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 BRIEF OF APPELLANT

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2. One may assert accident as a defense if, despite acting reasonably, he causes an unintentional injury while acting lawfully. When Mr. Muns approached his ex-wife's car, he found himself in grave danger when she began lurching her car toward him, trapping him between her car and his own truck. Mr. Muns beat on her window with a gun to get her to stop, and the gun unexpectedly discharged, injuring his ex-wife. Did the trial court err in refusing to charge accident?

3. A conviction for possessing a firearm during the commission of a violent crime requires that the defendant be found guilty of an associated violent crime. If the Court sets aside Mr. Muns' conviction for attempted murder, must it also set aside the conviction of possession of a firearm during the commission of a violent crime?

Statement of Facts

Mrs. Turner had been married to and divorced from Mr. Muns three times and had four children with him. (Sub. R. 88.) Mrs. Turner had later married Tony Turner (Sub. R. 94, 108-09), but she and Mr. Turner were separated in April 2013. (Sub. R. 73-74.) Although Mr. Muns and his ex-wife had maintained a working relationship for the benefit of their children, (Sub. R. 74), Mrs. Turner was not living with Mr. Muns on April 6, 2013. (Sub. R. 109 ("Q. And on this date, you were married to [Mr. Turner]? A. Yes, sir. Q. But you were living at Mr. Muns' residence? A. I was living at my own residence. He wasn't no longer living with us. He had been.").

On April 5, 2013, Mrs. Turner left her children at Mr. Muns' home at 107 Beard Road and joined her husband, Tony, spending the night with him at a motel. (Sub. R. 74-76.) In the morning, she drove back to Mr. Muns' home to check on her children and prepare for work. (Sub. R. 74.) Meanwhile, Mr. Muns was at home, preparing breakfast and getting things ready for work. (Sub. R. 138-39.) Mr. Muns got in his truck between 9:00 and 9:30 a.m. to run to the store. (Sub. R. 139.)

A cable ran across the entrance to the driveway off of Beard Road to keep people out, (Sub. R. 139), and Mr. Muns pulled his truck to the cable to lower it, (Sub. R. 139). Just then, Mr. Muns saw Mrs. Turner drive down the

road, approach the cable barrier from the street-side, and then swerve around it. (Sub. R. 139.)

Mrs. Turner avoided the blocked entrance by instead going a little further along Beard Road and driving across a neighboring empty lot. (Sub. R. 79-80, 112-13.) Mrs. Turner's route had been used by their children as a go-kart path and was wide enough for only one car. (Sub. R. 113-14.) The path was a "chokepoint" with obstructions on both sides. (Sub. R. 114; 142.) Mr. Muns had taken down a damaged tree and stacked the cut sections to prevent people from using the go-kart path to circumvent the normal driveway. (Sub. R. 100, 112, 141, Ex. 17.)[1]

Mr. Muns was worried that Mrs. Turner would damage an underground septic tank on the property by driving across it. (Sub. R. 143; 154.) As Mrs. Turner was driving across the empty lot, Mr. Muns "came from nowhere and blocked [her]" with his truck. (Sub. R. 80, 100, 103 ("I [Mrs. Turner] was stopped right in here somewhere and his truck was pulled up in front blocking me from going any further.").) Mr. Muns exited his truck and told Mrs. Turner to stop. (Sub. R. 143.)

Mr. Muns was standing next to the driver's side window. (Sub. R. 84.) Mr. Muns was "trying to bang the window out of the car." (R. 81; *see also*

[1] Although designated for the record by Appellant, the photographic exhibits were omitted from the Substituted Record prepared by Respondent because the black-and-white photocopies are very difficult to read. The original exhibits are being submitted separately to the Court by the Respondent.

Sub. R. 84-85.) Mrs. Turner testified that, during the argument with Mr. Muns, she "didn't think he was going to shoot me." (Sub. R. 88)

There was not much space between the vehicles: "I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open." (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 ("Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly."). Mr. Muns kept telling her to stop, but Mrs. Turner continued cursing at him and driving to navigate her car forward. (Sub. R. 144.) Mr. Muns was positioned in a small space – about three feet -- between Mrs. Turner's car and his own truck's door. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 ("Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles."). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 ("She won't stop. She keeps putting it in forward and reverse maybe three or four times.").) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was "pinning [him] between [his] truck and her car." (Sub. R. 145.)

Despite Mr. Muns' repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

> I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 146.) Mr. Muns testified very clearly that he was not trying to kill Mrs. Turner; he was simply beating on her window to get her to stop. (Sub. R. 146-47, 83 ("I was trying to get her to stop the vehicle. I was trying to keep from getting smushed in between two vehicles.").) He had beaten on the window with his fist before starting to use his gun and hit the window several times before the weapon discharged. (Sub. R. 153-54.)

Mrs. Turner shifted into reverse and then forward before racing forward over the debris that had hemmed her in along the edge of the go-kart path: "And then before [Mrs. Turner's car] hit him and the car door, I jumped – I just kept flooring it. And I floored it and I jumped over – there was a power pole in the yard right in front of a burn pile." (Sub. R. 82; *see also* Sub. R. 117.)

Mrs. Turner sped onward to Mr. Muns' trailer and yelled for someone to call the police. (Sub. R. 82, 93.) Then, she took off again, continuing

through the site and exiting onto Oak Drive along the rear of the property. (Sub. R. 82, 86, 89-91, 94, Ex. 28.) She circled the block and returned on Beard Road near the driveway entrance. (Sub. R. 94-95.) Mrs. Turner saw that Mr. Muns' truck was still there, so she decided to drive to the nearby home of a friend, Mrs. Lisa Mason. (Sub. R. 30, 83, 87; 94-95.) Mrs. Turner pulled up at the house of Mrs. Mason and asked her to call 911. (Sub. R. 26, 49.)

The EMS unit was sent to Mrs. Mason's home at 121 Riverbend Drive. (Sub. R. 38.) The bleeding had already stopped by the time a medic arrived (Sub. R. 108), but the medic still treated Mrs. Turner's wound (Sub. R. 40-41). She was then taken to the hospital. (Sub. R. 44.)

Statement of the Case

On October, 3 2014, Appellant Frank Muns was indicted for (1) attempted murder and (2) possession of a firearm during the commission of or attempt to commit a violent crime. (Sub. R. 1-2.) Mr. Muns was tried in the Court of General Sessions of Aiken County before Judge Doyet Early and a jury on February 4 and 5, 2014. (Sub. R. at 8.)

At the conclusion of the evidence, Mr. Muns' lawyer requested jury charges on the defenses of accident and self-defense. (Sub. R. 164 ("In addition, Your Honor, I think we've elicited testimony from Mr. Muns, if

the jury believes it, that this was either an accident or self-defense, Your Honor, or both.").) Mr. Muns' lawyer specifically requested both a charge on accident and self-defense. (R. Sub. 164-65.) When the State objected, Mr. Muns' lawyer explained:

> I guess the argument would run like this, Your Honor: He's doing this act out of self-defense. He's testified that he felt like he was going to be crushed, but he's not intending to shoot her, that that part of it was accidental. So it's somewhat nested inside – one inside the other. He intends to break the window, he's testified to that, but he did not intend for the gunshot (sic) to go off.

(Sub. R. 165.) The judge took the matter under advisement and the next day denied both jury charges. (Sub. R. 165-67.)

After the judge charged the jury, Mr. Muns' lawyer renewed his earlier motion for a directed verdict. The judge denied that motion and added, "And also, you're protected on the record as far as the request for charges on accident and self-defense." (Sub. R. 200-01.) The jury then began deliberations, returning with a guilty verdict on both charges on February 6, 2014. (Sub. R. 202-03.)

The judge sentenced Mr. Muns to fifteen years on the offense of attempted murder. (Sub. R. 207.) The judge also sentenced Mr. Muns to five

years (to run concurrently) for possessing a firearm during the commission of or attempt to commit a violent crime. (Sub. R. 207.)

Mr. Muns' lawyer filed a Notice of Intent to Appeal the conviction and sentence on February 11, 2014. (Sub. R. 208.) A certificate of service was filed on February 17, 2014. (Sub. R. 209.)

Standard of Review

The law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. *See State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993). The court should not weigh the evidence, but merely decide if there is any evidence supporting the charge's application. *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) ("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.").

Argument

I. The trial court erred when it refused to issue a self-defense charge despite evidence that Mr. Muns was trying to prevent his ex-wife from crushing him with her car.

One may assert self-defense when (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).

Self-defense applies even when the conduct giving rise to a criminal charge is an unintended consequence of one's purposeful, defensive actions. For example, if an accused fights his assailant in self-defense and the assailant falls against a table, then the blow to the assailant's head can still be justified as self-defense even though not part of the fist fight *per se*. *See* 40 C.J.S. *Homicide* § 111(c) (1991) ("Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure, as where in falling he struck or overturned an object and thereby received injuries resulting in his death, or

where in a struggle over the possession of a weapon it was accidentally discharged."), *cited in State v. Burriss*, 334 S.C. 256, 261, 513 S.E.2d 104, 107 (1999).[2]

In this case, Mr. Muns parked his truck and approached Mrs. Turner's car. (Sub. R. 80, 100, 103, 143.) Once Mr. Muns was between the two vehicles, Mrs. Turner began lurching her car forward and back, and Mr. Muns felt trapped and in danger of being crushed. (Sub. R. 115, 144-46.) Mr. Muns pulled out a gun, but only to use as a tool to strike Mrs. Turner's car and not as an offensive weapon. (Sub. R. 145-46, 153-54.) While Mr. Muns pounded his gun against Mrs. Turner's car, the weapon discharged, and Mrs. Turner was struck. (Sub. R. 153-54.)

Mr. Muns' evidence was above and beyond what was actually required to justify a self-defense charge. Once the defendant has asserted self-defense, the burden falls on the State to *disprove* self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). Nevertheless, the trial court, without making any findings about the State's evidence as to any of the necessary elements, rejected the request, giving two reasons.

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[2] After having been cited with approval by the South Carolina Supreme Court in 1999, the passage was renumbered in the latest edition of *Corpus Juris Secundum*; its current location is 40 C.J.S. *Homicide* § 180 (2014).

First, the judge ruled that Mr. Muns brought the incident upon himself when he tried to keep Mrs. Turner from driving over his septic tank instead of just leaving. (Sub. R. 167.) Mr. Muns' lawyer pointed out that the judge had misstated the evidence and that Mr. Muns had simply approached Mrs. Turner's car to keep her from driving off-road and driving over an underground septic tank. (Sub. R. 170.) Only thereafter, when he became pinned between his parked truck and Mrs. Turner's moving car, did Mr. Muns begin using his gun as an instrument to pound on the window to save his own life. (Sub. R. 170.) The judge declined to change his ruling. (Sub. R. 171.)

Second, the judge then added that, "as a matter of law," Mr. Muns had had other ways of avoiding being struck by Mrs. Turner's car. (Sub. R. 167.) Mr. Muns' lawyer explained, in response, that it was for the jury to decide if he had had any other avenues to avoid injury, but the judge was unmoved. (Sub. R. 170-01.)

A. Because Mr. Muns did nothing to cause Mrs. Turner to endanger him with her car, the trial court should not have denied a self-defense charge on the basis of provocation.

Although one who creates the need for force cannot claim self-defense, *see State v. Frazier*, 401 S.C. 224, 233, 736 S.E.2d 301, 306 (2013); *State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007), the focus

is not on the encounter in general, but rather is on the specific actions within the encounter that prompt a violent reaction.

In *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011), for example, the defendant admittedly set events in motion which led to a violent exchange between him and the victim, but he was still entitled to a self-defense charge since he had not prompted the actual violence. In that case, the defendant worked as a security guard at a Columbia apartment building. *Id.* at 495, 716 S.E.2d at 98. The defendant responded to the disruptive behavior of a visitor to one of the apartments and demanded that the visitor leave the premises. *Id.* at 495-96, 716 S.E.2d at 99. Not only did he begin the encounter with the guest, the defendant had actively sought him out to confront him. *Id.* at 495, 716 S.E.2d at 99.

Eventually the visitor emerged from an apartment and left the building; the defendant followed behind him as he made his way out of the building and watched as he walked down the street. *Id.* at 496, 716 S.E.2d at 99. When the visitor turned and took a few steps back toward the defendant, the defendant pulled a gun and shot the visitor. *Id.* at 496-97, 716 S.E.2d at 99-100. Even though the defendant had begun the encounter with the visitor and not the other way around, and even though the defendant had drawn his

weapon first, the Court agreed that there was at least some evidence supporting the self-defense charge. *Id.* at 500-01, 716 S.E.2d at 101-02.

Even uncorroborated from a defendant himself can support a claim that the defendant did not provoke the confrontation. In *State v. Williams*, for example, the Court found that a jury could have found that the defendant was not at fault in bringing on the difficulty based on the victim's conduct. 400 S.C. 308, 733 S.E.2d 605 (2012). There were three witnesses to the victim's shooting death on his porch, and all three testified that the defendant had set the events in motion by approaching the victim to discuss a supposed debt. But, on the more particular issue – whether the defendant had prompted the need for violence during the encounter – there were two different views.

First, the victim's girlfriend testified that the defendant had approached the victim on their porch, argued with him, pulled a gun, and shot him. *Id.* at 311, 733 S.E.2d at 607. Likewise, the defendant's friend, who had driven the defendant to the victim's house, testified that the defendant had approached the victim with his gun already drawn, argued with the victim over money, and then shot the victim without provocation. *Id.* at 311-12, 733 S.E.2d at 607.

Nevertheless, the defendant himself took the stand and offered a completely different version of events: He claimed that he simply walked up to the porch when the victim reached for a gun and seemed ready to shoot the defendant. *Id.* at 312-13, 733 S.E.2d at 607-08. The defendant claimed that "the victim began cursing at him, had a 'demented' look on his face, and pulled a pistol on [him] after [the defendant] confronted him unarmed." *Id.* at 315-16, 733 S.E.2d at 609.

The Court ruled on appeal that the defendant was entitled to a self-defense charge. Even though the defendant had offered the only evidence in support of his position, that unconfirmed testimony was enough. *Id.* at 315, 733 S.E.2d at 609.

Here, Mr. Muns offered testimony that Mrs. Turner was the original aggressor. Mr. Muns testified that on April 6, 2014, he was at home preparing things for work when he needed to make a quick trip to the store. (Sub. R. 139.) As he was leaving his property, he stopped to let the cable down that blocks the driveway. (Sub. R. 69.) While Mr. Muns was stopped at the cable, Mrs. Turner approached Mr. Muns' property via the driveway. (Sub. R. 69.) Mrs. Turner swerved to go around the cable blocking the driveway through the empty, adjacent lot. (Sub. R. 141.) As she entered Mr. Muns' property despite the physical barrier (the cable and various debris to

keep the children from driving their go-carts into the road), Mr. Muns exited his vehicle to tell Mrs. Turner to stop. (Sub. R. 143-44.) Mr. Muns simply wanted to stop Mrs. Turner from driving over the underground septic tank. (Sub. R. 143.) Although Mr. Muns admittedly approached Mrs. Turner's car, the encounter to that point did not involve any threatening actions whatsoever, and certainly Mr. Muns did not create anything that one would believe might become a dangerous situation.

Instead, it was Mrs. Turner who escalated the encounter and introduced an element of physical aggression. Mrs. Turner began moving her vehicle in a fashion that pinned Mr. Muns between the two vehicles. (Sub. R. 144-45.) Because of her aggressive movements, Mr. Muns tried to stop Mrs. Turner from pinning him between the cars by beating on her car window with his hands to get her to stop. (Sub. R. 145-46.) Only when that did not work did Mr. Muns pull his gun to use as a hammer to break Mrs. Turner's car window. (Sub. R. 146.) While using his revolver in this way, the gun discharged accidentally. (Sub. R. 146.)

Thus, Mr. Muns was not the original aggressor and provided evidence that he was not at fault at bringing on the difficulty. The trial court erred in denying him a self-defense charge on the mistaken belief that Mr. Muns had been the aggressor.

B. Because the State failed to introduce any basis for arguing that Defendant either needed to or even could have removed himself from the dangerous situation, the court erred in denying a self-defense charge on that basis.

1. Mr. Muns had no obligation to remove himself from the confrontation with Mrs. Turner because Mr. Muns was defending his own property.

Under the Castle Doctrine, the person claiming self-defense does not have to take advantage of other ways of avoiding the danger because the person claiming self-defense does not have a duty to retreat. The South Carolina Code provides:

> 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 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 . . . .

S.C. Code Ann. § 16-11-440(C) (Supp. 2013).

Although frequently raised in cases of home invasions or burglaries, the Castle Doctrine more broadly applies. *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013); *State v. Jackson*, 384 S.C. 29, 681 S.E.2d 17 (2009). The absence of a duty to retreat extends to the curtilage of one's home. *State v. Wiggins*, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998). In *Wiggins*, the defendant's wife had gotten into an argument with a frequent

customer of the couple's bar. *Id.* at 541, 500 S.E.2d at 491. When the customer's siblings returned the next day to confront the defendant's wife, the situation escalated quickly. *Id.* at 541, 500 S.E.2d at 491. Just then, the customer returned to the bar despite having been told he was not allowed to return. *Id.* at 542, 500 S.E.2d at 491. There was conflicting testimony about who drew a gun first and what exactly was said, but defendant shot and killed the customer in the parking lot. *Id.* at 542-43, 500 S.E.2d at 491-92. While the Court ruled that self-defense was inappropriate for unrelated reasons, the Court agreed that there had been no obligation to avoid the confrontation:

> We agree with [the defendant's] argument that under the fourth element he was under no duty to retreat because the incident occurred in the parking lot of his place of business. There is no duty to retreat where an attack occurs in one's home or place of business. We have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home.

Id. at 548 n.15, 500 S.E.2d at 494 n.15 (citing the former version of current 40 Am. Jur. 2d *Homicide* § 165 (2008) (noting that "curtilage" includes outbuildings, yard around dwelling, and garden)).

Here, Mr. Muns was on the property where he was living; Mrs. Turner, on the other hand, was not living at Mr. Muns' residence when the incident occurred. (Sub. R. 109 ("I was living at my own residence.").) Mrs.

Turner came to the property and was told not to enter the property from a particular point, but she instead continued to try to enter the property. (Sub. R. 144-46.) Once she began to maneuver to get access to the property, she pinned Mr. Muns, who lived there. Even if he had means of escaping the danger (and there is no testimony that he did), he would not have had any duty to avoid the danger due to the Castle Doctrine.

2. Whether or not Mr. Muns had any obligation to retreat from the dangerous confrontation with Mrs. Turner, the State wholly failed its own burden of disproving that no other means of escape existed.

If the State intends to challenge self-defense, then the burden is on the State to prove, beyond a reasonable doubt, that the claimant had other options to remain safe. All that a defendant needs to do to shift the burden to the State is produce *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). Self-defense is not an affirmative defense; instead, once raised by a defendant, the burden falls squarely on the State to affirmatively *disprove* its application. *Id.* at 544-45, 500 S.E.2d at 492-93.

In *State v. Williams*, 400 S.C. 308, 733 S.E.2d 605 (2012), for example, there was wildly inconsistent testimony about the shooting of the victim. While the State solicited the testimony of two witnesses who

testified that the shooter had drawn first and needlessly shot at the victim, the shooter himself said the victim was already pointing a gun at him. *Id.* at 311-12, 733 S.E.2d at 607-08. Reviewing whether the "no other probable means" element had been met, the South Carolina Supreme Court ruled, "Last, there is evidence, although conflicting, that Williams had no other means of avoiding the danger." *Id.* at 316, 733 S.E.2d at 609.

In the present case, the evidence about other means of escape was even more lopsided than the Court found in *Williams*. Mr. Muns testified that he became 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 moving vehicle 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. (Sub. R. 144-46.)

In contrast, the State did not offer *any* testimony from anyone that Mr. Muns had other means of escape. The *only* testimony was that Mr. Muns did not have another choice but to try to get Mrs. Turner to stop. 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. The trial court erred when it refused to issue an accident charge despite evidence that Mr. Muns' gun went off unintentionally while being used to pound on Mrs. Turner's car window to get her to stop.

For an attempted murder to be excused on the ground of accident, the attempt 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). The judge here did not question the fact that at least some evidence had been introduced showing that the shooting had been unintentional. Instead, the judge offered two other reasons for declining a charge on accident.

First, the judge explained that, "as a matter of law," Mr. Muns was not allowed to have a gun with him and was therefore not acting lawfully at the time. The judge explained that the unlawful behavior was Mr. Muns' being a felon in possession of a weapon under both state and federal law. (Sub. R. 168.) When Mr. Muns' attorney questioned that ruling, the judge repeated, "Well, I find as a matter of law that he was not by law allowed to have the weapon on him, that is an unlawful act . . . ." (Sub. R. 169.)

Also on the accident charge, the judge ruled, again "as a matter of law," that the evidence showed that Mr. Muns had not been using due care while trying to get Mrs. Turner to stop. (Sub. R. 166.) At the end of the

discussion over the jury charges, Mr. Muns' lawyer explained that whether the conduct had been reasonable in light of the circumstances was a question for the jury, but the judge again disagreed. (Sub. R. 169 ("I also find as *a matter of law* the way in which he used the weapon in no way can be deemed to be in due care." (emphasis added)).)

A. Because Mr. Muns' possession of a handgun was allowed by law and was not, in any event, a proximate cause of the Mrs. Turner's injury, the court should not have denied the accident charge based on its determination that Mr. Muns was engaged in unlawful behavior.

1. There was no showing that Mr. Muns' possession of a handgun was barred by either South Carolina or federal law, and the court erred in even declaring that he was engaged in unlawful activity.

First, state law prohibits only certain persons from possessing handguns, and Mr. Muns was not among them. Rather, only people who have been convicted of a "crime of violence" are barred from possessing a handgun in South Carolina. S.C. Code Ann. § 16-23-30(B) (Supp. 2013). A "crime of violence," for purposes of that article, means "murder, manslaughter (except negligent manslaughter arising out of traffic accidents), rape, mayhem, kidnapping, burglary, robbery, housebreaking, assault with intent to kill, commit rape, or rob, assault with a dangerous weapon, or assault with intent to commit any offense punishable by

imprisonment for more than one year." S.C. Code Ann. § 16-23-10(3) (Supp. 2013). Moreover, our courts strictly construe criminal statutes in favor of the defendant. *State v. Lewis*, 141 S.C. 207, 139 S.E. 386 (1927). The plain meaning of a statute cannot be contravened. *State v. Leopard*, 349 S.C. 467, 563 S.E.2d 342 (2002). Mr. Muns had convictions for petit larceny and theft (Sub. R. 149), but neither petit larceny nor theft is a "crime of violence" for purposes of § 16-23-30.

Likewise, there was no showing that Mr. Muns was barred by federal law from possessing his firearm. Only when one has a conviction that can be punished by more than one year in prison is the federal prohibition even possibly implicated. 15 U.S.C. § 922(g) (2012). There was no testimony presented at Mr. Muns' trial that he had ever been convicted of a crime which might have carried more than a one year sentence. Mr. Muns testified that he had been convicted of petit larceny and theft, (Sub. R. 149), but no other evidence of his criminal record was offered. The likeliest conviction[3] was for a violation of one of Georgia's offenses involving theft, Ga. Code Ann. §§ 16-8-2 to -9 (2012). However, absent an affirmative showing of special circumstances, such convictions are punished in Georgia only as

[3] The State failed to introduce Mr. Muns' criminal record, and there are no crimes in Georgia specifically known as petit larceny and theft.

misdemeanors, not felonies.[4] 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 . . . ."). Misdemeanors in Georgia do not carry possible sentences in excess of a year. Ga. Code Ann. § 17-10-3(a) (2014). Since there was no basis for a finding that Mr. Muns' faced imprisonment for longer than one year, there was likewise no basis for concluding that Mr. Muns' possession of a firearm violated federal law.

Regardless, even individuals with qualifying criminal records are not barred from possessing all firearms, but only those "which [have] been shipped or transported in interstate or foreign commerce." § 922(g). The "interstate commerce" element of § 922(g) is a jurisdictional requirement which must be proved by the prosecution: ". . . Section 922(g) expressly requires the government to prove that the firearm was 'ship[ped] or transport[ed] in interstate or foreign commerce'; was 'possess[ed] in or affect[ed] commerce'; or is received after having been 'shipped or transported in interstate or foreign commerce.' This jurisdictional element applies to all nine subsections included in Section 922(g)." *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999) (citation omitted). There was no

[4] Again, because the State failed to introduce any testimony about the details of Mr. Muns' criminal record, it is impossible to know when these convictions might have occurred to confirm beyond any doubt what the possible sentence might have been.

evidence whatsoever that the firearm involved in this case had any interstate connection at all, and there was no basis for the judge's determination that Mr. Muns' was barred from possessing his firearm.

Mr. Muns was not barred by South Carolina law from possessing a firearm since he has never been convicted of a violent crime, and the non-violent convictions from Georgia were not shown to trigger the federal ban on possession of a firearm. Moreover, Mr. Muns' firearm itself was not even shown to be implicated by the federal ban. For these reasons, the trial court erred in finding that Mr. Muns was engaged in unlawful activity at the time of the accidental shooting, and the court erred in denying an accident charge on that basis.

2. Because the discharge, not possession, of the handgun was the proximate cause of Mrs. Turner's injury, the court erred in denying a charge about the accident defense regardless of whether Mr. Muns was barred from possessing the gun.

An accident charge is unwarranted based on "unlawful conduct" by the accused only if the unlawful conduct itself was the actual, proximate cause of the ultimate injury. Mere *possession* of a gun by a felon in violation of a state or federal law does not itself proximately cause the accidental *discharge* of the gun, and the mere *possession* itself does not constitute "unlawful behavior" for purposes of preventing an accident charge.

In civil suits, several South Carolina cases have been careful to note that unlawful behavior is not necessarily the proximate cause of all injuries which would not have otherwise happened. *See, e.g.*, *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948) (holding pharmacist's unlawful sale of barbiturates to customer resulting in addiction was not the proximate cause of customer's subsequent self-imposed harm); *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989) (finding there was no proximate causation where the defendant sold alcohol to the already-intoxicated plaintiff, who later attempted suicide since the attempted suicide was an act which the defendant could not have reasonably foreseen when he last served the plaintiff).

The same principle also applies in criminal cases. In fact, in the first case to recognize accident as a defense in South Carolina, the connection between the defendant's unlawful behavior and the victim's death was an issue in a case involving a head-on automobile collision. *See State v. Brown*, 205 S.C. 514, 32 S.E.2d 825 (1945). The defendant claimed that a tire had gone flat just before the accident, and he was unable to react quickly enough to keep his vehicle from swerving into on-coming traffic. *Id.* at 518, 32 S.E.2d at 826. Although the defendant was driving unlawfully at the time of the impact, the jury was nevertheless entitled to weigh the evidence on the

defense of accident. The defendant must be pursuing a lawful enterprise, but instances of illegal behavior which are not the proximate cause of the death do not bar the defense.

More recently, the Supreme Court has permitted the defense of accident in a crime involving the shooting of the victim even though the defendant was unlawfully in possession of the weapon used. In *Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1993), the defendant (Goodson) argued with a patron of a bar over a pool game. The bar owner escorted Goodson outside where Goodson shot the bar owner. *Id.* at 279, 440 S.E.2d at 371. Goodson was convicted of murder, but on appeal, he asserted he was entitled to jury charges on self-defense and accident. *Id.* at 280, 440 S.E.2d at 372.

Although the Supreme Court ultimately ruled that Goodson was not entitled to a charge of accident, the Supreme Court did *not* base that outcome on the fact that Goodson was illegally in possession of the weapon used in the shooting. Indeed, the Court specifically rejected "the State's claim that because Goodson unlawfully possessed a firearm, the defense of accident is precluded." *Goodson*, 312 S.C. at 280 n.1, 440 S.E.2d at 372 n.1. To the contrary, the Court returned to its holding, first announced in *Brown*, and placed the burden on the State to disprove the application of the defense: "[T]he burden rests upon the State to prove beyond a reasonable doubt that

the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." The Court added that the mere illegal possession of a weapon is not the proximate cause of a homicide: "'The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible . . . where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law.'" *Id.* at 280 n.1, 440 S.E.2d at 372 n.1 (quoting 40 Am. Jur. 2d *Homicide* § 75 (1968)).

Most recently, in *State v. Burris*, 334 S.C. 256, 513 S.E.2d 104 (1999), the Supreme Court again ruled that a defense of accident is available even to those who illegally possess the weapon used in the crime charged. In that case, the defendant was a sixteen year old who was robbed by two men who wanted his money to buy drugs. *Id.* at 258, 513 S.E.2d at 108. The attackers threw the defendant on the ground, and he pulled a gun out, shooting twice into the ground. *Id.* at 258, 513 S.E.2d at 108. The attackers backed up, and the defendant got up from the ground. *Id.* at 258, 513 S.E.2d at 108. When the defendant went to pick up his gun, the gun discharged, striking one of the attackers. *Id.* at 258, 513 S.E.2d at 108. At trial, the defendant asked for a jury charge on accident as a defense, but the trial court

refused. The court ruled that, because the defendant was a minor, he was unlawfully in possession of a firearm, *id.* at 259 n.2, 513 S.E.2d at 106 n.2, and was therefore not entitled to assert accident as a defense.

But, at the very least, it was inappropriate for the trial court to prevent the jury from deciding that matter. "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Only in rare cases may proximate cause be decided as a matter of law. *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 137, 558 S.E.2d 271, 277 (Ct. App. 2001); *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). If there is a fair difference of opinion regarding which act proximately caused the injury, then the question of proximate cause must be submitted to the jury. *Ballou*, 291 S.C. at 147-48, 352 S.E.2d at 493.

In this case, Mr. Muns' possession of a gun (legal or not) was not a proximate cause of the shooting of Mrs. Turner. There was nothing about his possession of the weapon, without more, which would have injured anyone in any way. Indeed, Mr. Muns testified that he was not even wielding the gun as a gun at all, but rather was possessing it only as a blunt instrument

with which to strike the window of Mrs. Turner's car to get her to stop endangering him. (Sub. R. 145-46.) More correctly, the *discharge* of the weapon, not its possession, was the proximate cause, and the trial court erred in denying an accident charge based on an incorrect finding of unlawful conduct by Mr. Muns.

B. Because questions of due care are quintessential questions for juries, the court erred when it declined an accident charge based on a ruling about the trial testimony that, "as a matter of law," Mr. Muns was not exercising due care during the incident.

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). If the inferences properly deducible from controverted evidence are doubtful, or tend to show both parties guilty of negligence, and there may be a fair difference of opinion as to whose act proximately caused the injury complained of, then the question must be submitted to a jury. *McVey v. Whittington*, 248 S.C. 447, 151 S.E.2d 92 (1966).

There was certainly at least some evidence introduced showing that Mr. Muns was acting in a reasonable way when he withdrew his handgun and began using it as a hammer to beat on Mrs. Turner's window. Mr. Muns

found himself stuck between his truck and his ex-wife's car, which she was lurching forward and back, nearly striking Mr. Muns. Even Mrs. Turner admitted that he was in danger by her car's forward movement: "I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open." (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 ("Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly."). Mr. Muns tried repeatedly to get her to stop, but Mrs. Turner continued cursing at him and driving to navigate her car forward. (Sub. R. 144.) Mr. Muns was in a space only about three feet wide between the two vehicles. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 ("Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles."). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 ("She won't stop. She keeps putting it in forward and reverse maybe three or four times.").) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was "pinning [him] between [his] truck and her car." (Sub. R. 145-46.)

Despite Mr. Muns' repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

> I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 145-46.) He had beaten on the window with his fist before starting to use his gun. (Sub. R. 154.)

There was no testimony that Mr. Muns even knew that his gun was loaded at the time, and there was no testimony that other options existed. Given the testimony presented at trial, a reasonable jury could easily have found that Mr. Muns took due care in the moment even though the gun did discharge. At the very least, the inferences from the testimony created an issue for the jury to decide. The trial court erred in deciding, in the face of Mr. Muns' testimony, that Mr. Muns' actions reflected lack of due care so clearly that the jury did not deserve the chance to decide the matter for itself and that an accident charge was, thus, not appropriate.

III. Because Mr. Muns must 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.

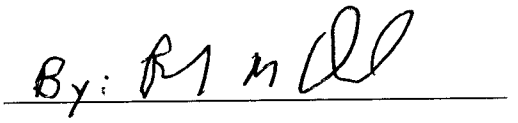
Mere possession of a fireman is not normally itself a criminal offense in South Carolina. Instead, certain instances of possession of a firearm are criminalized by various statutes. For example, Mr. Muns was charged with violating S.C. Code Ann. § 16-23-490. That statute imposes a five-year sentence on anyone who, while carrying out a "violent crime," displays a firearm or knife. S.C. Code Ann. § 16-23-490(A) (2003). The crime has two elements: (1) possession or display of a firearm or knife and (2) commission or attempt to commit a violent crime under § 16-1-160. *Id.*

In this case, Mr. Muns was charged with attempted murder and the possession of a firearm during that act. (Sub. R. 5.) Although attempted murder is a "violent crime," Mr. Muns' conviction has been appealed and must be set aside for the reasons explained above. If so, Mr. Muns would no longer have a conviction for any underlying crime necessary to trigger a possession charge. Therefore, if the Court sets aside Mr. Muns' attempted murder conviction, the Court must also set aside the related conviction for being in possession of a firearm under § 16-23-490.

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: 

Kevin Eberle

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June 21st, 2015

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.

CERTIFICATE OF SERVICE

I certify that a true copy of the Final 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.

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

My Commission Expires: October 24 2021

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