ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Case No. 2013-GS-020-1664

State of South Carolina .....Respondent,

versus

Frank Muns .....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I. Because Respondent has not raised any meritorious issues as to the self-defense charge, the Court should reverse the trial court, set aside the verdict, and remand for a new trial.

Respondent has failed to disprove any element of self-defense: (1) the defendant was without fault in bringing on the difficulty, (2) he actually believed he was in imminent danger of sustaining serious bodily injury, (3) a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and the circumstances would have warranted such a person to act to save himself from serious bodily harm, and (4) the defendant had no other probable means of avoiding the danger. *See State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008).

A. Respondent's argument about Mr. Muns' intention misidentifies the act of self-defense as the discharge of the gun and not the defensive beating on Mrs. Turner's car window.

Mr. Muns concedes that the discharge of his gun was unintentional, and Respondent has used that to argue that self-defense, which requires intentional conduct, cannot be proved. (Resp. Initial Brief at 14-16.) However, Mr. Muns' act of self-defense was banging on Mrs. Turner's car

window, *not* the discharge of the gun. Mr. Muns *intentionally* hit the window of Mrs. Turner's car to keep Mrs. Turner from crushing him between her car and his own truck.

Mr. Muns has argued in his own appellate brief that self-defense requires only an intentional act of self-defense, even if the ultimate violent outcome is an unintended consequence of that intentional act. (App. Brief at 9.) Respondent has not offered any discussion of that point and appears to have conceded its accuracy.

B. Respondent incorrectly blames Mr. Muns for causing the conflict with Mrs. Turner despite ample evidence that Mr. Muns merely blocked Mrs. Turner's entrance to his property and that it was Mrs. Turner who introduced violence into the exchange.

Mr. Muns did not bring about the need for self-defense as Respondent argues. Respondent would have this Court borrow far-reaching concepts of proximate cause to pin blame on Mr. Muns, starting with his decision to block Mrs. Turner's entrance to his property: Respondent claims that Mr. Muns blocked the entrance to his property with his car, causing Mrs. Turner to be unable to move her car forward, allowing Mr. Muns to approach her car, causing Mrs. Turner to lurch her car forward and back, causing Mr. Muns to pound on her window, causing the gun's discharge. Of course, such causation could endlessly be backed up by additional steps (e.g., Mrs. Turner

set the events in motion by trying to drive onto Mr. Muns' land). If the Court adopts the view of the Respondent, then almost *any* action taken by Mr. Muns throughout the morning (or even earlier) could be said to have brought about the difficulty.

Regardless, it has been settled law in South Carolina for over one hundred years that it is for a jury to decide whether initially non-violent conduct by the accused could have been reasonably predicted to lead to deadly force, thereby preventing the use of self-defense. In one early case, *State v. Rowell*, 75 S.C. 494, 56 S.E. 23 (1906), the defendant had been drinking throughout the day when two men happened by. The defendant overheard part of the men's conversation, said one of them was lying, and accused them of going to a "blind tiger"[1] to drink. *Id.* at 506, 56 S.E. at 28. Later that day, the defendant sought out the victim and again accused him of having been drinking at a blind tiger. *Id.* at 507, 56 S.E. at 28. The victim denied the charge and walked away. *Id.* at 507, 56 S.E. at 28. A little later, the defendant, while holding a stick, again confronted the victim. *Id.* at 507, 56 S.E. at 28. The victim grabbed the stick from the defendant's hand and tried to use it against the defendant. *Id.* at 507, 56 S.E. at 28. At the same

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1 A "blind tiger" was a reference to a secret bar which sold liquor in violation of South Carolina's Dispensary Act of 1893. *See generally* James Hill Welborn III, *Dispensing the Progressive State: Benjamin Tillman's South Carolina State Dispensary*, 27 Soc. Hist. of Alcohol and Drugs 82 (2013).

time, the defendant drew a gun and shot the victim, killing him. *Id.* at 507, 56 S.E. at 28.

The trial court charged the jury that the defendant could not assert self-defense because he had brought the conflict about himself through his earlier exchanges with the victim and his "opprobrious language." *Id.* at 510, 56 S.E. at 29. On appeal, however, the Supreme Court reversed. *Id.* at 510, 56 S.E. at 29. Specifically, the Court found that the defendant's own testimony at least created a jury issue over whether the defendant's conduct could reasonably have been predicted to lead to the final, violent confrontation. *Id.* at 510, 56 S.E. at 29.

Likewise, in the present case, Mr. Muns simply blocked Mrs. Turner's entry onto his property. Mrs. Turner, not Mr. Muns, escalated their interaction by nearly running Mr. Muns over with her car. Only after being threatened by Mrs. Turner and her car did Mr. Muns start beating on her car to get her to stop. (Sub. R. 145-46.) At the very least, it was for a jury to decide whether Mr. Muns should have reasonably foreseen that blocking the entrance would cause Mrs. Turner to pin him between two vehicles and nearly run him over, necessitating his beating on her car with his gun. Instead, the trial court ruled "as a matter of law that [Mr. Muns] was not

without fault in bringing upon the difficulty." (Sub. R. 167.) That ruling was a reversible error.

C. Mr. Muns timely contested the trial court's error about his duty to retreat since "other probable means of avoiding danger" do not include sacrificing the right to protect one's property.

Respondent argues that Mr. Muns is barred from asserting law concerning the duty to retreat because he did not specifically name the Castle Doctrine at the moment the trial court refused his request to charge during the charge conference. (Resp. Initial Brief at 20). However, *State v. Dunbar* specifically states, "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *State v. Russell,* 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)).

At the charge conference, Mr. Muns asked for the jury to be instructed on self-defense. (Sub. R. 164.) Judge Early refused, citing the requirement that the defendant had no other probable ways of avoiding the danger. (Sub. R. 167.) He stated that "all [Mr. Muns] had to [do] was get in his car, step out of [the] way, or have left." (Sub. R. 167.) Mr. Muns' lawyer responded that Mr. Muns was not required by law to retreat and noted that the property did not belong to Mrs. Turner. (Sub. R. 169-70.) Although Mr. Muns'

attorney did not refer to the Castle Doctrine by name, he raised the issue by asserting self-defense and pointing out to the court that Mr. Muns did not have a duty to retreat from his own property.

Respondent also wrongly claims that the Castle Doctrine must be raised in a pre-trial proceeding. (Resp. Initial Brief at 21.) Respondent's reliance on *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), is wildly misplaced. In *Duncan*, the State argued that the trial court erred in making a pre-trial determination of immunity under South Carolina's Protection of Persons and Property Act. *Id.* at 406, 709 S.E.2d at 663. The State appealed and argued that a pre-trial ruling on immunity was improper and needed to be resolved at trial. *Id.* at 406, 709 S.E.2d at 663. The South Carolina Supreme disagreed and, to shield an immune defendant from trial, ruled that a pre-trial ruling on immunity under the Act was proper. *Id.* at 410, 709 S.E.2d at 665.

Respondent argues that *Duncan* stands for the principle that the *only* time in which immunity under the act can be raised is during the pre-trial phase. (Resp. Initial Brief at 20-21.) There is no such language in *Duncan*. The Court was clearly ruling that immunity *could be* decided before a trial, not that it *had to be decided* at that time. The Court was giving more rights

to the accused, not fewer. As a result, the use of the Castle Doctrine can be raised either pre-trial or later.

Mr. Muns certainly raised the issue of retreat, and evidence supported that Mr. Muns was under no obligation to depart the scene. The trial court erred when it failed to recognize that.

D. Mr. Muns had to act because he was trapped by Mrs. Turner's car, and Respondent falsely claims that no such evidence supports that fact.

A defendant's only responsibility to shift the burden to the State in a self-defense case is producing *some* evidence that he was acting in self-defense. *State v. Wiggins*, 330 S.C. 538, 544-45, 500 S.E.2d 489, 493 (1998). Then, the burden is on the State to prove beyond a reasonable doubt that the defendant *did not* have probable means of escape. *Id.* at 544-45, 500 S.E.2d at 493. Respondent claims that there is no testimony that Mr. Muns was trapped. (Resp. Initial Brief at 21.) However, even Mrs. Turner testified, "I could have moved forward, but I would have run him over and hit his car door because he had his truck door open." When asked whether she might run Mr. Muns over, Mrs. Turner responded "Exactly." (Sub. R. 115.)

Mr. Muns confirmed the danger he was in, testifying, "Once she – she comes back around and the front of her car was coming around and *pinning me between my truck and her car*. I'm telling her to stop, stop." (Sub. R. 145

(emphasis added).) When asked by the prosecutor, "So your testimony is you're afraid you're going to get pinned between these two vehicles?" Mr. Muns responded, "Correct." (Sub. R. 146.) Mr. Muns was trapped between his truck, Mrs. Turner's car, and his open car door. (Sub. R. 144-45.) His back was against his truck, and his hands were outstretched, touching Mrs. Turner's car. (Sub. R. 144-45.) Mrs. Turner's car was approximately three feet away. (Sub. R. 144-45.) The only other exit was blocked by his open truck door, forming a small space where Mr. Muns was trapped.

Despite bearing the burden of disproving the element, Respondent did not offer any testimony from anyone that Mr. Muns had other means of escape. Therefore, the trial court erred in ruling "as a matter of law" that Mr. Muns could have retreated and rejecting a self-defense charge on that basis.

II. Because Respondent has failed any meritorious issues as to the accident charge, the Court should reverse the trial court, set aside the verdict, and remand for a new trial.

For an attempted homicide to be excused as an accident, it must have been unintentional, the defendant must have been acting lawfully, and due care must have been exercised in handling the weapon. *State v. Goodson*, 312 S.C 278, 440 S.E.2d 370 (1994). Respondent has failed to disprove any of those elements.

A. Mr. Muns preserved his argument by requesting an accident charge and contesting the trial court's refusal.

Respondent's issue preservation argument relies on both a misstatement and misunderstanding of the law. Respondent quotes the South Carolina Supreme Court as having ruled in *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011), that "'[a]n objection should be addressed to the trial court in a *sufficiently specific* manner that brings attention to the *exact* error.'" (Resp. Initial Brief at 26 (emphasis added).) However, no such quote appears anywhere in *State v. Byers*.

Regardless of the actual source of that quote, the Supreme Court in *Byers* ruled that the error has to be raised only "with sufficient specificity to inform the circuit court judge of the point being urged." *Id.* at 444, 710 S.E.2d at 58. Indeed, in that very case, the Supreme Court took up an issue on appeal since the matter had been "reasonably clear" to the lower court. *Id.* at 446 n.1, 710 S.E.2d at 49 n.1; *see also State v. Rivers*, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015) ("A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground.").

The trial judge explained that Mr. Muns' unlawful behavior was his being a felon in possession of a weapon under both state and federal law. (Sub. R. 168.) Mr. Muns' request for an accident charge and response to the trial court's refusal went far beyond the standards used by the Supreme Court.

B. Mr. Muns never admitted to being a felon in possession of a firearm in violation of law.

A defendant admittedly cannot assert accident if he is engaged in unlawful behavior, and Respondent has tried to claim that Mr. Muns was barred by federal law from having his gun. Mr. Muns testified that he had been convicted in Georgia of petit larceny and theft. (Sub. R. 149.) Neither petit larceny nor simple theft is a felony. *See* Ga. Code Ann. § 16-8-12(a) (Supp. 2013) ("A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor . . . ."). Respondent did not even attempt to introduce any evidence of Mr. Muns' criminal record at all, despite having the burden to do so.

Moreover, as explained in Mr. Muns' appellate brief, not even federal law bars convicted felons from having *any* guns. (App. Brief at 21-24.) The trial court was simply incorrect when it stated, "And under the law of this state and federal law, a convicted felon cannot be in possession of a

weapon." (Sub. R. 168.) Rather, the State has the affirmative burden of introducing testimony that the gun has been the subject of interstate commerce. Here, the State did not introduce even a single line of testimony on that point, and Respondent has not offered any discussion of its failure in its appellate brief.

C. Because Respondent introduced absolutely no details of Mr. Muns' misdemeanors from Georgia, it has no basis for asserting that Mr. Muns had ever been convicted of any "crime of violence."

State law does not prohibit *all* felons from having guns; rather, it is people who have been convicted of a "crime of violence" who are barred. S.C. Code Ann. § 16-23-30(B) (Supp. 2013). The trial court simply misstated the law when it ruled that "under the law of this state and federal law, a convicted felon cannot be in possession of a weapon. (Sub. R. 168.) To overcome that misstatement of law, Respondent claims that a violation of Georgia's "theft by taking" law would be tantamount to the violent crime of "robbery" in South Carolina. (Resp. Initial Brief at 26.)

First, Mr. Muns has a record for "theft," but Respondent neglected to identify the *variety* of theft. In Georgia, "theft" is an umbrella term which includes no fewer than ten related offenses including "theft of mislaid property" and "theft by receipt of stolen property." *See* Ga. Code §§ 16-8-1

to 16-8-9 (2012). Respondent has not even attempted to explain its selection of "theft by taking" off the list of possibilities for purposes of drawing comparisons.

Second, "theft by taking" in Georgia is not comparable to "robbery" in South Carolina in any event. A foreign conviction can satisfy an element of a South Carolina law expressed in terms of South Carolina's own statutes, but only when the foreign conviction would *necessarily* establish a violation of the South Carolina statute. *Hinton v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004). In *Hinton*, for example, a South Carolina inmate had once been convicted of "abduction" in Ohio. *Id.* at 331, 592 S.E.2d at 337. The South Carolina Parole Board determined that an "abduction" conviction in Ohio was tantamount to the South Carolina crime of "kidnapping," thereby foreclosing parole. *Id.* at 331, 592 S.E.2d at 338. This Court reversed and explained that, because the Ohio law included several scenarios, only some of which could have satisfied South Carolina's kidnapping statute, the Parole Board could not just assume that the conviction in Ohio was comparable. *Id.* at 340, 592 S.E.2d at 342.

Not even "theft by taking" is comparable to "robbery." As even Respondent states, "theft by taking" occurs in Georgia when, among other

things, a defendant in lawful possession of another's property appropriates it in any way. Ga. Code Ann. § 16-8-2 (2012) (cited in Resp. Initial Brief at 26). On the other hand, "robbery" in South Carolina requires the use of force and the taking of at least $2000 of property. (Resp. Initial Brief at 26). The two crimes are related only in the sense that they are both property offenses but are not otherwise overlapping.

Respondent also argues that Mr. Muns was nevertheless engaged in illegal activity by "presenting [his] revolver and pointing it at the victim" in violation of South Carolina Code §16-23-410. (Resp. Initial Brief at 27.) That crime requires proof that a gun was displayed to someone to make a threat. *In re Spencer*, 387 S.C. 517, 692 S.E.2d 569 (Ct. App. 2010). Respondent did not charge Mr. Muns with that crime, much less secure a conviction for it. Moreover, Mr. Muns testified that he was not using his gun to threaten Ms. Turner at all, but rather was using it only to beat on her window. (Sub. R. 146-47, 153.)

D. Respondent's belief that Mr. Muns' possession of a gun was the proximate cause of Mrs. Turner's injury relies on an inverted "least favorable" view of the evidence.

Rather than offering any definition of causation which would include Mr. Muns' conduct, Respondent tries to distinguish the cases cited by Mr. Muns by observing that Mr. Muns "did more" than the parties in those cases.

(Resp. Initial Brief at 28.) For example, Respondent argues that Mr. Muns "pointed and presented the weapon" at Ms. Turner. (Resp. Initial Brief at 28.) Again, that was never charged. Moreover, Mr. Muns clearly testified that he drew his gun only after Mrs. Turner starting threatening his life by running him over and, even then, did not present the weapon in a threatening way but only held it as an instrument to beat on her window. (Sub. R. 145-46.) Only by flipping the level of review and looking only at the *least* favorable view of the evidence for Mr. Muns could Respondent's argument possibly be correct. However, it was precisely because of the inconsistent testimony about Mr. Muns' actions, that the trial court should have allowed the jury to decide the issue of causation.

E. Respondent has not offered any legal support for its belief that Mr. Muns was acting without due care, much less that Respondent's notion was so well established as to place it beyond review by a jury.

The question of whether due care was exercised is controlled by the circumstances of the particular case and will not be determined by the court, as a matter of law, if the testimony is conflicting or the inferences to be drawn are doubtful. *Jarvis v. Green*, 257 S.C. 558, 186 S.E.2d 765 (1972). Mr. Muns' brief thoroughly reviews the testimony. He withdrew a gun for

the first time only after Mrs. Turner endangered his life by driving at him and crushing him between her car and his own truck. (Sub. R. 145-46.)

Respondent's response is based on Mr. Muns' knowing use of a loaded weapon as a tool. To make its point, Respondent has falsely represented that Mr. Muns admitted knowing that his gun was loaded. (Resp. Initial Brief at 28-29.) Mr. Muns did not make any such statement. He simply agreed with the prosecutor's undeniably accurate assertion – that the gun had been loaded – not that he had been aware of that before. (Sub. R. 152-53.) Respondent's argument, based on an inaccurate recitation of the testimony, should be struck.

F. The refusal to explain even the basic elements of accident to the jury was not a harmless error where a reasonable juror could, for all the reasons presented in Mr. Muns' appellate brief, find that the defense applied.

Respondent argues that the failure to charge accident was harmless because the judge effectively charged accident by using that word "accident" while defining intent for attempted murder purposes. (Resp. Initial Brief at 29-30.) Respondent's position is based on an erroneous understanding of harmless error.

Although a judge need not offer a series of duplicative charges, the mere coincidence of a single word's use in a jury charge on a different point

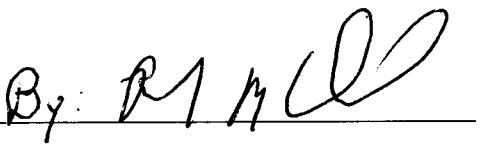
is hardly adequate to inform a jury of laypeople about the relevant law. As the Supreme Court explained in *State v. Fuller*, a trial judge must specifically tailor the defense instructions to adequately reflect the facts and theories presented by the defendant. 297 S.C. 440, 377 S.E.2d 328 (1989). In that case, the trial court read a lengthy charge directly instructing the jury about the elements of self-defense, but the court refused to offer more specific charges on nuances of the individual elements. *Id.* at 442, 377 S.E.2d at 330. On appeal, the Supreme Court ruled that a defense charge is erroneous when the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant. *Id.* at 442, 377 S.E.2d at 331.

In the present case, the trial court happened to use the word "accident" but only while defining "intent" for purposes of attempted homicide. However, the trial court flatly refused to charge accident and would likely be surprised to hear Respondent's argument that it actually *did charge* accident. There was no charge on accident, and certainly no complete charge. The trial court did not offer any instruction to the jury which explained the elements for accident, the burden of proof in asserting that defense, or any explanation of the nuanced legal principles raised by the case. Its failure to do so was a reversible error.

Conclusion

For all these reasons, this Court should reverse the decision of the trial court and remand this case for a new trial.

Respectfully submitted,

By: 

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June 2nd, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the South Carolina Attorney General's Office, Post Office Box 11549, Columbia, SC 29211-11549, this 2nd day of June, 2015.

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021

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