

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge  
\_\_\_\_\_

ORIGINAL

RECEIVED

JUN 26 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

THOMAS DUKES,

APPELLANT

APPELLATE CASE NO 2016-002363  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

TAYLOR D GILLIAM  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial judge erred in denying Appellant's motion for a new trial where Appellant, by virtue of necessity, was justified in maintaining access to his gun until the threat of an angry motorist subsided?

### STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant at the February 2016 term of General Sessions for unlawfully carrying a pistol. R. 116. His case was called to trial on November 16, 2016 before the Honorable Eugene C. Griffith. Assistant Solicitors Robert Elam and Todd Wagoner appeared on behalf of the prosecution, and Elizabeth Fullwood represented Appellant. R. 12.

At the conclusion of the bench trial, Judge Griffith found Appellant guilty as indicted. R. 108, l. 22 – R. 109, l. 5. Judge Griffith sentenced Appellant to pay a fine of two hundred and fifty dollars. R. 111, ll. 18 - 21.

This appeal follows.

## ARGUMENT

**The trial judge erred in denying Appellant's motion for a new trial where Appellant, by virtue of necessity, was justified in maintaining access to his gun until the threat of an angry motorist subsided.**

### Relevant facts

On the morning of October 26, 2015, Appellant was driving to work in Lexington County when another motorist swerved in his direction while attempting to change lanes. R. 76, ll. 10 – 18; Dash Cam Video. Because there was not enough room to change lanes safely, the other motorist remained in his lane but later passed Appellant. R. 76, l. 18 – R. 77, l. 18; Dash Cam Video. While passing, the other motorist cursed at Appellant. R. 76, l. 10 – R. 77, l. 18. The two drivers passed one another and exchanged words at least two more times. R. 80, ll. 6 – 13.

Appellant had previously been in a motor vehicle accident in 2013 which resulted in injuries to his hip, back, shoulder, and neck. R. 76, ll. 6 – 8. At the time of trial, those injuries still caused him pain. R. 76, ll. 8 – 9. As a result, Appellant was exceedingly afraid that the other motorist on the morning of October 26 was going to cause a wreck:

I wanted that man right then to back off because I was afraid he was going to cause a wreck because I had already been through six months of therapy two or three times a week and I don't want to do that again and I didn't know what my choices were at the time... [s]o I just wanted him to leave me alone.

R. 77, ll. 12 – 18.

Appellant was scared, because he did not know what the other motorist's intentions were; he just wanted the other driver to "back off." R. 80, ll. 8 – 13. In order to protect himself, Appellant reached behind the passenger seat, into the luggage area of his pickup truck, and

retrieved his pistol. Appellant removed the holstered gun from a black bag which was secured with a zipper and displayed it to the other motorist. R. 77, l. 4 – R. 80, l. 16.

After that, the other motorist immediately backed off. R. 80, ll. 17 – 20. Appellant stopped at a convenience store to pick up breakfast for his office, and the other motorist turned into the parking lot behind Appellant. R. 82, ll. 12 – 19. Because he could not reach the black bag which the gun had previously been stored in, Appellant laid the gun against the transmission hump on the passenger floorboard. R. 83, ll. 3 – 11; R. 89, ll. 3 – 7. He wanted to be able to get to it, because the other motorist was still in the parking lot. R. 83, ll. 8 – 11. Appellant left his truck locked and went inside to order his food. R. 83, l. 25 – R. 84, l. 6.

Appellant remained apprehensive of the other motorist; he was worried about being seriously hurt based on the other driver's conduct towards him on the road. R. 84, ll. 14 – 23. As he was inside waiting on his food, law enforcement officers arrived. R. 82, ll. 20 – 24.

Captain Daniel Currence with the Lexington County Sheriff's Department responded to a 911 call made by the other motorist by driving to the Exxon Station where Appellant and the other motorist parked. R. 11 – 14. Currence, who was familiar with Appellant from "some other issues" parked at a gas pump and "evaluate[d] the situation". R. 25, ll. 18 – 21; R. 28, ll. 18 – 24.

As Appellant walked out of the gas station with his food in hand, Currence and another officer approached him and asked about the location of the gun. R. 34, l. 3 – R. 35, l. 15. Appellant confirmed that the gun was on the passenger floorboard. R. 36, ll. 2 – 4. Currence looked through the window and saw it laying there. R. 36, ll. 5 – 25. Appellant gave a statement about the incident. R. 39, ll. 2 – 20; R. 114.

During the entirety of his interactions with Currence, Appellant was polite; he did not resist in any way. R. 42, ll. 15 – 18. Patricia Stoner, a Deputy with the Lexington County Sheriff's Department, opened the door to Appellant's truck, "retrieved the handgun, took the magazine out and rendered it safe." R. 52, ll. 1 – 2. Stoner later spoke with the other motorist, Anthony Smith, who stated he did not want to prosecute Appellant. R. 54, ll. 5 – 11; R. 55, l. 1. Because Stoner did not request to see Smith's driver license, she did not learn until after that date that he was driving with a suspended license. R. 61, ll. 3 – 11.

Stacey Gadson, a third law enforcement officer from Lexington County Sheriff's Department, reviewed the dashcam video, physical evidence, and Appellant's statement. R. 69, l. 18 – R. 71, l. 1. Following that review, Gadson obtained an arrest warrant for unlawful carry. R. 71, ll. 5 – 8.

At the conclusion of trial, defense counsel argued the defense of necessity:

[Appellant] was threatened to the extent that he was entitled to take reasonable measures to ward off this perceived threat from this man who ke[pt] coming up and screaming at him and making gestures. Our position is that it was reasonable for him to display that he was armed. He was in his own car. Under our law it's not a habitation but it's a place where you can stand your ground. He didn't take it out. He didn't point it at the guy. He just displayed it and put it down, continued on his way and got to a place basically of safety, of withdrawal.

...

When he gets there, he sees this irate enraged person has followed him. He goes inside because he is retreating, however, he's concerned that when he has to leave, that the fellow may re-engage so **out of necessity he left the gun where it would be accessible** should the fellow try to reignite his confrontation in case he was put in a position where he had to act in self defense again. So it's basically the defense of necessity and I think we meet the elements of that [defense].

R. 103, l. 25 – R. 104, l. 19.

The facts presented by Appellant supported this defense. After Appellant arrived at the gas station, he noticed Smith pull in behind him. Due to Smith's proximity, Appellant wanted to

be able to get to his gun. R. 83, ll. 3 – 11. Appellant was apprehensive and concerned about being seriously hurt: he felt as if he needed to take action to protect himself. R. 84, ll. 14 – 23.

Judge Griffith ruled that the necessity defense was not implicated because there were reasonable alternatives. R. 108, ll. 1 – 17. In particular, he found that once the gun was laid on the floorboard in the front seat, it was not properly stored and therefore unlawfully in the car. R. 108, ll. 13 – 16. Therefore, he found Appellant guilty as indicted and sentenced him to pay a fine of two-hundred and fifty dollars. R. 108, l. 18 – R. 109, l. 9.

### Discussion

“Generally, the grant or refusal of a new trial is within the trial [court]’s discretion and will not be disturbed on appeal without a clear abuse of that discretion.” State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). “Whe[n] there is competent evidence to sustain a jury’s verdict, the trial [court] may not substitute [its] judgment for that of the jury and overturn that verdict.” State v. Miller, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985).

The rationale behind the defense of necessity is that a person should not be criminally accountable if he engages in illegal conduct to avoid a greater harm. The defense of necessity is based on public policy and reflects the determination that if the legislature had foreseen the circumstances faced by the defendant, it would have created an exception. State v. Cole, 304 S.C. 47, 49, 403 S.E.2d 117, 118–19 (1991).

In order to prove necessity, a defendant must show that:

- (1) there is a present and imminent emergency arising without fault on the part of the actor concerned;
- (2) the emergency is of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done; and
- (3) there is no other reasonable alternative, other than committing the crime, to avoid the threat of harm.

State v. Cole, 304 S.C. 47, 49–50, 403 S.E.2d 117, 119 (1991), see also State v. Robinson, 294 S.C. 120, 121-122, 363 S.E.2d 104, 104 (1987) (duress case discussing circumstances under which criminal act could be excused).

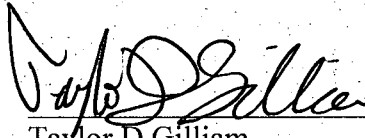
Appellant, by virtue of the necessity defense, was justified in leaving his gun in a place where he could quickly access it. First, there was a present and imminent emergency: Smith had followed Appellant to the convenience station parking lot. Smith was still in his vehicle and posed a greater threat to Appellant, who was no longer in his truck. R. 41, ll. 2 – 13.

Second, Appellant was apprehensive and believed he could have been gravely injured had he not acted to protect himself. R. 84, ll. 14 – 23. As shown at trial, he was worried about his continued safety once he left the store. R. 85, ll. 1 – 12. The situation had not yet resolved itself at the time that Appellant entered the store. That is why he left the gun on the passenger floorboard.

Lastly, Appellant had no reasonable alternatives. He attempted to call 911, but due to a Bluetooth popup on his phone, he was unable to initiate the call. R. 80, ll. 24 – R. 82, l. 19. Appellant indicated that Smith backed off after the gun was displayed; Appellant was under the impression that the situation had deescalated. R. 80, ll. 14 – 22. No reasonable measures needed to be implemented after the other driver backed off. Appellant felt safe once he reached the inside of the convenience store. R. 85, ll. 4 – 6. Therefore, no other reasonable alternatives existed. He acted to protect himself, and it was necessary that he do so.

**CONCLUSION**

Appellant's convictions should be reversed and this case remanded to the Cherokee County Court of General Sessions for a new trial.



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS DUKES,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Dukes states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Eugene C. Griffith, which was held on November 16, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

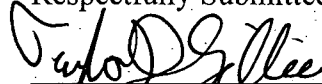
WHEREFORE, He asks the Court to relieve him as counsel for Thomas Dukes.

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SC Court of Appeals

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2017.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment
- (2) Pre-trial transcript dated November 15, 2016
- (3) Trial transcript dated November 16, 2016
- (4) Appellant's Written Statement
- (5) 911 Call
- (6) Dash Cam Video of incident
- (7) Dash Cam Video post-incident

I certify that this designation contains no matter which is irrelevant to this appeal.

June 26, 2017



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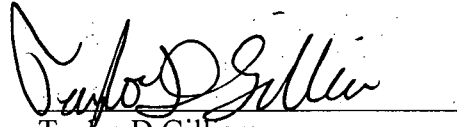
**SC Court of Appeals**

ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 26, 2017.



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