

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUL 07 2016

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

SC Court of Appeals

Case No. 2013-GS-020-1664

State of South CarolinaRespondent,

versus

Frank MunsAppellant.

**MOTION AND MEMORANDUM
FOR REHEARING**

Kevin R. Eberle
414 King Street
Charleston, South Carolina 29403
(843) 377-2412

Robert Dudek, Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorneys for Appellant

INTRODUCTION

Mr. Frank Muns was attacked by his ex-wife on April 6, 2013. She swerved around a barricade to Mr. Muns' property and pulled her car toward Mr. Muns, who had exited his own truck and found himself pinned between the vehicles. Only after Mr. Muns shouted at her and hit her car with his hands, Mr. Muns withdrew a gun. There was no testimony that Mr. Muns had any idea that the gun was loaded, but he was not using it as a weapon in any event. Instead, he used it as a hammer to beat on his assailant's car. Only upon the third strike did the gun accidentally discharge, and a bullet struck his ex-wife. She finally sped away, but Mr. Muns was charged with attempted murder.

Mr. Muns asked the trial court to have the jury consider whether the discharge had been an accident that happened in the course of self-defense. The trial judge refused both defenses based on several legal errors which were argued before the trial court. On appeal, Mr. Muns highlighted the many errors, but on June 22, 2016, this Court affirmed.

As to the accident charge, this Court ruled that, *as a matter of law*, Mr. Muns had acted unreasonably in defending himself despite the uncontested life-or-death attack by his ex-wife. This Court ruled that the trial judge had properly taken the quintessential jury issue of reasonableness from the jury without even recognizing the considerable and uncontested testimony about Mrs. Turner's attack on Mr.

Muns. Because this Court resolved the jury issue of reasonableness against Mr. Muns itself, none of the other issues were addressed.

Next, the Court ruled that Mr. Muns could not use self-defense because he had had other means to avoid the confrontation with his ex-wife. This Court ruled that Mr. Muns could not avoid the “other reasonable means of escape” prong of the defense since he had failed to invoke the Castle Doctrine below, despite his having had a specific argument on its use at trial. (Sub. R. 169-70.) The Court was simply wrong when it wrote that the invocation of the Castle Doctrine had been made only with reference to an argument about who had initiated the dispute. To the contrary, Mr. Muns raised the Castle Doctrine as part of an argument about whether he even had an obligation to retreat at all.

Moreover, the Court misunderstood the shifting burdens in a self-defense charge; it faulted Mr. Muns for not introducing any evidence about his *lack* of options even though the burden of *affirmatively proving the existence of such options* fell squarely on the State (which offered not even a single line of testimony on the point). Nevertheless, Mr. Muns did, in fact, testify that he was trapped, but the Court incorrectly relied on its own skepticism about Mr. Muns’ testimony and decided--based on *no evidence at all*--that Mr. Muns might have extracted himself by doing such things as crawling over the hood of the car.

For these reasons, Mr. Muns moves this Court to rehear this case and enter a new opinion for Mr. Muns.

ARGUMENT

I. The Court should rehear this case to correct the Court's misunderstandings of law and facts.

To prevail on a request for rehearing, the petitioning party must demonstrate that the Court overlooked or misapprehended some part of the argument. S.C. App. Ct. R. 221(a); *see Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

A. The Court misunderstood its role in resolving the classic jury issue of reasonableness and improperly took the issue from the jury based on a "least favorable" view of the evidence.

"[T]o be excusable on the ground of accident, it must be shown the [attempted murder] was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011).

Reasonableness is the textbook example of a jury issue. Neither the trial court nor this Court gets to decide whether a defendant's conduct was reasonable if there is *any* evidence even *suggesting* that a reasonable person would have acted in the same way. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A court commits

reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835.

The Court of Appeals has misstated the lesson from the one case it cited for the notion that courts, not juries, get to decide reasonableness. In *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011), a drug dealer took a gun to meet with an unarmed buyer. The two men got into a fight, and the gun went off. At trial the court refused to charge accident, *not because the defendant had been acting unreasonably*, but “because [the trial court] found there was no evidence [the defendant] was acting lawfully,” a completely different element of the defense. *Id.* at 412, 706 S.E.2d at 14. Likewise, on appeal, the Supreme Court decided that case, not based on the unreasonableness of the conduct, but “[b]ecause [the defendant] was acting unlawfully.” *Id.* at 415, 706 S.E.2d at 16.

In a footnote, the Supreme Court also noted, in dicta, that “there is no evidence Smith exercised due care in the handling of the gun.” *Id.* at 415 n.3; 706 S.E.2d at 16 n.3. Quite obviously, when the party bearing a burden fails to present *any* evidence on it, the court can enter a decision without submitting the case to a jury just to go through the motions. For instance, a trial court may enter summary judgment even in negligence cases but only if there is *no evidence* for the jury to even weigh; even if the court might reach a different outcome than the jury, the

jury gets to make the decision. The trial court (and this Court) commits reversible error by taking the matter from the jury and making a decision on its own.

Unlike *Smith*, this was not a case in which there was “no evidence” about the reasonableness of Mr. Muns’ behavior. To the contrary, certainly at least *some* evidence showed that Mr. Muns was acting in a reasonable way when he withdrew a handgun (which he did not know was loaded) and began using it as a hammer to beat on Mrs. Turner’s car. According to the Court’s view of the evidence, Mr. Muns simply decided to mindlessly attack his ex-wife’s car with a loaded gun. The Court did not even nod to the overwhelming evidence that Mr. Muns was acting only to protect himself in a life-and-death situation and that he escalated his response only after a series of other responses had failed to stop his ex-wife’s attack on him.

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.)

Those are the facts presented to the jury. The test for charging the jury was a simple one: Would *any* reasonable person, when attacked by his ex-wife, use the only tool available to strike his ex-wife’s car to get her to stop lurching the car at

him? The obvious answer to that is “Yes!” and the trial court (and this Court) erred in deciding that no reasonable person would ever react in such a way *as a matter of law*.

Since there was at least some evidence supporting that choice, it was wrong for the trial court and this Court to exclude the jury from the process and decide for itself that Mr. Muns’ behavior had been unreasonable. This Court should rehear this case to address the undeniable fact that a reasonable person might have behaved exactly as Mr. Muns did.

B. Because the Court misread the portion of the trial transcript invoking the Castle Doctrine, misunderstood the shifting burden analysis, and overlooked undisputed testimony that Mr. Muns was trapped during the altercation, the Court should rehear this case.

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).

This Court ruled that Mr. Muns could not assert self-defense because he had failed to contest the fourth element of the defense at trial and that there had been no evidence even suggesting that he had been trapped. Both rulings are wrong.

As an initial matter, the Court is wrong concerning the Castle Doctrine. According to this Court, Mr. Muns failed to preserve the use of the Castle Doctrine because he did not specifically mention it by name for a particular purpose. However, at the charge conference, Mr. Muns asked for the jury to be instructed on self-defense. (Sub. R. 164.) Judge Early refused, citing the requirement that the defendant had no other way to avoid the danger. (Sub. R. 167.) Mr. Muns' lawyer responded that Mr. Muns *was on his own property and was not required by law to retreat*. (Sub. R. 169-70.) That is undeniably an invocation of the Castle Doctrine.

But, even if Mr. Muns should have used some more specific language to preserve the issue, the Court's opinion is nevertheless flawed. Although the correct use of the Castle Doctrine would have completely removed the duty to retreat from the equation, the Court misunderstood the shifting burdens used in 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). 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.

The Court has not cited even a single word of testimony that Mr. Muns could have escaped the assault otherwise. *No one* testified that such avenues were open to Mr. Muns. In fact, at no point did the State even *ask* whether other options were open. Rather, the Court has offered its own unvarnished speculation about other means of escape that have not even a line of testimony in support.

Regardless, even though he had no obligation to retreat and certainly no obligation to prove he could *not* retreat, Mr. Muns did, in fact, go above and beyond his obligations and actually showed with uncontradicted testimony that he could not have retreated. Mr. Muns testified that he was trapped by Mrs. Turner's car. Mr. Muns said that Mrs. Turner began lurching her car forward and back and that Mr. Muns felt trapped and in danger of being crushed. (Sub. R. 115, 144-46.)

The Court apparently overlooked the testimony quoted by Mr. Muns in his Reply Brief showing that he did not have another means of escape. Mr. Muns testified, "Once she – she comes back around and the front of her car was coming around and *pinning me between my truck and her car*. I'm telling her to stop, stop." (Sub. R. 145 (emphasis added).)


That testimony alone raised a jury issue as to whether other avenues existed. *State v. Williams*, 400 S.C. 308, 733 S.E.2d 605 (2012). Although the Court has clearly decided not to believe Mr. Muns, neither this Court nor the trial judge was in a position to decide whether Mr. Muns had another avenue of escape. Having

introduced at least some testimony on the point, it was up to the jury to decide whether to believe Mr. Muns.

CONCLUSION

For all these reasons, this Court should rehear this case and reverse the decision of the trial court.

Respectfully submitted,

By:  _____

Kevin Eberle

Robert Dudek

July 7, 2016

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CERTIFICATE OF SERVICE

(Motion and Memorandum for Rehearing)

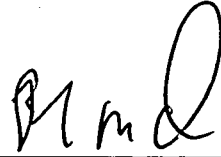
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Attorneys for Appellant

The undersigned hereby states that one copy of Appellant's Motion and Memorandum for Rehearing were served on opposing counsel by U.S. mail on July 7, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "K Eberle", written over a horizontal line.

Kevin Eberle

Robert Dudek

July 7, 2016