STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-000344

THE STATE, ...RESPONDENT

v.

FRANK MUNS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

P.O. Drawer 3368
Aiken, South Carolina 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly declined Appellant's request to charge the jury on the law of self-defense where: (1) there is no evidence in the record from which it could reasonable be inferred that Appellant intentionally fired his gun at the victim in self-defense; and (2) even if Appellant intentionally shot the victim the evidence conclusively demonstrates: (a) Appellant was not without fault in bringing on the difficulty and (b) Appellant had probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to shoot the victim through the window of her car.

2. Whether trial court properly declined Appellant's request to charge the jury on the law of accident where the evidence in the record conclusively demonstrates Appellant was neither acting lawfully nor using due care when, as an admitted felon in possession of a firearm, he pointed that loaded firearm at the victim while striking it, barrel first, three times against her car window, causing the gun to discharge and shoot the victim in the chest.

3. Whether Appellant is entitled to a new trial on the charge of possession of a firearm during the commission of or attempt to commit a violent crime where his related conviction for attempted murder must be affirmed.

STATEMENT OF THE CASE

Frank Muns (Appellant) was indicted at the October, 2013 term of the grand jury for Aiken County for attempted murder (2013-GS-02-1657) and possession of a firearm during the commission of or attempt to commit a violent crime (2013-GS-02-1664). Appellant was represented by Assistant Public Defender Michael Routzong, of the Second Circuit Public Defender's Office. The State was represented by Assistant Solicitors Virginia Sheftall and Jeffrey "Jay" Slocum, Jr., of the Second Circuit Solicitor's Office. (R.p.8). On February 4-5, 2014, Appellant proceeded to trial by jury before the Honorable Doyet A. "Jack" Early, III, pursuant to which he was found guilty as indicted. Appellant was sentenced to fifteen (15) years' imprisonment for attempted murder and five (5) years' concurrent imprisonment for possession of a firearm during the attempted murder. (R.p,1-6; R.p.207, lines 1-12). 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 (the State) follows.

STATEMENT OF FACTS

On April 6, 2013, at approximately 11:45 in the morning, Appellant shot Kim Turner (the victim) in the chest as she was sitting in the driver's seat of her car. Appellant approached the car on foot, pulled out a loaded revolver he admits was unlawfully in his possession, struck the closed driver-side window with the barrel of the gun several times, and ultimately fired a single shot through the window of the car, striking the victim in the chest. Despite suffering from the gunshot wound, the victim managed to drive to a neighbor's house to seek help. The neighbor called 911 and Aiken County Emergency Medical Services (EMS) responded to the scene to render assistance. The bullet had lodged against one of the victim's ribs and was surgically removed seven months after the shooting. Law enforcement officers also responded to the 911 call but were not able to find and arrest Appellant until April 28th, twenty-two days after the shooting. He was in a motel in Augusta, Georgia. (R.p.72, line 11-p.120, line 3; p.137, line 19-p.159, line 9).

Trial

At the call of the case, the trial court advised the jury pool that throughout the trial Appellant was presumed innocent unless the State was able to prove his guilt to them beyond a reasonable doubt. (R.p.9, lines 1-24). After the jury was selected and sworn, the trial court gave more detailed instructions on the presumption of innocence, the State's burden of proof, the roles of the judge and jury, including the jury's duty to judge the facts and the credibility of witnesses. (R.p.10, line 4-p.15, line 17). The parties then made opening statements and the State called its first witness. (R.p. 15, line 18-p.24, lIne 19).

First, the State called Lisa Mason to the stand. Mason lives in Georgia but was visiting her boyfriend, Dawson Mullins, in South Carolinan on April 6, 2013. Mullins lives near the residence where Appellant and the victim were living together at the time of the shooting. Mason was on her way out the door when the victim pulled in Mullins' yard and asked her to call 911 because she had been shot. Mason noticed a hole in the victim's car window and a gunshot wound under the victim's left breast. An audio recording of the 911 call was was played for the jury. (R.p.24, line 20-p.31, line 18). Next, the State called Aaron Lemaster, an Aiken County EMS worker to the stand. His unit was dispatched to Mullins' house at 11:51 a.m. and arrived at 12:05 p.m. Lemaster found the victim sitting in the front seat of her car suffering from a puncture wound directly under her left breast. He noticed two different holes in the car window. Lemaster explained he treats all gunshot victims for a worst case scenario because any gunshot could cause serious harm or death. He treated the victim's wound, moved her to a stretcher, placed her on oxygen, started an IV, and transported her to the hospital, arriving at 12:41 p.m. (R.p.31, line 17-p.44, line 20).

The State then called investigator Brad Wertz from the Aiken County Sheriff's Office, who was also dispatched to Mullins' house. When he arrived he saw a white Pontiac that had the front driver's side window shattered. Wertz spoke to the two officers who first responded to the scene and turned over processing of the crime scene to investigator Chris Johnson. Wertz identified a set of photographs of the victim's car which were admitted into evidence and described for the jury. He testified the shooting scene was about a half a mile from the location where the victim was treated by EMS and he identified an aerial photograph of the neighborhood which showed both locations.

Wertz explained they searched for physical evidence at the location of the shooting but noted there would be no spent shells because a revolver does not eject shells. He then identified a set of photographs from the scene of the shooting which were admitted into evidence and described for the jury. Finally, Wertz identified a set of photographs of the victim's injuries and the bullet which was eventually removed from the victim's body, all of which were admitted into evidence. (R.p.46, line 15-p.71, line 2).

The State next called the victim, Kim Turner, to the stand. She explained that on April 6, 2013, at the time of the shooting, she was married to Tony Turner; however, she and Turner were separated and she was actually living with Appellant, who is her ex-husband and the father of her children. The victim said she and Appellant were living together in an attempt to raise their kids together as a family in a bigger place where they all had their own rooms. She was on her way home to check on the kids on the morning of April 6th after having spent the night with Turner at a motel in Augusta, Georgia. The victim said she needed to go home to get a shower and get ready for work, but she also wanted to get home to check on the kids because Appellant has been calling her and sending threatening text messages while she was away. She was worried because she had not been able to get anyone on either the house phone or her daughter-in-law's phone. (R.p.72, line 11-p.79, line 3).

As the victim approached the property, she saw Appellant's truck in the back yard but did not see him in it. She wanted to drive into the driveway but it was blocked by a cable they had put up to keep other people out, so instead she drove past the driveway to enter the property by way of a go-kart path that could accommodate a car. As the victim attempted to pull-in, Appellant's truck came out of nowhere and blocked her. Appellant

jumped out of the truck with a pistol in his hand and started arguing with the victim and trying to bang the window out of her car. The victim rolled the window down hoping to keep Appellant from breaking it, but he then tried to hit her through the window, so she rolled it back up. At that point, Appellant pointed the gun at the victim, looked her straight in the face, and smirked. She though he was going to shoot her so she leaned over and closed her eyes. The victim then heard the gun go off and felt glass spray all over her. When she looked up, Appellant had the gun pointed at her again and she saw the bullet hole in her window. The victim couldn't get the car in reverse so she drove forward, narrowly avoiding Appellant and his car door as she jumped the car over a downed power pole and drove through some debris towards the back of the house. She honked the horn and yelled for somebody to come out of the house to help. Just as she saw someone coming out the door, the victim looked behind her and saw Appellant yelling and coming at her again with the gun. The victim drove all the way through Appellant's mother's adjoining yard to the road, back past the house, and around the corner to Mason's boyfriend's house. As she was driving, she knew she had actually been shot because she felt a hot burning sensation in her chest. When she pulled into the driveway, the victim honked the horn until Lisa and a bunch of her friends came out. She asked them to call 911 because Appellant had shot her. (R.p.79, line 4-p.84, line 7).

The solicitor asked the victim to slow down and provide more details from her testimony to make sure it was clear to the jurors. She testified that when Appellant pointed the gun at her he told her he was going to kill her. The victim then used the aerial map to explain her location and Appellant's location during the incident, including an explanation of exactly where Appellant blocked her with his truck. (R.p.84, line 8-

p.109, line 12). On cross-examination the victim clarified that the house where they lived was actually her trailer but it was located on Appellant's mother's property. (R.p.108, line 16-p.109, line 10). She also clarified that because Appellant blocked her in with his truck she felt like she could not go straight through the go-kart path without possibly running Appellant over or hitting his car door. (R.p.114, line 16-p.115, line 15).

Finally, the State called the victim's eleven year old daughter, Lydia Muns to the stand. Lydia was in the house at time of the incident. She heard a gunshot and ran outside just in time to see her mom pulling up to the house. Lydia testified her mom said: "he shot me, he shot me, call the police" before driving away. She tried to call 911 from the trailer but discovered the phone was gone, so she went next door to her grandmother's house to call. The next day, Lydia found the missing phone in Appellant's truck. (R.p.121, line 8-p.132, line 6). After Lydia finished her testimony, the State rested. (R.p.132, lines 13-15).

The trial court denied Appellant's motion for a directed verdict after which Appellant advised the court he would testify in his own defense. (R.p.133, line 15-p.137, line 7). Appellant then took the stand. He said he spent the night of April 5, 2013, in "my trailer in Beech Island" and got up around 8 or 8:30 a.m. on the day of the incident. Appellant said he cooked breakfast and put some stuff in his truck to get ready for work. He said he had to be to work by 11 a.m. but was going to the store first and was driving out at around 9:30 a.m. when he first saw the victim coming down the road towards the house. Appellant testified he had just stopped his truck in the driveway to take down the steel cable but put the truck in reverse when he saw her coming. He said the victim got right to the cable but then swerved around and continued down the street to the go-kart

path at the end of the lot. Appellant explained he had built a barrier along the property line with logs that prevented anyone from driving onto the property except at the driveway or the spot at the end where the kids drive go-karts through. He said the go-kart path is approximately five feet wide and that a car can barely get through. Appellant testified he pulled in front of the victim's car to try and stop her to prevent her from driving over a septic tank, and then got out of his truck and told her to stop. (R.p.137, line 18-p.144, line 3).

Appellant claimed that as he walked over to the victim's car, she cursed at him and refused to stop trying to maneuver her car onto the property. He said she backed up and turned her wheels, which brought her car about three and a half feet from him. Appellant testified he was afraid she was going to "smush" him between the two vehicles. He claimed she alternated between forward and reverse three or four times in an attempt to angle around his truck. Appellant said the front of the victim's car was pinning him between his truck and her car but she would not respond to his repeated commands to stop. He testified he had his revolver with him and pulled it out and hit her window. Appellant claimed he was trying to break the window to make the victim stop. He testified he hit the window once, then the victim backed up and he hit the window again, and then she shifted back into forward when he hit the window a third time and the gun discharged. Appellant testified he did not try to kill the victim and was only trying to make her stop. He said that after the gun went off he dropped it as the victim finally angled past his truck and drove over the septic tank to the back of the house. Appellant said the victim stopped and opened her car door to yell for someone to call the police before driving out through his mother's yard. He then picked up his gun and walked

back to the bus which was on the property. Appellant testified he first became aware the victim had been shot three or three-and-a-half hours later but did not turn himself in to the police. He claimed he was going to turn himself in but never did, and was eventually arrested at a motel in Augusta, Georgia, on April 28th. He acknowledged prior convictions for petit larceny in South Carolina and a theft by taking in Georgia. (R.p.144, line 4-p.149, line 8).

On cross-examination, Appellant admitted he was a convicted felon and that he was in possession of a loaded revolver during the altercation. He also admitted he intentionally struck the victim's driver's side window with that loaded revolver, barrel first, three times while she was in the driver's seat. Appellant however, insisted he did not intentionally shoot the victim to kill that day. (R.p.149, line 10-p.159, line 3). The defense rested and the State called Appellant's son, Kyle Muns, in reply. (R.p.159, line 11-p.162, line 11).

Charge Conference

After the close of the evidence, the trial judge listed the points of law he would cover in his regular jury charge and asked the parties if they had any other requests. The State requested a charge on assault and battery of a high and aggravated nature (ABHAN) as a lesser included of attempted murder, to which Appellant responded with a request to also charge assault and battery first and second degree. Appellant then requested jury charges on accident and self-defense. He acknowledged the two theories were somewhat contradictory, but argued the accident was "nested" in his claim of self-defense. The State argued the two theories were mutually exclusive. Appellant explained his theory was that he began acting in self-defense when he felt like he was going to be crushed, but

that he was not intending to shoot the victim, and that the shooting was accidental. He argued he intended to break the window, but did not intend for the gun to go off. The trial court took the requests under advisement and broke for the day. (R.p.163, line 24-p.165, line 17).

The following morning, the trial court made its ruling. In regard to the request for an accident charge, the court referenced State v. Smith[1] and recited the elements of the defense of accident. It found that as a matter of law Appellant was: (1) not acting lawfully because he was not authorized to have a weapon, and (2) not using due care in his handling of that weapon. As a result, the trial court found the defense of accident was not applicable and declined the request to charge. In regard to self-defense, the trial court found that Appellant: (1) was not without fault in brining on the difficulty because his conduct was reasonably calculated to provoke an assault, and (2) had another probable way to avoid the danger of serious bodily injury than to act as he did. Thus, the trial court refused to charge self-defense. (R.p.165, line 21-p.167, line 20).

Appellant was allowed to respond to the rulings with additional arguments. In regard to accident he admitted he was a felon in possession a firearm under Federal law, but argued this did not necessarily mean he was acting unlawfully for purposes of South Carolina law. He also argued he believed he was acting with due care under the circumstances of the case and that any decision in this regard should be left to the jury rather than the judge. In regard to self-defense, Appellant argued he had met all four prongs of the analysis to warrant a jury charge. The trial court stood by its earlier rulings and declined Appellant's requests to charge self-defense and accident. (R.p.168, line 10-p.171, line 3).

[1] 391 S.C. 408, 706 S.E.2d 12 (2011).

Closing Arguments, Jury Charge, and Verdict

In his closing argument, Appellant argued in part that the shooting was an accident because he did not intend for it to happen. He argued he did not bring it about and was only trying to protect himself. (R.p.172, lines 22-25). In the State's close, the solicitor argued the shooting was not an accident and certainly was not self-defense because Appellant "meant to shoot her." (R.p.173, line 6-p.188, line 9).

The trial judge charged the jury on the presumption of innocence, the State's burden of proof beyond a reasonable doubt, the roles of the judge and jury, credibility of witnesses, and the elements of the crimes. Both the solicitor and Appellant responded to the judge that they had no objections, requested additions or deletions to the charge. (R.p.189, line 9-p.200, line 19). After deliberating for approximately one hour and fifty minutes, the jury found Appellant guilty as charged. When addressing the court in mitigation Appellant said: "it was an accident and I apologize." The trial court sentenced him to fifteen (15) years' imprisonment for attempted murder and five (5) years' concurrent imprisonment for possession of a firearm during the attempted murder. (R.p.1-6; R.p.201, line 15-p.207, line 12).

ARGUMENT

I.

The trial court properly declined Appellant's request to charge the jury on the law of self-defense where: (1) there is no evidence in the record from which it could reasonable be inferred that Appellant intentionally fired his gun at the victim in self-defense; and (2) even if Appellant intentionally shot the victim the evidence conclusively demonstrates: (a) Appellant was not without fault in bringing on the difficulty and (b) Appellant had probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to shoot the victim through the window of her car.

Appellant contends the trial court erred in refusing to issue a self-defense charge to the jury because there was evidence in the record he was trying to prevent the victim from crushing him with her car. He claims the trial court should not have denied a self-defense charge on the basis of provocation because he did nothing to cause the victim to endanger him with her car. Appellant also claims the trial court should not have denied a self-defense charge on the basis of his failure to retreat both: (1) because he had no obligation to remove himself from the confrontation and (2) because the State failed to prove that he had no other probable means of escape than to shoot the victim. The State disagrees and submits Appellant's arguments are wholly without merit.

There is absolutely no evidence in the record to support a claim that Appellant acted in self-defense when he shot the victim in the chest. First, there is no evidence in the record from which it could reasonable be inferred that Appellant intentionally fired his gun at the victim in self-defense. Second, even if this Court finds Appellant intentionally shot the victim, the evidence conclusively demonstrates he was not without fault in bringing on the difficulty which led to the shooting and that he had probable means of avoiding the danger other than to shoot the victim. Therefore, the trial court

properly declined to charge self-defense. Accordingly, Appellant's convictions should be affirmed.

Standard of Review

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). A trial court is required to charge the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 58.

A self-defense charge is not required unless it is supported by the evidence. State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." Light, 378 S.C. at 650, 664 S.E.2d at 469 (citing State v. Slater, 373 S.C. 66, 644

S.E.2d 50 (2007)); State v. Frazier, 401 S.C. 224, 233, 736 S.E.2d 301, 306 (Ct. App. 2013). To prove entitlement to a self-defense charge, the record must contain evidence of four elements:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Light, 378 S.C. at 649, 664 S.E.2d at 469.

Intentional Act

It is axiomatic that a defendant may claim and be entitled to a jury charge on self-defense only if there is evidence in the record that he acted intentionally in self-defense. See Light, 378 S.C. at 651, 664 S.E.2d at 470 ("When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges [self-defense and involuntary manslaughter] as there is 'any evidence' to support each charge.") (emphasis added); State v. Frazier, 401 S.C. 224, 231, 736 S.E.2d 301, 304 (Ct. App. 2013) (finding Frazier was entitled to an instruction on self-defense in part because he testified he "stood up and shot back at the blue Cadillac three times."); State v. Williams, 400 S.C. 308, 316-17, 733 S.E.2d 605, 610 (Ct. App. 2012) (discussing the propriety of a giving both a self-defense charge and an accident charge where "Williams' testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim"); see also

State v. Dickey, 394 S.C. 491, 497, 716 S.E.2d 97, 99-100 (2011) (holding the evidence supported the conclusion that the defendant shot the victim in self-defense where the defendant testified as to why he intentionally fired a shot at the victim).

Here, there was no factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally. Indeed, the evidence supported only two versions of the shooting. According to the victim, Appellant blocked her car with his truck, jumped out of the truck with a gun in his hand, pointed the gun at the victim, looked her straight in the face and smirked, and told her he was going to kill her before he intentionally fired a shot through the car window and into her chest. (R.p.79, line 4-p.84, line 24). While this version certainly provides evidence of an intentional shooting, it does not provide evidence the shooting was committed intentionally in self-defense.

In contrast, Appellant testified he blocked the victim's car with his truck to prevent her from driving over a septic tank. Appellant claimed that when he got out and the victim continued to maneuver her car in an effort to get past his truck he was afraid she was going to "smush" him, so he pulled out his revolver and hit the window of her car several times. Appellant testified he was merely trying to break the window to make the victim stop and did not try to kill her. (R.p.137, line 18-p.149, line 8). On cross-examination Appellant admitted he intentionally struck the victim's driver's side window with a loaded gun but insisted he did not intentionally shoot her. (R.p.149, line 10-p.159, line 3). At the charge conference, Appellant's counsel articulated Appellant's version of the shooting in support of his requests to charge. He argued that though Appellant began acting in self-defense when he felt like he was going to be crushed, the shooting itself

was accidental because he did not intend to shoot the victim. He explained he intended to break the window, but did not intend for the gun to go off. (R.p.163, line 24-p.165, line 17). This version provides evidence only that the shooting was committed unintentionally.

Unlike the circumstances in Light, 378 S.C. at 650, 664 S.E.2d at 469 ("petitioner indicated he took the gun from Davis and that it was 'either her or me.'") and Williams, 400 S.C. at 316-17, 733 S.E.2d at 610 ("Williams testified he shot the victim because he feared the victim was going to shoot first."), Appellant's only contention at trial, and the only reasonable inference to be drawn from the evidence under his theory of defense, was that the shooting was unintentional. As a result, Appellant was not entitled to a jury charge on self-defense and the trial court's consideration of the four standard elements of self-defense was not necessary.

Fault in Bringing about the Harm

Even if this Court determines the evidence supports an inference that Appellant intentionally shot the victim, he was still not entitled to a charge on self-defense because the evidence conclusively demonstrates Appellant was not without fault in bringing on the difficulty. One 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); State v. Wigington, 375 S.C. 25, 31-32, 649 S.E.2d 185, 188 (Ct. App. 2007). Contrary to Appellant's assertion in this appeal, Appellant clearly acted as the original aggressor by blocking the victim's car with his truck. He followed this initial aggressive act by exiting his truck, while in unlawful possession of a handgun, and approached the victim's car where he engaged her in a verbal confrontation. In other words, Appellant

provoked the alleged "assault" from the victim. It is undisputed the victim was unarmed. She rolled up her window and was attempting to maneuver her car around the roadblock which had been set by Appellant when he drew his gun and began banging it, barrel first, against the closed car window. There is simply no evidence in the record from which a jury could find Appellant's conduct was not reasonably calculated to bring on the difficulty. As noted by the trial judge, if Appellant had not blocked the victim's car, the altercation would never have happened. (R.p.167, lines 3-9).

Appellant contends the focus should be not on the encounter in general but the specific actions within that encounter that prompt a violent reaction, and he argues the victim's specific actions in his case were what escalated the encounter and introduced an element of physical aggression which led to the shooting. He first cites Dickey in support of this contention and argues that even though Dickey "admittedly set events in motion which led to a violent exchange between himself and the victim, he was still entitled to a self-defense charge[2] because he had not prompted the actual violence." (Brief of Appellant, p.11). Appellant goes on to note how Dickey "actively sought out the victim to confront him" and "followed behind him as he made his way out of the building" prior to the shooting. (Brief of Appellant, p.12). Yet, Dickey is easily distinguishable on its facts.

In Dickey, our supreme court commented that: "the only evidence the State offered to prove Dickey's fault in bringing about the harm was the act of following [the victim] outside." Dickey, 394 S.C. at 499-500, 716 S.E.2d at 101. However, this was in the context of a business proprietor's right to eject a trespasser from his premises and

[2] Notably, Dickey was a case about whether petitioner was entitled to a directed verdict of acquittal on self-defense and not a case about whether he was entitled to a self-defense jury charge. 394 S.C. at 498, 716 S.E.2d at 100.

Dickey's employment as a security guard for the Cornell Arms apartments in Columbia. Id. Dickey also had a concealed weapons permit and was in lawful possession of the firearm. He testified he routinely carried the concealed weapon and did not deliberately arm himself in anticipation of a conflict. Id. The Supreme Court found: "As [Dickey] had the right to eject the trespassers from the premises, his decision to exit the building and stand on the doormat to ensure their departure cannot, in and of itself, be construed as acting in bad faith." Because Dickey was exercising his right to eject trespassers in good faith, the Supreme Court found, as a matter of law, he was without fault in bringing about the difficulty." Dickey, 394 S.C. at 501, 716 S.E.2d at 102.

Here, Appellant was not a business proprietor or an agent of a business proprietor and he was not attempting to eject a trespasser from the premises. Indeed, the victim's undisputed testimony was that she, Appellant, and their four children all lived in a residence on the property in question. She was on her way home and was attempting to enter that property when the confrontation occurred. (R.p.73, line 1-p.80, line 5). On cross-examination, the victim explained that the main "residence" where she and the kids were living was a trailer that belonged to her, which was located on Appellant's mother's property. (R.p.109, lines 6-10). She commented that she "was living at my own residence" and Appellant was "no longer living with us"; however, her daughter Lydia Muns explained this was because Appellant was living in a "bus" that was also on the property. (R.p.124, line 12-p.125, line 2). When Appellant testified in his own defense he baldly asserted it was "my trailer" and "my house," (R.p.138, lines 8-12; p.140, lines 1-5), but he never disputed he and the victim both lived on his mother's property. He

also acknowledged picking up his gun and going into his bus to sit and try to calm down after the shooting. (R.p.148, lines 5-13). Thus, the victim was not a trespasser.

In addition, Appellant did not have a concealed weapons permit and did not testify that he routinely carried his revolver. Instead, he simply testified "I had my revolver with me and I pulled it out and hit her window." (R.p.146, lines 2-4). This testimony was offered after Appellant claimed he was on his way to the store and then was going to work; yet, he gave no explanation as to why a convicted felon would be carrying a concealed weapon to either of these places. On cross-examination Appellant directly admitted he was a felon in possession of a weapon. (R.p.149, lines 12-16). These factual distinctions demonstrate that, unlike Dickey, Appellant was not simply not "without fault" in bringing on the difficulty, but instead was the person primarily at fault for causing it.

Appellant also relies upon Williams; however, the facts in Williams are also very different. Williams testified he was unarmed when he first confronted the victim. Williams, 400 S.C. at 312-13, 733 S.E.2d at 607-08. Here, Appellant was armed with a loaded weapon when he chose to block the victim's car with his truck and got out to confront her. In Williams, the victim had allegedly drawn a pistol and was holding it in his hand when Williams grabbed a shotgun that was throw to him by a friend and turned to shoot the victim. Id. Here, the victim was unarmed and was simply attempting to maneuver her vehicle around the trap which had been set by Appellant. Williams testified he knew the victim had shot people before and claimed if he had not shot the victim, he knew the victim would have shot him. Id. Here, there was no evidence presented that Appellant knew of any prior violent actions committed by the victim or

had any other reason to believe the victim would "smush" him with her car, especially where the car was barely able to move forward and never was closer than three or three-and-a-half feet from him. Again, the marked differences between the facts show Appellant was not "without fault" in bringing on the difficulty.

Duty to Retreat

Even if this Court determines the evidence reasonably supports an inference that Appellant intentionally shot the victim, he still was not entitled to a charge on self-defense because the evidence conclusively demonstrates Appellant had probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to shoot the victim through the window of her car.

Castle Doctrine / Protection of Persons and Property Act

In regard to the duty to retreat, Appellant first argues that he had no obligation to remove himself from the confrontation with the victim because he was defending his own property. He contends that under the castle doctrine, the person claiming self-defense does not have to take advantage of other ways to avoid the danger because he has no duty to retreat. Appellant then refers to a provision of the South Carolina "Protection of Persons and Property Act" (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2014), in support of his contention.

Initially, the State submits Appellant's argument regarding the castle doctrine is not preserved for appeal because it was neither raised to nor ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Appellant made no mention of the castle doctrine or the Act in his arguments to the trial judge; therefore, his argument on appeal is simply not preserved for appellate review. Furthermore, to the

extent Appellant is attempting to argue he was entitled to a self-defense jury charge drawing from the language in the Act, he waived any such argument when he failed to seek a pretrial determination from the trial court regarding immunity. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) ("Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.") (emphasis added). Under either scenario, neither the castle doctrine nor the Act is a proper topic for this Court's consideration.

In any event, there is no evidence in the record to support Appellant's claim that he was excused from the duty to retreat under the terms of the Act. Appellant misconstrues the evidence to suggest the victim was not living on the same property with him when the incident occurred; however, as explained above, this is not true. The victim, Appellant, and their four children had all lived in the victim's trailer on Appellant's mother's property; but, sometime before the incident Appellant had moved to a "bus" that was also on the property. (R.p.73, line 1-p.80, line 5; p.109, lines 6-10; p.124, line 12-p.125, line 2; p.148, lines 5-13).

Other Means of Avoiding the Danger

Next, Appellant argues the State failed to carry its burden of proving, beyond a reasonable doubt, that he had other options to remain safe. He argues that, similar to Williams, he was trapped with no other means of avoiding the danger posed by the victim's car. Appellant claims he "testified that he became trapped," yet no such testimony appears in the record. He testified he feared the victim's car would "smush" him and he described how close the car came to him preceding the shooting, but he never actually testified he was "trapped" and he certainly never testified he had no other means

of escape. Instead, Appellant explained that even at the moment when he fired a bullet into the victim's chest his main concern was keeping her from running over a septic tank. (R.p.146, line 21-p.147, line 5).

In contrast, the victim in Williams had allegedly drawn a pistol and was holding it in his hand when Williams grabbed a shotgun that was throw to him by a friend and turned to shoot the victim. 400 S.C. at 312-13, 733 S.E.2d at 608. The Supreme Court focused on the fact that "when Williams turned back towards the victim, Williams stated the victim was already pointing a gun at him." Id. at 316, 733 S.E.2d at 609. The Court found that this was evidence Williams had no other probable means of avoiding the danger. Id. The same conclusion does not hold here. Avoiding the danger of a slow moving vehicle which is maneuvering around a roadblock, even if frightening, is a far cry from avoiding the danger of a gun being pointed at you when you know the person pointing that gun has shot people before. Given these differences and the lack of any testimony Appellant believed he had no other means of escapte, the trial court properly concluded there was no evidence Appellant had no other means of avoiding the danger.

This is particularly true given the undisputed fact that the victim drove her car away from the scene immediately after being shot, without running over or even hitting Appellant with her car. The victim testified that after she had been shot, she drove forward, narrowly avoiding Appellant and his car door as she jumped the car over a downed power pole and drove through some debris towards the back of the house. (R.p.79, line 4-p.84, line 7). Appellant agreed that after the gun went off, he dropped it as the victim angled past his truck and drove over the septic tank to the back of the house. (R.p.144, line 4-p.149, line 8). Where there was sufficient space and opportunity for a

vehicle to drive away, there was necessarily sufficient space and opportunity for a person to retreat. Thus, the trial court properly found Appellant had other avenues to avoid the danger other than shooting the victim. (R.p.197, lines 10-20).

A charge of self-defense is only appropriate in a situation when the jury has actually been presented with evidence upon which it could rely to find Appellant acted in self-defense. No such evidence exists in this case; therefore, the trial court appropriately denied the request to charge self-defense.

II.

The trial court properly declined Appellant's request to charge the jury on the law of accident where the evidence in the record conclusively demonstrates Appellant was neither acting lawfully nor using due care when, as an admitted felon in possession of a firearm, he pointed that loaded firearm at the victim while striking it, barrel first, three times against her car window, causing the gun to discharge and shoot the victim in the chest.

Appellant argues the trial court erred when it refused to issue a jury charge on accident where there was evidence his gun went off unintentionally while being used to pound on the victim's car window to get her to stop. He contends the trial court erred in finding he (1) was acting unlawfully and (2) was not using due care at the time of the shooting. The State disagrees and submits Appellant's argument is without merit. The evidence in the record conclusively demonstrates Appellant was not acting lawfully where he: (1) was a felon in possession of a firearm, (2) presented and pointed that firearm at the victim, and (3) was not arming himself in self-defense at the time of the shooting. The evidence also conclusively demonstrates Appellant was not using due care when he repeatedly struck his loaded revolver, barrel first, against the window of the victim's car. For these reasons, the trial court's denial of an accident charge and Appellant's convictions should be affirmed.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 58.

"A homicide will be excusable on the ground of accident when: (1) the killing was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of the weapon. State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999); Williams, 400 S.C. at 316, 733 S.E.2d at 610. If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge on accident supposing evidence satisfies the other elements of the doctrine. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

Appellant was Not Acting Lawfully

Appellant first argues his possession of a handgun was allowed by law because there was no showing by the State that it was barred under either South Carolina or Federal statutes. He contends his prior convictions in South Carolina and Georgia are not "crimes of violence" under the terms of the South Carolina Code and therefore he is not barred from possessing a handgun in South Carolina. He likewise contends the prior crimes would not bar him from possessing a firearm under Federal law because there was no showing those convictions might have carried more than a one year sentence or that the gun was shipped or transported in interstate or foreign commerce. As a consequence, he contends the trail court erred in declaring he was engaged in an unlawful activity merely due to his possession of the revolver used to shoot the victim. The State submits this argument fails for several reasons.

First, at trial Appellant never made this particular objection or any other reference to the provisions of the South Carolina Code or the United States Code he now relies upon in this appeal. Instead, counsel agreed it would violate the federal statute for a felon to be in possession of a weapon but argued the word "lawfully" in the accident cases is

ambiguous and should be strictly construed against the State. By failing to state his argument is a sufficiently specific manner to bring attention to the exact claim, Appellant's current challenge to the trial court's conclusion that his actions were unlawful is not preserved for appellate review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing). Second, Appellant admitted he was a convicted felon and had possession of a revolver on the day of the incident. (R.p.149, lines 10-16). Thus, he waived any right he might otherwise have had to challenge whether he was in unlawful possession of his gun.

Third, it appears that Appellant's Georgia conviction for "theft by taking" would qualify as a "robbery" in South Carolina, and would therefore constitute a "crime of violence" under Section 16-23-30(B) of the Code. In South Carolina, "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intent of depriving him of the property, regardless of the manner in which the property is taken or appropriated." Ga. Code Ann. § 16-8-2 (2014). "The common law offense of robbery is essentially the commission of larceny with force. Larceny involves the felonious taking and carrying away of the goods of another, which must be accomplished against the will or without the consent of the [owners]." State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). In addition, if the property Appellant took by theft was at least $1,500.01 in value, his conviction in Georgia would subject him to imprisonment for "not less than one nor more

than five years." Ga. Code Ann. § 16-8-12(a)(1) (2014). This in turn, would implicate the federal prohibition against possessing a firearm.

Fourth, even if Appellant's act of possession the revolver was not unlawful, his act of presenting that revolver and pointing it at the victim was unlawful. S.C. Code Ann. § 16-23-410 (2003). For all of these reasons and because there is evidence in the record to support the trial court's factual finding that Appellant was in unlawful possession of a weapon, that finding should be affirmed. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (Finding an appellate court is bound by a trial court's factual findings unless they are clearly erroneous).

Appellant's Acts were the Proximate Cause of the Shooting

Next, Appellant argues that because the discharge, not possession, of the handgun was the proximate cause of the shooting, the trial court erred in denying an accident charge regardless of whether his possession of the gun was unlawful. He primarily relies on our supreme court's opinions in Goodson and Burriss; however, the facts in those cases were very different. Appellant first notes that in Goodson, the Supreme Court found the defendant was not entitled to a charge of accident not because he unlawfully possessed a firearm, but only because of the lack of evidence he was acting in self-defense. Goodson, at 280 n.1, 440 S.E.2d at 372 n.1. As explained in detail above, here there is also a lack of evidence Appellant was acting in self-defense, particularly where he armed himself prior to initiating the confrontation with the victim.

Appellant next contends that where he merely carried the weapon and there was an accidental discharge, the shooting "cannot be said to be the natural or necessary result of carrying the weapon in violation of the law." Goodson, 312 S.C. at 280 n.1, 440 S.E.2d

at 372 n.1. Here, Appellant did more than merely carry the weapon. Instead, he unlawfully pointed and presented the weapon, an act which, when combined with banging it on the car window, clearly was the proximate cause of the shooting.

Finally, Appellant suggests that as in Burriss there was sufficient evidence of an accidental discharge to warrant an accident charge. Yet in Burriss, the defendant merely "snatched his gun up and it fired." Burriss, 334 S.C. at 263, 513 S.E.2d at 104. Here, Appellant did not only snatch his revolver. Instead, he pointed and presented it at the victim while striking it against her car window. Ultimately, Appellant concludes: "There was nothing about his possession of the weapon, without more, which would have injured anyone in any way." (Brief of Appellant, p.28) (emphasis added). Here there was more and it proximately caused the shooting. Appellant's acts could not have been an accident.

Appellant was not Exercising Due Care

Appellant argues the trial court erred in concluding that, "as a matter of law," he was not exercising due care. He relies on several civil cases regarding the exercise of due care and argues a determination should never be made by the trial court if the testimony is conflicting or the inferences to be drawn are doubtful. Appellant contends the determination of due care is a quintessential question for the jury and that "at least some evidence was introduced showing he was acting in a reasonable way when he withdrew his handgun and began using it as a hammer to beat on [the victim's] window." (Brief of Appellant, p.29). In support of this claim, Appellant references his own testimony that he was "trying to break her window to make her stop," but fails to articulate exactly how the physical act of striking the window would stop a car. He also claims there was no testimony he knew his gun was loaded at the time; however, Appellant specifically

admitted during cross-examination he knew the gun was loaded. (R.p.152, line 13-p.153, line 25). Thus, the State submits Appellant's argument is wholly without merit.

Whether to give an accident charge to the jury is an issue which must be determined by the trial court. Chatman, supra; Williams, supra. That determination depends on whether there is evidence regarding three factors, including whether due care was exercised in the handling of the weapon. Id. Thus, the initial determination of whether there was any evidence of due care must be decided by the trial court. Here, there is simply no evidence that repeatedly banging a loaded weapon, barrel first, against the driver's side window of an occupied vehicle could constitute due care. Therefore, even considering Appellant's version of events, the State disproved Appellant was using due care. The trial court properly concluded there was a lack of due care as a matter of law and properly refused to charge the jury on accident.

Because no evidence was presented supporting a finding Appellant was acting lawfully or was exercising due care there was no evidence the shooting was an accident and the trial judge did not err in declining to instruct the jury on the defense of accident. Appellant's convictions should be affirmed.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When considering whether an error with respect to a jury instruction was

harmless, the appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). In making a harmless error analysis, the inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Id. Thus, whether or not the error was harmless is a fact-intensive inquiry. Id.

In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge accident, the only possible conclusion established by the evidence is that Appellant was guilty of attempted murder. The State submits there is no other way to construe the evidence in this case but that Appellant's actions in shooting the victim were not an accident. Indeed, the trial court thoroughly charged the jury on the law of attempted murder, including the law of attempt, intent, and malice. The court explained Appellant could not be convicted of attempted murder unless the elements of attempted murder were proven beyond a reasonable doubt. (R.p.193, line 25-p.196, line 6). Specifically in regard to intent the trial court charged: "Intent means intending the result which actually occurs, not accidentally or involuntarily." (R.p.194, lines 8-10) (emphasis added). The jury convicted Appellant of attempted murder. The means the jurors necessarily concluded the shooting was intentional beyond a reasonable doubt and not an accident as argued by Appellant in his closing. (R.p.172, lines 22-25). Clearly they did not believe Appellant's claim, but instead believed the version of events told by the victim. Therefore, any error in failing to charge accident was harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable

doubt. Middleton, supra; Adams, supra. Appellant's convictions for attempted murder and possession of a firearm should be affirmed.

III.

Appellant is not entitled to a new trial on the charge of possession of a firearm during the commission of or attempt to commit a violent crime because his related conviction for attempted murder must be affirmed.

Appellant argues that because he should receive a new trial on attempted murder, his conviction on that count cannot sustain the related charge of being in possession of a firearm while committing a violent crime, and the entire case must be retried. For all of the reasons argued above, the State submits Appellant is not entitled to a new trial on the charge of attempted murder. However, to the extent Appellant is indeed granted a new trial at the conclusion of this direct appeal, the State agrees he would likewise be entitled to a new trial on the possession of a weapon charge.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 1, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-000344

THE STATE,.....RESPONDENT

v.

FRANK MUNS,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated June 1, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Kevin R. Eberle, Esquire
Nicholas Shalosky, Esquire
414 King Street
Charleston, SC 29403

Robert M. Dudek, Esquire
Chief Appellate Defender
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 1st day of June, 2015.

Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727