

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 CarolinaRespondent,

versus

Frank MunsAppellant.

FINAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

1. One may assert self-defense if he reasonably believed he faced a serious danger not of his own making and had no other probable way of protecting himself. 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 discharged. Did the trial court err in refusing to charge self-defense?
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.

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 conviction³ 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 firearm 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: RM

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Nicholas Shalosky

Robert Dudek

June 2nd, 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 CarolinaRespondent,
versus
Frank MunsAppellant.

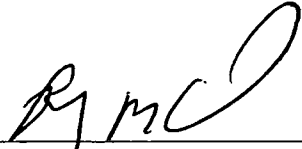
CERTIFICATE OF SERVICE

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 20th day of June, 2015.

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

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

My Commission Expires: October 24, 2021


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STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-000344

THE STATE,RESPONDENT

v.

FRANK MUNS,APPELLANT.

FINAL BRIEF OF 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 Carolina 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 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 thought 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. Smith¹ 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 charge² 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 escape, 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 trial 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 in 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.

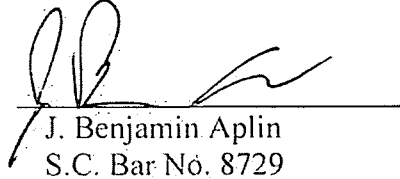
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Columbia, South Carolina
June 1, 2015

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.

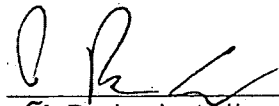
CERTIFICATE OF COUNSEL

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

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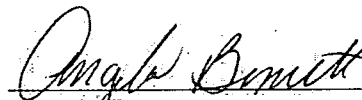
PROOF OF SERVICE

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:

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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 CarolinaRespondent,

versus

Frank MunsAppellant.

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Argument

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

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

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

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

However, Mr. Muns' act of self-defense was banging on Mrs. Turner's car

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

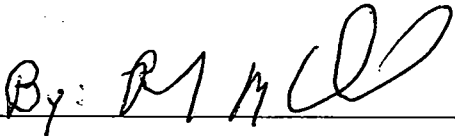
is hardly adequate to inform a jury of laypeople about the relevant law. As the Supreme Court explained in *State v. Fuller*, a trial judge must specifically tailor the defense instructions to adequately reflect the facts and theories presented by the defendant. 297 S.C. 440, 377 S.E.2d 328 (1989). In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

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

Conclusion

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

Respectfully submitted,

By:  _____

Kevin Eberle

Nicholas Shalosky

Robert Dudek

June 2nd, 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 CarolinaRespondent,
versus
Frank MunsAppellant.

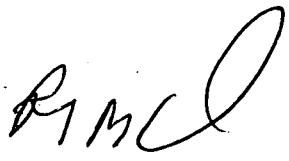
CERTIFICATE OF SERVICE

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

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

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

My Commission Expires: October 24, 2021


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