THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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OCT 21 2016
S.C. SUPREME COURT

Opinion No. 2016-UP-314 (S.C. Ct. App. filed June 22, 2016)

Appellate Case No: 2016-001966

The State, ...Respondent,

v.

Frank Muns, ...Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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

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

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

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

Prof. Kevin R. Eberle, Esquire
Charleston School of Law
385 Meeting Street
Charleston, SC 29403
(843) 377-2412

Rober M. Dudek, Chief Appellate Defender
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's denial of Petitioner's request to charge the jury on the law of accident where the evidence in the record conclusively demonstrates Petitioner was neither using due care nor acting lawfully when 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.

2. Whether the Court of Appeals properly affirmed the trial court's denial of Petitioner'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 Petitioner intentionally fired his gun at the victim in self-defense; and (2) even if Petitioner intentionally shot the victim the evidence conclusively demonstrates: (a) Petitioner 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; and (b) Petitioner was not without fault in bringing on the difficulty.

STATEMENT OF THE CASE

Frank Muns (Petitoner) 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). Petitoner 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, Petitoner proceeded to trial by jury before the Honorable Doyet A. "Jack" Early, III, pursuant to which he was found guilty as indicted. Petitoner 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). Petitioner timely filed a notice of intent to appeal his convictions and sentence as well as a brief in support of his appeal and the Respondent (the State) filed a brief in response. Petitioner's conviction and sentence were subsequently affirmed in an unpublished opinion from the Court of Appeals. State v. Muns, Op. No. 2016-UP-314 (S.C. Ct. App. filed June 22, 2016). (App.p.1-p.6). Petitioner submitted a timely Motion and Memorandum for Rehearing and by Order filed August 22, 2016, the Petition was denied. (App.p.7-p.21). On September 21, 2016, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

STATEMENT OF FACTS

On April 6, 2013, at approximately 11:45 in the morning, Petitoner shot Kim Turner (the victim) in the chest as she was sitting in the driver's seat of her car. Petitoner 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 Petitoner 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 Petitoner was presumed innocent unless the State was able to prove his guilt to them beyond a reasonable doubt. (R.p.9, lines 1-24). After the jury was selected and sworn, the trial court gave more detailed instructions on the presumption of innocence, the State's burden of proof, the roles of the judge and jury, including the jury's duty to judge the facts and the credibility of witnesses. (R.p.10, line 4-p.15, line 17). The parties then made opening statements and the State called its first witness. (R.p. 15, line 18-p.24, lIne 19).

First, the State called Lisa Mason to the stand. Mason lives in Georgia but was visiting her boyfriend, Dawson Mullins, in South Carolinan on April 6, 2013. Mullins lives near the

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

The State then called investigator Brad Wertz from the Aiken County Sheriff's Office, who was also dispatched to Mullins' house. When he arrived he saw a white Pontiac that had the front driver's side window shattered. Wertz spoke to the two officers who first responded to the scene and turned over processing of the crime scene to investigator Chris Johnson. Wertz identified a set of photographs of the victim's car which were admitted into evidence and described for the jury. He testified the shooting scene was about a half a mile from the location where the victim was treated by EMS and he identified an aerial photograph of the neighborhood which showed both locations. Wertz explained they searched for physical evidence at the location of the shooting but noted there would be no spent shells because a revolver does not eject shells. He then identified a set of photographs from the scene of the shooting which were admitted into evidence and described for the jury. Finally, Wertz identified a set of photographs

of the victim's injuries and the bullet which was eventually removed from the victim's body, all of which were admitted into evidence. (R.p.46, line 15-p.71, line 2).

The State next called the victim, Kim Turner, to the stand. She explained that on April 6, 2013, at the time of the shooting, she was married to Tony Turner; however, she and Turner were separated and she was actually living with Petitoner, who is her ex-husband and the father of her children. The victim said she and Petitoner 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 Petitoner 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 Petitoner'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, Petitoner's truck came out of nowhere and blocked her. Petitoner 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 Petitoner from breaking it, but he then tried to hit her through the window, so she rolled it back up. At that point, Petitoner pointed the gun at the victim, looked her straight in the face, and smirked. She though he was going to shoot her so she leaned over and closed her eyes. The victim then heard the gun go off and felt glass

spray all over her. When she looked up, Petitoner 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 Petitoner 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 Petitoner yelling and coming at her again with the gun. The victim drove all the way through Petitoner'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 Petitoner 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 Petitoner 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 Petitoner's location during the incident, including an explanation of exactly where Petitoner 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 Petitoner's mother's property. (R.p.108, line 16-p.109, line 10). She also clarified that because Petitoner blocked her in with his truck she felt like she could not go straight through the go-kart path without possibly running Petitoner 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 Petitoner'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 Petitoner's motion for a directed verdict after which Petitoner advised the court he would testify in his own defense. (R.p.133, line 15-p.137, line 7). Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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).

Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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. Petitoner 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, Petitoner 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. Petitoner 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 Petitoner'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 Petitoner responded with a request to also charge assault and battery first and second degree. Petitoner 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. Petitoner explained his theory was that he began acting in self-defense when he felt like he was going to be crushed, but that he was not intending to shoot the victim, and that the shooting was accidental. He argued he intended to break the window, but did not intend for the gun to go off. The trial court took the requests under advisement and broke for the day. (R.p.163, line 24-p.165, line 17).

The following morning, the trial court made its ruling. In regard to the request for an accident charge, the court referenced State v. Smith[1] and recited the elements of the defense of accident. It found that as a matter of law Petitoner 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 Petitoner: (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).

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

Petitoner 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, Petitoner 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 Petitoner's requests to charge self-defense and accident. (R.p.168, line 10-p.171, line 3).

Closing Arguments, Jury Charge, and Verdict

In his closing argument, Petitoner 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 Petitoner "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 Petitoner 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 Petitoner guilty as charged. When addressing the court in mitigation Petitoner 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).

CERTIORARI

Petitioner argues this Court should grant certiorari to review the Court of Appeals' decision in this case because it made rulings in affirming the trial court's refusal to charge the jury on the law of accident and the law of self-defense which conflict with prior decisions of this Court. In regard to the accident charge, he contends the Court of Appeals erred by failing to follow this Court's rulings that the reasonableness of a defendant's actions is a jury issue if there is any evidence to support that conclusion. In regard to the self-defense charge, he contends Court of Appeals erred by excusing the State's failure to introduce evidence that he had other means of reasonable escape, and by requiring that he retreat at all when he had not duty to do so under the Castle Doctrine. For these reasons, Petitioner argues the Court of Appeals decision requires review by this Court.

The State disagrees and submits the Court of Appeals properly affirmed the trial court's ruling for all of the reason set forth in its opinion and for all of the additional reasons argued in the Final Brief of Respondent, which is hereby incorporated by reference. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. The Court of Appeals' decision was a straightforward exercise of applying existing precedent, logic, and practical consideration of the particular facts and circumstances of Petitioner's case under the appropriate standard of review and does not merit further review by this Court. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court's denial of Petitioner's request to charge the jury on the law of accident where the evidence in the record conclusively demonstrates Petitioner was neither using due care nor acting lawfully when 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.

On appeal to the Court of Appeals, Petitioner argued the trial court erred when it refused to issue a jury charge on accident because 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 contended 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 Court of appeals found, as a matter of law, Petitioner was not entitled to an accident charge because he was failed to use due care in the handling of the weapon. (App.p.5). Petitioner continues to advance his claim that he should have gotten an accident charge and argues "the Court of Appeals misunderstood its role in resolving the classic jury issue of reasonableness and improperly took the issue from the jury based on a 'least favorable' view of the evidence." (Petition, p.7). The State disagrees and submits the Petition should be denied and dismissed. The Court of Appeals properly affirmed the trial court's denial of Petitioner's requested accident charge both for the reasons stated, and for the alternative sustaining grounds set forth in the Final Brief of Respondent. The evidence in the record conclusively demonstrates Petitioner was not using due care when he repeatedly struck his loaded revolver, barrel first, against the window of the victim's car. The evidence also conclusively demonstrates Petitioner 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. For these reasons, the trial court's denial of an accident charge and Petitioner's convictions was properly affirmed by the Court of Appeals.

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. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012). 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).

Petitioner was not Exercising Due Care

Petitioner argues both the Court of Appeals and the trial court erred in concluding that, "as a matter of law," he was not exercising due care. He argues that "[n]either the trial court nor the Court of Appeals gets to decide whether a defendant's conduct was reasonable if there is *any* evidence even *suggesting* that a reasonable person would have acted in the same way. Petitioner 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 a handgun (which he did not know was loaded) and began using it as a hammer to beat on [the

victim's] window." (Petition, p.9). In support of this claim, Petitioner 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, Petitioner specifically admitted during cross-examination he knew the gun was loaded. (R.p.152, line 13-p.153, line 25). Thus, the State submits Petitioner'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 Petitioner's version of events, the State disproved Petitioner was using due care. Both the trial court and the Court of Appeals properly concluded there was a lack of due care as a matter of law, and the trial court properly refused to charge the jury on accident.

Petitioner was Not Acting Lawfully

Petitioner also argued to the Court of Appeals that 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 contended his prior convictions in South Carolina and Georgia are not "crimes of violence" under the terms of the South Carolina Code and therefore he was not barred from possessing a handgun in South Carolina. He likewise contended 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 contended the trail court erred in declaring he was engaged in an unlawful activity merely due to his possession of the revolver used to shoot the victim. The State responded that Petitioner's argument must fail for several reasons.

First, at trial Petitioner never made this particular objection or any other reference to the provisions of the South Carolina Code or the United States Code he relied upon in the appeal. Instead, counsel agreed it would violate the federal statute for a felon to be in possession of a weapon but argued the word "lawfully" in the accident cases is ambiguous and should be strictly construed against the State. By failing to state his argument is a sufficiently specific manner to bring attention to the exact claim, Petitioner's appellate 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, Petitioner 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 Petitioner'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 Petitioner 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 Petitioner'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 Petitioner was in unlawful possession of a weapon, the trial court's finding serves as an alternative sustaining ground on which the Court of Appeals could have 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).

Petitioner's Acts were the Proximate Cause of the Shooting

Next, Petitioner argued to the Court of Appeals 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 relied on our supreme court's opinions in Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) and Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); however, the facts in those cases were very different. Petitioner first noted 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 below, here there is also a lack of evidence Petitioner was acting in self-defense, particularly where he armed himself prior to initiating the confrontation with the victim.

Petitioner next contended 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, Petitioner 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, Petitioner suggested 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, Petitioner did not only snatch his revolver. Instead, he pointed and presented it at the victim while striking it against her car window. Ultimately, Petitioner concluded: "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. Petitioner's acts could not have been an accident.

Because no evidence was presented supporting a finding Petitioner 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. Petitioner's convictions were properly affirmed by the Court of Appeals.

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. State v. 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 Petitioner was guilty of attempted murder. The State submits there is no other way to construe the evidence in this case but that Petitioner'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 Petitioner 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 Petitioner of attempted murder. The means the jurors necessarily concluded the shooting was intentional beyond a reasonable doubt

and not an accident as argued by Petitioner in his closing. (R.p.172, lines 22-25). Clearly they did not believe Petitioner'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. Thus, for this additional sustaining reasons, Petitioner's convictions for attempted murder and possession of a firearm were properly affirmed. Thus, the Court of Appeals decision affirming Petitioner's conviction should likewise be affirmed.

II.

The Court of Appeals properly affirmed the trial court's denial of Petitioner'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 Petitioner intentionally fired his gun at the victim in self-defense; and (2) even if Petitioner intentionally shot the victim the evidence conclusively demonstrates: (a) Petitioner 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; and (b) Petitioner was not without fault in bringing on the difficulty.

On appeal to the Court of Appeals, Petitioner argued 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 claimed 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. Petitioner also claimed 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.

Petitioner continues to advance his claim that he should have gotten a self-defense charge and argues "the Court of Appeals misread the invocation of the Castle Doctrine, misunderstood the shifting burden analysis, and overlooked undisputed testimony that [he] was trapped during the altercation." (Petition, p.11). The State disagrees and submits the Petition should be denied and dismissed. The Court of Appeals properly affirmed the trial court's denial of Petitioner's requested self-defense charge both for the reasons stated and for the alternative sustaining grounds set forth in the Final Brief of Respondent.

There is absolutely no evidence in the record to support a claim that Petitioner acted in self-defense when he shot the victim in the chest. First, there is no evidence in the record from which it could reasonably be inferred that Petitioner intentionally fired his gun at the victim in self-defense under either his version or the victim's version of the confrontation. (Brief of Respondent, p.14-p.16). Second, as found by the Court of Appeals, Petitioner's argument that he had no obligation to remove himself from the confrontation because, under the Castle Doctrine, he was defending his property and had no duty to retreat, is not preserved for Appellate review. (App.p.2). Third, and also as found by the Court of Appeals, there was no evidence that Petitioner had no other probable means of avoiding the danger other than to shoot the victim. (App.p.3). Finally, Petitioner was not entitled to a charge on self-defense because the evidence demonstrates he was not without fault in bringing on the difficulty. (Brief of Respondent, p.16-p.20). The State submits that for all of these reasons, the trial court properly declined to charge self-defense and the Court of Appeals properly affirmed that decision.

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.

In regard to whether Petitioner had no other probable means of avoiding the danger, Petitioner first argued to the Court of Appeals that he had no obligation to remove himself from the confrontation with the victim because he was defending his own property. He contended 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. Petitioner then referred 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.

As properly found by the Court of Appeals, Petitioner'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). Petitioner 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. With reference to pages 169-170 of the Record, Petitioner maintains his trial attorney argued to the trial judge that: "Mr. Muns was *on his own property and was not required by law to retreat.*" (Petition, p.12). Yet, a review of the record reveals the trial attorney never used the term "retreat" and, as noted by the Court of Appeals, only argued about it being his properly in the context of whether he brought about the difficulty. Thus, the Castle Doctrine argument is not preserved for review.

Furthermore, to the extent Petitioner was 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 was a proper topic for the Court of Appeals or this Court's consideration.

In regard to Petitioner's duty to retreat, he argued to the Court of Appeals that the State failed to carry its burden of proving, beyond a reasonable doubt, that he had other options to remain safe. He argued that, similar to Williams, 400 S.C. 308, 733 S.E.2d 605(Ct. App. 2012), he was trapped with no other means of avoiding the danger posed by the victim's car. Petitioner claimed 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, Petitioner 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 Petitioner believed he had no other means of escape, the trial court properly concluded there was no evidence Petitioner had no other means of avoiding the danger, and the Court of Appeals properly affirmed on this basis.

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 Petitioner with her car. The victim testified that after she had been shot, she drove forward, narrowly avoiding Petitioner 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). Petitioner 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 Petitioner had other avenues to avoid the danger other than shooting the victim, (R.p.197, lines 10-20), and the Court of Appeals properly affirmed the denial of a self-defense charge.

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 Petitioner acted in self-defense. No such evidence exists in this case; therefore, the trial court appropriately denied the request to charge self-defense and the Court of Appeals properly affirmed that denial.

CONCLUSION

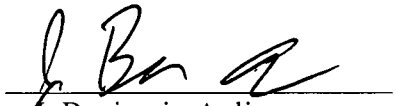
Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming Petitioner's convictions and sentence. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

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

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

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

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
October 21, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 2016-UP-314 (S.C. Ct. App. filed June 22, 2016)

Appellate Case No: 2016-001966

The State, ...Respondent,

v.

Frank Muns, ...Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated October 21, 2016, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

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

Prof. Kevin R. Eberle, Esquire
Charleston School of Law
385 Meeting Street
Charleston, SC 29403

I further certified that all parties required by Rule to be served have been served. This 21st day of October, 2016.

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