In the back. In the side in the back.

Q. All right. And how many times did he hit you?

A. At least two before I could even react to it.

Q. All right. And then once you reacted, what did you do in reacting to it?

A. I picked up a weapon myself, one of those slats – he was still holding his weapon – and I fought fire with fire. That's the only thing I could do. I couldn't run. I couldn't get in the house because I couldn't open the door. It was locked. He was blocking the steps. He had already hit me. There was nothing I could do.

Q. All right. When he hit you with the first board, where you afraid?

A. Absolutely.

Q. Were you in fear of death or great bodily injury?

A. I was.

Q. Did you believe that he could kill you at that point?

A. I absolutely did believe that.

Q. Did he ever threaten to kill you?

A. He has before. He told me in the bar—

Mr. Corbett: Objection, Your Honor. Leading.

The Court: Overruled.

A. He told me in the bar. Remember when I said that he had his hands around my stuff—my neck and he was going into dark places? One of the dark places was he literally told me that when he was a child that he would sit out behind the fence, the tree line in the trailer park, and watch me, with his gun in his pockets. Because he's had one since he was like twelve years old. His father's been good about getting him weapons and letting him be responsible and stuff.

Two days before this incident, he made sure that he came into the house and took Kim's gun out of the house and – you know. And then all of a sudden, two days later, we're having an incident like that out of nowhere for no reason. But Michael has told me several times that he wanted to hurt me just in that night. But before the night was over, like I said, we were supposed to be friends. You know, it was just him saying to me, Chris, I used to hate you because of the way you were but you've proven yourself to be half-ass decent now so I accept you. But by the time we got home, he didn't accept me anymore. (R. p. 30, line 24–p. 33, line 7).

There is no evidence in the record that Appellant was not attacked with deadly force and did not reasonably believe that deadly force was necessary to prevent his death or great bodily injury.

The trial court erroneously concluded Appellant did not meet its burden of proof based on the prior written statement of Kimberly Compton which indicated that Appellant continued to beat James Michael Compton after she attempted to stop the fight. This was clearly erroneous because, even if it is assumed that Kim Compton's prior written statement is true, it was not inconsistent or contradictory in any way on the facts of whether Appellant was initially attacked with deadly force and reasonably met the attack with deadly force. The only possible contradiction with Appellant's testimony was whether Appellant continued to strike the alleged victim after he was on the ground, not bearing on the issue of whether Appellant was attacked with deadly force. Even if Appellant continued to hit James Michael Compton after he was on the ground, Appellant " has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force." State v. Campbell, 111 S.C. 112, 113, 96 S.E. 543, 544 (1918),. Douglas v. State, 332 S.C. 67, 72, 504 S.E.2d 307, 309 (1998).

Even considering Kimberly Compton's out of court written statement, the evidence remains un-contradicted that Appellant was attacked with deadly force and reasonably feared for his life as he was in a place where he had the right to be. Appellant acknowledges that the trier of fact does not always have to accept un-contradicted evidence, however, the same should be accepted unless there is reason for disbelief. Elwood Constr. Co. v. Richards, 265 S.C. 228, 232, 217 S.E.2d 769, 771 (1975). In this

case, there was no evidence or reason not to accept Appellant's testimony, especially in light of the fact that the trial court found his testimony to be "extremely credible."

The lower court was also clearly erroneous in concluding after weighing the evidence that Appellant's testimony did not establish the greater weight of the evidence or that it convinces of its truth. As mentioned above, the trial court found Appellant's testimony "extremely credible." On the other hand, the evidence established that Kim Compton gave two contradictory and inconsistent statements about the facts involved in the altercation, and on the night of the occurrence told the responding officer that "I didn't know what happened. " (R. p. 98, line 24 – p. 99, line 11).

Further discrediting Kimberly Compton's testimony, Deputy Burnish, who responded to the incident location, testified that on the night of the incident Kimberly Compton was too intoxicated to give a statement to law enforcement. (R. p. 108, lines 3-6).

At the trial of this case, Kimberly Compton testified consistently with her statement made to law enforcement on the night of the incident that she "can't really tell you" what happened "because I was in the back of the truck asleep." (R. p. 79, lines 14 – 16)..

Testimony of Kimberly Compton

Q. Tell me what happened when you got home.

A. Can't really tell you, because I was in the back of the truck asleep. I've been told a few different things. But as far as I think, I think that I came around the trailer and – because I can – I can hear altercations. And I think that I got out

of the back of the truck myself. I'm not sure. And I went around the house and that's when I saw Chris hit Michael once and I jumped on top.

Q. Okay. What else did you see?

A. That was it. I didn't actually get to see anything, because at that point I was on top of my brother.

Q. How many times was your brother hit?

A. I don't know how many times he was hit. I only saw one and I think that was the last one. (R. p. 79, line 14 - p. 80, line 4).

Kimberly Compton also testified that she did not know whether James Michael Compton struck Appellant with a board or not.

Q. Now, and do you know whether Michael struck Chris with a board or not?

A. No, sir.

Q. When you heard the fight in the beginning, could you see what was happening?

A. No, sir.

(R. p. 99, lines 12-17).

In her written statement, Kimberly Compton stated the following:

A. I stayed on top of Michael, trying to protect him, and Chris was hitting me and was yelling and screaming at me. I don't know what made Chris stop, but he did. James came to and got up and started running away. I found him on a neighbor's porch and I ran to him and was cradling him in my arms and beat on the neighbor's door yelling for them to call the cop – for them to call the police and an ambulance. While Chris was beating James, I kept trying to tell – while

Chris was beating James, I kept trying to tell James everything was going to be okay. James told me, just let him finish, just let him finish. The police came and then the ambulance came and took James to the hospital. I never saw James – I never saw James hit Chris at any time.

Q. Now, let me back up for a moment. In your statement you indicated: I turned around and I saw James getting hit and falling to the ground.

A. Because I thought that I was the one trying to get into the door. But my daughter told me that my keys were left in the house, so that's why I'm thinking that I couldn't have been getting in the door.

Q. Let me ask it this way. When you saw him get hit and fall to the ground, okay—

A. Uh-huh.

Q. --did he—and then you ran over to cover him—.

A. Uh-huh.

Q. --did he get up between the time you saw him go to the ground and when you covered him?

A. No. He got up after I was on him.

Q. Now, you indicated here in the statement that before you got to James, it says – states here: Chris was still hitting him and I ran over.

A. Not with a board. He was kicking him.

Q. Kicking him?

A. Uh-huh.

The Court: That's a yes?

A. Yes, sir. Kicked him.

Only seen the one hit with the – the one with the board. I never saw any other boards.

Q. (Mr. Corbett) So when you told the detective, they're hitting, what you're saying today is that it was a kick?

A. Well, I know for sure that he did hit him with the board, because I saw him hit him with the board. But when I was running over is when he was kicking him in his side.

Q. I was crouched over James and Chris was still hitting him and yelling at him.

Was he using the board?

A. No, not at that point. I only saw the one hit with the board.

Q. But he was still hitting him?

A. He had kicked him, yes.

(R. p. 91, line 11- p. 93, line14).

It was clearly erroneous for the lower court to give Kimberly Compton's out of court written statement, which contradicted with her trial testimony, such weight so as to equal or exceed the weight given to Appellant's un-contradicted testimony, and to find that Appellant's "extremely credible" testimony did not establish by the preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act.

CONCLUSION

For the reasons stated, the Court should reverse the judgment of the circuit court.

Respectfully submitted,

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April 24, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211 (b), SCACR.

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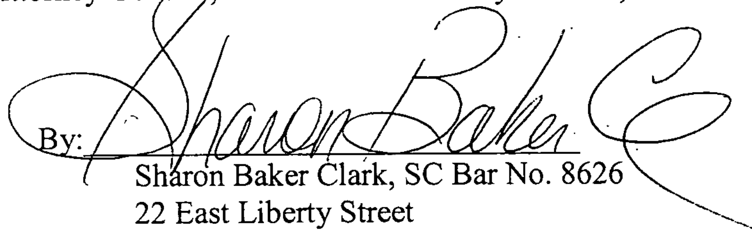
PROOF OF SERVICE

I, certify that I have served the Final Brief of Appellant and Record on Appeal to be on the above named Respondent by depositing a copy of same in the United States mail, postage prepaid, on April 29, 2013, addressed to the attorney of record, Alan Wilson, Attorney General, and J. Benjamin Aplin, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

April 29, 2013



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