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SC Court of Appeals

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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NOV 16 2016
S.C. SUPREME COURT

Case No. 2013-GS-020-1664

State of South Carolina .....Respondent,

versus

Frank Muns .....Petitioner

PETITIONER'S REPLY

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ARGUMENT

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

As previously addressed, this Court should hear this case to correct legal and factual errors committed by the Court of Appeals as to two defenses: accident and self-defense.

First, the Court of Appeals erred by finding *as a matter of law*, and on no evidence whatsoever, that Mr. Muns had not used due care while defending himself from his ex-wife's attack.

Second, the Court of Appeals erred by requiring Mr. Muns to show that he could not have otherwise escaped. Not only is there no obligation to make that showing when a property owner is attacked at his own home, but there was absolutely no evidence showing that any other avenues existed in any event.

A. The State has baldly misrepresented the testimony concerning Mr. Muns' behavior during his ex-wife's attack to show that he acted unreasonably.

Neither 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. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989).

Despite Mr. Muns' clear argument concerning the abundant evidence justifying his actions, the State has still not offered even one piece of evidence to show that Mr. Muns was acting unreasonably. Mr. Muns testified very clearly that his ex-wife was attacking him with her car and that he tried repeatedly to get her to stop by shouting at her and hitting her car with his hands. Only as a last resort, he withdrew a pistol and used it as a hammer, not as gun, to beat on his ex-wife's car window. (Sub. R. 81, 84-85, 115, 143-47, 153-54.) That testimony was far more than adequate to permit the jury—not the trial judge—to decide whether Mr. Muns had been reasonable in using a pistol to defend himself.

Rather, the State has repeated its baseless argument that Mr. Muns knew his gun was loaded before he started using it as a defensive tool. (Return to Pet. for Cert. at 14.) There is not a single piece of testimony supporting the State's claim. The prosecutor never even asked Mr. Muns whether he had known the weapon was loaded; he merely asked whether a loaded weapon had been used. (Sub. R. 152-53.) Obviously, in hindsight, everyone can agree that the weapon was loaded. That, however, is not the same as testifying that he had been aware that the gun had been loaded before, and the State never asked. The State's argument, based on an inaccurate recitation of the testimony, should be struck.

Given the extremely low threshold for creating a jury issue on reasonableness, the extensive testimony offered by Mr. Muns on that point, and the

complete lack of evidence from the State, the error of the Court of Appeal is obvious, and this Court should hear this case to review the issue.

B. Because the State never even tried to introduce any evidence that Mr. Muns had other avenues of escape, the Court of Appeals erred by refusing to charge "self-defense" on that basis.

The Court of Appeals refused to charge self-defense based on an incorrect belief that Mr. Muns had other avenues to escape. No such evidence was even needed since Mr. Muns' timely invocation of the Castle Doctrine caused that element of self-defense to entirely drop out of the analysis. But in any event, there is no evidence at all from the State that any other avenues existed, and the State has still not cited to any such testimony in its Return.

1. Mr. Muns clearly invoked the Castle Doctrine, and the Court of Appeals erred in even considering the "other avenues of escape" issue at all.

The State 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. (Return to Pet. at 21-22.) 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.) 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.) Mr. Muns undeniably raised the Castle Doctrine by asserting self-defense and pointing out to the court that Mr. Muns did not have a duty to retreat from his own property.

The State also wrongly claims that the Castle Doctrine must be raised in a pre-trial proceeding. (Return to Pet. at 22.) The State's reliance on *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), is 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.

The State 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. The Court of Appeals erred when it relied upon the "other avenues of escape" issue at all.

2. On the merits of the "other avenues of escape" issue, the State continues to misunderstand the burdens in this case.

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.

The error with the State's position (and the Court of Appeals') is stated expressly by the State: "[T]here was no evidence that Petitioner had no other probably means of avoiding the danger other than to shoot the victim." (Return to Pet. at 20.) *It is not the burden of the Petition to make that showing.* The burden was on the State to show that other avenues of escape *did* exist, but it failed to introduce even a single line of testimony showing how else Mr. Muns might have avoided injury.

Even overlooking that error, Mr. Muns introduced testimony that he could not have otherwise extracted himself. 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, his ex-wife's car, and his open car door. (Sub. R. 144-45.)

The State's response to that uncontradicted evidence is simply that Mr. Muns never used the word "trapped" during his testimony. (Return to Pet. at 22.) No case has ever ruled that invoking self-defense requires a party to use any special words, and the State certainly never cited any. Besides, Mr. Muns testified that he was "pinned" by his ex-wife's car. The *Oxford English Dictionary* shows that "pinned" and "trapped" are synonyms. "Pin" means "[t]o hold fast, esp. in such a way as to make escape or resistance difficult; to hold down so as to restrict actions or movement." *Oxford English Dictionary*, http://www.oed.com/view/Entry/144031?rskey=0V5GlU&result=5#eid.

Despite bearing the burden of disproving the element, the State 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. The remaining issues raised by the State in its Return to the Petition are not responsive to any arguments raised by Mr. Muns but are nevertheless incorrect as alternate sustaining grounds.

A. There was no showing that Mr. Muns' possession of a handgun was barred by either South Carolina or federal law.

The State would have this Court believe that Mr. Muns was engaged in illegal behavior by merely possessing a gun, thereby denying his the chance to assert "accident."

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" 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). 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.) The State 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). The State has not even attempted to explain its selection of "theft by taking" off the list of possibilities for purposes of drawing comparisons.

The likeliest conviction[1] 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 misdemeanors, not felonies.[2] Ga. Code Ann. § 16-8-12(a) (Supp. 2013). 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

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

[2] 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.

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.

"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.

"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). On the other hand, "robbery" in South Carolina requires the use of force and the taking of at least $2000 of property. The two crimes are related

only in the sense that they are both property offenses but are not otherwise overlapping.

The State 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. (Return to Pet. at 16.) 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). The State 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 his ex-wife at all, but rather was using it only to beat on her window. (Sub. R. 146-47, 153.)

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.

B. Because the discharge, not possession, of the handgun was the proximate cause of Mrs. Turner's injury, illegality of possessing a weapon is irrelevant in any event.

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.

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 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 his ex-wife'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.

C. The refusal to explain even the basic elements of accident to the jury was not a harmless error where a reasonable juror could find that the defense applied.

The State 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. (Return to Pet. at 18.) The State'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

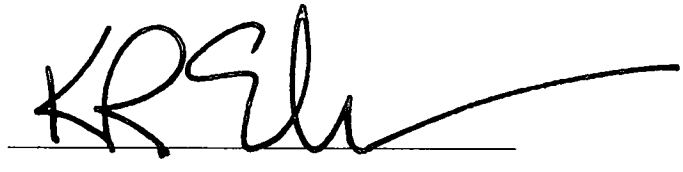
is erroneous when the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant. *Id.* at 442, 377 S.E.2d at 331.

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 grant certiorari and reverse the decision of the trial court.

Respectfully submitted,



Kevin Eberle

Robert Dudek

October 31, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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CERTIFICATE OF SERVICE

(Reply Brief as to Petition for Certiorari)

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The undersigned hereby states that one copy of Petitioner's Return was served on opposing counsel by U.S. mail on October 31, 2016.

Respectfully submitted,

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Oct. 31, 2016