

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

FRANK MUNS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001358

APPENDIX

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State of South Carolina
County of Aiken

Court of General Sessions

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	)	
	)	Transcript of Record
v.	)	2013-GS-02-01657
	)	2013-GS-02-01664
Frank Muns	)	
	)	
<u>Defendant.</u>	)	

February 4-5, 2014
Aiken, South Carolina

B E F O R E:

The Honorable Doyet Early, Judge; and a jury.

A P P E A R A N C E S:

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Attorney for the State

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1 (The following proceedings were held February
2 4-6, 2014.)

3 THE COURT: The State may call its next case.

4 MS. SHEFTALL: Thank you, Your Honor.

5 The State calls the *State of South Carolina vs.*
6 *Frank Muns*. It is a true-billed indictment for
7 attempted murder, 2013-GS-02-01657, and a
8 true-billed indictment for possession of a fire
9 during the commission of a violent crime, Indictment
10 No. 2013-GS-02-01664.

11 THE COURT: Thank you, ma'am.

12 All the defendant is present, represented by
13 Mr. Routzong.

14 All right. Ladies and gentlemen, the State has
15 called for trial a case for attempted murder and
16 possession of a firearm during the commission of or
17 attempt to commit a violent crime. Mr. Muns, the
18 defendant, has pled not guilty to both of these
19 indictments. A plea of not guilty gives him the
20 constitutional protection of being presumed innocent
21 unless the State is able to prove his guilt to you
22 beyond a reasonable doubt.

23 Mr. Muns, if you would please stand and face
24 the jury panel.

25 (The defendant stands and faces the jury

1 panel.)

2 THE COURT: Thank you. You may be seated.

3 The alleged victim in the case is one Kim
4 Turner. Is Ms. Turner in the courtroom? Please
5 stand and face the jury, ma'am.

6 (Ms. Turner stands and faces the jury panel.)

7 THE COURT: Thank you.

8 Ladies and gentlemen, are any member of the
9 jury panel related by blood or marriage or do you
10 now or have you in the past had a close personal or
11 social relationship with the defendant, Frank Muns,
12 or the alleged victim, Kim Turner? If so, please
13 stand.

14 I'm told that the potential witnesses in the
15 trial of this case are as follows: Investigator
16 Brad Wertz with Aiken County Sheriff's Department,
17 Deputy Benjamin Gavin -- G-A-V-I-N -- Aiken County
18 Sheriff's Office; Aaron Lemaster, Aiken County EMS;
19 Victoria Oxendine, Aiken County EMS; Sergeant Kristi
20 Eagerton, Aiken County Sheriff's Office; MINOR 1,
21 Anthony Tuner, Lisa Mason, Tina Hills, and Janice
22 Belger.

23 Mr. Routzong, do you have any witnesses?

24 MR. ROUTZONG: Only the defendant, Your Honor.

25 THE COURT: Are any members of the jury panel

1 related by blood or marriage now or in the past or
2 do you now or have you in the past had a close
3 personal or social relationship with these potential
4 witnesses? If so, please stand.

5 The State Solicitor's Office will be
6 prosecuting the case, Ms. Virginia Sheftall, Mr. Jay
7 Slocum; the defendant is represented by Mr. Michael
8 Routzong. Any member of the jury panel now or have
9 in the past had legal services performed by any of
10 the lawyers? If so, please stand.

11 Any member of the jury panel related by blood
12 or marriage now or in the past or have you had a
13 close personal or social relationship with any of
14 the lawyers? If so, please stand.

15 Ladies and gentlemen, the allegations are --
16 these are simply allegations. It's alleged that
17 here Aiken County on April 6th of 2013, that the
18 defendant attempted to murder or kill one Kim Turner
19 by shooting her in the side with a firearm and at
20 that time he had in his possession a weapon during
21 the commission of a violent crime. This occurred
22 where in Aiken County, allegedly?

23 MS. SHEFTALL: Your Honor, in Beech Island,
24 South Carolina.

25 THE COURT: In Beech Island, South Carolina.

1 Any member of the jury panel know anything about
2 this case? Read about it? Heard about? Anybody
3 discuss it with you? Seen anything on TV? Read
4 about it in the newspapers? Internet? Do you know
5 anything at all about the case?

6 As I told you when you were sitting here
7 earlier today about having two judges in the trial
8 of the case, me being the judge of the law and you
9 being the judge of the facts, I ask you once again,
10 having given you that explanation, do I have any
11 member of the jury panel who is unable because of
12 any reason whatsoever, personal, religious,
13 political, any reason why you cannot serve as a
14 juror in this case with particular emphasis being on
15 your ability to be fair both to the State and to the
16 defendant? If so, please stand.

17 Do I have any member of the jury panel who you
18 or your immediate family has been the victim of a
19 violent crime or the crime of burglary or petit or
20 grand larceny, stealing? If so, please stand.

21 All right. Once again I hate to have to go
22 back through this, but this is a separate case and
23 we have to make a separate record. Yes, ma'am?
24 Your name?

25 PROSPECTIVE JUROR: I'm Juror 48, Donna Erdman.

1 I was robbed, I guess it's been about 10 or 12 years
2 ago now, my home.

3 THE COURT: You had a home invasion or a home
4 break-in. The fact that you had to experience that,
5 ma'am, would that in any way preclude or keep you
6 from being fair and impartial?

7 PROSPECTIVE JUROR: No.

8 THE COURT: Thank you. You may be seated.

9 Yes, sir, my juror who has been married 21
10 years? You name?

11 PROSPECTIVE JUROR: Craig Mason, Juror 111. I
12 was robbed also at gunpoint.

13 THE COURT: And I asked you the same question
14 earlier this morning. But would that in any way
15 preclude or keep you from being fair and impartial?

16 PROSPECTIVE JUROR: No, sir.

17 THE COURT: Thank you. You may be seated.

18 Yes, sir, on the front row?

19 PROSPECTIVE JUROR: Yes, sir. I live in Beech
20 Island as well, and about four years ago I was
21 carjacked and robbed and pistol-whipped. I do not
22 feel as though that's going to be any prejudice in
23 my opinion.

24 THE COURT: So you can listen to this case and
25 set that aside and be fair an impartial?

1 PROSPECTIVE JUROR: I can.

2 THE COURT: Thank you.

3 Yes, ma'am. Once again, your name and number?

4 PROSPECTIVE JUROR: I'm Tyesha Smith, 170. My
5 brother was murdered in 2012 in North Augusta.

6 THE COURT: And that's still an unsolved
7 situation. But you told me earlier today that you
8 could serve and be a fair and impartial juror; is
9 that correct?

10 PROSPECTIVE JUROR: Yes, sir.

11 THE COURT: Still the same here?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: Thank you, ma'am.

14 Yes, ma'am, in the blue, your name again?

15 PROSPECTIVE JUROR: I'm Juror No. 12. My name
16 is Harriet Beadell. My youngest brother was
17 murdered.

18 THE COURT: And you earlier today in another
19 jury told me that you could set that aside and be
20 fair and impartial. Is that still correct, ma'am?

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Thank you, ma'am.

23 MR. SLOCUM: Your Honor, may we have the number
24 of the gentleman from Beech Island?

25 THE COURT: Your number, sir?

1 PROSPECTIVE JUROR: 106.

2 THE COURT: 106.

3 MR. SLOCUM: Thank you, sir.

4 THE COURT: Any member of the jury panel -- and
5 I'm sorry this is repetitious, but we have to make a
6 record of each case.

7 Any member of the jury panel who is a member of
8 or a contributor to an organization that has as its
9 primary concern the promotion of law enforcement
10 such as MADD, SADD? If so, please stand.

11 Any additional questions by the State?

12 MS. SHEFTALL: Nothing from the State, Your
13 Honor.

14 THE COURT: By the defendant?

15 MR. ROUTZONG: Just number one, Your Honor, on
16 our list.

17 THE COURT: Well, I asked if any member had a
18 violent crime or --

19 Any member of the jury panel been the victim of
20 a physical assault or criminal domestic violence?
21 If so, please stand.

22 PROSPECTIVE JUROR: Your Honor, I told you
23 about it.

24 THE COURT: Stand up and tell me again. We
25 have to do it again for the record.

1 PROSPECTIVE JUROR: A criminal domestic
2 violence. Me and my sister had got into a fight.

3 THE COURT: That was nine years ago; right?

4 PROSPECTIVE JUROR: 19. It was about 19 years
5 ago, sir.

6 THE COURT: 19 years ago?

7 PROSPECTIVE JUROR: Yes, sir.

8 THE COURT: What's your name again?

9 PROSPECTIVE JUROR: Elaine Milton. Well, my
10 maiden name is Brooks. But I've been married, like,
11 three years. Four years September the 18th.

12 THE COURT: Thank you, ma'am.

13 Yes, sir?

14 PROSPECTIVE JUROR: Does the information I gave
15 you earlier qualify for physical assault?

16 THE COURT: It certainly does. That's good.
17 You've already told us.

18 Anything else, Mr. Routzong?

19 MR. ROUTZONG: No, sir.

20 THE COURT: Anything by Ms. Sheftall?

21 MS. SHEFTALL: No, sir. Thank you.

22 THE COURT: All right. Five and five, ladies
23 and gentlemen. We're going to draw this jury with
24 the same procedure we just used. If your name is
25 called, please come forward.

1 THE CLERK: Juror No. 145, Wilfred Raiford.

2 (Mr. Raiford comes forward.)

3 THE CLERK: What say ye State?

4 MS. SHEFTALL: I beg the Court's indulgence a
5 moment, Your Honor.

6 Please present Mr. Raiford.

7 THE CLERK: What say ye Defense?

8 MR. ROUTZONG: Please seat Mr. Raiford.

9 THE CLERK: Please have a seat in the jury.

10 Juror No. 10, Randy Baker.

11 (Mr. Baker comes forward.)

12 THE CLERK: What say ye the State?

13 MS. SHEFTALL: Please excuse Mr. Baker.

14 THE CLERK: Please return to your seat.

15 Juror No. 8, Stacy Atkins.

16 (Mr. Atkins comes forward.)

17 THE CLERK: What say ye the State?

18 MS. SHEFTALL: Please excuse Mr. Atkins.

19 THE CLERK: Please return to your seat.

20 Juror No. 61, Tammy Glover.

21 (Ms. Glover comes forward.)

22 THE CLERK: What say ye the State?

23 MS. SHEFTALL: Please present Ms. Glover.

24 THE CLERK: What say ye Defense?

25 MR. ROUTZONG: Please seat Ms. Glover.

1 THE CLERK: Please have a seat in the jury box.
2 123, Elaine Milton.
3 (Ms. Milton comes forward.)
4 THE CLERK: What say ye the State?
5 MS. SHEFTALL: Please present Ms. Milton.
6 THE CLERK: What say ye the Defense?
7 MR. ROUTZONG: Please seat Ms. Milton.
8 THE CLERK: Ma'am, have a seat in the jury box.
9 97, Joan Jones.
10 (Ms. Jones comes forward.)
11 THE CLERK: What say ye the State?
12 MS. SHEFTALL: Please present Ms. Jones.
13 THE CLERK: What say ye Defense?
14 MR. ROUTZONG: Please seat Ms. Jones.
15 THE CLERK: Please have a seat in the jury box.
16 Number 175, Alexandros Stellar.
17 (Mr. Stellar comes forward.)
18 THE CLERK: What say ye the State?
19 MS. SHEFTALL: Please present Mr. Stellar.
20 THE CLERK: What say ye Defense?
21 MR. ROUTZONG: Please seat Mr. Stellar.
22 THE CLERK: Please have a seat in the jury box.
23 Number 12, Harriet Beadell.
24 (Ms. Beadell comes forward.)
25 THE CLERK: What say ye the State?

1 MS. SHEFTALL: Please present Ms. Beadell.

2 THE CLERK: What say ye Defense?

3 MR. ROUTZONG: Please excuse Ms. Beadell.

4 THE CLERK: Please return to your seat.

5 188, Patrick Warrick.

6 (Mr. Warrick comes forward.)

7 THE CLERK: What say ye the State?

8 MS. SHEFTALL: Please present Mr. Warrick.

9 THE CLERK: What say ye Defense?

10 MR. ROUTZONG: Please seat Mr. Warrick.

11 THE CLERK: Please have a seat in the jury box.

12 119, Bartley McLendon.

13 (Mr. McLendon comes forward.)

14 THE CLERK: What say ye the State?

15 MS. SHEFTALL: Please present Mr. McLendon.

16 THE CLERK: What say ye Defense?

17 MR. ROUTZONG: Please excuse Mr. McLendon.

18 THE CLERK: Please return to your seat.

19 50, Sarah Feagin.

20 (Ms. Feagin comes forward.)

21 THE CLERK: What say ye the State?

22 MS. SHEFTALL: Please present ms. Feagin.

23 THE CLERK: What say ye Defense?

24 MR. ROUTZONG: Please seat Ms. Feagin.

25 THE CLERK: Please have a seat in the jury box.

1 168, Marshall Smith.
2 (Mr. Smith comes forward.)
3 THE CLERK: What say ye the State?
4 MS. SHEFTALL: Please present Mr. Smith.
5 THE CLERK: What say ye Defense?
6 MR. ROUTZONG: Please seat Mr. Smith.
7 THE CLERK: Please have a seat in the jury box.
8 Juror 101, Lowell Koppert.
9 (Mr. Koppert comes forward.)
10 THE CLERK: What say ye the State?
11 MS. SHEFTALL: Please present Mr. Koppert.
12 THE CLERK: What say ye Defense?
13 MR. ROUTZONG: Please excuse Mr. Koppert.
14 THE CLERK: Please return to your seat.
15 Number 7, Richard Arkin.
16 (Mr. Arkin comes forward.)
17 THE CLERK: What say the State?
18 MS. SHEFTALL: Please present Mr. Arkin.
19 THE CLERK: What say ye Defense?
20 MR. ROUTZONG: Please seat Mr. Arkin.
21 THE CLERK: Please have a seat in the jury box.
22 Number 16, Jason Blackmon.
23 (Mr. Blackmon comes forward.)
24 THE CLERK: What say ye the State?
25 MS. SHEFTALL: Please present Mr. Blackmon.

1 THE CLERK: What say ye Defense?

2 MR. ROUTZONG: Please seat Mr. Blackmon.

3 THE CLERK: Please have a seat in the jury box.

4 118, Janice McKeon.

5 (Ms. McKeon comes forward.)

6 THE CLERK: What say ye the State?

7 MS. SHEFTALL: Please present Ms. McKeon.

8 THE CLERK: What say ye Defense?

9 MR. ROUTZONG: Please seat Ms. McKeon.

10 THE CLERK: Please have a seat in the jury box.

11 Number 174, Kristie Steelman.

12 (Ms. Steelman comes forward.)

13 THE CLERK: What say ye the State?

14 MS. SHEFTALL: Please present Ms. Steelman.

15 THE CLERK: What say ye Defense?

16 MR. ROUTZONG: Please seat Ms. Steelman.

17 THE CLERK: Please have a seat in the jury box.

18 THE COURT: All right. Two and one on the

19 alternates.

20 THE CLERK: Number 104, Joshua Leach.

21 (Mr. Leach comes forward.)

22 THE CLERK: What say ye the State?

23 MS. SHEFTALL: Please excuse Mr. Leach.

24 THE CLERK: Please return to your seat.

25 32, Donnie Carter.

1 (Mr. Carter comes forward.)

2 THE CLERK: What say ye the State?

3 MS. SHEFTALL: Please present Mr. Carter.

4 THE CLERK: What say ye Defense?

5 MR. ROUTZONG: Please seat Mr. Carter.

6 THE CLERK: Please have a seat in the jury box.

7 131, Iraida Musica.

8 (Ms. Musica comes forward.)

9 THE CLERK: What say ye the State?

10 MS. SHEFTALL: Please present Ms. Musica.

11 MR. ROUTZONG: Please excuse Ms. Musica.

12 THE CLERK: Please return to your seat.

13 124, Robert Molina.

14 (Mr. Molina comes forward.)

15 THE CLERK: What say ye the State?

16 MS. SHEFTALL: Please present Mr. Molina.

17 THE CLERK: What say ye Defense?

18 MR. ROUTZONG: Please excuse Mr. Molina.

19 THE CLERK: Please return to your seat.

20 173, Marcie Springer.

21 (Ms. Springer comes forward.)

22 THE CLERK: What say ye the State?

23 MS. SHEFTALL: Please present Ms. Springer.

24 THE CLERK: What say ye Defense?

25 MR. ROUTZONG: Please seat Ms. Springer.

1 THE CLERK: Please have a seat in the jury box.

2 THE COURT: Any motions by the State in
3 connection with the selection of the jury?

4 MS. SHEFTALL: Nothing from the State, Your
5 Honor.

6 THE COURT: By the defendant?

7 MR. ROUTZONG: No, sir.

8 THE COURT: I'm not sure when we'll start the
9 trial of this case. We've got to finish that first
10 one. So you've got, on the jury information card, a
11 number to call back. So call back after 6:00
12 tonight and we will identify them as -- Ms. Lisa?

13 THE CLERK: Panel 2.

14 THE COURT: Panel 2. Panel 1 has already been
15 selected and they will already be working. So that
16 will be on the thing, Panel 2, and the rest of the
17 jury panel. So you'll get instructions as to when
18 to return. It could very well be in the morning,
19 just not sure how this other case is going to go.
20 But it's Panel 2. You'll go now with Mr. Bill and
21 he will show you where to come back and where to
22 start.

23 Ladies and gentlemen, those, obviously, who
24 were not drawn, not sure if we will have any more
25 jury trials. It just depends on how certain things

1 go. So what I'll ask you to do is please call back
2 in after 6:00 tonight. And you'll be the panel, not
3 Panel 1 or 2 but -- how do you refer to them as?

4 THE CLERK: The pool.

5 THE COURT: The pool. I'm sorry. You'll be
6 the pool. And there will be instructions to you to
7 either report or to call back after such-and-such
8 time. And we do that so it will not be sitting up
9 here waiting and waiting and waiting; we're trying
10 to make it the most efficient for you. If I do not
11 see you again, I thank you for coming. Obviously we
12 cannot run our court system without the citizens
13 being ready, willing and able to perform their civic
14 duties. So I'm going to let you go now. Leave your
15 badges with Burt at the back door when you go out,
16 and you'll call back after 6:00 to receive
17 instructions concerning the balance of the week.
18 Thank you very much.

19 (Jury pool dismissed.)

20 THE COURT: Is the State ready to proceed?

21 MS. SHEFTALL: Yes, Your Honor.

22 THE COURT: Is the defendant ready to proceed?

23 MR. ROUTZONG: Yes, sir.

24 THE COURT: All right. We had a pretrial
25 conference at the sidebar. I was informed that we

1 have no pretrial matters; is that correct, Madam
2 Solicitor?

3 MS. SHEFTALL: That's correct, Your Honor.

4 THE COURT: Mr. Routzong?

5 MR. ROUTZONG: Yes, sir, Your Honor.

6 THE COURT: Bring the jury out, please.

7 MS. SHEFTALL: Your Honor, I apologize. I did
8 neglect to mention one thing.

9 THE COURT: Well, wait a minute.

10 Close the door.

11 MS. SHEFTALL: Do you want me to approach?

12 THE COURT: All right. Yes, ma'am.

13 (Sidebar conference.)

14 THE COURT: All right. Bring the jury out,
15 please.

16 (The jury enters the courtroom at 10:08 AM.)

17 THE COURT: Good morning. The first thing we
18 have to do to get started in the trial is for you to
19 be sworn in for this particular trial. So if you
20 would please stand and raise your right hand, the
21 clerk will administer the oath.

22 THE CLERK: You shall well and truly try in a
23 true deliverance make between the State of South
24 Carolina and a defendant at the bar in a true
25 verdict render according to the law and evidence

1 given in this case, so help you God.

2 THE COURT: Please say, I do.

3 THE JURY (collectively): I do.

4 (Jury is sworn.)

5 THE COURT: Ladies and gentlemen, let me give
6 you just a few opening remarks before we tell you
7 where we're going and how we're going to get there.
8 First of all, let me remind you that the fact that
9 the defendant -- Mr. Muns has been indicted for
10 attempted murder and a possession of a weapon during
11 the commission of or an attempt to commit a violent
12 crime. Please bear in mind that this indictment is
13 simply the charging document by way this case comes
14 into the courtroom. He has pled not guilty to the
15 indictments, and obviously by pleading not guilty,
16 he has the constitutional presumption of innocence
17 unless the State is able to prove their case to you
18 beyond a reasonable doubt. And we will discuss what
19 reasonable doubt means and all of that at the
20 conclusion of the case.

21 Now, the way the case proceeds is because the
22 State has the burden of proof, they will present
23 their witnesses first. And the State will conduct a
24 direct examination of the witness, asking them
25 questions about the events. The defense attorney

1 has the right to cross-examine those witnesses.
2 Once the State has completed their case and
3 presented all of the witnesses, then the defendant
4 has the right, if he chooses, to present his own
5 defense, and then the defendant would call the
6 witnesses, they would directly examine them and the
7 State could then cross-examine those witnesses.

8 Sometimes after the defense's case has been put
9 up, the State would have a right to reply to
10 anything. That rarely happens and I doubt it would
11 happen in this case, but if it does, it's just a
12 very short witness to reply to something. That
13 would be all of the testimony.

14 Before the testimony starts, the State and the
15 defendant have the right to make an opening
16 statement. And that is not evidence in the case,
17 that's simply the lawyers' -- what they want to tell
18 you to look for, sort of their game plan as to how
19 they're going to try the case. It's a roadmap of
20 where they're going from A to Z. But that is not
21 evidence in the case, it's simply the lawyers'
22 explanation to you as to what to listen to and what
23 the case is about.

24 After all of the testimony has been completed,
25 then the lawyers will then give you their final

1 arguments. And the arguments at the end of the
2 case, that, too, is not evidence in the case; that's
3 simply them arguing their side of the case. Once
4 the lawyers have completed their arguments, then I
5 will give you a charge or an instruction on the law
6 in the case dealing with general constitutional
7 policies and general definitions dealing with
8 reasonable doubt and credibility of witnesses and
9 presumption of innocence and that sort of thing, and
10 then I would go in specifically to the elements
11 dealing with these two indictments, attempted murder
12 and possession of a weapon during the commission or
13 the attempt to commit a violent crime. So that's
14 sort of how the trial will flow.

15 I suspect that if we don't finish today, we
16 will certainly finish tomorrow. We plan to go today
17 until 12:30 or so. We'll break for lunch about an
18 hour and half and then go til about 5:00 this
19 afternoon depending on where we are in the case.
20 And if we have to come back tomorrow, then obviously
21 we will get started about 9:30. But we'll just sort
22 of see how we're running as the day goes on and try
23 to accommodate everyone as possible.

24 As I told you yesterday, my job is -- I'm the
25 judge of the law in the case. So I give you the law

1 and you have to accept the law as I give it to you.
2 If you come into the courtroom with some
3 preconceived idea about what the law is or what it
4 should be and it doesn't agree with what I tell you,
5 please set aside your preconceived ideas and accept
6 the law as I give it to you. I give you the law as
7 it currently stands in the state of South Carolina.

8 My other job is to rule on the admissibility of
9 evidence. The lawyers have to ask the questions and
10 present evidence that comply with our rules of
11 evidence and our rules of criminal procedure. Once
12 that evidence is admitted into the trial of the
13 case -- and the evidence from one witness may be one
14 thing and the next witness may be a different thing,
15 but it's all admitted into the trial of the case --
16 then that's where your job comes in. You are the
17 judges of the facts, as I told you yesterday, and
18 what you do by that is you have to sit and listen
19 and judge and determine what the true facts are in
20 the case. You judge the credibility or the
21 believability of the witnesses who testify in the
22 case. It's a job you do on a daily basis dealing
23 with wives, husbands, children, employees,
24 employers. You know how to tell when someone is
25 telling the truth.

1 Once all of the evidence is in and you
2 determine what those true facts are, you take those
3 facts and apply it to the law as I give it to you,
4 then you'll be in a position to render a verdict.

5 I try to run an efficient courtroom. We
6 started right on time this morning and we'll keep
7 the lawyers moving. But I'm not trying to run a
8 race, so if at any time during the trial of the case
9 you become uncomfortable, you need to use the
10 restroom, you just get tired of sitting, get tired
11 of listening to me, whatever, you get hot, cold,
12 please raise your hand and I'll make sure your needs
13 are met. We will take a morning break and then
14 break for lunch, take an afternoon break. The
15 breaks won't be that long because we want to keep
16 the trial moving.

17 I will ask that at the first break, I need a
18 foreperson, the foreperson from the regular jurors,
19 not the alternates. And I would ask that the 12 of
20 y'all select a foreperson who is simply someone who
21 acts as a spokesman or spokeswoman for the jury and
22 you head up the deliberations at the conclusion. I
23 will ask that you do not start deliberating or
24 talking about the case, discussing the case, doing
25 anything about the case while you're in the jury

1 room until all of the evidence has been presented
2 and the final arguments have been made and I've
3 instructed you on the law. So you can talk about
4 anything you want to back there, but don't talk
5 about the case until it's time to start
6 deliberating.

7 So we're going to start right now with opening
8 statements. Any objections to my opening remarks by
9 the State?

10 MS. SHEFTALL: Nothing from the State, Your
11 Honor.

12 THE COURT: By the Defense?

13 MR. ROUTZONG: No, sir.

14 THE COURT: Okay. I look forward to working
15 with you. Like I said, if anything -- if you get
16 uncomfortable, you can't hear, you get cold, you get
17 hot, any problem, raise your hand. Thank you.

18 All right. Ms. Sheftall?

19 MS. SHEFTALL: Thank you, Your Honor. May it
20 please the Court.

21 THE COURT: Yes, ma'am.

22 MS. SHEFTALL: Ladies and gentlemen of the
23 jury, good morning. The case you're about to hear
24 this morning isn't one of those who-done-it
25 mysteries like Matlock or the CSI shows, or any show

1 on television for that matter. These are real
2 events that happened to real people. And we know
3 who done it. And this isn't a love story either, at
4 least not the kind that I expect you're used to
5 hearing where everyone lives happily ever after.

6 The case you're going to hear today is about
7 Kim Turner, the victim, and how she was shot at
8 pointblank range in the ribcage while she was in the
9 driver's seat of her car, by that man, Frank Muns,
10 the defendant, a man that Ms. Turner has known for
11 34 years. He is her ex-husband and he is the father
12 of her four children. Fortunately, Ms. Turner
13 survived the incident and she's here today to tell
14 you her story. You're going to hear what happened
15 to her on Saturday, April 6th, 2013, shortly before
16 noon, 11:45 in the morning.

17 Now, you're going to hear parts of the State's
18 case from different people; you're going to hear
19 from a woman named Lisa Mason, she called 911;
20 you're going to hear from the EMT, his name was
21 Aaron Lemaster, and he was in the ambulance that
22 took Ms. Turner from where 911 was called to MCG,
23 Georgia Regents University Hospital in Augusta;
24 you're going to hear from Investigator Brad Wertz
25 with the Aiken County Sheriff's Office, you're going

1 to hear about how he conducted his investigation,
2 what conclusions he reached and why. And, like I
3 said, you're going to hear from Ms. Turner. She's
4 going to tell you what she was doing that morning,
5 the events leading up to the shooting, what caused
6 her to be at 107 Beard Road that morning and
7 everything in between. You're going hear about a
8 tense encounter between Ms. Turner and the defendant
9 that happened at the 107 Beard Road, at our incident
10 location, in the moments leading up to the shooting.

11 Ms. Turner is going to tell you about her
12 injuries that she sustained that day, she's going to
13 tell you how she left the hospital two days later
14 with a bullet still lodged in her rib and how later,
15 months later, it was removed and why, the impact it
16 had on her, and how it was a constant reminder of
17 what happened to her every day in between.
18 Generally that's what the State's case in chief is
19 going to -- you're going to hear from us this
20 morning.

21 Now I need to talk to you a little bit about
22 evidence. There's two main types; there's direct
23 evidence and there's circumstantial evidence. We'll
24 start with direct evidence. Direct evidence would
25 be Ms. Turner's testimony. She was there. She's

1 going to tell you what she personally experienced,
2 what she saw, what she heard, what she felt. The
3 other type of evidence, circumstantial evidence, is
4 a little bit more difficult to explain, but I'll try
5 two different ways. You're going to hear from
6 Investigator Wertz, like I said, and Mr. Lemaster,
7 the EMT. Neither of them were present when the shot
8 was fired, but based on what they saw and heard and
9 experienced after that, they can testify, you can
10 infer a conclusion from what they saw and
11 experienced after the fact.

12 Another way to explain it is this: The 14 of
13 you right now are sitting in a windowless room. You
14 cannot know for certain, you cannot directly hear,
15 see, feel, smell, experience what the weather is
16 doing outside right now. But let's say that that
17 back door opens and three people walk in, two of
18 them have umbrellas and they're wet, and the third
19 guy doesn't have an umbrella and his clothes are
20 wet, his hair is wet, his shoes are wet. None of
21 you can sit here and directly know for certain what
22 the weather is doing outside, but based on those
23 three people, the logical conclusion, the reasonable
24 conclusion, is that it's raining outside. That's
25 circumstantial evidence. It's an inference. It's

1 the logical conclusion, the reasonable conclusion,
2 from what you can experience and see.

3 The burden of proof is the next thing I want to
4 talk to you about. And you're going to hear that
5 phrase a lot today. The burden of proof is on the
6 State, on myself and my co-counsel. The burden is
7 beyond a reasonable doubt. All of those words in
8 that phrase are important. It is not beyond all
9 doubt. There are very few things in this world that
10 we know with absolute certainty, so a burden of
11 absolute certainty is not placed on the State. It
12 is a burden to convince you, to firmly convince you,
13 to convince you beyond a reasonable doubt that the
14 events happened as the State alleges they did.

15 As Judge Early just said and as he said to all
16 of you yesterday, there are two judges in this
17 courtroom. Judge Early is the judge of the law.
18 What he says the law is, you have to accept that as
19 the truth. The 12 of you, when you begin your
20 deliberations and throughout the course of this
21 trial, are the judges of the facts. And what that
22 means is, your job, collectively, to have a
23 unanimous decision all together as one is to
24 determine credibility, to find out who you believe,
25 what you believe, what you know to be true, what you

1 believe to be true. And that might sound like a
2 difficult task, but you do that every day, we all do
3 that every day. You know how to tell if someone is
4 telling you the truth or if they're lying. We do it
5 with spouses, parents, children, coworkers,
6 strangers we meet on the street. You know how to
7 tell if someone is telling the truth or lying. And
8 that's your job, that is your only job.

9 So as Judge Early said and as I just said, he's
10 the judge of the law. So if something that I say
11 conflicts with what he says about the law, go with
12 him. But generally I want to give you the elements
13 of what Mr. Muns is charged with so you can listen
14 for facts that go along with those throughout the
15 course of the trial.

16 He's charged with attempted murder. Attempted
17 murder is an attempt to kill another person with the
18 intent to kill them; with the mental status to kill
19 them, the mental state to kill them, with malice
20 aforethought. And I'm going to talk to you a lot
21 more about what those -- intent and malice and what
22 those words mean and where you can find that
23 information in the facts in closing. But I just
24 wanted to give you a roadmap, as Judge Early said,
25 so that you know where we're going throughout the

1 course of this trial.

2 Because it's not murder, because it's attempted
3 murder that the defendant is charged with, the State
4 has to prove to you a general intent in the
5 defendant's mind. Rather than a specific intent to
6 kill her, we need to prove to you only a general
7 intent that he intended to harm her with great
8 bodily injury, not specifically kill her. But we'll
9 go into that a lot more in closing.

10 The second thing that Mr. Muns is charged with
11 is possession of a weapon during the commission of a
12 violent crime. What you'll be asked to do with that
13 is you will need to determine whether you are firmly
14 convinced, whether you're convinced beyond a
15 reasonable doubt, that he had a weapon in his
16 possession during the events on April 6th, 2013.

17 As I told you, you-all are the judges of the
18 facts, you-all are here with your common sense this
19 morning. I expect when you came through security
20 downstairs you may have had to check your keys, your
21 wallet, your cell phone, your belt, maybe even your
22 shoes, but you didn't check your common sense. I
23 ask that you keep it with you, I ask that you listen
24 to everything through the lens of your common sense
25 this morning, I ask that when you go back to that

1 jury room and deliberate that you use your common
2 sense to determine who you believe. And at the end
3 of this trial, at the end of your deliberations, I
4 ask that you return a verdict of guilty for
5 attempted murder and possession of a weapon during
6 the commission of a violent crime. Thank you.

7 THE COURT: Mr. Routzong?

8 MR. ROUTZONG: May it please the Court.

9 Good morning, ladies and gentlemen. My name is
10 Michael Routzong. I'm a defense attorney with the
11 Aiken Bar. There are times when I am constrained to
12 agree with the State, and this morning is one of
13 those times. She's right; this is not a love story.
14 On the other hand, that doesn't mean it's a hate
15 story. Your job here today is to listen to all of
16 these witnesses. You have to listen the State's
17 witnesses and I believe you'll be hearing from
18 Mr. Muns, and you're going to be evaluating the
19 credibility of everything that everybody testifies
20 to. His Honor is right, what I say is just my spin
21 on it, what they say is just their spin on it.
22 You're here to look at the evidence, and that's all
23 you're here for, and to speak the truth, speak a
24 verdict -- give a verdict that speak s the truth.

25 One of things that I need to tell you is that

1 while you're sitting right here right now, you have
2 to presume that Mr. Muns is innocent. What does
3 that mean? Well, if you are sitting there presuming
4 that Mr. Muns is innocent, that means the State's
5 case is wrong, they got it all wrong, he's innocent.
6 That's the way you have to view all of this evidence
7 for the entire case until you guys go back there,
8 the Judge gives you your charges and he lets you go
9 back there and you start talking about it. And all
10 the way through that discussion you have to be there
11 with the presumption that they're wrong as you're
12 looking at this evidence because that's what it
13 means to presume somebody is innocent. And then
14 when all of you are ready collectively and you come
15 to a decision, then you render the verdict. Until
16 that moment, he's presumed innocent, they're wrong.
17 If you don't do that, ladies and gentlemen, you've
18 broken your oath. You've taken an oath to do just
19 that. That's how our justice system works. That's
20 what Mr. Muns deserves, that's what the State
21 deserves.

22 This case is one -- it's kind of like
23 Ms. Sheftall said: There are only two people who
24 were present when this happened. There's no NASA
25 photographs, there's no satellite, no known

1 photographs; you've got to go by what two people
2 say, you've got to give both of them a chance. She
3 says you're allowed to infer what may be the case
4 from the evidence that's presented. That's true.
5 But you can't look at that as an invitation to just
6 rubber-stamp whatever the State says is going on
7 because, remember, you've got to presume they're
8 wrong.

9 A couple things aren't in dispute: Ms. Turner
10 got hit by a bullet and Mr. Muns had the gun in his
11 hand. That's not in dispute this morning. The
12 question is, why did it happen? How did it happen?
13 That's what you're here to determine. Please listen
14 to all of the evidence. Please assume that they're
15 wrong all the way through your deliberations and all
16 the way through this trial today. Thank you.

17 THE COURT: You may call your first witness.

18 MR. SLOCUM: Thank you, Your Honor.

19 The State calls Lisa Mason to the stand.

20 LISA MASON

21 being first duly sworn, testified as follows:

22 THE WITNESS: I do.

23 THE CLERK: Have a seat in the witness box
24 stating your full name and spelling your last for
25 the Court, please.

1 THE WITNESS: Lisa Mason, M-A-S-O-N.

2 DIRECT EXAMINATION

3 BY MR. SLOCUM:

4 Q. Ms. Mason, good morning.

5 A. Good morning.

6 Q. Where do you work?

7 A. I work for R&L Trucking.

8 Q. And where is R&L Trucking?

9 A. Beech Island, South Carolina.

10 Q. What do you do for R&L Trucking?

11 A. I strip wire.

12 Q. Can you explain that a little bit? What does
13 that mean to strip wire?

14 A. Copper wire from, like, wiring harnesses and
15 trucks, we have a machine that breaks the casing,
16 and I just pull the wire out.

17 Q. Is wire used for recycling purposes?

18 A. They recycle it.

19 Q. Okay. Where are you from are?

20 A. Martinez, Georgia.

21 Q. And where do you live right now?

22 A. Martinez, Georgia.

23 Q. Okay. How long have you lived in Martinez?

24 A. All my life. I was married 15 years and lived
25 in Beech Island.

1 Q. So you're from Martinez, but you've spent some
2 time in Beech Island?

3 A. Right.

4 Q. Do you recall the day of April 6th, 2013?

5 A. Yes, sir.

6 Q. Where were you on that day?

7 A. At my boyfriend's house in Beech Island.

8 Q. And what is that address?

9 A. 121 Riverbend Drive.

10 Q. And that's in Aiken County?

11 A. Beech Island.

12 Q. What is your boyfriend's name?

13 A. Dawson Mullins.

14 Q. What happened that day that caused you to
15 become involved in this case?

16 A. We were on the way out the door to go
17 yard-saling and Kim pulled in the yard and said that
18 she had been shot, could I call 911.

19 Q. When you say Kim, who -- is Kim in the
20 courtroom today?

21 A. Yes.

22 Q. What is she wearing?

23 A. A black shirt. Ms. Kim Turner.

24 Q. Okay.

25 MR. SLOCUM: Your Honor, let the record reflect

1 she's identified the victim, Ms. Turner.

2 BY MR. SLOCUM:

3 Q. And after -- you said she drove up in the yard.
4 What happened after that?

5 A. Well, she asked me to call 911. And I noticed,
6 you know, there was a hole in her window and she had
7 been shot.

8 Q. Did you call 911?

9 A. Yes, sir, I did.

10 Q. Did you see the wound --

11 A. Yes, sir.

12 Q. -- on her side? Excuse me.

13 Where was she shot?

14 A. Under her breast, her left breast.

15 MS. SHEFTALL: Your Honor, may I approach?

16 THE COURT: You may.

17 (State's Exhibit No. 29 marked for
18 identification.)

19 BY MR. SLOCUM:

20 Q. Ms. Mason, I'm going to show you what's been
21 previously marked for identification purposes as
22 State's Exhibit 29. Can you recognize that?

23 A. Yes, sir.

24 Q. What is that?

25 A. It's the recording of the 911 call I made.

1 Q. And you've had a chance to listen to that?

2 A. Yes, sir.

3 Q. And what is this marked on the disc?

4 A. My initials and the date that I listened to it.

5 Q. What does that indicate?

6 A. Today. This morning I listened to the
7 recording.

8 Q. Is this a fair and accurate depiction of the
9 recording on April 6th, 2013?

10 A. Yes.

11 Q. Has it been changed or altered in any way?

12 A. Not to my knowledge.

13 Q. Okay.

14 MS. SHEFTALL: Your Honor, at this time the
15 State would move to enter State's Exhibit 29 into
16 evidence.

17 THE COURT: Any objection?

18 MR. ROUTZONG: No, sir.

19 (State's Exhibit No. 29 admitted into
20 evidence.)

21 MS. SHEFTALL: Your Honor, may we publish this
22 to the jury at this time?

23 THE COURT: You may.

24 (WHEREUPON, the audiotape was played for the
25 Judge and jury.)

1 BY MR. SLOCUM:

2 Q. Ms. Mason, is that your voice initially, the
3 first one that comes on?

4 A. Yes, sir.

5 Q. Who did you hand the phone to? Who is that
6 second voice?

7 A. Kim.

8 Q. Ms. Turner?

9 A. Ms. Turner.

10 MR. SLOCUM: I beg the Court's indulgence, Your
11 Honor.

12 BY MR. SLOCUM:

13 Q. Ms. Mason, that's all of the questions I have
14 for you. Please answer any questions Mr. Routzong
15 may have for you at this time.

16 THE COURT: Any questions, Mr. Routzong?

17 MR. ROUTZONG: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. ROUTZONG:

20 Q. Good morning, Ms. Mason.

21 A. Good morning.

22 Q. Let me start out by asking, everything that you
23 know about this case you actually heard from
24 Ms. Turner; is that right?

25 A. No. Not -- no.

1 Q. Let me ask it another way: You weren't
2 there when this --

3 A. Oh, about -- yeah. Yes, sir, from Ms. Turner.

4 Q. So what you know about that, you heard from
5 Ms. Turner?

6 A. Yes, sir.

7 Q. And you wrote a statement to law enforcement.
8 And one of things that you wrote in your statement
9 was Mr. Muns broke the window and he shot her.

10 A. Yes.

11 Q. And you know that because you heard that from
12 Ms. Turner?

13 A. Yes, sir.

14 Q. How far away do you live from her house or
15 Mr. Muns' residence at that time?

16 A. About three blocks maybe.

17 Q. Not very far?

18 A. No.

19 Q. How long have you known Mr. Muns?

20 A. Maybe seven years.

21 Q. And he knows where you live?

22 A. Yes.

23 MR. ROUTZONG: I don't have any other
24 questions, Your Honor.

25 THE COURT: Thank you.

1 Redirect?

2 MS. SHEFTALL: Briefly, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. SLOCUM:

5 Q. Ms. Mason, did you see Ms. Turner when she
6 drove up to 121 Riverbend Drive?

7 A. Yes, sir.

8 Q. Did you see her injuries?

9 A. Yes, sir.

10 Q. Did you see her gunshot wound?

11 A. Yes, sir.

12 Q. Did you see the window where it was broken?

13 A. Yes, sir.

14 MS. SHEFTALL: That's all the questions I have.

15 THE COURT: Thank you. You may step down.

16 Next witness, please.

17 MS. SHEFTALL: Your Honor, the State calls
18 Aaron Lemaster.

19 AARON LEMASTER

20 being first duly sworn, testified as follows:

21 THE WITNESS: Yes, ma'am.

22 THE CLERK: Have a seat in the witness box.
23 State your full name for the Court spelling your
24 last.

25 THE WITNESS: I'm Aaron Lemaster,

1 L-E-M-A-S-T-E-R.

2 DIRECT EXAMINATION

3 BY MR. SLOCUM:

4 Q. Mr. Lemaster, where are you employed?

5 A. I am currently employed with SRS Fire
6 Department.

7 Q. How long have you been employed by the SRS Fire
8 Department?

9 A. Since August 12th of 2013, so coming up on six
10 months.

11 Q. What is your position there?

12 A. I'm a firefighter paramedic.

13 Q. What do you do on a daily basis at the fire
14 department at SRS?

15 A. Mostly I'm a paramedic. I treat patients
16 onsite.

17 Q. Before working at SRS, did you have a previous
18 position of employment anywhere else?

19 A. I did.

20 Q. Where was that?

21 A. Aiken County EMS.

22 Q. What did you do? What was your title at Aiken
23 County EMS?

24 A. I was a paramedic crew chief.

25 Q. What did being a paramedic crew chief entail?

1 What did you do?

2 A. My main responsibility was patient care, but it
3 also included -- being a crew chief meant that I was
4 a supervisor over my unit.

5 Q. How many people were in your unit?

6 A. Most of the time it was two, but it could be
7 three.

8 Q. Could you please tell the jury a little bit
9 about your education and background.

10 A. I went to basic EMT school at Aiken Tech that
11 was six months; I went to intermediate EMT school
12 also at Aiken Tech that was another five months; I
13 then went to paramedic school at Midlands EMS which
14 was a total of a year. I've been with Aiken County
15 since March the 13th of 2009. I'm still currently
16 employed with them, so coming up on five years next
17 month.

18 Q. You said you were with Aiken County from March
19 of 2009, but you're at SRS now; right?

20 A. That's correct.

21 Q. When did you stop working at Aiken County?

22 A. I stopped being a full-time employee August
23 12th of 2013.

24 Q. Okay. You mentioned being -- going to school
25 at Aiken Tech for basic and intermediate EMT and

1 then Midlands EMS for full-fledged paramedic. Are
2 there different levels of the EMT?

3 A. Yes, sir.

4 Q. And being a paramedic is the highest level of
5 EMT?

6 A. Yes, sir.

7 Q. Mr. Lemaster, do you have any
8 continuing-education requirements --

9 A. I do. I --

10 Q. -- to told your status as a paramedic?

11 A. I do. I -- I have to do -- complete four hours
12 every month every year to hold up my certification.

13 Q. And when did you obtain your certification to
14 be a paramedic?

15 A. I -- at the end of 2011.

16 Q. So you've had to go through that continuing
17 education every year since 2011?

18 A. I've had to go through that continuing ed every
19 year since 2009.

20 Q. Going on five years?

21 A. Yes.

22 Q. Do you hold any certifications in the field of
23 being a paramedic?

24 A. I do.

25 Q. What are they?

1 A. I have cards, if you'd like me to pull them
2 out.

3 Q. Please do.

4 A. The first one I come across is my PEP card
5 which is pediatric emergencies for prehospital for
6 professionals.

7 Q. Could you explain what each certification you
8 hold entails? What does it allow you to do?

9 A. Absolutely. The pediatric emergencies would
10 just specialize me in pediatrics. I have my state
11 paramedic certification card, I have my ACLS card
12 which is Advanced Cardiac Life Support, it's further
13 training in cardiac life support; I have my ITLS
14 card which is my trauma life support; I have my CPR
15 card, my pediatric advanced life support card which
16 furthers me in pediatrics again. I'm also a BLS
17 instructor which allows me to teach CPR to anyone.
18 I have my American Safety and Health Institute
19 instructor card which allows me to teach not only
20 CPR but it also allows me to teach First Aid, the
21 ACLS and the PALS as well, so it allows me to teach
22 the pediatric advanced life support and the advanced
23 cardiac life support, and it also allows me to teach
24 EMTs and first responders. I also have my national
25 registry paramedic cards and my advanced medical

1 life support card which is further education in
2 advanced medical.

3 Q. Did you have to complete certain requirements
4 and pass certain tests to obtain all of these
5 certifications?

6 A. I did.

7 Q. And you mentioned this allows you to teach
8 others in the field of paramedics; is that correct?

9 A. Yes, sir.

10 Q. Are you currently a member of any professional
11 organizations that are related to emergency
12 response?

13 A. Yes, sir. SRS Fire Department, Aiken County
14 EMS, Langley Fire Department.

15 Q. You're actually still a member of the Aiken
16 County EMS?

17 A. Yes, sir. I'm just part-time now.

18 Q. Understood.

19 Have you had the chance to respond to scenes as
20 an EMS worker?

21 A. Yes.

22 Q. Approximately how many have you done over your
23 career?

24 A. I couldn't give you an exact number, but I
25 could state that it's over a thousand.

1 Q. How many did you do in the last year?

2 A. Last year was approximately 600.

3 Q. Do you know how many you'd done four years
4 previous to that?

5 A. It's probably around the same number.

6 Q. Do you make presentations or train other
7 paramedics in the field?

8 A. I do.

9 Q. So not only do you train them at -- in the book
10 portion, but also in the field actively?

11 A. Correct.

12 Q. Have you ever testified in court before?

13 A. No, sir.

14 Q. This is your first time?

15 A. Yes, sir.

16 MR. SLOCUM: Your Honor, at this time the State
17 would offer Mr. Aaron Lemaster as an expert in the
18 field of emergency medical services and specifically
19 prehospital care.

20 THE COURT: I mean, you're going to ask him to
21 describe what he saw or give opinions? What --

22 MS. SHEFTALL: Give his opinion that when he
23 arrived on the scene, his ability to assess the
24 situation with Ms. Turner.

25 THE COURT: Well, he can testify about what he

1 saw and observed. I don't know whether he's going
2 to be allowed to give opinions as to anything.

3 What's your position, Mr. Routzong?

4 MR. ROUTZONG: I agree, Your Honor. I think he
5 can talk about what he saw. That's what he's here
6 for. He's got a report, he made the notes about
7 what he saw. I think we can stick with that.

8 THE COURT: You can ask him direct questions.
9 I'm not going to allow him to give opinions about --
10 I mean, I don't know what your questions are going
11 to be.

12 MR. SLOCUM: Very fine, Your Honor. I'll move
13 forward.

14 THE COURT: Just ask him what he saw and
15 observed.

16 MR. SLOCUM: Yes, sir.

17 BY MR. SLOCUM:

18 Q. Mr. Lemaster, how did you become involved in
19 this case?

20 A. My EMS unit was dispatched to the location.

21 Q. What location was that?

22 A. 121 Riverbend Drive in Beech Island.

23 Q. And on what date did this happen?

24 A. April the 6th of 2013.

25 Q. And that previous address, is that in Aiken

1 County?

2 A. Yes, sir, it is.

3 Q. Do you recall approximately the time you were
4 dispatched?

5 A. My unit was dispatched at 11:51 a.m.

6 Q. What information did you have at the time about
7 the location you were being sent to?

8 A. Dispatch doesn't give us much. They gave us --
9 said that we were going to a gunshot victim.

10 Q. About how much time longer did you arrive on
11 the scene?

12 A. I believe we arrived at 12:05.

13 Q. I see you have your report with you.

14 A. Yes, sir.

15 Q. Is that what that is?

16 If you need to refresh your recollection, you
17 can certainly look at that. Were you given any
18 names of the victim?

19 A. I wasn't given the name of the victim until I
20 actually arrived on the scene and introduced myself
21 as a paramedic with EMS.

22 Q. Do you see the victim that you treated that day
23 in the courtroom?

24 A. I do.

25 Q. Would you please describe what she's wearing?

1 A. She's the second row, second from the end,
2 black shirt.

3 MS. SHEFTALL: Your Honor, let the record
4 reflect that Mr. Lemaster is discussing the victim,
5 Ms. Kim Turner.

6 BY MR. SLOCUM:

7 Q. Mr. Lemaster, what did you observe when you
8 arrived on the scene at 121 Riverbend?

9 A. Whenever I first walked up, I noticed that she
10 was sitting in the front seat of her car. The
11 officer had the car door open. I could see the
12 window as I approached the vehicle. The window had
13 two different holes in it; one hole was about a
14 half-inch in diameter, and the other hole was
15 somewhere between three and six inches in diameter.

16 When I actually approached Ms. Turner, she said
17 that she had been shot. An officer was actually
18 holding pressure on her wound. He moved his hand
19 away, I was able to see a puncture wound directly
20 under her left breast, approximately around the 10th
21 to 12th rib.

22 Q. And what did you do next after you saw this
23 wound?

24 A. I treated her wounds, I placed my glove hand
25 over her wound to begin with. Whenever an occlusive

1 dressing was ready, I placed an occlusive dressing
2 over it to keep air from possibly going into the
3 chest cavity, and then we moved her to the stretcher
4 and then transported her to the hospital.

5 Q. What is an occlusive dress wound?

6 A. Occlusive dressing is just an airtight dressing
7 to prevent any air from entering the chest cavity.

8 Q. Does it help with bleeding?

9 A. Most of the time the bleeding is generally
10 stopped prior to, but it can help with the bleeding.

11 Q. Do you approach all EMS calls the same?

12 A. No. It really depends on the incident. A
13 gunshot wound would be different from a car wreck, a
14 car wreck would be different from a heart attack, so
15 on and so forth. It all depends on the incident.

16 Q. And why is that?

17 A. Every call is different. No patient is going
18 to present the same, every call is going to be
19 different.

20 Q. Is there a different procedure when treating
21 someone with a gunshot wound versus treating someone
22 on the scene of, say, a car wreck?

23 A. Absolutely. We try to treat all gunshot
24 victims for worst-case scenario. We don't actually
25 know the path that the bullet traveled when it

1 entered the body. It could hit a bone and ricochet
2 and bounce all throughout the body, so we don't
3 actually know what damage that bullet has caused.
4 We don't know if it's gone in a straight path or
5 where it's gone. It could have hit arteries or
6 vital organs.

7 Pretty much the point that I'd like to make is
8 that a gunshot victim -- it could possibly cause
9 serious harm or disfigurement or even death.

10 Q. Okay. What treatment, if any, did you give
11 Ms. Turner both when you arrived at 121 Riverbend
12 and en route to the hospital?

13 A. As I said before, I did an occlusive dressing
14 to bandage her wound. I also placed her on
15 high-flow oxygen. I started an IV in the back of
16 the truck on the way to the hospital to give her
17 some fluid to compensate for the blood loss that she
18 had. I also put her on a heart monitor to monitor
19 her heart rhythm.

20 Q. Was she strapped to a stretcher --

21 A. Yes, sir.

22 Q. -- on the way to the hospital?

23 How was she moved from the car to the
24 stretcher?

25 A. We wanted to put her in what's called FSI

1 equipment. FSI is just full spinal immobilization
2 equipment, it's a backboard and a C collar.

3 Ms. Turner didn't want that due to her history of
4 back problems. She figured -- she thought that she
5 would be uncomfortable laying down, so she refused
6 that. So me and my partner picked her up underneath
7 her arms and under her legs and then placed her on
8 the stretcher and then strapped her in with three
9 straps and put her in the back of the truck.

10 Q. At what point did you start administering
11 treatment?

12 A. As soon as we got there.

13 Q. Okay. You said you gave her an IV on the way
14 to the hospital.

15 A. Yes, sir.

16 Q. What was in that IV? What was the details with
17 that?

18 A. It's normal saline. It's water and salt,
19 pretty much.

20 Q. Was there any urgency, if any, to get fluids in
21 her because it was a gunshot wound?

22 A. At the time, no. Her vitals were all stable at
23 the time as they remained en route to the hospital.
24 It was just precautionary to cover up for some of
25 the blood loss that she had.

1 Q. But you didn't know, as you stated earlier,
2 what had happened with the bullet, what it may
3 have --

4 A. Right.

5 Q. -- punctured on the inside?

6 A. There's no way of knowing.

7 Q. About what time -- how long did it take to
8 leave 121 Riverbend to get to MCG?

9 A. We left 121 Riverbend at 12:25 and then arrived
10 at MCG at 12:41, so 16 minutes.

11 Q. What did you do when you arrived at MCG?

12 A. After we arrived, I moved Ms. Turner to C1 in
13 the emergency room which would be their first trauma
14 room over in the emergency room, and then I
15 transferred my patient care over to the ER staff
16 there.

17 MS. SHEFTALL: I beg the Court's indulgence,
18 Your Honor.

19 Mr. Lemaster, that's all of the questions that
20 I have for you.

21 THE COURT: Mr. Routzong, any cross?

22 MR. ROUTZONG: Yes, sir.

23 CROSS-EXAMINATION

24 BY MR. ROUTZONG:

25 Q. Good morning, sir.

1 A. Good morning.

2 Q. I was looking in your notes and it said that by
3 the time you had gotten there, bleeding had stopped.

4 A. Yes, sir.

5 Q. You also write in your report that it looked
6 like the bullet stopped on to of her ribs.

7 A. That's the way it appeared at the time. Her
8 muscle had swollen over top of the ribs, just
9 basically closing off the entry.

10 Q. What does it mean lung sounds, LL clear, LU
11 clear, RL clear, RU clear?

12 A. Each area of your lungs will give off a sound
13 whenever you breathe. Basically I was just stating
14 that all of her lung sounds were clear, there were
15 no noises heard whenever I listened to her lung
16 sounds.

17 Q. What would you conclude from that?

18 A. There's really nothing that I can conclude
19 other than that they were clear.

20 Q. And her vitals were good all the way to the
21 hospital from the time --

22 A. Yes, sir.

23 Q. I'm sorry -- from the time you got there to the
24 time she got to the hospital?

25 A. Yes, sir. She never had a drop in her vital

1 signs.

2 MR. ROUTZONG: Thank you, sir.

3 THE COURT: Redirect, if any.

4 MS. SHEFTALL: Nothing from the State, Your
5 Honor.

6 THE COURT: You may step down.

7 May he be released from his subpoena?

8 MR. SLOCUM: No objection from the State.

9 THE COURT: Mr. Routzong?

10 MR. ROUTZONG: That's fine, sir.

11 THE COURT: He will be released from his
12 subpoena. Any objection, Mr. Routzong?

13 MR. ROUTZONG: No, sir.

14 THE COURT: Next witness, please.

15 MS. SHEFTALL: Thank you, Your Honor. The
16 State calls Sergeant Brad Wertz with the Aiken
17 County Sheriff's Office.

18 Your Honor, may Ms. Lisa Mason be released from
19 her subpoena at this time as well?

20 THE COURT: She may.

21 Any objection?

22 MR. ROUTZONG: No, sir.

23 BRAD WERTZ

24 being first duly sworn, testified as follows:

25 THE WITNESS: Yes.

1 THE CLERK: Have a seat in the witness box.
2 State your full name for the Court spelling your
3 last.

4 THE WITNESS: My name is Investigator Brad
5 Wertz, W-E-R-T-Z, with the Aiken County Sheriff's
6 Office.

7 DIRECT EXAMINATION

8 BY MR. SLOCUM:

9 Q. Investigator Wertz, how long have you been
10 employed by Aiken County Sheriff's Office?

11 A. Since June of 2002.

12 Q. Have you spent time at any other agencies prior
13 to Aiken County Sheriff's Office?

14 A. I have not.

15 Q. What are your job responsibilities and duties
16 with Aiken County Sheriff's Office?

17 A. As a criminal investigator we are tasked with
18 investigating any major or violent crimes. We will
19 respond to crime scenes at the request of the road
20 patrol and analyze and identify leads and witnesses
21 and interview the witnesses.

22 Q. Were you working in an investigative capacity
23 on April 6th, 2013?

24 A. I was.

25 Q. With the Aiken County Sheriff's Office?

1 A. Yes, sir.

2 Q. Were you called out to anything on that day?

3 A. I was dispatched to a shooting incident on
4 Riverbend Road.

5 Q. And what time did you arrive at Riverbend Road,
6 approximately?

7 A. I arrived at approximately 12:30 p.m.

8 Q. Just after lunch?

9 A. Just after lunch.

10 Q. What information, if any, did you have on the
11 way to that location?

12 A. On the way to the incident, I spoke with
13 Sergeant Hahn who informed me that there had been a
14 shooting incident between -- at that time it was
15 male and female, is all he knew. He knew the victim
16 was Kim Turner and said -- told me that the suspect
17 was Frank Muns. He had told me that the incident
18 occurred on Beard Road, however the victim drove
19 herself to Riverbend Road, which was where I
20 responded initially.

21 Q. Your investigation initially revealed the
22 incident shooting at another location than where you
23 were being dispatched to?

24 A. Correct.

25 Q. What did you observe when you arrived at 121

1 Riverbend Road?

2 A. When I arrived, I observed a white four-door
3 Pontiac that had the driver's side front-door window
4 shattered and busted out.

5 Q. Did you talk to anybody on the scene?

6 A. I did. I spoke with Sergeant Hahn and Deputy
7 Worschel who were the initial responding officers.
8 Ms. Turner had already been transported to MCG for
9 treatment. Left on scene was a Theresa Mason and a
10 Janice Belger -- I believe that's how the name is
11 spelled -- and they were friends of the victim, that
12 the victim came to them and asked them to call 911.

13 Q. And as an investigator with the sheriff's
14 office, is it in your duties to process any crime
15 scenes?

16 A. It does fall within the realms; however, I had
17 a forensic investigator respond, Investigator Chris
18 Johnson, and he processed the scene for me.

19 Q. To your knowledge, were any pictures taken of
20 121 Riverbend Road?

21 A. He did. He photographed the vehicle and the
22 location of where it was sitting.

23 MS. SHEFTALL: Permission approach, Your Honor?

24 THE COURT: Yes, sir.

25 (State's Exhibit Nos. 1-12 marked for

1 identification.)

2 BY MR. SLOCUM:

3 Q. Investigator Wertz, I'm showing you what's been
4 previously marked for identification purposes as
5 State's Exhibits 1 through 12. Could you take a
6 look at those and tell me what they are, please,
7 sir?

8 A. This would be the victim's vehicle that was
9 first seen on Riverbend Road. This here is her
10 vehicle again showing the window busted out. The
11 closer-up photograph of the window which shows a
12 larger area busted out of the window and then a
13 smaller area which appeared to be a bullet hole.
14 And just another close-up video of the glass -- or
15 photograph of the glass; a scaled photograph of the
16 glass; another scaled photograph of the glass; again
17 scaled photograph of the glass. This is a scale in
18 the larger hole in the window on the glass.

19 This is the front driver's seat which has small
20 shards of glass found in it. And, again, the
21 smaller driver's seat with smaller shards of glass
22 in it. This would be an inside view of the driver's
23 side window and, again, another inside view of the
24 driver's side window.

25 Q. Investigator Wertz, do those pictures fairly

1 and accurately depict the victim's car, Ms. Turner,
2 on April 6th, 2013 when you arrived at 121 Riverbend
3 Drive?

4 A. Yes.

5 Q. Have they been altered or changed in any way,
6 shape or form?

7 A. No.

8 MR. SLOCUM: Your Honor, at this time the State
9 would move to admit these Exhibits 1 through 12 into
10 evidence.

11 THE COURT: Any objection?

12 MR. ROUTZONG: No, sir.

13 (State's Exhibit Nos. 1-12 admitted into
14 evidence.)

15 MR. SLOCUM: Your Honor, may we publish these
16 to the jury?

17 THE COURT: You may.

18 (Photographs published to the jury.)

19 MR. SLOCUM: Your Honor, may Investigator Wertz
20 step down and discuss these pictures?

21 THE COURT: He may.

22 BY MR. SLOCUM:

23 Q. Investigator Wertz, if you would, please stand
24 here facing the jury so they can hear you.

25 This is State's Exhibit 1. What do you see

1 here?

2 A. This is the victim's vehicle exactly where she
3 pulled into the yard at Riverbend Road and left and
4 got out the car. You can see that the driver's side
5 window has a large hole in it and then another
6 smaller hole right underneath it.

7 Q. Exhibit 2, is this just a closer view of the
8 car?

9 A. Correct.

10 Q. Number 3, same there?

11 A. Same, just a little closer.

12 Q. And 4, what do we have here?

13 A. Now this is an extreme close-up view of the
14 window. And what it's showing here is -- you've got
15 the fractured glass all the way around with an
16 inconsistent fracture pattern, then you've got a
17 large hole in the window there, and then the smaller
18 hole as the radial lines that are fractured through
19 and around it which is consistent with a gunshot
20 through a window.

21 Now, that larger hole appears to be a -- had
22 forced through the radial lines, which suggest to me
23 that the larger hole was created after the bullet
24 hole.

25 Q. This hole happened after this hole?

1 A. Correct, because you've got a circular pattern
2 from the high-velocity bullet going through and even
3 the radial fractures, and then suddenly they're gone
4 and it just falls over on that one linear fracture.

5 Q. Is that a closer-up view of that same hole?

6 A. That's a scaled view of the apparent bullet
7 hole.

8 Q. Next on, please. Closer view of the same
9 thing?

10 A. Another scale view of it.

11 Q. And an even up-closer view?

12 A. Correct.

13 Q. And what is this?

14 A. And that is a --

15 Q. State's Exhibit 8.

16 A. That is a scale of the larger hole that was in
17 the window. And in this picture you can see that
18 not only is it larger, but it's inconsistent with
19 the way it was busted out where you have a --
20 everything is somewhat symmetrical with the other
21 fracture pattern and this one is just round.

22 Q. You're discussing the differences between the
23 fracture pattern of the bullet hole versus the other
24 hole?

25 A. Correct.

1 Q. Okay. What is this, State's Exhibit 9?

2 A. This is the driver's seat of that vehicle. And
3 there's small shards of glass that's in the crease
4 of the seat. And there's actually some small shards
5 over in here too. (Indicating)

6 Q. Okay. State's Exhibit 10?

7 A. Just a closer view of that last image.

8 Q. 11?

9 A. That's from -- that's the same driver's side
10 window, just from the inside of the vehicle, where
11 you see, again, the consistency of the fracture
12 patterns around the one hole and then the
13 inconsistency of the way it fractured around the
14 bigger hole.

15 Q. And then State's Exhibit 12?

16 A. That's just a little closer view of that same
17 picture.

18 Q. Thank you, Investigator Wertz. You may step
19 back up for me.

20 Investigator Wertz, where did you go after you
21 left 121 Riverbend Drive?

22 A. After I left Riverbend I went to Beard Road. I
23 believe it was 107 Beard Road.

24 Q. And approximately how far is that from 121
25 Riverbend Drive?

1 A. Approximately a half a mile.

2 (State's Exhibit No. 13 marked for
3 identification.)

4 BY MR. SLOCUM:

5 Q. Investigator Wertz, I'm showing you what's been
6 previously marked as State's Exhibit 13. Can you
7 please tell the Court and jury what you see. What
8 is that picture, first of all?

9 A. That is an overhead view of the map of the area
10 of Riverbend and Beard Road.

11 Q. Do you --

12 A. Riverbend Road is right here and Beard Road is
13 right there. (Indicating)

14 Q. Has that picture been changed or altered in any
15 way, to your knowledge, since the previous time
16 you've seen it?

17 A. It has not.

18 Q. Does it fairly and accurately depict an aerial
19 view of the area of 121 Riverbend Drive and 107
20 Beard Road in Beech Island, South Carolina?

21 A. It does.

22 MS. SHEFTALL: Your Honor, at this time the
23 State would move to enter State's Exhibit 13 into
24 evidence.

25 THE COURT: Any objection?

1 MR. ROUTZONG: No, sir.

2 (State's Exhibit No. 13 admitted into
3 evidence.)

4 BY MR. SLOCUM:

5 Q. Mr. Wertz, could you please mark on this map
6 the residences of 121 Riverbend and 107 Beard Road.
7 You can just put the numbers 121 and 107 on each
8 address respectively.

9 A. (Witness complies).

10 Q. Thank you.

11 And, again, how far are these apart?

12 A. Approximately half a mile.

13 Q. So it didn't take you any time at all to get
14 over there?

15 A. No.

16 Q. Investigator Wertz, what did you do when you
17 arrived on the scene at 107 Beard Road?

18 A. First thing we did was canvass the area from
19 the road to behind the residence where Ms. Turner
20 advised us that the incident occurred in attempts to
21 locate any possible evidence.

22 Q. Did you locate any suspects in that canvass?

23 A. We did not.

24 Q. Was the scene processed for evidence?

25 A. It was.

1 Q. In what manner?

2 A. The scene was photographed, documenting
3 everything that we saw.

4 Q. Was -- were any physical pieces of evidence
5 found, shell casings?

6 A. No shell casings were found. There were some
7 small, what could have been either skid or spin
8 marks from a tire in the dirt that were documented
9 with photographs and there were also some shards of
10 glass found on the ground behind the residence.

11 Q. Investigator Wertz, real quickly, in your
12 training and experiences, what type of weapon does
13 not eject its spent shells?

14 A. Typically a firearm that would be a revolver.

15 Q. And semiautomatic weapons do eject shells?

16 A. That's correct.

17 Q. And why is that?

18 A. The way the guns are made, the -- there's --
19 the magazine -- it's a force-pressure magazine that
20 automatically loads the next round into the gun on a
21 semiautomatic so the combustion and gasses have to
22 eject the fired round out where the revolvers, a
23 cylinder that pulls a certain number of rounds that
24 spin and when the rounds are all shot you have to
25 remove them from the cylinder.

1 Q. Manually?

2 A. Manually.

3 (State's Exhibit Nos. 14-24 marked for
4 identification.)

5 Q. Understood.

6 Investigator Wertz, I'm showing you what's been
7 previously marked for identification purposes
8 State's Exhibits 14 through 24. And without going
9 into any detail, could you flip through these ten
10 pictures and answer if you recognize what they are.

11 A. This is the residence at 107 Beard Road.

12 Q. You can just flip through them and if you
13 recognize them, we'll get into the details later.

14 A. The residence, the driveway that had a cable
15 across it; again, the driveway with the cable across
16 it; the skid or spin marks in the dirt; again, skid
17 or spin marks in the dirt.

18 Q. Could you say the number as you read them.

19 A. I'm sorry. You want me to go back and say it
20 again?

21 Q. Please, sir.

22 A. Okay. Number 14 would be the residence at 107
23 Beard Road; 15 would be the driveway at 107 Beard
24 Road with the cable cross the driveway; 16 is the
25 same thing, the cable cross the driveway; 17 are the

1 spin or skid marks in the dirt in the driveway at
2 107 Beard Road; 18 is, again, the skid marks and
3 spin marks in the driveway showing a little more
4 detail in the background because it's panned out
5 farther; 19 -- 19 is where Ms. Turner --

6 Q. Do you recognize the photo?

7 A. I recognize the photo.

8 Q. Is it of the scene at 107 Beard Road?

9 A. It is the scene at 107 Beard Road.

10 Q. And the next one?

11 A. 20 is, again, the scene at 107 Beard Road
12 directly behind the residence; 21 is the scene at
13 Beard Road directly behind the residence; 22, the
14 scene at 107 Beard Road behind the residence; 23 is
15 the scene at 107 Beard Road behind the residence
16 showing more detail on the pathway to get off the
17 property; 24 is the driveway, the exit out directly
18 onto -- I believe it's Atomic Road.

19 Q. Investigator Wertz, do these pictures fairly
20 and accurately depict the scene at 107 Beard Road on
21 the date of April 6th, 2013?

22 A. They are.

23 Q. Have they been altered or changed in any way,
24 shape or form?

25 A. Not at all.

1 MR. SLOCUM: Your Honor, at this time the State
2 would move to admit Exhibits 14 through 24 into
3 evidence.

4 MR. ROUTZONG: No objection.

5 THE COURT: Without objection.

6 (State's Exhibit Nos. 14-24 admitted into
7 evidence.)

8 MR. SLOCUM: May Investigator Wertz step down?

9 THE COURT: He may.

10 BY MR. SLOCUM:

11 Q. Investigator Wertz, this is State's Exhibit 13.
12 If you would, step over to the side so the other
13 members of the jury can see too. What is this?

14 A. This is the overhead view of the map of the
15 area showing Beard Road and 107 Bear Road being
16 right here and Riverbend Road, the -- (Indicating)

17 Q. And so you were dispatched to 121 Riverbend
18 initially?

19 A. Correct.

20 Q. And then followed up to 107 Beard Road?

21 A. Yes.

22 Q. Which of those addresses did the shooting
23 incident occur?

24 A. 107 Beard Road.

25 Q. And is that in Aiken County?

1 A. It is.

2 Q. State's Exhibit 14, what do we have here?

3 A. This is 107 Beard Road. This is -- you can see
4 the cable that's laying on the ground now that was
5 put up across the driveway trying to block anyone
6 from going into the driveway. That would be Atomic
7 Road.

8 Q. State's Exhibit 15?

9 A. Again, the driveway entering in at 107 Beard
10 Road. Now the cable is down. At the time of the
11 incident, Ms. Turner told us that the cable was
12 blocking the driveway.

13 Q. State's Exhibit 16, what is this?

14 A. This is to the right of the cable.

15 Q. Is this the cable that we just saw in 14 and
16 15?

17 A. Can you go back one picture?

18 Q. Yes, sir, we can.

19 A. No. There's a small gap here before that --
20 the next tree you'll see in the next photograph.

21 Q. Okay. That was the initial tree. This is --
22 this is -- back up one more to 14. I just want to
23 make sure we got everything straight. Here's the
24 trailer, the cable coming through; is that correct?

25 A. Yes, sir.

1 Q. And on 15 we have cable connecting this tree
2 with a do-not-enter sign; is that correct?

3 A. Correct.

4 Q. And 16, we have the same do-not-enter sign; is
5 that correct?

6 A. Correct.

7 Q. So that is the cable from the first tree to the
8 second tree going in the driveway?

9 A. Correct.

10 Q. Okay. I just wanted to clear that up. Thank
11 you, sir.

12 Number 17?

13 A. These are the skid or spin marks in the dirt
14 from the tire that are just inside the cable from
15 where Ms. Turner advised us that she had went around
16 the cable and stated Mr. Muns tried to block her in
17 and wouldn't let her go any further.

18 Q. 18?

19 A. Again, the same spot at 107 Beard Road just
20 looking a little farther down the driveway.

21 Q. Okay. 19?

22 A. This is behind the residence at 107 Beard Road.
23 It's not completely -- this photograph is pretty
24 much taken at the corner.

25 Q. Okay.

1 A. And what he's doing is, he's walking down the
2 driveway and photographing these pictures as he's
3 going down the driveway.

4 Q. This is the individual who processes --

5 A. Correct.

6 Q. You didn't take these, but you know what they
7 are?

8 A. Correct.

9 Q. Number 20?

10 A. This is the same thing. This would be --

11 Q. Is this a progression of photos?

12 A. Correct.

13 Q. 21?

14 A. This is the back side of the residence that was
15 shown in the first picture. The driveway circles --
16 goes around and all the way up to right here, and
17 then it will turn and go up between a house that
18 we'll come to see. But there are spin marks in the
19 dirt there and there's some sort of spin or skid
20 mark in the dirt there. (Indicating)

21 Q. How close are those spin marks to the back
22 porch area of the residence of 107, approximately?

23 A. These or those?

24 Q. These up here, closer to the door.

25 A. 15 feet -- 15, 20 feet.

1 Q. 22?

2 A. And now he's walked back a little closer to the
3 corner of the house and just took the same pictures.

4 Q. Is this the back door?

5 A. It is.

6 Q. And are these the skid marks we just saw on
7 State's Exhibit 21?

8 A. They are.

9 Q. 23?

10 A. And you can also -- also there are tire marks
11 where you can tell someone is trying to turn around.

12 Q. What are those skid marks on the top of that
13 picture?

14 A. These skid marks here are where we're assuming
15 Ms. Turner stated that -- when she was able to get
16 away from Mr. Muns, she said she sped out of the
17 driveway and in between -- I believe it's Frank's
18 mother's house and out onto Atomic Road.

19 Q. When you say Frank, who are you --

20 A. Or, I'm sorry, Muns, Frank Muns.

21 Q. The defendant in this case?

22 A. Correct.

23 Q. 24, closer-up view of the same?

24 A. Correct.

25 Q. You can step back up.

1 MR. SLOCUM: I beg the Court's indulgence, Your
2 Honor.

3

4 BY MR. SLOCUM:

5 Q. Investigator Wertz, what did you do after you
6 left the scene at 107 -- or did you ever leave the
7 scene at 107 that day?

8 A. I did. When I left the scene at 107, I
9 responded to MCG to meet with Ms. Turner.

10 Q. And what did you observe when you arrived at
11 MCG on August [sic] 6th, 2013?

12 A. When I arrived I had a public safety officer
13 for MCG take me back to Ms. Turner, and she was
14 lying on a gurney. She had a bandage, which she
15 removed for me, on her left side just below her
16 breast on her ribcage which appeared to be a bullet
17 entry; on her right arm there were -- the way I
18 would describe it would be almost pepper -- like she
19 was peppered with -- I don't know if it would have
20 been gun powder or glass, but there were lots of
21 little, like, blood blister marks on her on the
22 inside of her right arm.

23 Q. Did you ever come to find out during the course
24 of your investigation if Ms. Turner had actually
25 been shot?

1 A. Ms. Turner advised me that she had been shot.
2 She stated that Frank Muns approached her in her car
3 with a gun in his hand and shot her.

4 Q. Do you see Frank Muns in the courtroom today?

5 A. I do.

6 Q. Would you please describe what he's wearing and
7 point him out to the jury, please.

8 A. He's wearing a black sports coat, he has a gray
9 goatee, thinning hair, sitting in between the two
10 men at the defendant's table.

11 MS. SHEFTALL: Your Honor, let the record
12 reflect that Investigator Wertz has identified the
13 defendant.

14 BY MR. SLOCUM:

15 Q. Did you take any pictures of Ms. Turner's
16 injuries that day?

17 A. I did.

18 MS. SHEFTALL: Permission to approach, Your
19 Honor?

20 THE COURT: You may.

21 (State's Exhibit Nos. 25-27 marked for
22 identification.)

23 BY MR. SLOCUM:

24 Q. Investigator Wertz, I'm showing you what's been
25 marked as State's Exhibits 25, 26 and 27. If you

1 could, just briefly look over these and tell me if
2 you recognize them.

3 A. 25 is the photograph that I took of Ms. Turner
4 and the marks on the inside of her right arm that I
5 described as pepper marks or...

6 Q. And 26?

7 A. 26 is Ms. Turner's left hand and an injury
8 between her thumb and her first finger.

9 Q. And 27?

10 A. 27 is the bullet entry wound below her left
11 breast into her ribcage.

12 Q. Do these pictures fairly and accurately depict
13 Ms. Turner's injuries on the date of August 6th,
14 2013?

15 A. Absolutely.

16 Q. Have they been changed, altered or deleted in
17 any way, shape or form?

18 A. No.

19 MS. SHEFTALL: Your Honor, at this time the
20 State would move to enter State's Exhibits 25, 26
21 and 27 into evidence.

22 MR. ROUTZONG: Without objection, Your Honor.

23 THE COURT: Thank you.

24 (State's Exhibit Nos. 25-27 admitted into
25 evidence.)

1 BY MR. SLOCUM:

2 Q. Investigator Wertz, did your investigation
3 reveal any treatment that Ms. Turner may have had at
4 the hospital that day?

5 A. I spoke with the doctor that was treating her
6 and he advised me that --

7 MR. ROUTZONG: Objection, Your Honor.

8 THE COURT: Sustained.

9 BY MR. SLOCUM:

10 Q. Was Ms. Turner kept in the hospital that day?

11 A. She was released that day. Actually, I'm not
12 sure. They had talked to me and stated that they --

13 THE COURT: Sir, don't testify about what
14 people told you.

15 BY MR. SLOCUM:

16 Q. If you don't know, that's fine.

17 A. I don't know.

18 Q. Did you have to go back to MCG at a later point
19 during this investigation of this case?

20 A. I did.

21 Q. And what was the reason to do that?

22 A. To retrieve the bullet that was pulled from her
23 body.

24 Q. Approximately how long after April 6th, 2013
25 did you retrieve that bullet?

1 A. It was on November 13th, 2013.

2 Q. And where did you go to pick up that bullet?

3 A. To MCG. And I met with one of MCG's public
4 safety officers.

5 MS. SHEFTALL: Permission to approach, Your
6 Honor?

7 THE COURT: Yes.

8 (State's Exhibit No. 30 marked for
9 identification.)

10 BY MR. SLOCUM:

11 Q. Investigator Wertz, I have what's been
12 previously marked for identification purposes as
13 State's Exhibit 30. Would you please tell me if you
14 recognize what is in that bag, please, sir?

15 A. You want me to open it?

16 Q. Please, sir. Well, first off, do you recognize
17 the envelope?

18 A. It is the envelope that I secured from out of
19 the Aiken County Sheriff's Office evidence locker
20 that was submitted by me as the bullet.

21 Q. That's the envelope you used to pick up the
22 bullet in November?

23 A. Correct.

24 Q. Now inside the envelope?

25 A. This is a small plastic vial with a blue top

1 that contains the lead that appears to be from a
2 bullet. It's the bullet that I was informed that
3 was removed from Ms. Turner's body.

4 Q. And that's bullet you got in November from
5 public safety at Medical College of Georgia?

6 A. Correct.

7 Q. Is there a name on that bottle?

8 A. It has Kim Turner's name.

9 Q. From November to today, has that bottle or
10 envelope been changed, altered or deleted in any
11 way, shape or form?

12 A. This is the exact container that it was given
13 to me in.

14 MR. SLOCUM: Your Honor, at this time the State
15 would move to enter State's Exhibit 30 into
16 evidence.

17 THE COURT: Any objection?

18 MR. ROUTZONG: No, sir.

19 (State's Exhibit No. 30 admitted into
20 evidence.)

21 THE COURT: And 30 is what?

22 MR. SLOCUM: The bullet.

23 I beg the Court's indulgence, Your Honor.

24 BY MR. SLOCUM:

25 Q. Investigator Wertz, that's all of the questions

1 that I have. Please answer any that Mr. Routzong
2 may have for you.

3 THE COURT: Mr. Routzong?

4 CROSS-EXAMINATION

5 BY MR. ROUTZONG:

6 Q. Good morning, sir.

7 A. Good morning.

8 Q. Pursuant to your investigation you had a chance
9 to talk with Ms. Turner.

10 A. I spoke with her at the hospital on the day of
11 the incident.

12 Q. And you became aware that she alleged that
13 there were two shots?

14 A. She alleged that she thought there may have
15 been two shots. She was -- she stated to me that
16 she couldn't be certain.

17 Q. You actually found only one bullet?

18 A. I'm sorry?

19 Q. You actually found only one bullet? You got
20 one bullet?

21 A. Correct.

22 Q. And you looked all through the car?

23 A. I did.

24 Q. And no holes in the car anywhere that were
25 consistent with a gunshot?

1 A. No.

2 Q. Didn't recover any other bullets in the car?

3 A. No.

4 Q. Nowhere on the ground?

5 A. Nope.

6 Q. No shell casings they're alleging of a
7 revolver?

8 A. No.

9 Q. The tire tracks that you were referring to
10 there several places all over, you can't really say
11 who or what caused those?

12 A. No. No, we can't.

13 Q. In parts of your statement or your
14 investigative summary report, I notice there seems
15 to be some differences in what people are saying
16 happened. And I know that you've had training and
17 experience and you know that you're to record this
18 as accurately as you can, just like a recording
19 device.

20 THE COURT: Is that a question?

21 MR. ROUTZONG: Yes, sir.

22 MR. SLOCUM: Your Honor, I would object to the
23 form.

24 THE COURT: Sustained.

25 BY MR. ROUTZONG:

1 Q. You record things as accurately as you can in
2 your statement?

3 A. Correct.

4 Q. In one part of the statement you say -- in your
5 statement, that she pulled up -- excuse me, Mr. Muns
6 pulled up behind her and was blocking her in.

7 A. That was what she -- what she told me the day
8 at the hospital or that was the way I interpreted
9 it.

10 Q. There's another part of the report where it
11 looks like she's saying he was just sitting there
12 and she pulled up.

13 A. That would be in my report?

14 Q. I believe so.

15 THE COURT: Please direct him to where in the
16 report.

17 BY MR. ROUTZONG:

18 Q. This is page 2 of the supplementary report,
19 about midway down. She stated she didn't see Frank
20 until she got around the cable. She said he was
21 sitting in his truck and he pulled up and tried to
22 block her in once he got past the cable.

23 A. Okay. Correct. She told me that when she
24 pulled in the driveway, she did not see him. And
25 after she got around the cables, then apparently

1 across the property he had been sitting in his truck
2 with it motionless, and suddenly it moved and it
3 pulled in behind her to block her, is the way she
4 explained it to me.

5 Q. I'm going to show you what's been admitted as
6 State's Exhibit 15.

7 A. Okay.

8 Q. It's your understanding that she tried to pull
9 in right between that sign and there's some obstacle
10 right beside it. But she had room to pull in right
11 there?

12 A. If you're looking at this picture, to the right
13 of the sign there's an area where she could pull in.

14 Q. Right next to that sign?

15 A. It's not right next to the sign. It's
16 actually -- there's another -- I believe there's
17 another spot that's actually blocked off right next
18 to the sign, and then just past it she could get
19 around it and come up by the trash pile.

20 Q. Well, how far down is that entrance point?

21 A. 30 or 40 feet maybe. It wasn't measured.

22 Q. But it's not right beside that sign?

23 A. No. But there's another sign next to -- see,
24 there's two signs. So after you go past the next
25 chain, there's another sign. So technically she did

1 pull in next to a sign.

2 MR. ROUTZONG: I beg the Court's indulgence.

3 THE COURT: Certainly.

4 BY MR. ROUTZONG:

5 Q. I'd like to hand up to you what's been admitted
6 as State's Exhibit 17. Can you tell me what that
7 is?

8 A. That would be the ground. The last photograph
9 that you handed me, that would be the ground just
10 inside of that cable.

11 Q. And that's the area where if you were going to
12 go down -- drive down a little bit farther past
13 this, that's the entrance and that's where you come
14 around over there by those logs?

15 A. Yeah. Well, you can almost see in this
16 photograph how it goes down and then where she would
17 end up going out on the road. You can see it's not
18 right next to the tree. You see there's a path that
19 goes down. And I say 30 feet, but it's not
20 measured, so I can't be exact on how far.

21 Q. What are all those things back there?

22 A. What are all what things?

23 Q. Those things that you took a picture of right
24 back here?

25 A. Mind you, I did not take this picture. But

1 this is a photograph taken by forensic investigator
2 Chris Johnson, and they are the woods.

3 Q. Those things laying down right there?

4 A. Yeah.

5 Q. They're logs?

6 A. They're got relevant to the picture.

7 Q. They're logs?

8 A. They're limbs and branches and --

9 Q. Obstacles?

10 A. That's not where she would drive through.

11 Q. It would be to the right of that --

12 A. It would be to --

13 Q. -- looking at that -- looking --

14 A. Right. To the right of it if you're looking at
15 the photograph.

16 Q. Going back to number 15 here, are there logs
17 and barriers all along the dirt road going back that
18 way?

19 A. I remember there being a -- where the motor
20 grader grades the road, so the dirt is kind of
21 stacked up a little bit. But I believe there's
22 another chain or cable between two more trees to the
23 right of that sign.

24 Q. So going this way, there are obstacles going
25 down this way. So you really have to -- in this

1 picture, you've got to go down some distance and
2 then you're going to be able to enter this way?

3 A. Correct.

4 Q. Investigator Wertz, I do have one other
5 question, just to make sure about something. I'm
6 going back to 15. Where does that road or that dirt
7 path go to? Can you get out of the property that
8 way? Does that go all the way out to the highway?

9 A. It does. It -- the dirt, not that you can see
10 in this photograph, but it turns around and goes
11 parallel with the house and then it kind of snakes
12 is what it does and goes up between -- there's
13 another house back here. It goes up between that
14 house and -- or beside that house and out to the
15 highway.

16 Q. And you found little bits of glass going down
17 the road that way?

18 A. I --

19 Q. -- at least --

20 A. I'm not aware of little bits of glass going
21 down the road. But directly behind this
22 residence where the -- she come to a stop almost
23 next to the steps. There was some glass found where
24 she had told us she pulled up and stopped.

25 Q. Yes, sir. The incident would have happened not

1 far from that do-not-enter sign to the right. And
2 going back that way, you found little bits of glass?

3 A. Well, actually, the incident happened a little
4 farther up toward the house, not back toward the
5 sign.

6 Q. Where was that?

7 A. That's right here. He blocks her in right
8 behind the sign. And then she pulls up -- well,
9 there was two different times where he tried to get
10 in the car, which one he shot at her at. I believe
11 he approached the car right here the first time --
12 he blocked her in and he approached the car right
13 here behind the sign. And then she got away and
14 pulled off and pulled up behind the house and
15 stopped thinking she was going to be able to call
16 her daughter who was in the house to come out and
17 help her, but she couldn't get her to come out.

18 But you're correct. I believe the actual
19 shooting incident did happen at the sign or right
20 behind the sign.

21 Q. And then there was glass down that way?

22 A. Well, down that way. (Indicating)

23 Q. Yes, sir.

24 MR. ROUTZONG: I don't have any other
25 questions.

1 THE COURT: Thank you.

2 Redirect, if any.

3 MR. SLOCUM: Briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. SLOCUM:

6 Q. Investigator Wertz, was there any doubt in
7 Ms. Turner's mind who shot her that day on --

8 MR. ROUTZONG: Objection, Your Honor.

9 THE COURT: Hold on. You can't answer that.

10 BY MR. SLOCUM:

11 Q. Were you given any other name in your
12 investigation other than Frank Muns as a suspect?

13 A. No. No.

14 MS. SHEFTALL: No further questions.

15 THE COURT: Thank you. You may step down.

16 All right. Ladies and gentlemen of the jury
17 panel, we've got to take a little longer lunch break
18 today because I've got hearings through the lunch
19 hour. We're going to break now for lunch. Let's
20 start back at 2:15. That's longer than I normally
21 like to take. Please do not discuss the case, don't
22 let anybody discuss it with you. We'll start right
23 back at 2:15 and go till about 5:00 unless I tell
24 you differently when you get here. Everybody else
25 remain seated.

1 (The jury retires to the jury room at 11:49
2 AM.)

3 THE COURT: Anything for the record before we
4 break by the State?

5 MS. SHEFTALL: Nothing from the State, Your
6 Honor.

7 THE COURT: Mr. Routzong?

8 MR. ROUTZONG: No, sir.

9 (A luncheon recess transpired.)

10 THE COURT: Call your next witness.

11 MS. SHEFTALL: Thank you Your Honor. The State
12 calls Kim Turner.

13 KIM TURNER

14 being first duly sworn, testified as follows:

15 THE WITNESS: So help me God.

16 THE CLERK: Have a seat in the witness box.
17 State your full name for the Court spelling your
18 last.

19 THE WITNESS: My name is Kim Susan Turner,
20 T-U-R-N-E-R.

21 THE COURT: Ms. Turner, please speak up for me.

22 DIRECT EXAMINATION

23 BY MS. SHEFTALL:

24 Q. Ms. Turner, where do you live now?

25 A. I live at [REDACTED].

1 Q. And where did you live on April 6th, 2013?

2 A. At 107 Beard Road, Beech Island, South
3 Carolina.

4 Q. What county is that in?

5 A. Aiken County.

6 Q. Why are you here today?

7 A. Because my ex-husband shot me.

8 Q. And who is your ex-husband?

9 A. Frank Muns.

10 Q. Can you describe to the jury what he's wearing
11 or point him out, please.

12 A. He's wearing a dark suit with a tie and a white
13 shirt. He's sitting between the two lawyers over
14 there. (Indicating)

15 MS. SHEFTALL: Your Honor, please let the
16 record reflect that Ms. Turner has identified the
17 defendant.

18 BY MS. SHEFTALL:

19 Q. Who were you married to last April?

20 A. To Tony Turner.

21 THE COURT: I'm sorry. Who?

22 THE WITNESS: Tony Turner.

23 Q. You were not married to the defendant, Frank
24 Muns?

25 A. No, we were not married at the time.

1 Q. Why were you living at 107 Beard Road?

2 A. I lived there with my children. Tony and I
3 were separated, and we lived there with Frank. The
4 kids had to go back to school and they went to
5 school in Beech Island and in Jackson, and so we
6 lived there for them to go to school and because
7 Frank and I were supposedly trying to get together
8 and try to raise them as a family, trying to make a
9 bigger house for them to live in where they all had
10 their own rooms and so forth.

11 Q. Who are you married to now?

12 A. Still married to Tony.

13 Q. Can you tell me what you were doing on the
14 morning of April 6th of last year?

15 A. I was coming back from Augusta, Georgia.

16 Q. Where were you headed?

17 A. We -- I was going home. I had to -- spent the
18 night previously at a motel with Tony and I was
19 coming back home. I had to get ready for work and I
20 wanted to check on my children and make sure they
21 were okay. I had left them with my daughter and
22 so-called daughter-in-law. And she was babysitting
23 that night. I left for work and went and met Tony
24 at a motel and went and spent the night with him.

25 And then when I was coming home, I wanted to

1 check on the kids. I had received text messages and
2 so forth that were scaring me. When we came out of
3 the motel room that morning, my mother's -- I had my
4 mother's car, and the mirror on the passenger's side
5 was on the ground. And Tony had went outside and
6 when he came back in the motel room, he had told me
7 that Frank had been out there and ripped the mirror
8 off the car. He had sent me some text messages and
9 he had tried calling and I didn't answer the phone
10 the night before.

11 Q. When you say he, who are you --

12 A. Frank had sent me some text messages that I
13 didn't answer. And like I said, he had tried to
14 call and I didn't answer the phone. Tony had asked
15 me to cut the phone off so he wouldn't -- we --

16 MR. ROUTZONG: Objection, Your Honor.

17 THE COURT: Hold on a second. Objection is
18 what?

19 MR. ROUTZONG: She's trying to say what he told
20 her.

21 THE COURT: Sustained. Don't testify about
22 what anybody told you, ma'am, just what you know.

23 BY MS. SHEFTALL:

24 Q. Let's go back a little bit. So you said the
25 night before. So what day would that have been?

1 A. It was the night of April 5th.

2 Q. Okay. And you said that your children were
3 with your daughter-in-law?

4 A. I had left them that day when I went to work --
5 I worked from 2:00 to 10:00 at night. So I had left
6 them that day with my daughter-in-law, she was
7 watching them while I went to work. And then I had
8 already told her that I didn't plan on coming home
9 after work that night, I already had in my mind that
10 I was going somewhere that night.

11 Q. What's your daughter-in-law's name?

12 A. Her name is Stella Wiles.

13 Q. Does she go by any other names?

14 A. She goes by Nicky.

15 Q. Okay. So Nicky was watching the kids. So
16 you -- the morning of -- let's get back to the
17 morning of April 6th. What if anything made you
18 feel like you needed to go by the house to check on
19 the kids?

20 A. Because, like I said, I needed to go home and
21 get a shower and get ready for work, for one thing,
22 and the second thing was because he -- I had gotten
23 text messages from Frank and I had read a few of
24 them that were threatening and a little scary to me.
25 I didn't know what kind of state of mind he was in.

1 It had been a lot going on for a long time and he
2 hadn't been in a rational state of mind for quite a
3 while. And I wanted to make sure they were okay.

4 And my phone had died on the -- on the way back
5 to the house, but I had stopped at Dollar General in
6 Beech Island to get a charger to charge my phone up
7 because I knew my battery was dying, and the lighter
8 in the car didn't work so I couldn't charge it. But
9 I had called Lisa who was here earlier and asked her
10 if she knew -- I couldn't get ahold of them. I
11 tried calling the house and couldn't get no answer
12 on the house phone, I couldn't get no answer on --
13 Nicky's cell phone was dead, so I was worried about
14 them. I didn't know -- make sure that everybody was
15 okay. And I had asked Lisa if she could send
16 somebody over there to check on them. And she
17 said that she had sent --

18 THE COURT: Ma'am, don't say what she said.

19 THE WITNESS: Yes, sir. But anyways, that's
20 why I went to the house. I needed to go home and
21 get ready for work, plus I had to make sure if they
22 were okay.

23 BY MS. SHEFTALL:

24 Q. And you said you hadn't been able to get them
25 on the phone?

1 A. No, I hadn't.

2 Q. Do you mean the phone at the house?

3 A. I tried the house phone and I tried Nicky's
4 phone. And like I said, Nicky's phone was dead and
5 then the house phone -- nobody answered the house
6 phone.

7 Q. Okay. Thank you. Who if anyone did you tell
8 that you were going to go to 107 Beard Road, to the
9 home where you had been staying?

10 A. I told my mother and I told Lisa Mason on the
11 phone was going.

12 Q. What did Lisa want you to do?

13 A. She told me --

14 THE COURT: Ma'am.

15 Q. Without saying --

16 A. Lisa wanted me to go to her house --

17 THE COURT: Ma'am, you can't ask that question.
18 You can't testify to what somebody told you. Come
19 on. Let's do it right.

20 BY MS. SHEFTALL:

21 Q. What did you do after talking to Lisa?

22 A. I thought about going to Lisa's house and
23 taking a shower there and getting ready for work.
24 But I really felt uncomfortable not knowing if the
25 kids were okay because I couldn't speak to somebody

1 myself and I wanted to make sure if everything was
2 okay. So instead of going to Lisa's house, I went
3 straight to my house.

4 Q. What did you see as you were approaching 107
5 Beard Road, the house where you and your kids had
6 been staying?

7 A. When I turned in to Beard Road, I could see
8 where -- my trailer was here, to the back part of
9 the trailer, I could see Frank's truck sitting by
10 his mother's pool in the backyard. And I didn't see
11 him in it.

12 And like I said, I was already nervous about
13 going home. I was scared to go there because I knew
14 he knew where I had been and I knew that -- like I
15 said, he sent me threatening text messages. And so
16 I went around the side of the house. When I did, he
17 had -- there was a cable that -- he had my driveway
18 blocked and he had the cable up. We had put the
19 cable up previously to keep other people out, and
20 he -- I don't know. Obviously somebody had put it
21 up that night to keep me out that morning.

22 But because I couldn't go through my driveway,
23 I went past. And his mother owned the lot right
24 next to where my lot was. His mother owned that lot
25 too. And the kids used to ride their go-karts

1 through there all the time, so there was already a
2 path. And I was going past that and I was going in
3 this way, and when I pulled in, trying to pull
4 around this way, he came from nowhere and blocked
5 me.

6 Q. Okay. Let me stop you right there for just one
7 second. You could not get into the driveway?

8 A. No.

9 Q. Because of that cable?

10 A. Right.

11 Q. You said there was a go-kart path. Is that
12 path what you used to access the property?

13 A. I was attempting to, yes.

14 Q. Okay. So as you're pulling into the go-kart
15 path off of Beard Road, you said that -- continue
16 from that point. Tell the jury what happened as you
17 pulled into the property.

18 A. When I pulled into the property, he came out --
19 like I said, he came out of nowhere and his truck
20 was right there and he jumped out of the truck and
21 his door was still open and he had the pistol in his
22 hand. And he came up to my car window and was
23 telling me I wasn't coming on this effing property.
24 And he said you were with that -- he always him
25 this, but, you were with that faggot motherfucker,

1 he said. And I -- he was trying to bang the window
2 out of the car, and I rolled the window down and I
3 told him, I said, you're talking about me. I said,
4 you were with the nastiest, dirtiest dope whore in
5 Beech Island and have been with all of them. And I
6 said, you have no right to tell me what to do, you
7 can't tell me what to do anymore. I said, but I am
8 going home to my children.

9 Q. So suffice it to say, y'all quickly start an
10 argument?

11 A. We started arguing. Anyways, he went to hit me
12 with -- in the window. And when he went to hit me
13 in the window, I leaned over and I started rolling
14 the window all the way back up. And when I rolled
15 the window back up, he -- I didn't even know what we
16 were saying to -- we were still saying stuff back
17 and forth to each other through the window, but he
18 pointed the gun at me and looked at me straight in
19 my face and he caught the trigger and he smirked at
20 me. And when he did that, I thought he was going to
21 shoot me, so I leaned over again and closed my eyes.

22 Q. Well -- I'm sorry. Go ahead.

23 A. And I leaned over again and I felt -- I heard
24 the gun go off and I felt the spray all over me. I
25 thought it was -- glass had went all over me. And I

1 looked and when I looked up, he had the gun pointed
2 at me to shoot me again. And I realized that --
3 seen the bullet hole. I realized he had shot me or
4 shot at me. I wasn't even sure I was shot right at
5 that second. But I knew he was going to try and
6 shoot me again and that he meant to kill me, so I
7 was trying to put the car in reverse and it wouldn't
8 go in reverse, it just went straight into drive.

9 And then before it hit him and the car door, I
10 jumped -- I just kept flooring it. And I floored it
11 and I jumped over -- there was a power pole in the
12 yard right in front of a burn pile. And I jumped
13 over the power pole and went halfway over the burn
14 pile and I flew behind my trailer and opened the
15 door and was blowing the horn and yelling for
16 somebody to come out to call that he had shot me.

17 And my daughter came out, which I wasn't even
18 sure if it was her or my daughter-in-law. At the
19 time all I said was call -- call the police, he shot
20 me. And when I looked back, he was still yelling at
21 me and coming at me with the gun. So I shut the
22 door and I took off again and went all the way
23 through his mother's yard and went out her side
24 entrance and I went around the block. And I was
25 sitting there, I trying to think -- trying to --

1 where can I go to call where he wouldn't chase after
2 me. I was scared he was going to chase after me and
3 keep trying to shoot me. And I was thinking crazy
4 at the time. I was like, calm down, calm down. I
5 could feel the bullet and I could tell then -- I
6 knew he had shot me. I felt it, it was hot and
7 burning in my chest. And I didn't have a lot of
8 blood coming from it.

9 Later the doctor said -- told me it corterized
10 me. But I felt the spray in my arm and on my chest
11 and -- and I was trying to tell myself to calm down,
12 that -- I kept thinking like it was a snake bite,
13 that it might spread or blow up inside me or
14 something.

15 But I went around the drive and I knew he was
16 still there, and I was shaking and I was nervous and
17 I didn't know where to go. But I went ahead and I
18 flew past the house and his truck was still there.
19 But I flew about 80 miles an hour and I kept
20 thinking, where do I go. And I had already been on
21 the phone with Lisa and I knew she was right around
22 the corner. And she was more his friend than me.
23 He probably liked her a lot better than he liked me.
24 And I went over there thinking that somebody there
25 would stop him from shooting me again if he followed

1 me over there. And I laid on the horn and opened up
2 the car door because I couldn't roll my window down
3 because the glass was splattered or whatever, I
4 didn't even try to roll it down. But I opened the
5 car door and then laid on the horn and a bunch of --
6 her and her friends and boyfriend and all came out
7 and I told them to call 911, that he had shot me.

8 Q. Thank you. And I realize that that all
9 happened about as fast as you were just able to tell
10 the jury. But what I'd like to do to make sure that
11 we -- that it's all very clear to the jurors what
12 exactly happened to you, I want to slow that time
13 down, if that's okay with you. And take me back a
14 little bit. So at the point where y'all are
15 arguing, where are you?

16 A. I was sitting in the driver's side of my car.

17 Q. And where was the defendant?

18 A. He was standing outside of the car right by my
19 window.

20 Q. And you said he had a gun?

21 A. He had the gun pointing at me.

22 Q. Okay. And what was me doing with the gun?

23 A. He was pointing it at me. He told me he was
24 going to kill me.

25 Q. Okay. And you said, I think, initially, that

1 he hit the window with the gun.

2 A. He was trying to break the car window out. And
3 I kept thinking he had already ripped the mirror
4 out, my mother is going to kill me for that. So
5 that's why I rolled the window thinking it would
6 keep him from busting it out.

7 Q. And it's your mother's car?

8 A. Yes.

9 Q. Okay. All right. So at the point where you
10 realize that you've been shot, you -- I believe you
11 testified that you realized at that point that you
12 thought he was going to kill you.

13 A. I did.

14 Q. Okay. You take off in your car over a power
15 pole; is that what you said?

16 A. It was a power pole. I call it a telephone
17 pole because it looked like the old telephone poles.

18 Q. Laying on the ground?

19 A. Yes.

20 Q. Okay. And you head towards the back door to
21 the trailer --

22 A. Right.

23 Q. -- honking your horn; is that what you said?

24 A. I did. And I had the door open and I looked
25 back and I kept thinking, he shot me, he's

1 definitely going to take off. But instead of taking
2 off, he came back at me.

3 Q. And you saw someone, you don't remember --

4 A. I don't.

5 Q. -- because this is all happening very fast, I'm
6 sure. But you saw someone come out and you yelled
7 at them, is that correct, to call the police?

8 A. Yes.

9 Q. Okay. And you just said that you saw the
10 defendant still coming at you?

11 A. He was still hollering and calling me a bitch
12 and still coming at me.

13 Q. Was he on foot or was he --

14 A. He was on foot.

15 Q. Okay. So you told the jury then that you took
16 off again in your car.

17 A. I did.

18 Q. Through the rest of the property. And we're
19 going to show them a map in a minute so they can
20 understand. You go through the rest of the
21 property, get out on the road. Tell me what you did
22 then.

23 A. After I went out of his -- out of the -- off
24 the property, I took a right. And the -- Oak Drive
25 is here. His mother owns the property from Oak to

1 Beard Road. And Oak loops all the way around Beard
2 Road. And I turned around on Oak and I kept
3 thinking -- I even seen the guy across the street,
4 Chris, walking on the street. And, like, a lot
5 happened in a short period of time, but I kept
6 thinking to myself, where can I go to call.

7 Q. Why didn't you stop there at Chris?

8 A. They don't have -- Chris don't have a
9 telephone. And all of those people in that
10 neighborhood are his friends or whatever. And then
11 I don't really -- I didn't really know -- I knew
12 Ms. Black lived right next door.

13 And then I didn't really know -- I didn't know
14 who to stop. I thought about stopping at one of the
15 other houses and blowing the horn there and trying
16 to get them to call 911, but I kept thinking he
17 could jump in that truck and follow me. And I
18 thought he was going to come after me and try to
19 shoot me again, so I wanted to try and get away from
20 there. I don't know, I just -- I just wasn't
21 thinking rational, period. But the only thing I
22 kept thinking -- the only closer -- the closest
23 person I knew where they lived was Lisa. And I had
24 just talked to her, and I guess that's why it was in
25 my mind to go to Lisa's house. And I went over

1 there thinking that at least she would stop him from
2 trying to hurt me because, like I said, I think
3 he -- she's an ex-girlfriend of his. So I figured
4 he liked her a lot more than he cared about me. So
5 he -- somebody there -- he had friends there and
6 they were his friends, that somebody there would
7 stop him from coming at me and shooting me again.

8 Q. Okay. So you pull up in Lisa's yard and
9 tell -- and honk the horn. And you told Lisa and
10 Lisa told us all earlier -- you were in here for
11 that -- that she called 911.

12 A. Right.

13 Q. Was that your voice on the 911 tape?

14 A. Yes, ma'am.

15 Q. Okay. How were you feeling when you pulled up
16 in Lisa's yard?

17 A. I was scared, I was angry. I was a lot of
18 things. I couldn't believe he shot me. I wouldn't
19 believe that he would shoot me. We were 15 years
20 old when we started going together and we'd been
21 married and divorced three times and we had four
22 children and four grandchildren. And even with him
23 sticking the gun in my face, I didn't think he was
24 going to shoot me, that's why I rolled my window
25 down.

1 MS. SHEFTALL: Your Honor, permission to
2 approach?

3 THE COURT: Certainly.

4 (State's Exhibit No. 28 marked for
5 identification.)

6 BY MS. SHEFTALL:

7 Q. Ms. Turner, I'm going to show you what's been
8 previously marked for identification purposes as
9 State's Exhibit 28. If you'll tell me if you
10 recognize that, please, ma'am.

11 A. Yeah, I recognize it.

12 Q. What do you recognize it to be, Ms. Turner.

13 A. It's an aerial photo of Beard Road and Oak
14 Drive.

15 Q. How do you recognize it?

16 A. Because that's where I used to live with my
17 children and that's where my mother-in-law lives.

18 Q. Is it a fair and accurate representation of
19 that area?

20 A. Yes, it is.

21 Q. Any alterations, changes, deletions that you
22 can tell?

23 A. No.

24 Q. Okay.

25 MS. SHEFTALL: Your Honor, the State would move

1 at this time to admit Exhibit 28 into evidence.

2 THE COURT: Any objection?

3 MR. ROUTZONG: Did she take that picture, Your
4 Honor? Has that been authenticated by law
5 enforcement or whoever took that?

6 THE COURT: Any objection?

7 MR. ROUTZONG: I do. I don't think she can
8 authenticate it.

9 MS. SHEFTALL: Your Honor, it's an aerial map
10 of the area where she lived for quite a while.

11 THE COURT: I'll allow it in. Overruled.

12 MS. SHEFTALL: Thank you, Your Honor.

13 (State's Exhibit No. 28 admitted into
14 evidence.)

15 BY MS. SHEFTALL:

16 Q. All right. Ms. Turner, I'm going to give you
17 this marker. And what I want you to do is use that
18 marker to draw on that map the path that you took
19 from the time that you turned off of Atomic Road
20 onto Beard Road to access the property. And then at
21 the first point where you stopped your car because
22 the defendant blocked your way, I want you to put
23 the number one, please, right where that happened.

24 A. (Witness complies).

25 Q. And then from there, if you'll draw a line to

1 where the next place you stopped behind the trailer
2 and where you stopped that second time, put a number
3 two, please, ma'am.

4 A. (Witness complies).

5 Q. And then from there, continue drawing your path
6 through the rest of the property to the point where
7 you exited onto Oak Drive.

8 A. (Witness complies).

9 Q. Thank you.

10 MS. SHEFTALL: Your Honor, permission for
11 Ms. Turner to step down and publish this to the
12 jury?

13 THE COURT: Yes, ma'am.

14 BY MS. SHEFTALL:

15 Q. I'm going to have you stand right there on that
16 side so that the jury can all see and hear. I'll
17 give you this marker. Don't draw on the TV, just
18 use it to point when we get the picture up. Show us
19 what you just drew for me on this picture.

20 A. Okay. I came in through here --

21 THE COURT: Speak up for us, please.

22 A. I came in down Beard Road this way. That's
23 my -- that was my home right there. It was a --
24 there's a driveway right here, and that was what he
25 had cabled off, and that's what was cabled off, so I

1 went past in here and pulled in like around this way
2 to come in on this side property right here.

3 (Indicating)

4 Q. Okay.

5 A. And --

6 Q. Where did you put the number one?

7 A. I put the number one in here somewhere. It's
8 hard to see with the trees in the way. But right in
9 here somewhere was where he came from here, because
10 that's where his truck was -- when I seen his truck,
11 like, right through here, when I was turning into
12 the road, I could see his truck. It was swimming
13 pool right in here between the bus and the -- behind
14 his mother's house. (Indicating)

15 Q. Okay. Let me stop you right there. So you --
16 when you turned onto Atomic Road --

17 A. I could see right here and seen his truck back
18 here. (Indicating)

19 Q. And by the time you got from here -- from this
20 point on Beard Road right off of Atomic --

21 A. To here. (Indicating)

22 Q. -- to the point where you accessed the go-kart
23 path onto the property, his truck had gone --

24 A. From here --

25 Q. -- from here --

1 A. -- all the way to here. (Indicating)

2 Q. Please try to stand to the side so all of the
3 jurors can see. I know it's difficult to do.

4 So to reiterate, to make sure everybody saw
5 that, from the time you got from this point right
6 off of Atomic --

7 A. Over here --

8 Q. -- to the point where you got -- where your --

9 A. Right here. (Indicating)

10 Q. -- right here where he stopped you the first
11 time, will you put a number one on that map there
12 for me?

13 A. (Witness complies).

14 Q. His -- Frank's truck, the defendant's truck,
15 went from right here on the property to blocking you
16 off?

17 A. Right.

18 Q. Okay. So you put the number one right here.
19 So follow the path from there. Where did you go
20 from that point?

21 A. After -- after -- after he shot me and I got in
22 the car and took off and I went and I pulled right
23 behind the trailer back here. (Indicating)

24 Q. And this is the trailer?

25 A. That's the trailer. And I pulled behind the

1 trailer right here. And then we had a back porch
2 back there. And that's when I opened the door and
3 was screaming for someone to call the police, that
4 he had shot me. And then from there --

5 Q. And is that where you put the number two on
6 this map?

7 A. That's where I put the number two.

8 Q. Okay.

9 A. And then from there, when I seen him coming
10 towards me with the gun still in his hand and
11 yelling at me, from there I took off and I skidded
12 out and took off this way and went -- on the side of
13 his mother's house right here is another drive. She
14 has a drive on this side and a drive on that side.
15 (Indicating)

16 Q. And this is his mother's house?

17 A. That's his mother's house back here.

18 Q. Okay.

19 A. And I took off through here and went this way
20 where his truck had previously been, and took off
21 and went out the drive this way and went this way on
22 Oak Drive where it loops all the way around and
23 comes back on Beard. (Indicating)

24 Q. Okay.

25 A. And I flew past him because his truck was still

1 out there. And I flew past going back by --

2 Q. So you essentially circled the block, came back
3 up Beard Road, the opposite direction of the way you
4 first come down it. And when you got to this point,
5 you said you saw his truck still there?

6 A. Yes. I was -- I was seeing -- when was flying
7 by as fast as I could, I was still scared that he
8 might chase me out the road if he seen me go back by
9 again.

10 Q. All right. So from that point, what did you
11 do? You --

12 A. After that, I took off down here. (Indicating)

13 Q. I know it goes off the map, but is that --
14 that's the road you took to go to Lisa Mason's
15 house?

16 A. Right. And actually, if that's the next
17 street, I went past Oak and went on up and the next
18 street over is going down to Lisa's house. She
19 lives in Riverbend right down there. (Indicating)

20 Q. Okay. Thank you. You can go back to your
21 seat.

22 Ms. Turner, what did you think the defendant
23 was going to do if he caught up to you?

24 A. I thought he was going to shoot me.

25 Q. Why?

1 A. Because after he shot me the first time, he
2 wasn't going to stop. He had the gun pointed at me
3 to shoot me again. There was no remorse, no
4 nothing. He wanted -- he was still angry. He was
5 still wanting to shoot me. And I kept thinking to
6 myself, at first, I couldn't believe he shot me. I
7 kept saying, well, he needs to kill me because he
8 pointed the gun at me again to shoot me again.

9 Q. What did he look like -- when you say he was
10 angry, what made you think that?

11 A. He had the devil in his eyes. It looked like
12 looking at a pure demon.

13 Q. So once you get to Lisa Mason's house, she
14 called 911 -- and we all heard that earlier -- and
15 we heard from Mr. Lemaster, the EMT who was in the
16 ambulance, did you go to the hospital?

17 A. I did.

18 Q. What hospital?

19 A. To MCG.

20 Q. Okay. What injuries did you have?

21 A. I had a gunshot or a bullet still lodged inside
22 of me, hit my ribcage underneath my left breast, and
23 I had some kind of spray that's -- I had some kind
24 of spray. I'm still not sure what it was from. It
25 looked like birdseed or birdshot or buckshot.

1 That's why I said buckshot because I didn't know
2 what it was. Nobody could really tell me. But it
3 was like black seeds sprayed all over my arm and my
4 chest right in here. (Indicating)

5 Q. How long were you in the hospital?

6 A. Two -- I think they kept me two or three
7 nights. I can't even remember exactly.

8 Q. Did you ever go back to a doctor after that?

9 A. I did.

10 Q. In relation to these injuries?

11 A. I did.

12 Q. What did they tell you about that bullet?

13 THE COURT: Ma'am, she can't testify to that.

14 MS. SHEFTALL: I apologize, Your Honor.

15 BY MS. SHEFTALL:

16 Q. Was the bullet -- where was the bullet when you
17 left the hospital?

18 A. It was still lodged into my ribcage right
19 outside of my -- above my ribcage up here.

20 (Indicating)

21 Q. And how long did the bullet stay there?

22 A. Till it was taken out in November.

23 Q. Why was it taken out in November?

24 A. Because it was causing me pain because I
25 couldn't lay on my stomach because it caused pain

1 and because when they took the bullet out, it had
2 been abscessed. But it was causing like heated
3 infection and I was sore and getting sick from it,
4 and it would, like, flare up. And if I got a cold
5 and coughed, it would cause a lot of pain.

6 Q. How often did you feel it?

7 A. The bullet?

8 Q. Right. During the time that it was still
9 lodged in your rib, how frequently did you feel it?

10 A. Every day.

11 Q. You just told the jury that the bullet was
12 removed in November of last year.

13 A. Yes, ma'am.

14 Q. Did you see the bullet when the doctor took it
15 out?

16 A. I did.

17 Q. What did you think when you saw it?

18 A. I was shook up pretty bad because I seen how
19 big it was and I realized that my kids could have
20 lost their mother and their father that day.

21 MS. SHEFTALL: Permission to approach, Your
22 Honor?

23 THE COURT: Sure.

24 BY MS. SHEFTALL:

25 Q. Ms. Turner, I'm going to show you a few of

1 these exhibits that have previously been entered
2 into evidence, and you just tell me whether these
3 look familiar to you. These are -- State's Exhibit
4 3, do you know what that is?

5 A. Yes. That's my mother's car after he had shot
6 me.

7 Q. And State's Exhibit 12, what's that one?

8 A. That's the inside of the window.

9 Q. Would that have been your viewpoint from inside
10 the car?

11 A. It would have been.

12 Q. Okay. State's Exhibits 14 through 18, tell me
13 what those are.

14 A. This is the trailer I lived at with my
15 children. And the trailer in front is the trailer
16 we had purchased to -- we were supposed to put the
17 two trailers together at one time and try and build
18 one home out of it. That's the driveway to get into
19 my house and that's the cable that was put up that
20 night. That morning when I got in, it was pulled
21 up, it wasn't laying on the ground, so that I
22 couldn't get in. And that's the side right here.

23 And in here, there was all logs right in here.
24 We had cut this tree back here. We had logs up in
25 here trying to keep people out. (Indicating)

1 Q. Tell me what exhibit that is that you're
2 talking about right now.

3 A. This is exhibit 16.

4 Q. 16. Okay.

5 A. And this is where I came around. This is where
6 the go-kart path was. And that's where I had come
7 around originally. I couldn't get in here because
8 of the log up against the -- blocking that area fell
9 on the ground this way. And that's where I came in.
10 That was the fire pit, which was different at that
11 time.

12 But he had stopped me when I was coming around
13 this way. About right in here somewhere, he had
14 stopped me and came flying from in here and stopped
15 me right in here. And then -- (Indicating)

16 Q. What exhibit?

17 A. Number 17, this will show you -- that's the --
18 this picture they took that day, this was the power
19 pole right here that was on the line. I was right
20 here somewhere and his truck was in here somewhere
21 and I had to jump over that power pole. And part of
22 that fire pit, which you can't tell in this picture,
23 but it was pretty deep. But part of that fire pit
24 right there -- and I came out this way to back
25 around to get back behind my house.

1 Q. Okay. I'm going to hand you State's Exhibit
2 21. Tell me what that picture shows.

3 A. That's the back behind the house, the -- back
4 behind my house is where -- right in here is where I
5 stopped and was hollering --

6 Q. The second time --

7 A. -- at the back door. The second time. I
8 stopped right here and was hollering for them to
9 call the police because he had shot me.

10 Q. And State's Exhibit 24, tell me what that one
11 is.

12 A. That's where I took off and went around this
13 way. And about -- I went out this way and went on
14 the side. This is the driveway right in here behind
15 the bus. And I went through here and went out that
16 driveway right there --

17 Q. Okay.

18 A. -- and went out and down Oak Drive.

19 Q. Okay. And these are State's Exhibits 25, 26
20 and 27. Tell me what those three show, please,
21 ma'am.

22 A. This is my arm where it had little pieces of
23 black seed or pellet or something. We weren't --
24 nobody was sure what it was. And it was sprayed all
25 over on my chest. You can't see it from this

1 picture.

2 And then this is some more of the pellets or
3 whatever that was in my hand, which that stayed in
4 there a really long time before it ever wedged its
5 way out. And then this is the bullet wound where
6 the bullet entered inside of me where he shot me at.

7 Q. Thank you, Ms. Turner.

8 MS. SHEFTALL: Your Honor, permission for
9 Ms. Turner to step down and allow the jury to see
10 these on the demonstrative.

11 (Witness steps down from the witness stand.)

12 BY MS. SHEFTALL:

13 Q. Now that the jury can look on with us, I wanted
14 you to identify these. But I want you to do it
15 again for me so the jury can see what you were
16 telling me. So what does this one show you?

17 A. My mother's car window after he shot me.

18 Q. Okay. And then State's Exhibit 12?

19 A. That's the inside view, my view, looking out
20 after he shot me.

21 Q. Okay. State's 14?

22 A. And this was where I came in on Beard Road.
23 This is the actual trailer that we lived in. And
24 like I said, that was the trailer his mother had
25 bought for us to make one home out of. We were

1 supposed to add onto that trailer.

2 Q. 15?

3 A. This was the cable right here. It was
4 caught -- it's a heavy cable. And my driveway where
5 he blocked at and where it was blocked and I
6 couldn't get through.

7 Q. This cable right here --

8 A. Right.

9 Q. -- was --

10 A. It was caught. It was pulled all the way
11 across -- straight across, blocking the driveway.

12 Q. 16?

13 A. Right here, this is where -- at that time,
14 there were, like I said, logs going all the way
15 across this way where we cut up that tree. And I
16 had come in this way on this far end and came back
17 this way, and he come up this way and blocked me
18 right here. I was stopped right in here somewhere
19 and his truck was pulled up in front blocking me
20 from going any further.

21 Q. And is this --

22 A. And there was more logs and stuff out there
23 that way because all of that was different at the
24 time.

25 Q. Okay. Is this what the cable looked like when

1 you arrived that day?

2 A. Right. And it was probably even tighter than
3 that at the time.

4 Q. State's 17?

5 A. This is -- this is one you can see better.
6 This is more how it looked like because, see, there
7 were logs and all still here where we had cut it up
8 that -- ones that weren't on the road. And I was
9 right in here, and he had pulled up and stopped me
10 right there. (Indicating)

11 Q. Which way was your car facing?

12 A. My car was coming in -- I was trying to turn
13 around and come in this way, so I was kind of coming
14 in this way. And he stopped me from trying to come
15 in and he blocked me right there. And this is where
16 I ran over the log right in here and run over
17 that -- part of that fire pit and took off and went
18 that way because he was standing there with the
19 car -- his truck door was open and I was trying to
20 avoid hitting him and hitting the truck door even
21 after he shot me and took off and went over the log.

22 Q. Do you recall whether that tarp was there?

23 A. I don't remember. I think I run it over. I
24 think it was laying on top of the fire pit at the
25 time. I think we had that -- I think that's why it

1 was right there. (Indicating)

2 Q. 18? Is this a progression from what we just
3 saw?

4 A. Right. I took off from there and I went in
5 here. I went in here and pulled in behind -- behind
6 my trailer back there. (Indicating)

7 Q. Would this be the edge of the trailer in the
8 corner of the picture right here?

9 A. Yeah.

10 Q. Okay. 21?

11 A. And this is behind the house. This was behind
12 the trailer right here. (Indicating)

13 Q. Is this where you stopped the second time?

14 A. Right. I stopped right here and was hollering,
15 and my daughter came out on the back porch.

16 Q. Okay. And tell me, what is this right here in
17 the dirt?

18 A. That's my skid marks from me taking off out of
19 there. That's where I took off and went out that
20 way. (Indicating)

21 Q. State's 24? Is that a closer version of those
22 same --

23 A. It is. And you can see right here where I took
24 off and went out and went out this drive right
25 there. (Indicating)

1 Q. Okay. So this is where you were stopped for
2 the second time?

3 A. Yes.

4 Q. And you looked back and you saw Frank coming
5 after you with the gun still --

6 A. He still had it in his hand.

7 Q. Took off in this direction, went around this
8 way, and went between these vehicles, this bus, and
9 this house?

10 A. Right.

11 Q. Out that driveway right there?

12 A. Right.

13 Q. And that driveway accesses Oak Drive?

14 A. Right.

15 Q. Okay. 25?

16 A. That's my arm with all of the scrap -- all the
17 shrapnel in it. I don't know what all -- and then,
18 like I said, there was a bunch of spray on my chest
19 right here too. It -- he didn't take a picture, but
20 you could see it.

21 Q. Did it look like your arm?

22 A. It did.

23 Q. 26, please?

24 A. Then that's the piece that had gotten in my
25 hand. On the other side, you can see right here, I

1 had some other pieces that were in that hand also.

2 Q. And 27?

3 A. And that's the bullet wound where he shot me,
4 the bullet where it stayed lodged.

5 Q. Thank you, Ms. Turner. You may have a seat.

6 Ms. Turner, I'm going to show you what's been
7 marked as State's Exhibit 30 and entered into
8 evidence. Can you open this envelope, please,
9 ma'am, and tell me what you see inside.

10 A. This is the bullet that they took out of me at
11 MCG. And it's in the same container that it was in
12 when it -- the doctor put it in there after he took
13 it out of me.

14 Q. And that was in November, that surgery?

15 A. Yes, ma'am.

16 Q. Were they able -- was the doctor able to remove
17 the bullet through the same wound that --

18 A. No. They had to cut another incision in order
19 to remove the bullet. And he -- he was pretty
20 traumatized because he said that he normally
21 would --

22 THE COURT: Ma'am, ma'am, ma'am.

23 Q. Ms. Turner, without telling us what the doctor
24 said, just tell us whether he was able to remove the
25 bullet through the same hole.

1 A. No, he wasn't.

2 Q. Do you have an additional injury as a result of
3 removing that bullet?

4 A. Right. I have a different -- I have a bullet
5 hole and I have a scar about that wide from where
6 they cut the bullet out of me. (Demonstrating)

7 Q. Thank you, ma'am.

8 MS. SHEFTALL: I beg the Court's indulgence for
9 just a moment.

10 BY MS. SHEFTALL:

11 Q. Those are all of the questions I have for you.
12 Please answer any questions Mr. Routzong has.

13 MR. ROUTZONG: Your Honor, may we approach for
14 just a second?

15 (Sidebar conference.)

16 CROSS-EXAMINATION

17 BY MR. ROUTZONG:

18 Q. Good afternoon, Ms. Turner.

19 A. Good afternoon.

20 THE COURT: Speak up for me, please, ma'am.

21 Q. I just have a couple questions. That gentleman
22 right there, that's your present husband?

23 A. Yes, it is.

24 Q. And you testified that you've been married to
25 Mr. Muns three times, divorced three times?

1 A. Yes, sir.

2 Q. And presently married to him?

3 A. Yes, sir.

4 Q. And on this date, you were married to him?

5 A. Yes, sir.

6 Q. But you were living at Mr. Muns' residence?

7 A. I was living at my own residence. He wasn't no
8 longer living with us. He had been.

9 Q. But it was at Mr. Muns' property?

10 A. It's his mother's property; it's not his.

11 Q. I think you testified that on the night before
12 this incident, you had spent the night with
13 Mr. Turner, your husband --

14 A. I did.

15 Q. -- and during that time you got some voice
16 mails or text messages.

17 A. I did.

18 Q. And I think you characterized them as being
19 scary and threatening.

20 A. I did.

21 Q. And you got up the next morning --

22 A. I did.

23 Q. -- and you had -- you knew about those text
24 messages and the scary things -- the scary threats,
25 and your husband was still with you.

1 A. He wasn't with me when I -- when I went home.

2 No.

3 Q. But he knew where you were going?

4 A. Yes, he did.

5 Q. Because you left him at the motel room?

6 A. We probably left around the same time. Yeah.

7 Q. I want to make sure I fully understand. And so
8 these folks fully understand, you took these things
9 very seriously. They were threatening and scary,
10 that's how you characterized it?

11 A. It wasn't the first time I've been scared.

12 Yes, sir.

13 Q. But you took them seriously?

14 A. Yes, sir.

15 Q. And yet your husband, Mr. Turner, stays at the
16 motel room, you go by yourself back to this
17 residence, and you were going -- I think you
18 testified you were going to take a shower.

19 A. I did. I had to be at work that day.

20 Q. But you didn't bring your husband?

21 A. He didn't live there.

22 Q. You didn't call the sheriff's office and ask
23 for an escort?

24 A. No, I did not.

25 Q. You testified that -- that -- was it at the

1 motel room that the mirrors were broken on your car?

2 Is that what you testified to?

3 A. It was.

4 Q. I think you said they were laying down.

5 A. It was.

6 Q. But you didn't see what happened with those?

7 A. No, sir.

8 Q. And I think you testified that -- and I'm going
9 to try to find a couple pictures here. Bear with
10 me. That's a good one.

11 I'm going to show you what's already been
12 admitted as State's 14, 15, 16 and 17. This is
13 State's No. 14. Can you show the jury where you
14 were heading from? As you were going to the
15 residence, I think you were coming down that road,
16 you testified.

17 A. Where was I heading from? I was heading
18 from --

19 Q. And make sure the jury can see it.

20 A. I was heading from Augusta and I turned into
21 Beard Road.

22 Q. If I were on the road, you'd be heading towards
23 me right now. You hadn't turned in yet.

24 A. I wouldn't be heading towards -- I would be
25 heading from Augusta towards Beech Island, is the

1 way I was coming.

2 Q. And if that picture was in your rearview
3 mirror -- let's look at it that way -- you'd be
4 heading towards me and I'd be standing here and that
5 would be in your rearview mirror?

6 A. Right.

7 Q. Thank you.

8 I'm handing up to you what's been admitted as
9 State's No. 16. That's not exactly how it looked
10 that day. I think you testified there was a lot of
11 debris and logs and everything around there. There
12 was also, I think you testified, obstructions. Can
13 you show us where those --

14 A. I did.

15 Q. -- obstructions were?

16 A. Right in here, we had placed logs that we had
17 cut like a fence.

18 Q. Yes, ma'am.

19 A. And then this -- this one -- this picture was
20 taken. There was a bunch of piles of logs and stuff
21 up here that were -- that was the pit itself, and
22 everything had been piled up on top of it. But,
23 yeah, there was some more debris and stuff right in
24 this area right here. (Indicating)

25 Q. Yes, ma'am. And didn't you testify that that

1 cable that's right across that road, that was up at
2 that time?

3 A. It was.

4 Q. And you testified that you couldn't turn in
5 there.

6 A. You're exactly right.

7 Q. Now correct me if I'm wrong, but your testimony
8 is you had to keep driving -- if I'm going down this
9 road like this, you had to keep driving. And you
10 turn around and -- and --

11 A. Right, right here. I turned right in here,
12 right past this tree right here, and went in this
13 way because the kids had a go-kart path going
14 through there.

15 Q. Yes, ma'am. And you testified it doesn't look
16 that -- it looks a lot clearer in that picture, but
17 back then there was a lot more debris, there was --

18 A. There was a lot more debris.

19 Q. It was a pretty narrow, confined little --

20 A. It wasn't that narrow. We drove through there
21 more frequently than not --

22 Q. Just get one car --

23 A. Cars still go through --

24 Q. -- through there, easily --

25 A. Yeah. You could only get one car through

1 there.

2 THE COURT: Hold on. Mr. Routzong, let her
3 finish before you ask. Ma'am, let him finish his
4 question before you answer.

5 THE WITNESS: Yes, sir.

6 THE COURT: The court reporter can't take down
7 y'all talking at the same time.

8 Rephrase the question.

9 BY MR. ROUTZONG:

10 Q. At least one -- you could get one car at a time
11 through that chokepoint. And it's kind of like a
12 chokepoint there?

13 A. Yes.

14 Q. Okay. And there's obstructions on each side?

15 A. Yes, sir.

16 Q. I know this is going to be hard for you to
17 guesstimate here. And I'm not asking you to guess,
18 I'm actually asking you to, you know, tell us what
19 you remember. But your testimony is Mr. Muns pulls
20 his car up -- his truck -- he's got a pickup truck;
21 right?

22 A. Yes, he did.

23 Q. He pulls it up here and you're coming through
24 that narrow spot. And he's pulling up up here
25 pretty close to your car?

1 A. He was this way and my car was this way. He
2 cut me off before I could get around into that neck.
3 Yes. (Demonstrating)

4 Q. Yes, ma'am. And you didn't feel like you could
5 easily move forward? It was -- he was close enough
6 where there wasn't much distance between your truck
7 and -- I'm sorry, his truck and your car?

8 A. No.

9 Q. Yes, ma'am.

10 A. I could have moved forward, but I would have
11 run him over and hit his car door because he had his
12 truck door open.

13 Q. But there was an issue about you might be
14 running him over?

15 A. Exactly.

16 Q. What do you remember in terms of time? When he
17 pulls his truck up there and you're worried about
18 running him over and the door is open and all of
19 this is going on and the glass busts -- you know,
20 that's a good -- I meant to ask you about that. I'm
21 sorry.

22 Let me back up right there. You told -- you
23 told -- her name is Lisa, I believe -- that Mr. Muns
24 broke out the glass and then he shot you.

25 A. I never told Lisa that.

1 Q. You heard her testimony today?

2 A. He told her that.

3 Q. So Mr. Muns got his truck, he pulls up there
4 and he's close, you're worried about running him
5 over, and the glass breaks and you hear a shot. One
6 way or the other, the shot or the glass breaks.
7 This is when this all happened. About how long were
8 you there? Can you tell me what you remember about
9 that?

10 A. I don't know how long it --

11 Q. Was it ten seconds? Fifteen seconds?

12 A. Probably five minutes.

13 Q. You were there for five minutes?

14 A. Probably so.

15 Q. You were there for five minutes? Okay.

16 Well, after that glass breaks, and I think you
17 testified you're trying to get the car in gear, and
18 Mr. Muns is still between -- he's still between your
19 car and his truck. He's trying to -- your
20 testimony, he's trying to get at you --

21 A. He was still standing at my window with the
22 pistol pointed at me when I sat back up and --

23 Q. And his truck is right behind you?

24 A. After he shot me.

25 Q. His truck is right back here.

1 A. His truck is behind him and --

2 Q. Yes, ma'am. And he's trying to get into the
3 window; that's your testimony?

4 A. No. I said he had the gun still pointed at me
5 after she shot me.

6 Q. Yes, ma'am. But he's still right here, his
7 truck is behind him, you're still afraid --

8 A. Yes, sir.

9 Q. -- you get that car in gear. And then what
10 happens?

11 A. Then I floored it. I floored it and I went
12 over the wood that I was trying not to run over. I
13 run over that log and run over part of that fire pit
14 to get away from him. And I pulled up behind the
15 house and stopped because --

16 Q. Well, that's a good question. I wanted to ask
17 you, just about how far is it from -- I know we've
18 got photographs, but it's hard to tell sometimes.
19 The incident is back there, and you'd gone up this
20 way. About how far would you say that is?

21 A. It's not that far. It's from one lot to
22 another. But it was far enough that I thought he
23 would jump in his truck and leave after he shot me.
24 I didn't think that he would stay there.

25 Q. Well, how fast could you have walked it -- if

1 you were back there, how fast could you walk or run
2 to get up to where you were at?

3 A. I don't know.

4 Q. Not very long?

5 A. It wouldn't have taken that long.

6 Q. Okay. And so you're -- you've left that where
7 all that mess is happening back there and now you've
8 driven up here. And now you've stopped and you're
9 blowing on the horn, and you talked to somebody but
10 you're not sure who. About how long would you say
11 you were there?

12 A. A matter of seconds.

13 Q. Would you say it was 10 or 15 seconds?

14 A. Probably so.

15 Q. Were you there longer than it would have taken
16 him to walk up and --

17 A. No. As soon as I looked and seen him heading
18 towards me with the gun, I took off again. I never
19 cut the car off, I never got out of the car; I laid
20 on the horn screaming for somebody to call the
21 police. I was scared for my children also.

22 Q. You -- and it's from there that you left and
23 went to Ms. Lisa's house?

24 A. That's correct.

25 Q. Just one more question here. And I just want

1 to -- and I know I already asked you, but you don't
2 know what happened with these mirrors. But it's
3 your testimony that they were broken off.

4 A. Only one mirror was broken off. But we had
5 stuck it back on there. It had a screw still in it.
6 It was ripped where the screw was still stuck in it.
7 And we stuck it back in there at the motel and was
8 able to push the screw back in that held it on
9 there. But we had it fixed later on. We had to
10 have it glued down.

11 MR. ROUTZONG: I don't have anything else, Your
12 Honor.

13 THE COURT: Redirect, if any.

14 MS. SHEFTALL: Thank you, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. SHEFTALL:

17 Q. Ms. Turner, approximately how long was it
18 between the time you got onto the property owned by
19 the defendant's mother and the time that you left?

20 A. About five minutes maybe. Around five minutes.

21 Q. Okay. And approximately how long was it after
22 you were shot until you left the property?

23 A. A matter of seconds probably, maybe a minute.
24 I don't even know if it was that long. It was fast.

25 MS. SHEFTALL: Thank you. No further

1 questions.

2 THE COURT: Thank you, ma'am. You may step
3 down.

4 All right. Mr. Foreman, ladies and gentlemen
5 of the jury, we're going to take about a 10-,
6 15-minute afternoon break. When you get back I'll
7 let you know where we stand. Please do not discuss
8 the case or start any deliberations. Thank you.

9 (The jury retires to the jury room at 3:21 PM.)

10 THE COURT: Mr. Routzong, you have a motion you
11 want to put on the record?

12 MR. ROUTZONG: Yes, Your Honor. I move for a
13 mistrial. Deputy Melnick [phonetic], during his --
14 or her testimony, moved in right behind the
15 defendant, Mr. Muns. I think the inference that the
16 jury could make would be that he's a danger to her;
17 it requires a uniformed deputy to be right behind
18 him to keep him from attacking her.

19 Your Honor, I think that's a definite prejudice
20 against Mr. Muns and I'd ask the Court for a new
21 trial -- excuse me, I'd move for a mistrial.

22 THE COURT: All right. Respectfully denied. I
23 requested the deputy to move there. I have to watch
24 everything going on in this courtroom. Y'all know
25 how I do that.

1 Your client was getting awfully fidgety,
2 staring at the -- his ex-wife, the victim in this
3 case, coming up out of his chair. And I deemed it
4 necessary to have security closer to him. I don't
5 see where I -- it was necessary. And I respectfully
6 deny your request for a mistrial. And he will
7 continue to sit back there. Thank you.

8 All right. We'll take about a ten-minute
9 break.

10 (A recess transpired.)

11 THE COURT: Ms. Sheftall, can you give me some
12 guesstimate as to how many more witnesses you have?

13 MS. SHEFTALL: Your Honor, the State intends to
14 call one additional witness in its case in chief,
15 reserving the right for rebuttal witnesses if
16 necessary.

17 THE COURT: And how long will that witness be?

18 MS. SHEFTALL: Twenty minutes at the most, Your
19 Honor.

20 THE COURT: So we've got one witness left?

21 MS. SHEFTALL: Yes, Your Honor.

22 THE COURT: And you've got one maybe or none?

23 MR. ROUTZONG: Yes, sir.

24 THE COURT: One or none?

25 MR. ROUTZONG: One, sir.

1 THE COURT: All right.

2 Bring the jury in, please.

3 (The jury enters the courtroom at 3:40 PM.)

4 THE COURT: You may call your next witness.

5 MS. SHEFTALL: Thank you, Your Honor. The

6 State calls MINOR 1 .

7 THE COURT: Come around, please, ma'am.

8 MINOR 1

9 being first duly sworn, testified as follows:

10 THE WITNESS: Yes, ma'am.

11 THE CLERK: Have a seat in the witness box.

12 State your full name for the Court spelling your
13 last.

14 THE WITNESS: MINOR 1 --

15 THE COURT: Ma'am, you have to speak up for us.

16 THE WITNESS: MINOR 1 .

17 DIRECT EXAMINATION

18 BY MS. SHEFTALL:

19 Q. MINOR 1 , how old are you?

20 A. Eleven.

21 Q. And where do you go to school?

22 A. Redcliffe --

23 THE COURT: Speak up, MINOR 1 .

24 A. Redcliffe Elementary.

25 Q. That little black thing in front of you is a

1 microphone, so if you'll just kind of talk to it.

2 There you go. That's perfect. Thank you.

3 All right. One more time, what school do you
4 go to?

5 A. Redcliffe Elementary.

6 Q. And what grade are you in?

7 A. 5th.

8 Q. And what is your favorite subject?

9 A. Math.

10 Q. What grades do you have in math right now?

11 A. All A's.

12 Q. Good for you. Do you remember what you were
13 doing on the night -- it would have been a Friday
14 night -- of April 5th, 2013?

15 A. My brother's girlfriend, Nicky, came over and
16 she was babysitting us that night. And she spent
17 the night over there.

18 Q. Okay. And do you know the address of where you
19 were living at the time, that night? Was it at your
20 grandmother's property?

21 A. Yes, ma'am.

22 Q. Okay.

23 THE COURT: Speak up for me, please, ma'am.

24 BY MS. SHEFTALL:

25 Q. So Nicky was staying with you?

1 A. Yes, ma'am.

2 Q. What did you and Nicky do?

3 A. We were watching movies.

4 Q. Okay. Was anyone else with y'all?

5 A. My two brothers, Cole and MINOR 3.

6 Q. Okay. Did anyone else come into the trailer
7 that night?

8 A. My dad.

9 Q. What did he do?

10 A. He was using the telephone.

11 Q. Okay. Do you remember what time you fell
12 asleep?

13 A. Around 9:00.

14 Q. Okay. Where did you fall asleep?

15 A. On the couch.

16 Q. Where is the couch?

17 A. It was in the living room in front of -- in the
18 living room in front of the TV.

19 Q. Okay. Where was Nicky?

20 A. She slept on the couch -- she slept on the
21 couch with me, with her son, and my nephew.

22 Q. Okay. What is your nephew's name?

23 A. MINOR 2

24 Q. Do you remember what woke you up the next
25 morning?

1 A. I heard a gunshot.

2 Q. Okay. What did you do when you heard the
3 gunshot?

4 A. I went outside.

5 Q. What did you see?

6 A. I saw my mom pull up.

7 Q. Okay. Did she say anything to you?

8 A. Yes.

9 Q. What did she say?

10 A. She said, he shot me, he shot me, call the
11 police.

12 Q. Okay. And what happened next?

13 A. I saw my dad running to the bus with a long gun
14 in his hand.

15 Q. Okay. And was your mom still sitting there in
16 her car?

17 A. No. She -- she done took off in between the
18 bus and my -- my grandma's house.

19 Q. What do you call your grandmother?

20 A. Memaw.

21 Q. Okay. And that is your dad's mother?

22 A. Uh-huh.

23 Q. Okay. So your mom took off and you saw your
24 dad, you said, running towards the bus?

25 A. Yes, ma'am.

1 Q. Where was your dad living at that time?

2 A. He was living in the bus.

3 Q. In the bus. And did you say he had a gun in
4 his hand?

5 A. Yes.

6 Q. Okay. Did he say anything to you?

7 A. No.

8 Q. Did you say anything to him?

9 A. No.

10 Q. What did you do next?

11 A. I ran in the house and I got Nicky. And it
12 took her about ten minutes to get ready before she
13 got up.

14 Q. All right.

15 MR. ROUTZONG: Your Honor, can you ask the
16 witness to speak up?

17 THE COURT: MINOR 1, you need to speak up a
18 little louder, please.

19 BY MS. SHEFTALL:

20 Q. It took her how long to get ready?

21 A. It took her about ten minutes.

22 Q. Okay. Did you call 911 in the trailer?

23 A. No. The phone was gone because --

24 Q. Tell me what you mean by gone.

25 A. Someone took it. So we went over to my

1 grandma's house to call the police.

2 Q. Okay. What kind of phone was it that was
3 supposed to be in the trailer? Like a cordless
4 phone or one that did have a cord or --

5 A. It had a cord.

6 Q. Okay. And you said it was gone like someone
7 took it. Why do you think that?

8 A. Because the whole set -- like, just the cord
9 was there.

10 Q. Okay.

11 A. The whole other thing was gone.

12 Q. Okay. So you got Nicky and y'all -- she got
13 ready and then y'all went to Memaw's house to call
14 the police?

15 A. Yes.

16 Q. What did you do once you got into Memaw's
17 house?

18 A. We went through the living room and we saw my
19 brother MINOR 3 watching TV. So we grabbed the phone
20 and went on the porch.

21 Q. On the porch of Memaw's house?

22 A. Yes, ma'am.

23 Q. Okay. And what did you do then?

24 A. We were sitting on the porch and we saw an
25 ambulance and police cars go by, so then we called

1 my grandma.

2 Q. Okay. Did you call 911?

3 A. No.

4 Q. Why not?

5 A. Because we already figured since we saw the
6 ambulance and the police car -- so we already
7 thought somebody else called.

8 Q. Okay. So you called your grandmother?

9 A. Yes.

10 Q. Memaw -- you called Memaw?

11 A. No. We called my other grandmother, Nana.

12 Q. Your mom's mom?

13 A. Yes, ma'am.

14 Q. You call her Nana?

15 A. Yes, ma'am.

16 Q. Where was Memaw? Was she at her house?

17 A. No. She had to -- she went to the store that
18 morning.

19 Q. Okay. So at Memaw's house, at that point is
20 you, Nicky, MINOR 3 your brother --

21 A. Yes, ma'am, and my cousin Joseph because he was
22 paralyzed and -- oh, and also Chris was there. He
23 lived down the road and he would take care of Joseph
24 when she was gone.

25 Q. Okay. So you just told us that you heard

1 sirens.

2 A. Yes, ma'am.

3 Q. And you saw an ambulance.

4 A. Yes, ma'am.

5 Q. Okay. And what did you do then?

6 A. Well, we called my Nana and we went back to the
7 house and --

8 Q. When you say the house, what house do you mean?

9 A. My trailer.

10 Q. Okay. Go ahead. I'm sorry.

11 A. And then like a few moments later, the police
12 came up into the -- the detectives, like about an
13 hour later.

14 Q. Okay. When you and Nicky left the trailer to
15 go to Memaw's to use the phone, was your dad still
16 there?

17 A. No.

18 Q. How do you know that?

19 A. Because I looked -- me and Nicky looked for the
20 truck and looked for him, and he was nowhere to be
21 found.

22 Q. What did his truck look like?

23 A. It was a blue -- greenish, bluish Ford truck.

24 Q. Okay. So by the time you left Memaw's house
25 and got back to your trailer, you said the police

1 were there or showed up?

2 A. No; about an hour later.

3 Q. Okay.

4 A. We were just sitting on the porch and then an
5 hour later they came.

6 Q. Okay. Now, you weren't in here to hear this,
7 but did your mom come home that day?

8 A. No.

9 Q. Do you know where she was?

10 A. Not that day. But that night my grandma called
11 and told us that she was at the hospital.

12 Q. Which grandmother was that?

13 A. My Nana.

14 Q. Nana. Okay. So who did you stay with while
15 your mom was in the hospital?

16 A. My two brothers, Cole and --

17 MR. ROUTZONG: Objection, Your Honor. We're
18 really starting to get into some irrelevant things.
19 The only thing she can really testify to is she
20 heard the gunshot. We already know that the --
21 Ms. Turner went to the hospital. All these other
22 things, where she's at, is not really particularly
23 relevant to the issue at hand.

24 THE COURT: Overruled.

25 MS. SHEFTALL: Thank you, Your Honor.

1 BY MS. SHEFTALL:

2 Q. Who did you stay with while your mom was in the
3 hospital?

4 A. I stayed with Nicky and my nephew MINOR 2

5 Q. Where did Nicky live?

6 A. She lived on Foreman Road --

7 Q. Is that --

8 A. -- in a trailer.

9 Q. In a trailer. Is that close to where you were
10 living at the time?

11 A. Like -- yes. Yeah.

12 Q. Kinda?

13 A. Yeah.

14 Q. Okay. Did anything weird happened while you
15 were staying with Nicky?

16 A. Yes.

17 Q. Tell us what happened.

18 A. Later that night we thought we heard something
19 outside, so --

20 Q. The same night with the sirens and --

21 A. Yes, ma'am.

22 Q. Okay. And you saw your mom and your -- okay.
23 That same night?

24 A. Yes. And we thought we heard something
25 outside, so she looked out the window and she

1 thought she saw something, but --

2 THE COURT: Whoa, whoa, whoa. She can't
3 testify to what another person thought or saw.

4 MS. SHEFTALL: Okay.

5 BY MS. SHEFTALL:

6 Q. Just tell us, did you go outside --

7 A. No.

8 Q. -- that night?

9 Did you go outside the next morning?

10 A. Yes.

11 Q. What did you see when you went outside the next
12 morning?

13 A. We saw my dad's truck.

14 Q. Where was it?

15 A. It was in the back -- it was in the backyard of
16 her trailer.

17 Q. Of Nicky's?

18 A. Yes, ma'am.

19 Q. Did you look inside the truck?

20 A. Yes.

21 Q. What did you see inside the truck?

22 A. We saw the phone that was missing from our
23 house.

24 Q. Okay.

25 MS. SHEFTALL: I beg the Court's indulgence a

1 moment.

2 BY MS. SHEFTALL:

3 Q. MINOR 1, thank you for answering my questions.

4 If you'll answer any questions Mr. Routzong has.

5 Okay?

6 A. Okay.

7 THE COURT: Mr. Routzong?

8 MR. ROUTZONG: I don't have any questions, Your

9 Honor.

10 THE COURT: Thank you. You may step down,
11 young lady.

12 Next witness, please.

13 MS. SHEFTALL: Your Honor, at this time the
14 State would rest, reserving the right for rebuttal
15 witness if necessary.

16 THE COURT: Thank you.

17 All right. Mr. Foreman, ladies and gentlemen
18 of the jury, this concludes the testimony by the
19 State. We still testimony that the defense will
20 give. I was asking the lawyers if they thought we
21 could get all of the testimony in today by 5:00, and
22 I think that's probably a doable deal.

23 At the conclusion of the State's case I have to
24 spend about five minutes with the lawyers to
25 consider certain motions outside of your presence.

1 So I'm going to let you step out. And as soon as I
2 finish that, I'll bring you right back in and we'll
3 go into the testimony and see if we can't get all of
4 the testimony in by this afternoon, which would
5 leave us coming back tomorrow, at which time you
6 would get the final arguments, my charge, and then
7 you'd get the case midmorning and then I would order
8 you some lunch and all that and you can work right
9 through and be out of here when you finish. Fair
10 enough? Don't discuss the case and don't
11 deliberate.

12 (The jury retires to the jury room at 3:53 PM.)

13 THE COURT: Any motions by the State?

14 MS. SHEFTALL: None from the State, Your Honor.

15 THE COURT: Mr. Routzong, any motions?

16 MR. ROUTZONG: Yes, Your Honor. At this time
17 we would move for a directed verdict in favor of the
18 defendant. Viewing the evidence in the light most
19 favorable to the State, Your Honor, we don't believe
20 that the State has provided competent evidence to
21 show that the defendant attempted to kill, had
22 intent to kill, or malice aforethought, Your Honor.

23 THE COURT: Thank you. Well, I respectfully
24 disagree with you. If the jury believes it,
25 obviously the victim has testified he shot her,

1 threatened to kill her, and she was certainly shot,
2 went to the hospital, bullets removed from her, so
3 obviously there's evidence in the record that if the
4 jury believes her, would support a conviction. So I
5 respectfully deny your motion for directed verdict.

6 Thank you.

7 MR. ROUTZONG: Thank you, Your Honor.

8 THE COURT: Anything else by the defendant?

9 MR. ROUTZONG: Nothing else, Your Honor.

10 THE COURT: Mr. Muns, you can sit right there
11 for me, please, and raise your right hand. Do you
12 swear or affirm the testimony you're giving in this
13 matter to be the truth?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Thank you. We have reached the
16 stage in the trial, sir, where, obviously, now you
17 can present your side of the story, your defense;
18 that means that you can call witnesses to testify,
19 if you wish; that means you can introduce relevant
20 exhibits, if that is necessary or you need to do so;
21 that also means that you can testify in your own
22 defense.

23 If you choose to testify, obviously you'll be
24 subjected to the same rules that everyone else is;
25 that is, you'll be allowed to be cross-examined on

1 any and all relevant subjects in the case or
2 relevant evidence in the case.

3 Does he have a record that would be used for
4 impeachment?

5 MS. SHEFTALL: Your Honor, we have three
6 convictions that we'll be using for impeachment
7 purposes.

8 THE COURT: Those are?

9 MS. SHEFTALL: A larceny from 2006, a theft by
10 taking -- I apologize; a larceny from 2012 and a
11 theft by taking out of Georgia from 2012.

12 THE COURT: So three different offenses?

13 MS. SHEFTALL: Yes, Your Honor.

14 THE COURT: Mr. Routzong, do you agree that
15 those are offenses that could be used for
16 impeachment only?

17 MR. ROUTZONG: Yes, sir.

18 THE COURT: All right. Mr. Muns, likewise, if
19 you take the witness stand, then your prior record
20 that the State just announced to me could be
21 presented to the jury, but I will tell them the fact
22 that you have a prior record cannot be used to
23 determine your guilt in this case, but it simply
24 could be used to give the jurors -- they can use
25 that to judge your credibility, for no other reason

1 but that.

2 On the other side of the coin on the other
3 hand, you have the absolute right to invoke your
4 constitutional right to remain silent. The
5 Constitution says that no one in a criminal case can
6 be forced to testify in that case, you have the
7 right to remain silent. A lot of defendants do
8 that, they exercise their rights to remain silent
9 and some want to testify. If you testify, you'll be
10 cross-examined and your record could be used for
11 impeachment purposes.

12 If you exercise your right to remain silent, I
13 will tell the jury that the fact that you did not
14 testify cannot be used against you in any manner
15 whatsoever, it is not to be considered by them at
16 all when they deliberate your guilt or innocence, it
17 is not to be mentioned in the jury room and it is
18 not to be given any consideration whatsoever in this
19 case. You have the absolute right to remain silent,
20 you have nothing to prove, the burden of proof is on
21 the State.

22 So do you understand your constitutional right
23 to remain silent?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: That decision is solely yours. You

1 can obviously talk with your lawyer and whoever else
2 you'd like to talk to, but in the end, that has to
3 be your decision. If you do not testify and you do
4 not put up any testimony, then under our rules you
5 would have the last argument, the final argument.

6 So I need to know if you intend to testify.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Y'all ready to proceed?

9 MS. SHEFTALL: Yes, Your Honor.

10 MR. ROUTZONG: Yes, sir.

11 (The jury enters the courtroom at 3:59 PM.)

12 THE COURT: Mr. Foreman, ladies and gentlemen,
13 my best guess is we've got one more witness. I
14 can't hold them to that, but that's what they're
15 telling me. Something may come up and we may have
16 more than one. I suspect we can finish this up this
17 afternoon.

18 Mr. Routzong, you may call your first witness.

19 MR. ROUTZONG: Thank you, Your Honor. The
20 defense calls Mr. Frank Muns.

21 FRANK MUNS

22 being first duly sworn, testified as follows:

23 THE CLERK: Have a seat in the witness box.
24 State your full name for the Court spelling your
25 last.

1 THE DEFENDANT: Frank Muns, M-U-N-S.

2 DIRECT EXAMINATION

3 BY MR. ROUTZONG:

4 Q. Frank, how old are you?

5 A. 48, almost 49.

6 Q. How many children do you have?

7 A. Four.

8 Q. Do you remember the night of April 5th? That
9 would be the night before this incident.

10 A. Yes, sir.

11 Q. What were you doing?

12 A. I was at my trailer in Beech Island.

13 Q. What did you do -- let's say after 6:00, what
14 did you do?

15 A. I run a few errands. The babysitter was at the
16 house. I was in and out of the house to the bus
17 working on stuff. I was supposed to be at work at,
18 like, 11:00 that next day. I was getting tools
19 ready, stuff like that.

20 Q. What time did go to bed?

21 A. Probably 1:00.

22 Q. What time did you get up on April 6th, the next
23 morning?

24 A. Around 8:00, 830.

25 Q. What did you do then?

1 A. I messed around the house a little bit and I
2 cooked breakfast. And around 9:00, 9:15 -- 9:15,
3 9:30, I went out and got some stuff ready to put in
4 the truck to get ready to go to work. I was
5 supposed to been at work at 11:00. And went back in
6 the house, check on the kids. Of course the
7 babysitter is still asleep, everybody is still
8 asleep but Cole; he's the one that gets up early.
9 And I was going to the store --

10 Q. Let me stop you right there. You say you were
11 going to the store. Were you in your truck?

12 A. Yes, sir. I was going to drive my truck.

13 Q. When you got into your truck and you started it
14 up, what did you do then?

15 A. I pulled around to the cable to let the cable
16 down to pull out and go to the store.

17 Q. And then what happened?

18 A. When I got to the -- almost to the cable, Kim
19 was coming down the road, so I stopped and I put my
20 truck in reverse. She got right to the cable and
21 swerved around. While I was backing up, she just
22 come around; she didn't stop. She drove down the
23 street a little bit to the end of the lot and was
24 pulling in.

25 Q. Let me show you what's -- let me show you

1 what's been admitted as State's Exhibit No. 15. Do
2 you recognize that?

3 A. Yes, sir; that's my place.

4 THE COURT: Speak up, please, sir.

5 THE DEFENDANT: That's my house.

6 BY MR. ROUTZONG:

7 Q. And what is that you're looking at right there?

8 A. This is my front driveway and this is the road
9 right here. They was standing in the road and took
10 the picture. This is my trailer and this is the
11 driveway to my house.

12 Q. What's that thing attached to the tree?

13 A. This is a cable -- a steel cable.

14 Q. Where's the other end attached to?

15 A. Attached to another tree up by this trailer.

16 (Indicating)

17 Q. Mr. Muns, if -- I guess if the -- right now I'd
18 be -- would I be walking parallel to the road?

19 A. The road, yes, sir.

20 Q. So if I come down this way, what do I have on
21 my left after I pass that tree?

22 A. This tree?

23 Q. Yes, sir.

24 A. There's another tree about three foot right
25 here -- well, it's not quite. But you can see it on

1 this shot, there's a group of trees.

2 Q. That's State's Exhibit No. 16?

3 A. Right. There's another group of trees. But
4 before this lot -- this lot's been cleaned up now.
5 Here's another photograph. I can show you what --
6 in between here where this was, this tree we had to
7 cut down because it was rotten and it was leaning on
8 the power lines. The tree was about this big. So
9 when we cut it down, we cut like three-and-a-half,
10 four-foot blocks. And I placed them down this road
11 and in between these trees, so if you wanted to pull
12 in, you couldn't go around this -- where the cable
13 is. I put the blocks right here so you couldn't
14 drive -- drive through. So it's like a fence, but
15 it's like logs about three foot high.

16 (Demonstrating)

17 Q. So when Ms. Turner is driving down the road and
18 you see her, where is her car at and where does she
19 turn in at?

20 A. She was coming here and about to turn in. But
21 when she saw me here, she swerved and went straight.

22 (Indicating)

23 Q. And how did she get into the property?

24 A. She goes down -- you can't quite see it, but I
25 think there's a tarp. Up behind here is where I had

1 the logs up. On my neighbor's property there's a
2 telephone pole. There was a little spot where you
3 could -- where the go-karts -- all my kids had
4 go-karts. And I wouldn't let them come out of the
5 driveway because they wouldn't -- they wouldn't
6 look to the right to see what was coming. When they
7 come around the house, they was just flying through,
8 so I made them start going this way so they wouldn't
9 get run over.

10 Q. About how wide is that go-kart path?

11 A. It's roughly four, five foot -- five foot,
12 maybe.

13 Q. Okay. A car can get through there?

14 A. Barely. I put the logs up so nobody could
15 drive in. They was -- I had this tree cut up and
16 there was big piles of limbs and some logs. And
17 people -- when I wasn't there, people would come in
18 and stealing wood. And I've had problems with --

19 Q. Let me stop you right there. I'm going to show
20 you what's been marked and admitted as State's
21 Exhibit 17, I believe. That's that area you're
22 talking about?

23 A. Yes, sir.

24 Q. What are all those things at the back end of
25 that picture?

1 A. Those are more logs that we cut up from this
2 tree. They're roughly four to five foot. I try to
3 cut them where I could cut them one more time then
4 split them for firewood.

5 Q. Where did you park your truck at?

6 A. I was here when she was first coming. But when
7 she passed -- when I seen her coming, I put my truck
8 in reverse. Then she whipped around, so I pulled in
9 here. I was going to pull in here to let the cable
10 down and let her in, but she went on past. So I
11 pulled in here. I was already here and she's coming
12 up this way, and I pull in to try to stop her,
13 because here is a septic tank. She knows it's --
14 this is a trailer lot -- an empty trailer lot. And
15 I got a pole right here beside the septic tank. You
16 can barely -- you can see the lid of it. So I put
17 the pole there so nobody would run over the top of
18 it. (Indicating)

19 Q. When you pulled your truck up in there, what
20 did you do next?

21 A. I got out of my truck. When she was pulling
22 in, I got out and said, stop.

23 Q. And where was she at?

24 A. She was in her vehicle.

25 Q. How close were you to your truck and her car?

1 A. When she first pulled in?

2 Q. Yes, sir.

3 A. I was standing beside my truck.

4 Q. And then what happened?

5 A. She pulled in and I said stop. And she had her
6 window down about this much. And she said, F you.
7 So I walk over to her car in between my truck -- my
8 truck door is here -- and she puts her car -- she
9 can't -- she pulls up -- like, my truck is here, and
10 when she pulled in, she can't go further anymore.
11 Her car was here and my truck was here, and she
12 wants to go around this way, but she can't make the
13 angle. So she pulls up probably to her rear quarter
14 panel with my -- the front of my truck. So I'm
15 telling her to stop, stop, but she won't stop.

16 She says fuck -- F you. She puts the car in
17 reverse, she turns her wheels, and the front of --
18 the front of her car comes back toward me.

19 Q. Now let me stop you right there. Where were
20 you, where was your truck, and where was her car?

21 A. I was on the front side of my truck door, she
22 was in her car, and the front of her car was coming
23 around toward me.

24 Q. About how much space are we talking about here?

25 A. At first when she come, it was maybe two and a

1 half feet. But she kept coming. And I got to the
2 car door and I said, stop, stop, stop. And she's
3 coming on around. And I said, stop. And right
4 there where she finally stopped and tried to pull up
5 again, it was no further -- I was -- my back was to
6 the truck and I had my hand on the car door. So it
7 was three feet, maybe -- three and a half feet.

8 Q. What were you afraid was going to happen, if
9 anything?

10 A. That she was going to smush me between the two
11 vehicles.

12 Q. What happened next?

13 A. She backs up again, and she's trying to angle
14 around my vehicle. Like, she couldn't because the
15 logs were up there; she had to back up a couple
16 times. She rolled the window up. But she won't
17 stop. She keeps putting it in forward and reverse
18 maybe three or four times. And I'm telling her to
19 stop and I hit the window a couple times and she
20 still won't stop. Once she -- she comes back around
21 and the front of her car was coming around and
22 pinning me between my truck and her car. I'm
23 telling her to stop, stop. She won't stop.

24 Q. So your testimony is you're afraid you're going
25 to get pinned between these two vehicles?

1 A. Correct.

2 Q. Frank, what did you do next?

3 A. I had a gun -- I had my revolver with me and I
4 pulled it out and hit her window. I was trying to
5 break her window to make her stop. I hit the
6 window -- I hit the window one time and she backed
7 up some more, I hit it again and she stopped, put
8 the car in forward, and I hit it again and the gun
9 discharged.

10 Q. I got a little cardboard cutout. This is not
11 to scale. I just want to ask you how you were
12 holding it. So if we can imagine that's the gun,
13 how were you holding that gun when you hit that
14 window?

15 A. I had the gun like this. And when I hit the
16 window, it was kind of like -- this is a little big.
17 I mean, it's almost -- it's about palm size. And I
18 hit the window with the barrel. And I had my hand
19 up here on the top. And the third time I hit it, it
20 discharged. (Demonstrating)

21 Q. Frank, did you try to kill Ms. Turner?

22 A. No, I did not.

23 Q. What were you trying to do?

24 A. Trying to make her stop. She knew better than
25 to pull around because I didn't want anybody running

1 over the septic tank. I had a telephone pole there.
2 And she run it over anyway. I don't see how she
3 didn't fall in -- it's just a fiberglass lid on the
4 top. I don't see how she didn't fall in the septic
5 tank.

6 Q. After the gun went off, what did you do?

7 A. When I hit the window and the gun went off, it
8 scared me. I dropped the gun. And the way I had
9 it, I thought it hit the window and ricocheted
10 toward me. I thought I got shot. So I did that and
11 she was -- when -- the last -- like, the last time I
12 hit it, she was already pulling forward. It's like
13 this much room. She finally angled around and got
14 straight to come past my vehicle, and she flies on
15 by. (Demonstrating)

16 Q. Where did you see her go then?

17 A. She drives -- she drives here, comes around.
18 She was here, she gets straight, she runs over this
19 and the septic tank, comes this way, comes around
20 here, around to the back of my house, and stops
21 close to the back door. (Demonstrating)

22 Q. What did you see then?

23 A. She stopped. It looked like she put the car in
24 park. She opened her door. And she had dropped
25 something in between her car door and her seat. And

1 she -- whatever she -- I don't know what she picked
2 up. And she yelled out the door, called the police,
3 call the police. She then slammed the door, put the
4 car in drive, and took out through my mother's yard.

5 Q. Frank, what did you do then?

6 A. I stood there a few minutes and I was, like, in
7 a daze. And I didn't think she got hit. So I
8 picked my gun up and I walked to the bus and went
9 into the bus and sit down to try to calm down.

10 Q. When did you become aware that something
11 actually did happen?

12 A. Probably three hours later, three and a half
13 maybe.

14 Q. Frank, did you turn yourself in to the police?

15 A. I was going to, but it was a Saturday and I was
16 going early in the morning and turning myself in to
17 the jail.

18 Q. But you didn't?

19 A. No.

20 Q. When did you actually encounter the police and
21 then they arrested you?

22 A. I was at a motel in Augusta, the same motel
23 they was at.

24 Q. When did that happen? When did you get caught?

25 A. April 28th.

1 Q. Frank, I just got a couple other questions.
2 Are you the same Frank Muns that has two convictions
3 for petit larceny?

4 A. Yes, sir.

5 Q. And a theft by taking in Georgia?

6 A. Yes, sir.

7 MR. ROUTZONG: I don't have any other
8 questions, Your Honor.

9 THE COURT: Cross?

10 CROSS-EXAMINATION

11 BY MS. SHEFTALL:

12 Q. Mr. Muns, you're a convicted felon, aren't you?

13 A. Yes, ma'am.

14 Q. Yet you just testified that you had a revolver
15 on you that day?

16 A. Yes, sir.

17 Q. You also have several long guns, don't you?

18 A. No, ma'am.

19 Q. You don't have a 20-gauge shotgun?

20 A. I do have, yes.

21 Q. You don't have a sawed-off shotgun?

22 A. No, ma'am.

23 Q. You load your own ammo, don't you?

24 A. No, ma'am.

25 Q. You've never loaded your ammo for a long gun or

1 a pistol?

2 A. No, ma'am. You need a machine for -- to put
3 the powder and the shot and everything in to
4 compress the bullets, and I don't have all that. I
5 don't load my own ammunition.

6 Q. You told the jury just a moment ago that you
7 had to be at work at 11:00 a.m. the morning of the
8 6th.

9 A. Yes, ma'am.

10 Q. What time was it then that you saw Kim coming
11 down the road?

12 A. It was roughly ten to 10:00 maybe, 10:15 maybe,
13 somewhere in that neighborhood.

14 Q. 9:50, is that your first number?

15 A. Maybe. Ten after 10:00, somewhere in there.

16 Q. And yet after this incident, you testified just
17 that you went to your bus to sit down to calm down;
18 is that correct?

19 A. I stayed -- I stayed -- after the incident, I
20 stayed on my property for at least 45 minutes.

21 Q. You just testified for Mr. Routzong that it was
22 approximately three and a half hours before you left
23 the property.

24 A. No, I didn't say that.

25 Q. You needed to calm down because you knew you

1 shot her, didn't you?

2 A. No, ma'am. I needed to calm down because we
3 just had a heated argument and I thought she was
4 going to run me over in the car.

5 Q. You saw her when she pulled up, didn't you?

6 A. I was going to the store and I seen her when
7 she was coming down the road, yes.

8 Q. Because you knew she was coming to the
9 property, didn't you?

10 A. I did not. She did not come home from work,
11 she did not call from work. I knew -- I found out
12 where she was. But I didn't know when she was
13 coming home.

14 Q. And you went to that motel in Augusta, didn't
15 you that night?

16 A. Yes, I did.

17 Q. And you knocked off the side mirror off her
18 mom's car, didn't you?

19 A. No, I did not.

20 Q. And you left her threatening voice mails and
21 text messages, didn't you?

22 A. No, I did not. My phone was dead. The only
23 reason I went to the motel -- my phone was dead.

24 Q. But it is --

25 A. I run out of minutes.

1 Q. It is your testimony today that you were at the
2 hotel in Augusta where Kim and Tony stayed the night
3 before the incident?

4 A. I went by there, yes, ma'am, to make -- to
5 see -- somebody had called me and told me they seen
6 her vehicle there, and I went by there to see for
7 myself if she was there.

8 Q. Because that made you mad, didn't it?

9 A. Not really. I was -- she didn't come home, she
10 didn't call.

11 Q. And you were mad about that, weren't you?

12 A. No, ma'am.

13 Q. You told the jury a moment ago that you had a
14 loaded 32 revolver on your person when you -- in
15 this altercation --

16 A. When --

17 Q. -- with the truck and the car and all that.

18 A. Yes.

19 Q. So with a loaded weapon, you decided that the
20 best way to keep her from hitting you was to
21 pistol-whip the window?

22 A. I tried to break the window. Yes.

23 Q. To get Kim to stop the vehicle?

24 A. Yes.

25 Q. Because you were trying to get in the vehicle,

1 weren't you?

2 A. No. I was trying to get her to stop the
3 vehicle. I was trying to keep from getting smushed
4 in between two vehicles.

5 Q. By beating the window with a loaded weapon?

6 A. To try to make her stop, yes. There was this
7 much room in between the two cars and she's pulling
8 back and forth. (Demonstrating)

9 Q. Can you show me again how you were hitting the
10 window with the gun?

11 A. If I can have the --

12 Q. Well, can you tell me if you were hitting it
13 with the barrel or the --

14 A. With the barrel, yes, ma'am.

15 Q. Okay.

16 A. I had it more in my palm -- in the palm of my
17 hand with the barrel this way. And I was hitting it
18 like this. (Demonstrating)

19 Q. Which way was the muzzle facing?

20 A. The barrel was facing down.

21 Q. Okay. So your testimony for the jury is that
22 you were hitting the window -- Kim's driver's side
23 window with a loaded revolver, barrel first?

24 A. Yes, ma'am.

25 Q. While she was in the driver's seat?

1 A. Yes, ma'am.

2 Q. It's your testimony that you hit the window
3 three times?

4 A. Yes, ma'am, three times with the gun and
5 probably twice with my fist before I got my gun.

6 Q. I believe it was your testimony that you were
7 trying to get her to stop so that she didn't run
8 over a septic tank. Is that correct?

9 A. At first when she was pulling in, I didn't -- I
10 didn't want her going and cutting through the lot.
11 That's the whole reason I put the logs down. I had
12 a water meter -- there's a water meter up by the
13 road and the septic tank, which got a fiberglass lid
14 on it, and if a vehicle rides over the top, it's
15 going to cave in. It's right here. This is the
16 septic tank right here. And over here by the road,
17 that's the water meter. (Indicating)

18 Q. The septic tank is buried?

19 A. It's buried but the top is -- it's maybe an
20 inch below the ground.

21 Q. And that's why you were trying to get Kim to
22 stop?

23 A. Yes.

24 Q. I believe you testified just a minute ago for
25 Mr. Routzong that you didn't know how Kim didn't

1 fall through the septic tank in the car -- in the
2 vehicle.

3 A. She jumped -- when she pulled -- when she
4 finally got around, she kinda jumped over the pole.
5 But I guess she was going too fast when she hit the
6 pole. And then she -- after she jumped over that
7 part, she come on around this way. (Indicating)

8 Q. So it's your testimony that she did in fact
9 drive over the septic tank?

10 A. Yeah. She hit the pole.

11 Q. But the septic tank fiberglass top didn't cave
12 in when she drive over it with her vehicle?

13 A. I don't know if she went right over the exact
14 top of it, because the pole was there -- the pole
15 was there to keep people from driving into it, and
16 she hit that. So I'm not sure if she was right over
17 the center of it or hit the side of it. I didn't --
18 I know she hit the pole.

19 Q. Mr. Muns, the septic tank fiberglass top didn't
20 break because she didn't -- because it wasn't there;
21 isn't that true?

22 A. No, it's not true. She stated that she run
23 over the pole herself.

24 Q. She did state that she ran over the pole,
25 that's correct.

1 A. She did.

2 Q. But not a septic tank.

3 A. The pole is right by the septic tank for -- to
4 keep people from running into the septic tank. The
5 pole is here and the septic tank is this -- is
6 under. You can see it right here. (Indicating)

7 Q. Is it your testimony that after you hit the
8 window upon the third time and it just discharged
9 that you dropped the gun?

10 A. Yes, ma'am.

11 Q. Because you were scared?

12 A. I thought I got shot.

13 Q. Where were your injuries?

14 A. I thought I got shot. I didn't have any
15 injury.

16 Q. You weren't shot, were you?

17 A. No. But when the gun went off, I thought it
18 ricocheted this way. But I didn't know it had went
19 in and shot her.

20 Q. You had a long gun on you too at the time,
21 didn't you?

22 A. No, ma'am.

23 Q. You testified that you heard Kim say call the
24 police?

25 A. Yes, ma'am.

1 Q. You also testified that you stood there for a
2 few minutes in a daze?

3 A. Yes, ma'am. And I seen her where she pulled
4 through my mom's yard and headed towards Beech
5 Island.

6 Q. You didn't see your daughter come out of the
7 back door of the trailer, did you?

8 A. No, ma'am. From that angle -- from there I
9 can't -- from where I was over here, I can't see the
10 back door of my trailer. I was kind of over here
11 where my truck was. And if you look that way, I got
12 a little -- I got about a 12-by-12 porch on the back
13 of my place and I can't see the back door from where
14 I was.

15 Q. Mr. Muns, you told Mr. Routzong that you had to
16 be at work at 11:00.

17 A. Yes, ma'am.

18 Q. You also told him that you then intended to
19 turn yourself in at 11:00?

20 A. No, ma'am.

21 Q. You testified that you waited for three hours
22 before you left the property.

23 A. No, ma'am. It was 45 minutes -- roughly 45
24 minutes when I left the property.

25 Q. And that you knew of the warrant for your

1 arrest at that point?

2 A. No, ma'am.

3 Q. But you intended to turn yourself in?

4 A. That's not what I said. I said it was at least
5 45 minutes before I left my residence and it was
6 three and a half hours -- three or three and a half
7 hours before I found out that she was shot and I had
8 a warrant for attempted murder, armed and dangerous.

9 Q. But you did testify that you intended to turn
10 yourself in?

11 A. Yes, ma'am.

12 Q. Then --

13 A. After --

14 Q. Yet you didn't turn yourself in 24 days --

15 A. Yes, ma'am.

16 Q. -- after that day?

17 A. Yes, ma'am.

18 Q. And you were, in fact, located in a different
19 state, weren't you?

20 A. Yes, ma'am. I had went to --

21 Q. And you evaded police for the entire 24 days
22 that you were on the run, did you not?

23 A. Yes, ma'am.

24 Q. Mr. Muns, you shot Kim to kill her that day,
25 did you not?

1 A. No, ma'am.

2 MS. SHEFTALL: I beg the Court's indulgence.

3 No further questions, Your Honor.

4 THE COURT: Thank you.

5 Anything on redirect, Mr. Routzong?

6 MR. ROUTZONG: I don't have any questions, Your
7 Honor.

8 THE COURT: All right. You may step down.

9 Thank you, sir.

10 Next witness.

11 MR. ROUTZONG: The defense rests, Your Honor.

12 THE COURT: Anything in reply?

13 MS. SHEFTALL: Yes, Your Honor. The State has
14 one witness.

15 MR. SLOCUM: Your Honor, the State calls MINOR 3
16 to the stand.

17 MINOR 3
18 being first duly sworn, testified as follows:

19 THE WITNESS: Absolutely.

20 THE CLERK: Have a seat in the witness box.
21 State your full name for the Court spelling your
22 last.

23 THE WITNESS: MINOR 3 .

24 DIRECT EXAMINATION

25 BY MR. SLOCUM:

1 Q. MINOR 3, how old are you?

2 A. I'm 14. I'm going to turn 15 February [REDACTED].

3 Q. Are you in school anywhere?

4 A. Yes. I go to -- I'm in 9th grade at [REDACTED]
5 [REDACTED] High School.

6 Q. And do you know Frank Muns, the defendant?

7 A. That's my father.

8 Q. You were in here just a minute ago. Did you
9 hear his testimony?

10 A. Yes.

11 Q. Have you ever seen your father load his own
12 ammunition?

13 A. I walked in his room for about 30 seconds to
14 tell him something, and I saw shotgun round, a
15 candle, and some shot on the table.

16 Q. What was he doing?

17 A. He was loading his own ammunition.

18 Q. How long ago was this?

19 A. I'd say about a week before the shooting.

20 Q. Is this the only time you've ever seen him do
21 that?

22 A. Yes, sir.

23 MR. SLOCUM: That's all of the questions we
24 have.

25 THE COURT: Cross?

1 CROSS-EXAMINATION

2 BY MR. ROUTZONG:

3 Q. Good afternoon, [REDACTED]. I just want to make
4 sure I heard correctly. You're saying you saw a
5 candle?

6 A. Yes.

7 Q. And a shot shell?

8 A. Yes.

9 Q. What gauge was it?

10 A. Twenty.

11 Q. It was a 20-gauge?

12 A. Yes.

13 Q. Did you see anything else?

14 A. There was a box of rounds on his dresser that
15 were 32.

16 Q. No other reloading equipment?

17 A. No.

18 MR. ROUTZONG: I don't have any other
19 questions, Your Honor.

20 THE COURT: All right. Anything on redirect?

21 MS. SHEFTALL: Two questions, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. SLOCUM:

24 Q. Had he completed any loadings at that point,
25 any pieces of ammunition?

1 A. Yes.

2 Q. And he was loading one when you walked in?

3 A. Yes.

4 MR. SLOCUM: That's all the questions I have.

5 THE COURT: All right. You may step down.

6 Any other witnesses in reply?

7 MR. SLOCUM: That's all from the State.

8 THE COURT: All right. That concludes all of
9 the testimony. Mr. Foreman, ladies and gentlemen,
10 we'll start at 9:30 or 10:00, whatever your
11 pleasure.

12 THE FOREMAN: 9:30, sir.

13 THE COURT: That's a good choice. We'll start
14 right at 9:30.

15 Second question, would you like some sausage
16 biscuits to eat before we start? Fruit, donuts, or
17 nothing?

18 THE FOREMAN: We want sausage biscuits.

19 THE COURT: All right. I'll have sausage
20 biscuits for everyone with hot coffee. We're going
21 to start right at 9:30, so if you wish to eat your
22 sausage biscuits, get here in time to eat them. I
23 can't let you bring them out here.

24 What we intend to do tomorrow as soon as you
25 get here at 9:30, we'll start, and have the final

1 arguments. They probably will be about the same
2 length as the opening statements were. Once we do
3 that, then I'll have my instructions on the law,
4 which is about 15 or 20 minutes, and then you will
5 be given the case to start deliberations. It just
6 depends what time it is to see how we run it. I can
7 order lunch for you and sort of wait to see how
8 you're doing. But once we start deliberating,
9 you'll stay back and deliberate until we finish. If
10 it gets close to lunch, we'll order something. I'll
11 let the girls make that decision.

12 I want you to have a wonderful evening. Please
13 don't go home and do any kind of research on the law
14 or anything else. Have a pleasant evening. Don't
15 deliberate, don't discuss, and I'll see you bright
16 and early at 9:30 in the morning. Thank you very
17 much.

18 (The jury retires to the jury room at 4:32 PM.)

19 THE COURT: Anything for the record before we
20 break for the evening by the State?

21 MS. SHEFTALL: No, sir, nothing from the State.

22 THE COURT: By the defendant?

23 MR. ROUTZONG: No, sir.

24 THE COURT: All right. The charge will be my
25 regular charge; judge and jury, presumption of

1 innocence, reasonable doubt, credibility of
2 witnesses, prior record of the defendant for
3 impeachment only, attempted murder and possession of
4 a weapon during the commission of a violent crime.
5 I'll have two verdict forms; we find the defendant
6 not guilty or guilty of the crime of attempted
7 murder and then one on possession of a weapon during
8 the commission of a violent crime. Anything else we
9 need?

10 MS. SHEFTALL: Your Honor, the State would
11 request an instruction on ABHAN, for the lesser
12 included.

13 THE COURT: What do you say, Mr. Routzong?

14 MR. ROUTZONG: If Your Honor considers that,
15 we'd also like an assault and battery first and
16 second, Your Honor. Those are all lesser includeds
17 as well. In addition, Your Honor, I think we've
18 elicited testimony from Mr. Muns, if the jury
19 believes it, that this was either an accident or
20 self-defense, Your Honor, or both. Actually, it
21 sounds -- it seems somewhat contradictory, but it is
22 kind of nested in -- one inside the other, I guess,
23 so to speak.

24 THE COURT: So what are you asking?

25 MR. ROUTZONG: Self-defense and accident, Your

1 Honor.

2 THE COURT: What do you say?

3 MS. SHEFTALL: Your Honor, I believe those are
4 mutually exclusive. I don't see how we can have
5 that.

6 MR. ROUTZONG: I guess the argument would run
7 like this, Your Honor: He's doing this act out of
8 self-defense. He's testified that he felt like he
9 was going to be crushed, but he's not intending to
10 shoot her, that that part of it was accidental. So
11 it's somewhat nested inside -- one inside the other.
12 He intends to break the window, he's testified to
13 that, but he did not intend for the gunshot to go
14 off.

15 THE COURT: If you believe him. Okay. I'll
16 consider it all this evening and let you know in the
17 morning.

18 MS. SHEFTALL: Thank you, Your Honor.

19 MR. ROUTZONG: Thank you, Your Honor.

20 (A recess transpired.)

21 THE COURT: Mr. Routzong, bring your client
22 out, please.

23 MR. ROUTZONG: Yes, sir.

24 THE COURT: All right. At the conclusion
25 yesterday, I told you that I would take under

1 advisement and do some research last night on the
2 request for a charge on self-defense and accident.
3 Let me address that first: In the case of *State of*
4 *South Carolina vs. David Dwight Smith*, decided in
5 2011, deals with the defense of accident. For the
6 defense to be excusable on the ground of accident,
7 it must be shown the injury was unintentional, the
8 defendant was acting lawfully and due care was
9 exercised in the handling of the weapon. I find as
10 a matter of law two things: He was not acting
11 lawfully, he was not authorized under the law to
12 have that weapon; secondly, there's no way, from the
13 evidence that he testified to, the uncontradicted
14 evidence, the way he was handling the weapon,
15 loaded, pistol forward, beating out a window, can in
16 any way be classified as using due care. So I find
17 as a matter of law that the defense of accident is
18 not applicable.

19 As to self-defense, I will not charge that.
20 The law is very specific on that. The elements of
21 self-defense or, first one being that the defendant
22 must be without fault in bringing on the difficulty.
23 If the defendant's conduct was the type which
24 reasonably calculated to and did provoke an assault,
25 the defendant would be at fault to bringing on the

1 difficulty, would not be entitled to acquittal on
2 self-defense.

3 In this case, the defendant was leaving the
4 premises when the victim appeared in her car and got
5 beyond him, turned in instead of leaving, he stopped
6 her, which without that stop the altercation would
7 never have been -- would never have happened. So I
8 find as a matter of law that he was not without
9 fault in bringing upon the difficulty.

10 Likewise, the third element of self-defense was
11 that the defendant had no other probable way to
12 avoid the danger of serious bodily injury than to
13 act as he did in this particular instance. I find
14 as a matter of law that the means by which he used
15 the pistol, even if you believe him, would be way
16 beyond the fact that he -- simply, all he had to was
17 get in his car, step out of way, or have left. So I
18 find that there were plenty of other avenues to
19 avoid the danger other than the means in which he
20 did it. So I will refuse to charge self-defense.

21 As to the lesser included offenses, as to
22 assault and battery of a high and aggravated nature,
23 under the new legislation, in order to prove assault
24 and battery of a high and aggravated nature,
25 obviously the State must prove beyond a reasonable

1 doubt that the person, defendant, i.e., acted
2 unlawfully and injures another person and that the
3 injuries created great bodily injury. And they
4 define that as an injury which causes a substantial
5 risk of death or which cause a serious, permanent
6 disfigurement, protracted loss or impairment of the
7 function of a bodily member or organ.

8 The record is absent of any testimony as to the
9 degree that this injury caused; i.e., whether or not
10 it caused substantial risk of death or caused any
11 serious, permanent disfigurement or protracted loss
12 or impairment of any body member or organ.

13 Obviously the lady was shot, discharged from the
14 hospital with the bullet still intact; it was later
15 removed. But the record is completely absent of any
16 testimony that would substantiate or prove that it
17 was a great bodily injury as this new statute
18 requires, which I'm not saying I agree with the
19 statute, but it is what it is. Likewise, assault
20 and battery in the first degree, and that has to
21 also create great bodily injury. So I'm not going
22 to charge that for the reasons set forth.

23 I will charge the lesser included offense of
24 assault and battery in the second degree that deals
25 with persons who unlawfully injures another and

1 creates moderate bodily injury. And moderate bodily
2 injury is defined as a physical injury requiring
3 treatment to an organ system of the body other than
4 skin, muscles and connective tissues, except when
5 there is penetration of the skin, which we have here
6 with the bullet, and did require some type of
7 surgical removal and it did require some either
8 regional or general anesthesia, even though the
9 record is not clear on that.

10 So that's where I am. Any argument by the
11 State?

12 MR. SLOCUM: Yes, Your Honor. First, as to
13 assault and battery of a high and aggravated nature
14 being a lesser included --

15 THE COURT: Well, it is a lesser included.

16 MR. SLOCUM: -- and requesting the charge in
17 this case, there was testimony by Aaron Lemaster as
18 a paramedic that in his training and experience in
19 gunshot wound --

20 THE COURT: I did not qualify him as an expert.

21 MR. SLOCUM: Yes, sir. His testimony was that
22 it was a fatal -- can be fatal, in his experience.

23 THE COURT: Sure. Gunshot wounds can be fatal.
24 That's in general, but not in this particular case.

25 MR. SLOCUM: Understood. Yes, sir.

1 The second prong of assault and battery of a
2 high and aggravated nature is accomplished by means
3 likely to produce death or great bodily injury.

4 THE COURT: Where are you reading that?

5 MR. SLOCUM: A gunshot wound an inch to the
6 left or right, and we could be here for murder, if
7 not attempted murder.

8 Assault and battery of a high and aggravated
9 nature: A person commits the statutory offense of
10 assault and battery of a high and aggravated nature
11 when he unlawfully injures another person and either
12 great bodily injury to another person results or the
13 act is accomplished by means likely to produce death
14 or great bodily injury.

15 The State would take the position on that
16 second prong; the act is accomplished by means
17 likely to produce death, that ABHAN fits in this
18 situation.

19 THE COURT: You got a case on that?

20 MR. SLOCUM: No, sir, Your Honor. This is
21 straight from the statute. I can find one.

22 THE COURT: Mr. Routzong, I may be wrong. I
23 maybe should include assault and battery of a high
24 and aggravated nature because, obviously, a gunshot,
25 I think in the general common scheme of things,

1 everybody in their ordinary common sense knows it
2 could produce or is likely to produce death or great
3 bodily harm. What do you say?

4 MR. ROUTZONG: Your Honor, my reaction to that
5 would be, I don't think we can -- those are the
6 kinds of things that we cannot leave up to a jury to
7 determine. There should have been evidence
8 presented that a gunshot could have -- a gunshot
9 could have caused a great bodily injury or death.

10 THE COURT: You know, you can get all kinds of
11 gunshots; you can get shot in the toe, you can get
12 shot in the hand, you can get shot in the heart, you
13 can get shot in the head. And what your argument
14 is, is you got to have some testimony as to this
15 specific gunshot wound as to whether or not it could
16 likely have caused death or great bodily harm, and
17 the record is absent of it?

18 MR. ROUTZONG: That's correct, Your Honor.

19 THE COURT: Anything else?

20 MR. SLOCUM: Your Honor, just in response to
21 leaving this up to the jury, that's exactly who we
22 should leave it up to. It's a jury issue to
23 determine whether --

24 THE COURT: Well, I understand that. You got
25 to have testimony to give them something to

1 consider.

2 MR. SLOCUM: I believe that paramedic Aaron
3 Lemaster's testimony does satisfy that and puts
4 it --

5 THE COURT: I respectfully -- I don't think
6 he's qualified to talk about that.

7 MR. SLOCUM: Thank you, Your Honor.

8 THE COURT: All right. I'm going to stand by
9 my ruling.

10 Anything on the self-defense and accident,
11 Mr. Routzong?

12 MR. ROUTZONG: Yes, sir. In the context of
13 accident, to say that the defendant wasn't acting
14 lawfully, Your Honor, I'm not sure in what way he
15 wasn't acting lawfully.

16 THE COURT: Well, he was in the possession of a
17 weapon. And as I understand, he had been convicted
18 previously for a --

19 MS. SHEFTALL: Felony.

20 THE COURT: -- felony. And under the law of
21 this state and federal law, a convicted felon cannot
22 be in possession of a weapon.

23 MR. ROUTZONG: That's correct, Your Honor,
24 under federal law. But then the question is, what
25 does this statute mean by lawfully? It doesn't say

1 federal law or state law, it just says lawfully. I
2 think with that ambiguity, Your Honor, it should be
3 construed against the State.

4 In addition, Your Honor, it would be asking a
5 lot of the defendant to have to prove that he wasn't
6 handling the weapon properly when that was the only
7 object he had that he felt he had at that moment to
8 break that window to try to get her stop to keep him
9 from being pinned between these two automobiles,
10 which is what he testified happened. There is some
11 evidence that he was acting in a reasonable,
12 consistent way a reasonable prudent person would
13 have acted. It's for that -- that is in fact
14 something for the jury to decide.

15 THE COURT: Well, I find as a matter of law
16 that he was not by law allowed to have the weapon on
17 him, that is an unlawful act, and I also find as a
18 matter of law the way in which he used the weapon in
19 no way can be deemed to be in due care. But either
20 one of those prongs hasn't been met, that includes
21 the use of the defense of accident. I stand by my
22 ruling.

23 MR. ROUTZONG: And in the context of
24 self-defense, Your Honor, I know that you observed
25 and you felt that he -- the evidence showed that he

1 was at fault. But actually what he did, what he
2 testified to, was he parked his truck there just to
3 try to stop her from running over things that maybe
4 she wasn't aware that they were there. But he
5 didn't -- this is his property or his mother's
6 property, that he -- it's not that he was trying to
7 confront her, that's not his testimony. His
8 testimony is he's trying to stop her from running
9 over these septic tanks, I believe is one thing, the
10 water meter he testified to. Your Honor, that's not
11 bringing on the difficulty. And he's merely getting
12 out of his car trying to stop her and he's being
13 pinned, he testifies, in between these two vehicles.
14 By being pinned in between these vehicles, Your
15 Honor, he's met the second the prong because he's
16 actually in eminent danger of losing his life or
17 sustaining serious bodily injury.

18 Third, Your Honor, it's for the jury to decide
19 whether or not a reasonably prudent person would
20 have acted like he did. That would be the third
21 prong. And the fourth prong, that he had no other
22 means of avoiding the danger, losing his own life or
23 sustaining this injury, Your Honor, that's for the
24 jury to decide. He acted in the way that he -- the
25 only way, he testifies, that he thought he could

1 have acted.

2 THE COURT: I'm going to stand by my ruling.

3 Thank you.

4 Now, Mr. Muns, my understanding that the State
5 has agreed this morning -- listen to me carefully --
6 to allow you to plead to assault and battery in the
7 first degree, that carries up to ten years in
8 department of corrections. That is not an
9 85-percent, no-parole offense. You would be
10 eligible for parole, and Mr. Routzong can tell you,
11 but it's not serving ten years; it's a lot less than
12 that, and you would have credit for your time
13 served.

14 If the case goes to the jury, one of three
15 things is going to happen. You can ask me
16 questions. One of three things is going to happen:
17 You're going to be found not guilty on all charges
18 and go home; you're going to be found guilty of
19 assault and battery in the second degree, that's the
20 other option, that carries up to three years; or
21 you'll be found guilty of attempted murder, and that
22 carries up to 30 years and you'll do 85 percent of
23 whatever I sentence you to. So if I sentenced you
24 to ten years on that, you'd do eight and a half
25 years; if I sentenced you to 15, you'd do 12 or 13.

1 The other way, you admitting this altercation,
2 from your actions your ex-wife received moderate
3 injuries, and if you get a ten-year sentence, you
4 won't serve nearly all of that. Those are your
5 options. I want to make sure you understood that.

6 THE DEFENDANT: Yes, sir, Your Honor.

7 THE COURT: And we're getting ready now to
8 bring the jury in for the final arguments, so if
9 you're going --

10 MR. ROUTZONG: Your Honor --

11 THE COURT: You need to make a decision one way
12 or the other. And I respect your decision, I'm
13 just -- I'm not trying to force anything on you, I
14 just want to make sure you understand what your
15 options are. And you're fine. The outcome will be
16 one of three things: Not guilty, guilty of the
17 lesser included offense or the main offense.

18 THE DEFENDANT: Thank you, Your Honor.

19 Your Honor, I'm guilty of being stupid and
20 careless, but I wasn't trying to kill anybody.

21 THE COURT: Well, all right. Anything else
22 before we bring --

23 MR. SLOCUM: Your Honor, the State would
24 request the jury charge of permissive inference of
25 malice based on the use of a deadly weapon. We know

1 it's permissive not concrete and that the jury may
2 draw an inference for malice of proof in the use of
3 a deadly weapon if it concludes such as proper after
4 considering all of the facts and circumstances in
5 evidence. That is *State v. Wilds* cited at 355 SC --

6 THE COURT: I understand. I'm going to stay
7 away from that. I'm just going to say there's two
8 types of malice, implied and expressed. And I'm not
9 going to use the infer can be from the use of a
10 deadly weapon.

11 All right. Anything else?

12 MR. ROUTZONG: We approach, Your Honor?

13 THE COURT: You certainly may.

14 (Sidebar conference.)

15 THE COURT: Mr. Routzong, do you need a few
16 extra seconds?

17 MR. ROUTZONG: Yes, sir. Thank you.

18 THE COURT: No problem. Mr. Routzong, do you
19 need some privacy?

20 MR. ROUTZONG: Yes, sir, please. Thank you,
21 Your Honor, very much.

22 THE COURT: You're more than welcome. I can't
23 give you long because we have the jury --

24 MR. ROUTZONG: Yes, sir.

25 (Brief pause in the proceedings.)

1 THE COURT: Are you ready to proceed?

2 MR. ROUTZONG: Yes, sir.

3 THE COURT: Is the State ready to proceed.

4 MS. SHEFTALL: Yes, Your Honor.

5 THE COURT: All right. Bring the jury in,
6 please.

7 (The jury enters the courtroom at 10:01 AM.)

8 THE COURT: Mr. Foreman, ladies and gentlemen,
9 I apologize for the few minutes' delay.

10 We're now going to hear the closing arguments.
11 As I told you earlier, the closing arguments is not
12 evidence in the case, it's simply how the lawyers
13 argue what the evidence showed. You've heard all of
14 the evidence from which you'll make your decision.
15 But please listen carefully to the closing
16 arguments. Once they've concluded that, then I will
17 instruct you on the law in the case and you'll be in
18 a position to start your deliberations.

19 Is the State going to waive opening?

20 MS. SHEFTALL: Yes, Your Honor.

21 THE COURT: Mr. Routzong.

22 MR. ROUTZONG: Thank you, Your Honor.

23 Good morning, ladies and gentlemen. I want to
24 just take a couple minutes to talk about what I
25 mentioned yesterday in my opening argument, opening

1 statement. I mentioned to you that you had on oath
2 to take, and you took it. And part of that is that
3 even as you're sitting here right now, you have to
4 presume that the State's case is wrong, and you have
5 to keep that presumption until, collectively, all of
6 you makes the decision as to what happened here.
7 And all that happens back here, through the closing
8 arguments, all of it.

9 Now, you know there is one thing I wanted to
10 bring to your attention. If you'll take a look at
11 the clock with me right here, it's right at about
12 four minutes after. And we'll talk about that a
13 little bit more in a minute. A lot of times lawyers
14 get up and when they're doing their statements and
15 closing arguments, they invite you to look at the
16 evidence in a certain way. The State may invite you
17 to look at the evidence as what a bad day for
18 Mr. Muns, all of these things, he was just trying to
19 keep his wife from running over the water meter and
20 he happened to get pinned in, she didn't know what
21 was -- what a bad day for Mr. Muns, his gun went off
22 in his hand.

23 Ladies and gentlemen, that's an invitation I'm
24 asking you not to accept because it is wrong, we all
25 know that. It's not just an issue of whether or not

1 he's having a bad day, it's not an issue of whether
2 this is the June Cleaver in Leave It to Beaver
3 family or whether it's more like Honey Boo-Boo.
4 That's not the question. You're focused on very
5 definite issues, that's what happened when that car
6 pulled up and Mr. Muns gets out of his truck? What
7 happened then?

8 And let's talk about that. Prior to going over
9 there to the house, she tells you that she got some
10 really, really scary, threatening messages from
11 Frank. Now, Frank is the man she's been married to
12 three times, divorced three times from, is remarried
13 to that gentleman sitting right over there, she
14 testified, and she spent the night with him. That's
15 okay, she's married to him. But she's living with
16 Frank or at least at Frank's property, and she
17 said -- she testified they're trying to start a
18 relationship again, and that was what was going on.
19 For some reason she's over there with -- it doesn't
20 matter about all that.

21 What does matter is this: She's so scared of
22 what this man is capable of doing -- and this goes
23 to her credibility. That's the only reason I'm
24 bringing it out, because this is a he said/she said.
25 Her credibility, his credibility is on the line

1 here. It's for your evaluation. So she says she's
2 so afraid and threatened that she doesn't take that
3 man with her, she doesn't call the sheriff's office.
4 She's still -- you remember when I looked at the
5 clock? I don't mean to interrupt. But she's still
6 there, according to her testimony. Even through all
7 this and they're fighting, she's still there, she
8 hasn't gone yet.

9 Okay. So she's so scared that she drives over
10 there by herself, doesn't call the sheriff's office
11 to ask for an escort because this man just did this
12 to her. She's so scared, she goes up there. She
13 testified she saw him and she still -- what does she
14 say? She goes in there. And I remember I went up
15 like this and I kind of went like that and I said
16 it's kind of a tight squeeze, a chokepoint I think
17 is the word I used? She said yes, it's a
18 chokepoint. She's doing all -- she's going down the
19 road, she didn't keep going, she didn't back up.
20 She says she saw Frank, he got out of the car, he's
21 got a gun, and she's still coming right into that
22 area where this incident happened.

23 That should give you some pause right there
24 about her credibility, because this case really
25 hinges on whether she's telling the truth or he's

1 telling the truth. And she squeezed in there and
2 she testified that he was between his truck and her.
3 And so they both testified very narrow area. And
4 she just wants to get by him. And he pulls out this
5 gun and she's there -- she still hasn't left yet.
6 She's close to leaving, but she still hasn't left
7 yet. She's in there and he's got this gun, and she
8 doesn't just put it in -- she must have had it --
9 she must have had it out of gear. It must have been
10 in park. She said she tried to put it in gear.

11 And she said -- and this goes to her
12 credibility: She told how many people -- you heard
13 the testimony. She told law enforcement and she
14 told Lisa she tried to break -- now she's gone.
15 It's five minutes. She left. Remember she
16 testified five minutes? It's all this time. Well,
17 she's gone now. She's left the building.

18 She told Lisa he tried -- and law enforcement,
19 he tried to break the window and then he shot me.
20 And then she sat right up there when I asked her,
21 you heard what Lisa said, you said he tried to break
22 the window and then he tried to shoot you. She
23 said, I didn't tell her that. She told everybody
24 else that, she's not telling you that. This is only
25 important, ladies and gentlemen, because it comes

1 under the question of her credibility.

2 Let's contrast that with Frank. You know the
3 thing that is interesting about his testimony
4 yesterday is that he didn't have to tell you he went
5 to that motel room. Nobody saw him. Who's going to
6 contradict that? He was up there telling you the
7 truth about everything.

8 I started out this thing by saying, guess what,
9 ladies and gentlemen, I was forced to agree with the
10 State that she got hit by a bullet and he had the
11 gun, the only question was how and why. From the
12 very beginning, there's not been any left turns or
13 right turns, we've been up front. He told you why
14 he was trying to stop her.

15 Let's see how much of the evidence that she
16 says and what he says are corroborated by one
17 another. They both say it's a very narrow opening,
18 that these cars are -- the truck is parked here and
19 this other car is coming in this way, they both say
20 he's pinned -- well, they both say he's between her
21 car and his car -- his truck, they both say or at
22 least have said in the past, according to some of
23 the testimony that you heard, that he was trying to
24 break the glass to get her to stop, and he told you
25 why. It wasn't because he was -- you haven't heard

1 any testimony that he was all mad. He's trying to
2 keep her from running over the water meter, the
3 septic tank and whatever else they got out there, he
4 wasn't trying to start anything. And you also heard
5 her talk about her mirrors; the mirrors were broken
6 the night before. What do you think she thought? I
7 bet he did it. And he told you he was there. He
8 didn't break the mirrors, but he told you he was
9 there. She doesn't know who broke the mirrors, but
10 I can bet you when she came in there that day, she
11 was ready to confront him about it. So was she a
12 little bit mad? Was she a little bit trying to push
13 her way through that little narrow confine? Did she
14 want to talk to him? She's on her way to get in the
15 shower. What do you think? His testimony is she
16 was moving left and right, turning the wheels left
17 and right trying to get straight because it wasn't a
18 straight shot in there and you have to come at a
19 certain angle, more straightforward, or you're going
20 to either hit that car or hit a barrier on the other
21 side. Think about what her state of mind must have
22 been based on what you heard or what it might have
23 been.

24 You're going to see some of the pictures of her
25 car and the mirrors. There's some damage on --

1 looks to me like there's some damage on one side,
2 but they're both on there, certainly on the
3 passenger's side. You heard her testimony about
4 that. And here's the thing, ladies and gentlemen:
5 There's been no testimony or very little testimony
6 about the gunshot.

7 You haven't heard from any kind of expert
8 saying it was impossible that his story happened.
9 If it's possible and you're not sure what happened,
10 it's not your job to go back there and just give
11 closure to the State and to the accuser. That's not
12 your job. If you're not sure, if you go back there
13 and you just rubber-stamp this process, you've
14 broken your oath. Think about how long it took me
15 to point out the time on that clock until my alarm
16 went off, five minutes. If that man had wanted to
17 kill that woman, you think he'd been able to do it?
18 This is her testimony, five minutes. He could have
19 stood there and gone, bang, bang, bang, right there.
20 That took, what, a few seconds. Come on, ladies and
21 gentlemen.

22 I'm asking you to find Mr. Muns not guilty.
23 This was an accident, he didn't intend for it to
24 happen, he didn't bring it about himself; he was
25 trying to protect himself.

1 THE COURT: Ms. Sheftall.

2 MS. SHEFTALL: Thank you, Your Honor. May it
3 please the Court.

4 THE COURT: Yes, ma'am.

5 (Audiotape played for His Honor and the jury.)

6 MS. SHEFTALL: 11:50 a.m., that's the timestamp
7 on that 911 call that Lisa Mason made. The
8 defendant sat right there yesterday and told you
9 that the incident occurred at about 9:50 a.m. He
10 sat right there under oath and said 9:50 a.m., maybe
11 10:00. There's about a two-hour difference between
12 11:50 a.m. and what the defendant told you up there
13 under oath. The victim would have had to have a
14 time machine in order for the defendant's story to
15 make sense. That's the reason why there's that
16 two-hour discrepancy, because he sat right there and
17 told you a story. He made up an excuse for why he
18 intentionally shot his ex-wife Ms. Turner. That
19 two-hour difference right there lets you know that
20 everything else he said yesterday was a fabrication.
21 It's not possible. It defies the laws of physics.
22 But that's not the only thing about his story that
23 doesn't make sense.

24 Let's look at a couple other of these pieces of
25 the defense's story. This is the one we just talked

1 about. Here's the time. That call to 911 came in
2 at 11:50. So we'll say approximately 11:45, the
3 shooting occurred. The defendant would like for you
4 to believe that it occurred at 9:50 or 10:00 in the
5 morning, about two hours' difference. So the reason
6 for this confrontation between the two of them in
7 the yard. The State alleges that the defendant was
8 mad at Ms. Turner because he knew that she had been
9 in a motel with her legal husband the night before.
10 He knew and he sat right there and told you that he
11 knew. He sat right there and told you that he drove
12 to Augusta to see it with his own eyes.

13 He would like for you to believe that this
14 whole thing started because he didn't want her to
15 run over a septic tank. Ms. Turner told you about
16 some threatening voice mails and text messages that
17 she received from the defendant the night before the
18 incident, the night that he drove to Augusta to see
19 it with his own eyes. He says he didn't. The
20 defendant's own son, his 14-year-old son [REDACTED], sat
21 there yesterday, told you that about a week before
22 this incident, a week before his father shot his
23 mother, he walked into his father's room and saw him
24 making his own ammunition and saw the finished
25 product too. The defendant says he didn't.

1 The State alleges that Mr. Muns intentionally
2 shot Ms. Turner, that he cocked that hammer on the
3 revolver and he pulled the trigger. That's not an
4 accident and it certainly wasn't self-defense; he
5 meant to shoot her.

6 Now, I'm going to leave this up because the
7 next thing I want to talk to you about is what we
8 agree on. There's a lot, a lot more than the five
9 things -- five big things that we're really here to
10 decide. The defendant admits he had a 32 revolver,
11 he admits that it was loaded, he admits that he had
12 it in his possession at the time of the incident; he
13 admits that the night before he went to that motel
14 room and saw with his own eyes that his ex-wife,
15 when they were trying to work it out, had gone and
16 stayed the night with her husband; he admits that he
17 blocked her path with his truck as she pulled in
18 through that go-kart path, that four- or
19 five-foot-wide path because she had no other way to
20 access the property because the chain was up, she
21 couldn't get ahold of her kids, she wanted to check
22 on them. That's why she put herself there, that's
23 why she felt compelled to come back.

24 They both told you that the incident happened
25 in the same area, that the cars were aligned about

1 the same way. They both told you that an argument
2 ensued. There's a little difference in what was
3 said, who said it, but they both told you that words
4 were exchanged, heated words. They both told you,
5 we can all agree, that she was sitting in her car.
6 We all agree that he was standing next to the window
7 with a gun, a loaded gun. We both agree that her
8 window was up. Why is her window up? Because she's
9 scared? We both agree he sat here and told you
10 yesterday that he hit her driver's side window where
11 she is inches away with the barrel of a loaded
12 weapon. Does that sound like a man who's not angry?

13 Everyone agrees that Ms. Turner was shot.
14 Everyone agrees that she took a bullet to her
15 ribcage and that it stayed there for approximately
16 seven months. But we all agree that she was shot
17 with a bullet. We all agree that at that point
18 Ms. Turner takes off, she floors it. She wasn't in
19 park. Her car was running, it was in gear, that's
20 why when she hit the gas pedal, she accelerated
21 forward. She took off over that power pole right
22 there, around that burn pile. Everyone agrees with
23 how she wound up back behind that trailer.

24 Mr. Muns, the defendant, sat here yesterday and
25 told you the next thing that we agree about is that

1 she stopped right there. The defendant sat right
2 there and told you he heard her yell, call the
3 police. Ms. Muns told you -- Ms. Turner told you
4 the same thing and MINOR 1 told you the same
5 thing too. We all agree that she then took off
6 again through the property and exited the property
7 on the other road, Oak Drive.

8 Interestingly enough, we all agree that the
9 defendant wasn't arrested for 28 days. He sat right
10 here and told you that three hours after the
11 shooting, three and a half, he knew about a warrant
12 for his arrest. But he wasn't arrested for 28 days.
13 And he wasn't arrested at his house, didn't turn
14 himself in, he was arrested in Augusta. And we all
15 agree that there was about five minutes between the
16 time that Ms. Turner entered the property on that
17 go-kart path, got shot, and exited the property on
18 the other side. That's a lot. That is a lot that
19 we all agree about. That's a lot of facts that
20 aren't in issue at all.

21 So look back at this: Given all that we agree
22 about, which version jives with your common sense?
23 What's -- what makes sense? That's all we're asking
24 you to do today is to think about these things that
25 we differ on and everything that we agree about,

1 determine who you believe and what makes sense to
2 you.

3 I told you in my opening a little bit about the
4 law, a little bit about the elements of attempted
5 murder, talked a little bit about malice
6 aforethought, intent, those kinds of things. I'd
7 like to talk to you a little bit about that again.
8 But you're going to hear from Judge Early exactly
9 what law you should apply to the facts.

10 The elements of attempted murder, as I told you
11 in my opening, an intent to kill another with the
12 intent to kill -- I'm sorry. An attempt to kill
13 another with the intent to kill with malice
14 aforethought. So let's talk about intent for a
15 minute. Intent means what's going on in the
16 defendant's head as he -- as the act is committed.
17 When this gun is fired, what's going on in his mind?

18 Now, our Supreme Court in South Carolina has
19 defined it, and I want to read some language to you
20 so that you understand that there's lots of
21 different ways to think about intent, because no one
22 can know for certain what's going on in someone
23 else's mind even if they tell you because you still
24 have to determine whether you believe them.

25 Intent: With attempted murder, all of the

1 intent needed to find him guilty of attempted murder
2 is that he had an intent to commit serious bodily
3 injury. Firing a gun at pointblank range through a
4 car window to someone seated in the driver's seat,
5 does that show you evidence of what was going on in
6 his mind? Does that show you evidence that he
7 intended to commit serious bodily injury to her?
8 She was shot in the chest cavity, ladies and
9 gentlemen. An inch to the left, right, up, down,
10 and Ms. Turner might not have been here to testify.
11 The State doesn't have to prove that the defendant
12 intended to kill her. We don't have to prove that
13 he pulled that trigger intending to kill her. But
14 if you believe that he pulled that trigger intending
15 to hurt her when he shot her in the chest cavity,
16 all of the vital organs and everything contained in
17 there, that's attempted murder. That's the intent
18 that you need to find him guilty of attempted murder
19 because, as our courts have defined it, each of us
20 is responsible for the natural consequences of our
21 actions, each of us is. The defendant is
22 responsible for the natural consequences of his
23 actions. He is responsible for what naturally
24 follows when he points a loaded weapon at someone
25 and pulls the trigger.

1 The next part of the law that I want to talk to
2 you about is malice, malice aforethought. It can be
3 kind of hard to wrap your mind around, which, again,
4 is why I'm going to read you some of the ways that
5 our Supreme Court has defined malice aforethought,
6 so that you can understand. There's lots of
7 different ways to think about it. They've defined
8 malice as ill-will, a wicked or depraved spirit,
9 intent on doing wrong, doing a wrongful act without
10 justification or excuse, a recklessness for the
11 lives and safety of others. It's malice if he
12 committed an act which has a natural tendency to be
13 fatal to another. Shot to a chest cavity,
14 recklessness for the life and safety of another.
15 Malice can be demonstrated by circumstances showing
16 a reckless disregard for human life that a
17 reasonably prudent man or woman would have known was
18 likely that death could follow the act. We have
19 12 -- 14 reasonably prudent men and women with you,
20 the jury.

21 The second part of that phrase in malice
22 aforethought is aforethought. In South Carolina
23 aforethought can be formed in an instant, a split
24 second is all the aforethought needed. He didn't
25 have to plan ahead. If the instant before he pulled

1 that trigger he had ill-will, a wicked, depraved
2 spirit, intent on doing wrong, a recklessness for
3 the life and safety Ms. Turner, if in that instant
4 before he pulled the trigger you believe that, then
5 he's guilty of attempted murder.

6 Judge Early is going to tell you a lot about
7 the law of attempted murder. He's also going to
8 tell you the law of assault and battery in the
9 second degree. Assault and battery in the second
10 degree is committed when someone unlawfully injures
11 another and moderate bodily injury results. There's
12 no intent needed. That's why I wrote this in all
13 caps, ladies and gentlemen, is because to get down
14 to the point of the matter, when you go back there
15 to your jury room and you deliberate, what the 12 of
16 you are going to be deciding is whether you believe
17 that he intended to do it, because if he intended to
18 pull that trigger and he did so in a way that was
19 reckless or could have caused serious bodily injury
20 or all those other ways that I just described to
21 you, then that's attempted murder.

22 Now that I've told you a little bit about the
23 law, I want to go back through the facts with you
24 because it's a lot easier, I think, to understand
25 all of these legal phrases in a context and in the

1 context of the facts. How can you, the jury, look
2 at these facts as the judges of the facts and apply
3 it to the law? What facts do you have in evidence
4 that show you, that prove to you, what was going on
5 in the defendant's mind that he intended to shoot
6 her?

7 Let's start the night before. He heard -- the
8 defendant heard that Ms. Turner was in Augusta in a
9 hotel with her husband. He drove to Augusta to see
10 it with his own eyes, but he testified to you
11 yesterday right here under oath that he wasn't
12 angry, that that didn't make him angry when he saw
13 their cars at the motel parking lot. He had to see
14 it with his own eyes. You heard Ms. Turner testify
15 about threatening, harassing voice mails and text
16 messages that he she got that night at the motel;
17 that the side mirror of her vehicle, the same
18 vehicle that the next day would be shot into, the
19 side mirror of that vehicle had been knocked off and
20 was hanging by a wire on the ground, that it was
21 completely off. Does that sound like an act of
22 somebody who is not mad? Is that what happy people
23 do?

24 The next day, the next morning, Saturday
25 morning, Ms. Turner told you that as she turned off

1 of Atomic Road onto Beard Road, when she turned and
2 she made that turn, she saw the defendant's vehicle
3 back on the property near his mother's house. You
4 will have a map back there with you so that you can
5 see all of this. By the time she made it to the
6 go-kart path, his truck, which had been back by the
7 swimming pool, by the swingset is what she told you,
8 was already right there where everybody agrees the
9 confrontation happened. She said she didn't see him
10 in his car. But there's no way he wasn't lying in
11 wait.

12 He knew she was coming and he was waiting on
13 her because he was angry, because he was mad,
14 because he had ill-will toward her. He flew to the
15 place where that confrontation occurred, by the burn
16 pile and the power pole and all of that that you
17 heard, across the property to cut her off when all
18 she wanted to do was get to the trailer to check on
19 the children and take a shower so she could go to
20 work. Why cut her off? Why start a confrontation
21 if you're not angry? The defendant told you, as
22 well as Ms. Turner, that he was beating on her
23 window with the barrel of a loaded gun. Is that the
24 act of someone who is not angry?

25 Everyone agrees that they were having an

1 argument. I don't think happy people have arguments
2 when they're happy. It's not a happy thing to do;
3 it's an argument. Are you starting to get a picture
4 of what's going on in his head? Are you starting to
5 get a picture of what he's thinking at the time? He
6 is mad at her for spending the night in the motel
7 room with her husband. He waited on her to come
8 home, he started a confrontation, he beat on the
9 window with a gun, with a loaded gun. If that isn't
10 reckless, I don't know what is.

11 A shot was fired. It's a revolver. He pulled
12 the hammer back and he pulled the trigger. It
13 didn't go off accidentally. He sat right here
14 yesterday and told you that he was holding it such
15 that the barrel of the gun was hitting the window.
16 Bullets go in straight lines. If he's hitting the
17 window with the barrel of the gun, how in the world
18 does it go straight through the window, into her
19 ribcage if he didn't mean to pull that trigger? It
20 doesn't. It doesn't. He pulled the trigger and
21 that's why the bullet lodged in her ribcage.

22 Ms. Turner told you that the defendant
23 continued to beat on the window after the shot was
24 fired. There's two holes in that window. You go
25 back there and you look at them. You tell me which

1 one happened first. I submit to you that that
2 bullet hole went through the window first.
3 Investigator Wertz told you that there was a radial
4 shatter pattern like rays of sunlight around the
5 hole where the bullet went through the window and
6 that there is a rectangular-shaped hole near the
7 bullet hole that is almost a perfect cutout between
8 some of those radial shatter marks from the bullet
9 hole. That's because that rectangular hole came
10 after the bullet hole because he was still hitting
11 the window of the car after he shot it because he
12 was furious, because he had ill-will toward
13 Ms. Turner, because he was mad. You don't
14 accidentally fire a gun, continue beating on the
15 window, make another hole, on accident.

16 She takes off when she realizes she's been
17 shot, calls for someone, anyone, to help her, to
18 call 911, and it happens to be MINOR 1, her
19 10-year-old daughter. She's 11 now. You heard
20 MINOR 1 testify that she tried to call 911, she went
21 back inside, she told her sister-in-law Nicky what
22 had happened, that they needed to call 911; they
23 went to the phone and it wasn't there. MINOR 1 told
24 you that the last person she remembers talking on it
25 the night before was the defendant, that he was in

1 and out. She testified that the night of the
2 shooting, the night of the 6th, when she went to
3 stay with Nicky because her mother is in the
4 hospital getting treated for a gunshot wound, they
5 heard a noise, that they were scared to go outside.
6 The next morning they go outside. Low and behold,
7 what's in the yard of Nicky's trailer? The
8 defendant's truck. And what's in his truck? The
9 phone. MINOR 1 told you it looked like someone took
10 the phone. He took it, because he knew that
11 Ms. Turner, if she couldn't get ahold of those
12 children, was going to come back there to check on
13 them. And she did. He made this confrontation
14 happen because he was angry, because he wanted to
15 hurt her.

16 The last fact that I have for you to apply to
17 what you think was going on in his mind at the time
18 that he told you out of his own mouth was that he
19 ran from the law for 28 days. 28 days. The month
20 of February is 28 -- a month. He ran for a month.
21 If you accidentally shoot someone, you run for a
22 month when you know there's a warrant for your
23 arrest? He told you he knew. What's going on in
24 his head, ladies and gentlemen? What's reasonable?
25 What gives with your common sense?

1 When you go back there, ladies and gentlemen,
2 to your jury room, you're going to have all of those
3 pictures, you're going to have the bullet, you're
4 going to have maps, you're going to see Ms. Turner's
5 injuries, and you're all going to discuss the
6 testimony that you heard. Your job when you get
7 back there to you deliberate is to put the pieces of
8 this puzzle together, look at all of the evidence,
9 recall the testimony, and figure out who you
10 believe. You can consider who has a motive to lie,
11 who has a motive to make up a story, to come up with
12 an excuse. A motive to lie makes a person less
13 credible, obviously.

14 We talked about in opening that we all know how
15 to tell if someone is telling the truth or lying. A
16 motive to lie is a reason to find someone less
17 credible. There's plenty of other reasons. You-all
18 have them already; it's your common sense. You
19 know. Did those children have a motive to lie? I
20 ask you when you go back there to focus on this,
21 look at all of it, sift through it, dissect it, but
22 remember that these are the main differences that
23 we've got in this case, ladies and gentlemen.
24 They're relatively few. And ultimately the question
25 that you-all will have to answer as one is did he

1 mean to do it? Did he mean to pull that trigger?
2 Did he mean to shoot his ex-wife? If you are firmly
3 convinced after viewing all of the evidence that
4 Frank Muns, the defendant, meant to shoot his
5 ex-wife, that he had intent, that he had malice
6 aforethought, the only reasonable decision, the only
7 reasonable verdict, the only one that makes sense is
8 that Mr. Muns is guilty of attempted murder. Thank
9 you.

10 THE COURT: Mr. Foreman, ladies and gentlemen,
11 let's take about a five-, ten-minute break so
12 everybody can stretch their legs. My charge is
13 about 15 to 20 minutes and then I'll give you the
14 case. That's going to put us about 11:20, 11:30, at
15 the latest. I'm going to leave it up to you, after
16 input from everyone, as to whether or not you'd like
17 for me to order you some lunch. And if you do, they
18 will give you a menu during this break period. Fill
19 it out so we can order it while I'm charging and you
20 deliberate, but with input from everybody. Okay?

21 THE FOREMAN: Yes, sir.

22 THE COURT: Thank you. Don't start
23 deliberating or start talking about the case.

24 (The jury retires to the jury room at 10:49
25 AM.)

1 THE COURT: Okay. We'll stand at ease for
2 about ten minutes. Thank you.

3 (A recess transpired.)

4 THE COURT: Is the State ready to proceed?

5 MS. SHEFTALL: Yes, Your Honor.

6 THE COURT: Mr. Routzong, are you ready to
7 proceed?

8 MR. ROUTZONG: Yes, sir.

9 THE COURT: Let's bring the jury out, please.

10 (The jury enters the courtroom at 11:09 AM.)

11 THE COURT: Mr. Foreman, ladies and gentlemen
12 of the jury, let me give you a charge or instruction
13 on the law. The first part of the charge dealing
14 with certain issues are general propositions of
15 criminal law that we charge in all criminal cases.
16 And then once we finish that, I'll go to the
17 specific indictments in this case and we'll talk
18 about those and then you'll be in a position to
19 start your deliberation.

20 So let me just remind you, the that the
21 defendant was indicted for attempted murder and
22 possession of a weapon during the commission of or
23 attempt to commit a violent crime, that is not
24 evidence in the case; that's simply the charging
25 document by way these cases came into the courtroom,

1 and you cannot infer anything from the fact that he
2 indicted. In fact, he has pled not guilty to both
3 indictments and a plea of not guilty puts the burden
4 on the State of South Carolina to prove the
5 defendant guilty beyond a reasonable doubt. The
6 person charged with committing a criminal offense in
7 our state is never required to prove himself
8 innocent. I instruct you that it is an important
9 constitutional rule of law that a defendant in a
10 criminal trial, notwithstanding how serious the
11 charge may be, will always be presumed to be
12 innocent of the crimes for which he was indicted
13 unless guilt has been proven by evidence satisfying
14 you of that guilt beyond a reasonable doubt.

15 The presumption of innocence does not end when
16 you start your deliberations, but it stays with the
17 defendant throughout the trial until you reach a
18 verdict of guilt based on evidence satisfying you of
19 that guilt beyond a reasonable doubt. The
20 presumption of innocence is not a mere legal phrase
21 or theory. It is a substantial constitutional right
22 to which every defendant is entitled unless you, the
23 jury, are satisfied from the evidence convincing you
24 of that defendant 's guilt beyond a reasonable
25 doubt.

1 Our courts have defined the term reasonable
2 doubt as follows: A reasonable doubt is the kind of
3 doubt that would cause a reasonable person to
4 hesitate to act. It's the kind of doubt that would
5 cause a reasonable person to hesitate to act. Proof
6 beyond a reasonable doubt is proof that leaves you
7 firmly convinced of the defendant's guilt. There
8 are very few things in the world that we know with
9 absolute certainty, and in criminal law, cases do
10 not require proof beyond and overcome every possible
11 doubt. If based on your consideration of the
12 evidence you are firmly convinced that the defendant
13 is guilty of the crimes charged, you must find him
14 guilty. If on the other hand you think there is a
15 real possibility that the defendant is not guilty,
16 you must give him the benefit of the doubt and find
17 him not guilty.

18 Mr. Foreman, ladies and gentlemen of the jury,
19 let me remind you that obviously during the trial of
20 this case I have told you that you and I have
21 certain duties and functions to perform. My job is
22 to instruct and charge you on the law and to rule on
23 the admissibility of evidence. Obviously your job
24 is much more important than mine because you are the
25 judges of the facts in the case. You judge the

1 credibility of the witnesses who testify. And as I
2 told you, you will hear two different sides and,
3 obviously, you have to make a determination on who
4 is telling the truth. So if at any time during the
5 trial of the case I've done anything up here to make
6 you believe that I have some opinion about the
7 facts, please disregard it. The law does not allow
8 me to have any opinion whatsoever about the facts.
9 I try cases all over the state. I'm the judge of
10 the law, but my juries determine the facts. So if
11 I've done anything like yawned or smiled or frowned
12 or took my glasses off, raised my eyebrows or
13 whatever, that's just me up here. I have no opinion
14 about the facts; the law does not allow me to. That
15 is your job and your job only. You are the sole
16 judges of the facts.

17 Now, by being the judges of the facts,
18 obviously you have to determine -- that's your job,
19 to determine the credibility of the witnesses who
20 have testified in this case. Credibility simply
21 means believability. Who do you believe? What do
22 you believe? So it becomes your duty as jurors to
23 analyze and to evaluate the evidence and determine
24 which evidence convinces you of its truth. Now, in
25 doing this job and determining the believability of

1 the witnesses, you can believe one witness over
2 several, several over one, you can disbelieve
3 everything somebody says, you can believe everything
4 he or she says, you can believe a little bit and
5 disregard the rest. In other words, use your
6 ordinary common sense in dealing with people
7 throughout life to determine what the true facts are
8 in the case. You may consider whether any witness
9 has exhibited to you any interest, bias, prejudice
10 or other motive in the case, and also how the
11 witness appeared on the witness stand.

12 In the trial of this case you heard evidence
13 that the defendant was convicted of crimes other
14 than the one for which he is now on trial. This
15 evidence may be considered by you, if you conclude
16 that it's true, only in deciding whether the
17 defendant's testimony is believable or credible and
18 for no other purpose. You must not consider the
19 defendant's prior record as any evidence of the
20 defendant's guilt of the charge we're trying here
21 today. So you use that prior record only to judge
22 his credibility, for no other reason whatsoever, and
23 it cannot be used in deciding the case that's here
24 today.

25 In the first indictment, we're dealing with the

1 charge of attempted murder. Our law defines the
2 word attempt as an effort to accomplish a crime
3 which does not succeed. An attempt includes a
4 specific intent to do a particular criminal act
5 along with an act falling short of the act intended.
6 The State must show more than mere preparation and
7 intent; there must be some overt act committed in
8 the effort to commit the crime. Intent means
9 intending the result which actually occurs, not
10 accidentally or involuntarily. Intent may be shown
11 by acts and conduct of the defendant and other
12 circumstances from which you may naturally and
13 reasonably infer intent. So in this case, the
14 defendant is charged with attempted murder.

15 In order to prove the offense of attempted
16 murder, the State must prove beyond a reasonable
17 doubt that the defendant attempted to kill another
18 person with malice aforethought, that malice
19 aforethought being either expressed or implied.
20 Pretty simple. The State must prove beyond a
21 reasonable doubt that the defendant attempted -- and
22 I defined attempt to you already -- to kill another
23 person with malice aforethought, and that malice
24 must be either expressed or implied. The term
25 malice is defined as hatred, ill-will, or hostility

1 towards another person. It's the intentional doing
2 of a wrongful act without just cause or excuse and
3 with an intent to inflict an injury or under
4 circumstances that the law would infer an evil
5 intent. Malice aforethought does not require that
6 the malice exist for any particular time before the
7 act is committed, but malice must exist in the mind
8 of the defendant just before and at the time of the
9 act is committed; therefore, there must be a
10 combination of the previous evil intent and the act.

11 Malice aforethought may be either expressed or
12 inferred. The terms expressed and inferred do not
13 mean different kinds of malice, but merely the
14 manner in which malice may be shown to exist; that
15 is either by direct evidence or by inference from
16 the facts and circumstances which approve.

17 Expressed malice is shown when a person speaks
18 words which express hatred or ill-will to another,
19 or when the person prepared beforehand to do the act
20 which was later accomplished. Malice also may be
21 inferred from conduct showing a total disregard for
22 human life. So those are the two types of malice --
23 strike that. That's two ways to prove malice.
24 There's only one malice, but they can either be
25 shown by expressed evidence or inferred from the

1 circumstances which were proven.

2 So to prove the offense of attempted murder,
3 the State must prove to you, beyond a reasonable
4 doubt, that the defendant attempted to kill another
5 person with malice aforethought, that malice
6 aforethought being either expressed or implied.

7 Now, Mr. Foreman, ladies and gentlemen of the
8 jury, we have a concept of law that is known as a
9 lesser included offense. So, for example, if you've
10 got a gallon of water, milk, Coca-Cola, whatever,
11 the lesser included of a gallon could be a pint, a
12 quart, or a half a gallon. It's part of the whole
13 thing. So that's -- and in the law we have what's
14 called a lesser included offense. So if you make
15 your decision that the State has failed to prove
16 that the defendant attempted to kill another person
17 with malice aforethought, then you can consider the
18 lesser offense, the one that's not as high up as
19 that. It's a lesser offense. And that's what we
20 call the offense of second degree assault and
21 battery.

22 In order to prove someone has committed the
23 offense of second degree assault and battery, which
24 is in our Section 16-3-600, the State must prove
25 that the defendant unlawfully injures another person

1 or offers or attempts to injure another person with
2 the present ability to do so and moderate bodily
3 injury to another person results or moderate bodily
4 injury to another person could have resulted. And
5 the laws define moderate bodily injury as a physical
6 injury requiring treatment to an organ system of the
7 body other than the skin, muscles, and connective
8 tissues of the body, except when there's a
9 penetration of the skin, muscles, and connective
10 tissue that requires surgical repair of a complex
11 nature or when treatment of the injuries requires
12 the use of regional or general anesthesia.

13 So in making your analysis of whether or not
14 the State has proven the case of attempted murder
15 beyond a reasonable doubt, if you find that the
16 State has failed to do that, then you would then
17 consider whether or not they've proved the lesser
18 included offense of assault and battery in the
19 second degree, which basically just does not require
20 the specific intent that the attempted murder --
21 this is an unlawful injuring of a person.

22 So you will have a verdict form dealing with
23 that. And, Mr. Foreman, first of all, you make an
24 analysis on the attempted murder and you find him
25 guilty of attempted murder, the State has proven

1 their case beyond a reasonable doubt of attempted
2 murder, you stop there. If you find that they
3 failed to prove that, you would find him not guilty,
4 obviously, and then you would consider whether or
5 not he's guilty of the lesser included offense.

6 Now, the other offense to which he is charged
7 is possession of a weapon during the commission of
8 or attempt to commit a violent crime. If you find
9 that he's guilty of attempted murder, then you must
10 decide whether or not he had in his possession a
11 firearm during the commission of that crime. If you
12 find him not guilty of attempted murder, obviously
13 he didn't have a firearm in the commission of a
14 violent crime because assault and battery in the
15 second degree is not a violent crime, so he can't be
16 found guilty of -- assault and battery would not be
17 a violent crime, so this would not -- does that make
18 sense?

19 THE FOREMAN: Yes, sir.

20 THE COURT: You will have a verdict form back
21 there. Now, obviously our law requires that your
22 verdict be unanimous. All 12 of you must
23 unanimously agree on the verdict. Obviously you are
24 to decide the based solely on what you heard in the
25 courtroom, determine what the true facts are and

1 applying it to the law as I give it to you. We're
2 not here to reward any friends or punish any
3 enemies; we're here to simply make a deliberate
4 examination of the facts and apply the law as I have
5 given it to you.

6 Often times during the deliberation you will
7 have questions. That's not unusual. If you do, the
8 procedure is to write it out on a piece of paper --
9 you'll have a notepad in there -- and send it to me.
10 And if I can answer it, I will. Sometimes I can,
11 sometimes I can't. But I will tell you if I can't
12 and basically why I can't. If I can answer it, then
13 I'll either answer it on the paper or bring you back
14 out here and answer it. While you are deliberating
15 you'll have all of the exhibits that have been
16 introduced during the trial of the case to review,
17 if you choose.

18 So I'm going to ask you now to -- and when you
19 finish and complete your deliberations, obviously
20 you fill out the verdict form, sign it, and knock on
21 the door and tell the bailiff you've got it. Lunch
22 should be here within 30 minutes, so when it comes,
23 y'all enjoy it. You can stop deliberating and enjoy
24 your lunch, you can eat and deliberate, but you have
25 to all stay together. So I'm asking you to please

1 go back to your jury room. Please segregate my two
2 alternates. Do not start deliberating quite yet. I
3 have to ask the lawyers if I've left anything out of
4 the charge and then we have to gather up the
5 evidence. And then I'll give you these two verdict
6 forms. And then the bailiff will bring them in
7 there to you in about two or three minutes. Then
8 you can start. Fair enough?

9 THE FOREMAN: Yes, sir.

10 THE COURT: If you have any questions, please
11 let me know. Thank you.

12 (The jury retires to the jury room at 11:27
13 AM.)

14 THE COURT: Any objections, requested additions
15 or deletions to the charge by the State?

16 MS. SHEFTALL: Nothing from the State, Your
17 Honor.

18 THE COURT: Mr. Routzong?

19 MR. ROUTZONG: No, sir. I just -- I think I
20 neglected to renew my directed verdict motion, so
21 I'd like to do that at this time for the same
22 reasons, Your Honor.

23 THE COURT: We'll nunc pro tunc that, and for
24 the same reasons, it's respectfully denied. And
25 also, you're protected on the record as far as the

1 request for charges on accident and self-defense.

2 MR. ROUTZONG: Thank you, sir.

3 THE COURT: Thank you. Please come up and
4 review all of the exhibits and make sure we have
5 them all and that they're in order. The verdict
6 form -- let the record reflect, please, that the
7 State and defendant have examined and reviewed all
8 of the exhibits and they're all in order and
9 accounted for; they've reviewed the verdict form and
10 are in agreement with no objection. Is that
11 correct, Mr. Routzong?

12 MR. ROUTZONG: Yes, sir.

13 THE COURT: Ms. Sheftall?

14 MS. SHEFTALL: Yes, Your Honor, that's correct.

15 THE COURT: All right. We'll let the jury
16 start deliberating at 11:29.

17 (The jury begins deliberations at 11:29 AM.)

18 THE COURT: All right. We'll stand at ease.

19 (A recess transpired from 11:29 AM to 1:16 PM.)

20 THE CLERK: While I'm waiting on the clerks to
21 come in, let me remind everyone, I have no earthly
22 idea what the verdict is. Somebody is going to
23 happy and somebody is not going to be happy. If you
24 cannot control your emotions, I'll ask you to leave
25 now. I will not tolerate any outbursts, any

1 untoward behavior. If you do, you'll be subject to
2 contempt of court. Thank you.

3 All right. Is the State ready to receive the
4 verdict?

5 MS. SHEFTALL: We are, Your Honor.

6 THE COURT: Mr. Routzong?

7 MR. ROUTZONG: Yes, Your Honor.

8 THE COURT: All right. Bring the jury in,
9 please.

10 (The jury enters the courtroom at 1:19 PM.)

11 THE COURT: Mr. Foreman, have y'all reached a
12 verdict?

13 THE FOREMAN: Yes, sir, we have.

14 THE COURT: Please pass up the verdict form.
15 Ma'am?

16 THE CLERK: Your Honor, we have *State of South*
17 *Carolina, County of Aiken vs. Frank Muns, Sr.* As to
18 the offense of attempted murder, we the jury find
19 the defendant guilty. We unanimously agree, dated
20 February 6th, 2014. Signed by Foreperson Richard
21 Arkin.

22 Your Honor, we have *State of South Carolina,*
23 *County of Aiken vs. Frank Muns, Sr.,* Indictment No.
24 2013-GS-02-01664. As to the offense of possession
25 of a firearm during the commission of or attempt to

1 commit a violent crime, we the jury find the
2 defendant guilty. We unanimously agree, dated
3 February 6th, 2014. Signed by Foreperson Richard
4 Arkin.

5 Ladies and gentlemen of the petit jury, if this
6 is your verdict, please indicate by raising your
7 hands.

8 (Jurors raise their hands.)

9 THE CLERK: All hands are raised, Your Honor.

10 THE COURT: Thank you.

11 Anything for the jury before I release them by
12 the State?

13 MS. SHEFTALL: No, sir, Your Honor.

14 THE COURT: By the defendant?

15 MR. ROUTZONG: No, sir.

16 THE COURT: Thank you.

17 Mr. Foreman, ladies and gentlemen, that
18 obviously concludes your service this week. On
19 behalf of the County of Aiken and everyone, we
20 appreciate your service. We cannot run our criminal
21 court system without having people ready, willing,
22 and able to serve. Interesting case, difficult
23 case, sad case. I agree wholeheartedly with your
24 verdict. I think the evidence certainly supported
25 it. I thank you. We will now sentence him. You're

1 welcome to stay for that or you are certainly free
2 to go. It will take place in about 15 or 20
3 minutes. If anyone needs a work excuse, let us know
4 and we'll get the clerks office up here to give you
5 one. There will be some checks mailed to you.
6 Unfortunately, it's not a very big check. Y'all
7 were great and paid close attention. Obviously we
8 had the wrong foreperson because the women ran the
9 jury. But that's the way it always is. Seriously,
10 y'all were wonderful, paid close attention, and I
11 cannot thank you enough. Have a wonderful day.
12 Thank you.

13 (Jury released.)

14 THE COURT: Mr. Routzong, are you ready for
15 presentment?

16 MR. ROUTZONG: Yes, sir.

17 THE COURT: Mr. Routzong --

18 MR. ROUTZONG: Your Honor, I think you heard
19 all of the facts of the case. Mr. Muns is 48 years
20 old, soon to be 49, and he has four children.

21 THE COURT: I met two of them, did I not?

22 MR. ROUTZONG: You did, sir. As I mentioned to
23 the Court before, his mom is in the courtroom in
24 support of him.

25 THE COURT: Anything else?

1 MR. ROUTZONG: No, sir. Mr. Muns did want to
2 address the Court, Your Honor.

3 THE COURT: All right. Give me a minute.

4 MR. ROUTZONG: Yes, sir.

5 THE COURT: Yes, sir.

6 THE DEFENDANT: My mom wanted to speak on my
7 behalf. But if you would explain to her that I did
8 not take the State's plea and we have a negotiation
9 agreement. I don't want any more stress on her for
10 her to have to come up and try to speak on my
11 behalf.

12 THE COURT: Do you want her to speak or not
13 speak?

14 THE DEFENDANT: I rather she didn't because
15 it's going to be a lot of stress on her.

16 THE COURT: I will not call on her then.
17 That's up to you.

18 THE DEFENDANT: Thank you, sir.

19 THE COURT: Anything else you want to tell me?

20 THE DEFENDANT: I would like to say it was an
21 accident and I apologize.

22 THE COURT: The jury did not believe you. That
23 was their province, that was their duty to determine
24 the true facts of the case. They found, obviously,
25 your testimony to be not credible; they found your

1 ex-wife's testimony to be credible. And quite
2 frankly, from listening to all of it, I believe the
3 same.

4 You know, it's a -- I tried to give you a
5 situation where it would have been a lot more
6 palatable than what you chose to do.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Does he want to sign the sentence
9 sheets or not?

10 MR. ROUTZONG: He tells me he does not, Your
11 Honor.

12 THE COURT: Let the record reflect both
13 sentence sheets, the defendant has refused to sign.

14 Anything by the State? Tell me what his record
15 is. I know he's got a grand larceny.

16 MS. SHEFTALL: Two petit larcenies, 2006 2012;
17 criminal domestic violence first offense, 2005; and
18 out of Georgia in 2012, a felony theft by taking.

19 THE COURT: Was the CDV back -- was it the same
20 lady back then?

21 MS. SHEFTALL: Yes, Your Honor, same victim.

22 THE COURT: Anything else anybody else wants to
23 say?

24 MS. SHEFTALL: Your Honor, the victim does not
25 wish to address the Court at this time.

1 THE COURT: All right. As to indictment
2 2013-GS-02-1657, for the offense of attempted
3 murder, having been found guilty by the jury, the
4 sentence of this Court is that you be committed to
5 the state department of corrections for a period of
6 15 years.

7 On the possession of a weapon during the
8 commission of a violent crime, that is a five-year
9 sentence, it will run concurrent with 1657. I'll
10 give you credit for your time served. Good luck to
11 you.

12 THE DEFENDANT: Thank you, sir.

13 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Bethanie Patterson, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the General Sessions Court for Aiken County, South Carolina, on the 4th and 5th of February, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 15, 2014



Bethanie Patterson
Circuit Court Reporter

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 Carolina Respondent,

versus

Frank Muns Appellant.

FINAL BRIEF OF APPELLANT

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40 C.J.S. <i>Homicide</i> § 180 (2014).	9

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: R1 n Ql

Kevin Eberle

Nicholas Shalosky

Robert Dudek

June 2nd, 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.

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 Carolinan 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 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

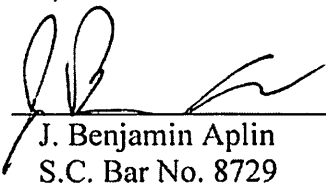
For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentence of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

J. STROM THURMOND, JR.
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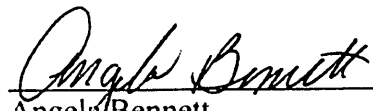
PROOF OF SERVICE

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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I further certified that all parties required by Rule to be served have been served.
This 1st day of June, 2015.


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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Frank Muns, Appellant.

Appellate Case No. 2014-000344

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2016-UP-314
Heard February 2, 2016 – Filed June 22, 2016

AFFIRMED

Kevin Roger Eberle, of Charleston; Nicholas Anthony Shalosky, of Philadelphia, PA; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General John Benjamin Aplin, both of Columbia; and Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

PER CURIAM: Frank Muns appeals his attempted murder and possession of a firearm during the commission of or attempt to commit a violent crime convictions arguing the trial court erred in refusing to charge the jury on the law of self-defense and on the law of accident. He further contends, because he must receive a new trial on the attempted murder charge based upon the trial court's failure to give the self-defense and/or accident charges, he is likewise entitled to a new trial on the possession of a firearm charge. We affirm.

1. Muns argues the trial court erred in refusing to issue a self-defense charge despite evidence he was attempting to prevent Victim from crushing him with her car. We affirm the trial court's refusal to charge self-defense based upon the absence of evidence that Muns had no other probable means of avoiding the danger.

First, we note Muns's argument that he had no obligation to remove himself from the confrontation because—under the Castle Doctrine—he was defending his property and, therefore, was under no duty to retreat, is not preserved for appellate review. Not only did he never specifically raise the Castle Doctrine to the trial court, he never asserted to the trial court he had no duty to retreat because he was defending his own property or because the attack occurred on his own property. In fact, he made no argument whatsoever to the trial court concerning "duty to retreat." As to his assertion regarding trial counsel's discussion with the court concerning the real property belonging to his mother, at best, Muns only referenced ownership of the property in regard to his argument concerning whether he *brought about the difficulty*, not in regard to whether he had *other probable means to avoid the danger*. Accordingly, this argument is not preserved. See *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("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."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments, and noting that the purpose of an appeal is to determine whether the trial court erroneously acted or failed to act, and when appellant's contentions are not presented or passed upon by the trial court, such contentions will not be considered on appeal).

Further, we find no evidence that Muns had no other probable means of avoiding the danger.

A self-defense charge is not required unless it is supported by the evidence. To establish self-defense in South Carolina, four elements must be present: (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, 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.

State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007) (citations omitted). To raise self-defense, the defendant must produce some evidence from which the jury could have a reasonable doubt as to guilt. *See State v. Wiggins*, 330 S.C. 538, 544-45, 500 S.E.2d 489, 493 (1998) ("It is clear that the defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt.") (quoting *State v. Bellamy*, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In order to satisfy the fourth element of self-defense, there must be evidence the defendant:

had no other probable means of escape except to take the life of his assailant or stated another way, that he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily harm than to act as

he did in the particular instance; that it is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.

State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955). "A defendant is not required to retreat if he has 'no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance.'" *State v. Dickey*, 394 S.C. 491, 502, 716 S.E.2d 97, 102 (2011) (alteration in original) (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493). "The law says if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense." *State v. Burriss*, 334 S.C. 256, 268, 513 S.E.2d 104, 111 (1999) (Burnett, J., dissenting) (quoting *State v. George*, 119 S.C. 120, 121, 111 S.E. 880 (1921)).

The trial court did not err in ruling Muns could not meet the fourth element of self-defense—that the defendant had no other probable means of avoiding the danger—as Muns presented no evidence that he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did. Muns argues on appeal that he was trapped between Victim's car and his open truck door; however, Muns never testified that he was "trapped" or that his only exit was blocked by his open truck door, with no ability to retreat from the area of the vehicles. The only evidence is Victim was attempting to maneuver her car around Muns and his truck without hitting either. There is nothing to suggest Victim was using her car as a weapon to attack Muns or that Muns was in immediate danger from Victim's car from which he could not remove himself. Rather, the undisputed evidence reveals Victim made several maneuvers with her car in an attempt to get around Muns and his truck. Though Muns may have been afraid he could ultimately be harmed if he were to maintain his position between the vehicles in order to stop Victim as she continued to attempt to get around him and his truck, there is nothing to show he could not have removed himself from the area and the possible harm that he perceived could occur. Even assuming *arguendo*, as Muns contends on appeal, that he was stationed in an area between Victim's car, his truck, and his truck door as Victim attempted to maneuver around him, there is nothing to suggest he could not have simply shut his truck door and walked away, or shut his truck door and reopened it once on the other side and then

entered his truck, or merely climbed over his truck. In short, there is nothing in the evidence presented to show he attempted to leave or that he was unable to safely remove himself from the situation. Rather, under his own testimony, he chose to use a loaded gun to beat on the driver's side car window as Victim sat in the driver's seat in an attempt to make Victim stop her car. Viewing the evidence in the light most favorable to Muns, he chose to maintain a position he perceived as potentially dangerous in an attempt to stop Victim, rather than remove himself from the situation. *See State v. Santiago*, 370 S.C. 153, 160-61, 634 S.E.2d 23, 27-28 (Ct. App. 2006) (holding, in face of testimony, that after the victim looked at a shotgun in the trunk of the appellant's car, looked at the appellant, and looked at the shotgun again, and the appellant thought the victim was about to grab the shotgun so the appellant grabbed the gun first and, believing the victim was reaching for the gun, shot the victim, the evidence taken in the light most favorable to the appellant indicated, given the distance between the two men, the appellant could have retreated with his shotgun rather than shooting the victim, and "[m]oreover, [the appellant] simply could have avoided the danger by closing his trunk").

2. Muns next argues the trial court erred in refusing to issue an accident charge despite evidence Muns's gun discharged unintentionally while being used to pound on Victim's window in order to get her to stop her car. We affirm the trial court's determination that Muns was not entitled to a charge on accident because he failed to exercise due care by using a loaded pistol to beat the window of Victim's car.

"[T]o be excusable on the ground of accident, it must be shown the [attempted murder] was unintentional, the defendant was acting lawfully, *and due care was exercised in the handling of the weapon.*" *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) (emphasis added). Viewing the evidence in the light most favorable to Muns, he used a loaded gun to beat on the driver's side window of Victim's car as she sat in the driver's seat, hitting the loaded gun against the window at least three times before it discharged and struck Victim. We therefore find, as a matter of law, Muns was not entitled to an accident charge because he failed to use due care in the handling of the weapon. *See id.* at 412, 415 n.3, 706 S.E.2d at 14, 16 n.3 (holding the appellant was not entitled to an accident charge and finding, as a matter of law, there was no evidence the appellant exercised due care in the handling of a gun from evidence that, during a drug transaction, after the victim threatened to take the appellant's drugs and approached the appellant with a "real serious demeanor," the appellant pulled a gun on the victim, the victim grabbed the appellant and tried to knock the gun from the appellant's hand, the

appellant struck the victim in the face with the gun, the appellant and the victim struggled and "the gun went off," striking the victim).

3. Muns lastly contends, should this court set aside his attempted murder conviction, he is entitled to a new trial on his possession of a weapon during the commission or attempt to commit a violent crime charge. *See* S.C. Code Ann. § 16-23-490(A) (2015) ("If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime *and is convicted of committing or attempting to commit a violent crime* as defined in section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime."(emphasis added)). Because we find the trial court properly refused to charge self-defense and accident and Muns, therefore, is not entitled to a new trial on his attempted murder charge, there is no basis for granting him a new trial on the weapons possession charge.

For the foregoing reasons, Muns's convictions are

AFFIRMED.

HUFF, KONDUROS, and GEATHERS, JJ., concur.

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 Carolina Respondent,

versus

Frank Muns Appellant.

**MOTION AND MEMORANDUM
FOR REHEARING**

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INTRODUCTION

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

Mr. Muns found himself stuck between his truck and his ex-wife’s car, which she was lurching forward and back, nearly striking Mr. Muns. Even Mrs. Turner admitted that he was in danger by her car’s forward movement: “I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open.” (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 (“Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly.”). Mr. Muns tried repeatedly to get her to stop, but Mrs. Turner continued cursing at him and driving

to navigate her car forward. (Sub. R. 144.) Mr. Muns was in a space only about three feet wide between the two vehicles. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 (“Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles.”). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 (“She won’t stop. She keeps putting it in forward and reverse maybe three or four times.”).) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was “pinning [him] between [his] truck and her car.” (Sub. R. 145-46.)

Despite Mr. Muns’ repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 145-46.) He had beaten on the window with his fist before starting to use his gun. (Sub. R. 154.)

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

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

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

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

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

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

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

But, even if Mr. Muns should have used some more specific language to preserve the issue, the Court's opinion is nevertheless flawed. Although the correct use of the Castle Doctrine would have completely removed the duty to retreat from the equation, the Court misunderstood the shifting burdens used in a self-defense charge. Once the defendant has asserted self-defense, the burden falls on the State to *disprove* self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). Self-defense is not an affirmative defense; instead, once raised by a defendant, the burden falls squarely on the State to affirmatively *disprove* its application. *Id.* at 544-45, 500 S.E.2d at 492-93.

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,



A handwritten signature in blue ink, appearing to read "By: R M QD", is written over a horizontal line.

Kevin Eberle

Robert Dudek

July 7, 2016

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 Carolina Respondent,

versus

Frank Muns Appellant.

CERTIFICATE OF SERVICE
(Motion and Memorandum for Rehearing)

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

Attorneys for Appellant

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

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'K Eberle', is written above a horizontal line.

Kevin Eberle

Robert Dudek

July 7, 2016

The South Carolina Court of Appeals

The State, Respondent,

v.

Frank Muns, Appellant.

Appellate Case No. 2014-000344

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

J.

U. K.

J.

John D. Heather

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Robert Michael Dudek, Esquire *mpm (AP)*

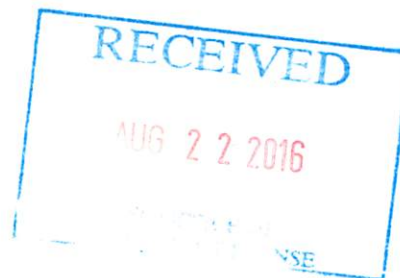
Kevin Roger Eberle, Esquire

John Benjamin Aplin, Esquire

Nicholas Anthony Shalosky, Esquire

FILED

August 22, 2016



James Strom Thurmond, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2013-GS-020-1664

State of South Carolina Respondent,

versus

Frank Muns Appellant.

PETITION FOR CERTIORARI

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

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

Attorneys for Appellant

CERTIFICATION

The undersigned certifies that a petition for rehearing was made by Mr. Frank Muns. The petition for rehearing was denied on August 22, 2016, by the Court of Appeals.

QUESTIONS FOR REVIEW

Mr. Muns raised two defenses which the trial court refused to charge. First, one may assert accident as a defense if, despite acting reasonably, he causes an unintentional injury. Second, one may assert self-defense if he reasonably believed he faced a serious danger and had no other 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. After taking other steps to get her to stop, Mr. Muns beat on her window with a gun to get her to stop, and the gun unexpectedly discharged.

- As to the **accident** charge, did the Court of Appeals err when it refused to follow this Court's rulings that the reasonableness of a defendant's actions is a *jury issue* if there is *any* evidence and instead ruled *as a matter of law* that Mr. Muns unreasonably defended himself despite testimony that his ex-wife was engaged in a life-or-death attack against him?
- As to the **self-defense** charge, did the Court of Appeals err by excusing the State's failure to introduce even a single line of testimony that Mr. Muns had

other means of escape, shifting the burden to Mr. Muns to prove he did *not* have other avenues of escape, and then disregarding without explanation Mr. Muns' uncontradicted testimony that his ex-wife had "*pinn[ed] me between my truck and her car*"?

- As to the **self-defense** charge, did the Court of Appeals also err by even requiring Mr. Muns to retreat at all—given that the Castle Doctrine permitted him to stand his ground—only because of an issue preservation concern despite the fact that Mr. Muns specifically raised the Castle Doctrine to the trial court?

STATEMENT OF THE CASE

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.)

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* Sub. R. 84-

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.

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, exiting onto Oak Drive along the rear of the property. (Sub. R. 82, 86, 89-91, 94, Ex. 28.) The bleeding had already stopped by the time a medic arrived at Mrs. Turner’s location (Sub. R. 108), but the medic still treated Mrs. Turner’s wound (Sub. R. 40-41).

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.)

ARGUMENT

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

A. 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.

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

Reasonableness is the textbook example of a jury issue. Neither the trial court nor 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). A court

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

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

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

reversible error by taking the matter from the jury and making a decision on its own.

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

Mr. Muns found himself stuck between his truck and his ex-wife’s car, which she was lurching forward and back, nearly striking Mr. Muns. Even Mrs. Turner admitted that he was in danger by her car’s forward movement: “I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open.” (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 (“Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly.”). Mr. Muns tried repeatedly to get her to stop, but Mrs. Turner continued cursing at him and driving

to navigate her car forward. (Sub. R. 144.) Mr. Muns was in a space only about three feet wide between the two vehicles. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 (“Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles.”). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 (“She won’t stop. She keeps putting it in forward and reverse maybe three or four times.”).) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was “pinning [him] between [his] truck and her car.” (Sub. R. 145-46.)

Despite Mr. Muns’ repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 145-46.) He had beaten on the window with his fist before starting to use his gun. (Sub. R. 154.)

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

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

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

B. Because the Court of Appeals misread the invocation of the Castle Doctrine, misunderstood the shifting burden analysis, and overlooked undisputed testimony that Mr. Muns was trapped during the altercation, this Court should grant certiorari.

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).

The Court of Appeals ruled that Mr. Muns could not assert self-defense because he had failed to contest the fourth element of the defense at trial and that

there had been no evidence even suggesting that he had been trapped. Both rulings are wrong.

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

But, even if Mr. Muns should have used some more specific language to preserve the issue, the Court of Appeal's opinion is nevertheless flawed. Although the correct use of the Castle Doctrine would have completely removed the duty to retreat from the equation, the Court of Appeals misunderstood the shifting burdens used in a self-defense charge. Once the defendant has asserted self-defense, the burden falls on the State to *disprove* self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). Self-defense is not an affirmative defense; instead, once raised by a defendant, the burden falls

squarely on the State to affirmatively *disprove* its application. *Id.* at 544-45, 500 S.E.2d at 492-93.

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

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

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

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "By [unclear] MDD", is written over a horizontal line.

Kevin Eberle

Robert Dudek

September 21, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

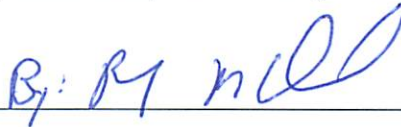
APPEAL FROM AIKEN COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Case No. 2013-GS-020-1664

State of South Carolina Respondent,
versus
Frank Muns Appellant.

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Frank Muns, #358883, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 21st day of September, 2016.

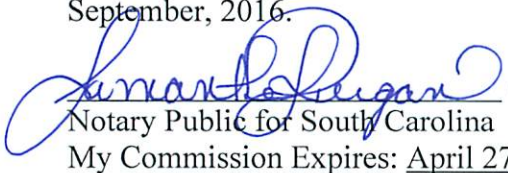


Kevin Eberle

Robert Dudek

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 21st day of
September, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.

The Supreme Court of South Carolina

The State, Respondent,

v.

Frank Muns, Petitioner.

Appellate Case No. 2016-001966

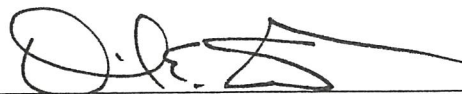
Lower Court Case Nos. 2013-GS-02-01657, 2013-GS-02-01664

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

May 30, 2017

cc:

The Honorable Jenny Abbott Kitchings

Robert Michael Dudek, Esquire *RFM (PR)*

Kevin Roger Eberle, Esquire

Alan McCrory Wilson, Esquire

John Benjamin Aplin, Esquire

James Strom Thurmond, Jr., Esquire

The Honorable Robert J. Harte

RECEIVED

MAY 30 2017

APPELLATE DEFENSE



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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June 12, 2017

The Honorable Robert J. Harte
PO Box 583
Aiken SC 29802

REMITTITUR

Re: The State v. Frank Muns
Lower Court Case No. 2013GS0201657, 2013GS0201664
Appellate Case No. 2014-000344

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire *mg n (AP)*
Kevin Roger Eberle, Esquire
John Benjamin Aplin, Esquire
James Strom Thurmond, Jr., Esquire

RECEIVED

JUN 12 2017

APPELLATE DEFENSE

2013A0210200353
2013A0210200354

361

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Aiken)

Frank Muns #358883)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2018CP0200759
IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention South Carolina Department of Corrections / Kirkland CI
4344 Broad River Rd. Columbia, SC 29210
2. Name and location of Court which imposed sentence Aiken County General Sessions Court
P.O. Box 583 at 109 Park Ave Aiken, S.C.
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-02-01657 Attempted murder
 - (b) 2013-GS-02-01664 - possession of Firearm during violent crime
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2-6-14 Sentence 15 years for attempted murder
 - (b) 2-6-14 Sentence 5 years for possession of firearm during the commission of a violent crime to be served concurrent with the 15 years for attempted murder.

Revised 3/2003

ELECTRONICALLY FILED - 2018 Apr 02 1:23 PM - AIKEN - COMMON PLEAS - CASE#2018CP0200759

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina court of Appeals
- ii. South Carolina Supreme court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. court of Appeals Affirmed on Appeal
- ii. Supreme court Denied review
- iii. _____
- (c) the date of each such result:
- i. Court of Appeal August 22, 2016
- ii. Supreme Court July 26 2017
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Court of appeals Unpublished opinion No. 2016-UP-314
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) NA
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:



11.

- (a) See Supplement Pappers marked Appendix-A- Pages 1-11
 (b) Applicant believes he has additional claims for post-conviction relief but does not yet have callateral Counsel access to the discovery process or funds for expert services to investigate claims.
 (c) State concisely and in the same order the facts which support each of the grounds set out

in (10):

- (a) See Supplement Pappers marked Appendix-A- Page 1-
 (b) _____
 (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NA
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA
 (d) any other petitions, motions or applications in this or any other Court? NA

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. NA
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. NA
 ii. _____
 iii. NA
 iv. _____

(c) the disposition thereof:

- i. NA
 ii. _____

ELECTRONICALLY FILED - 2018 Apr 02 1:23 PM - AIKEN - COMMON PLEAS - CASE#2018CP0200759

- iii. NA
- iv. _____
- (d) the date of each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- no
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. NA
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. NA
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) NA
- (b) _____

- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? —
 - (b) your trial, if any? yes
 - (c) your sentencing? yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Michael Rautzong, Public Defenders Office 410 Barnwell AV, N.W., P.O. Box 2247 Aiken, SC 29803
 - ii. Carmen V. Ganuehsani, and Robert Oudek Appellate Defender P.O. Box 11589 Columbia, SC 29211-1589
 - iii. Nicholas A. Shalowsky and Kevin A. Shalowsky, Charleston School of Law 256 W. Poplar Street Charleston, SC 29403
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing
 - ii. Direct Appeal
 - iii. Appeal to the South Carolina Supreme Court
19. State clearly the relief you seek in filing this application: Appellants conviction and sentence should be reserved and this case remanded to the Aiken County Court of General Sessions for a new Trial.
20. Are you now under sentence from any other court that you have not challenged? NO

STATE OF SOUTH CAROLINA)

County of Aiken)

VERIFICATION

I, Frank Mens, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 26
day of March, 2018.

 (L.S.)
Notary Public

My Commission Expires: Dec. 1, 2025

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Frank Muns, hereby
apply for leave to proceed in this action without prepayment of fees or costs or security therefor.
In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Frank Muns
Applicant

SWORN or affirmed to and subscribed before me this
26 day of March, 2018.

Melissa Spigler
Notary Public

My Commission Expires: Dec. 1, 2025

Appendix - A

(10A): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1§3 and 14 of the South Carolina Constitution during the guilt or innocence phase of trial.

(11A): Supporting facts: Trial Counsel's performance during the guilt or innocence phase was both unreasonable and prejudicial. See *Stickland v. Washington* 466 U.S. 668 (1984). Counsel's act or omissions included but are not limited to the following:

(1): Trial counsel failed to file a motion to have a pre-trial hearing to determine if applicant was entitled to immunity under Subsections 16-11-440 and 16-11-450. See *State v. Duncan* 392 S.C. 404, 709 S.E.2d 662 (2011), and see Chief Justice Pleicones dissent in *State v. Manning* 418 S.C. 38, 791 S.E.2d 148 (2016).

(2): Trial Counsel failed to investigate and present all the facts in a pre-trial hearing that could have established that the applicant was immune from prosecution under the Castle doctrine by the preponderance of the evidence. See *State v. Curry* 406 S.C. 364, 752 S.E.2d 263 (2013). As a result to Counsel's failures the applicant's conviction and sentence is unreliable.

(10B): Applicant was denied the right to effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution - during the guilt-or-innocence phase of his trial.

(11B): Supporting facts: Trial Counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington* 466 U.S. 668 (1984). Counsel's acts or omissions included but are not limited to the following:

(1): Trial Counsel failed to argue and present in a pre-trial hearing that the Applicant was not the cause of Ms. Turner's actions when she used her car as a weapon to endanger the life of the Applicant. See *State v. Harden* 223 W.Va. 796, 679 S.E.2d 628, 640 (2009) and *State v. Jones* 416 S.C. 283, 786 S.E.2d 132 (2016).

(2): Trial Counsel failed to argue and present in a pre-trial hearing that the Applicant did not create the need for force and was rightfully defending himself from the dangerous action he encountered from Ms. Turner that prompted him to react in self defense. See *State v. Slater* 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007).

(3): Trial counsel failed to investigate, develop, and present all the evidence of the facts in a pre-trial hearing that would show that the applicant was not the one who prompted the actual Violence. See *State V. Dickey* 394 S.C. 491, 716 S.E.2d 97 (2011). As a result to Counsel's failures to show that the applicant did not provoke the Confrontation makes the applicants conviction and sentence unreliable.

(10C): Applicant was denied the right to effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and by Article 1 §3 and 14 of the South Carolina Constitution during the guilt or-innocence phase of his trial.

(11C): Supporting facts: Trial Counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland V. Washington* 466 U.S. 668 (1984). Counsel's acts or omissions included but are not limited to the following.

(11): Trial Counsel failed to move the court to determine in a pre-trial hearing whether or not the Applicant obligated to remove himself from the Confrontation. See *State V. Scott* 420 S.C. 108, 800 S.E.2d 793 (2017).

(2): Trial counsel failed to ask the court for a pre-trial hearing to determine if the applicant could have removed himself from the dangerous situation. See *State v. Oates* 421 S.C.1, 803 S.E.2d 911 (2017), *State v. Duncan* 392 S.C. 404, 709 S.E.2d 662 (2011) and *State v. Scott* 420 S.C. 108, 800 S.E.2d 793 (2017)

3. Trial counsel failed to investigate, develop and present the facts and circumstances necessary to show that the applicant could not have removed him self from from the situation that placed his life in danger. As a result to counsels failures the applicants conviction and sentence is unreliable.

(10D): Applicant was denied the right to effective assistance of Counsel guaranted by the Sixth and Fourteenth Amendments to the United States constitution and by Article 133 and 14 of the South Carolina constitution during the guilt or innocence phase of his trial.

(11D): Supporting facts: Trial Counsels performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington* 466 U.S. 668 (1984). Counsels acts or omissions included but are not limited to the following:

(1): Trial counsel failed to move the court in a pre-trial hearing raising the immunity issue under the Castle Doctrine and properly preserving the issue for direct appeal. See *State v. Dickey* 394 S.C. 491, 716 S.E.2d 97 (2011).

(2). Trial counsel failed to properly object, present, and argue the applicant right to immunity under the Castle Doctrine. As a result ~~to~~ counsel's failures to properly defend the applicant under the Castle Doctrine his conviction and sentence should be Remanded back to the trial court for a proper hearing and determination by that court.

(10E): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and by Article 1§3 and 14 of the South Carolina Constitution during the guilt-or-innocence phase of his trial.

(11E): Supporting facts: Trial counsels performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See Strickland v. Washington 466 U.S. 668 (1984). Counsels acts or omissions included but not limited to the following:

1. Trial counsel failed to object to and file pre-trial motion in limine impeachment evidence showing contradiction in Mrs. Turners statements at trial. As a result to counsels failures the applicants conviction and sentence is unreliable.

(2): Trial Counsels failure to investigate, develop and present all impeachment evidence Pertaining to Ms Turners statements made at trial creates prejudice to the applicant by impeachment of Ms. Turners statements. As a result to counsels failures the applicants conviction and sentence is unreliable.

(10E): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 13 and 14 of the South Carolina Constitution during the guilt-or-innocence phase of his trial.

(11E): Supporting facts: Trial Counsels performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See Strickland V Washington 466 U.S. 668 (1984). Counsels acts or omissions included but are not limited to the following:

(1): Trial counsel failed to properly argue and show that Mr. Mens was lawfully in possession of a handgun and that he was not engaging in unlawful activity while in possession of the handgun. (see State V. McCaskill 387 S.E2d 268)

(2): Trial Counsels failure to develop and present the facts showing that The applicant was lawfully possessing the handgun and was not engaged in unlawful activity and lawfully had a right to arm himself in self-defence. As a result to counsels failures the applicants conviction and sentence is unreliable.

(10 F): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1 § 3 and 14 of the South Carolina Constitution during the guilt-or-innocence phase of his trial.

(11 F): Supporting facts: Trial Counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington* 466 U.S. 668 (1984). Counsel's acts or omissions included but are not limited to the following:

(1): Trial counsel failed to ask the Court for a lesser included charge of assault and battery with high and aggravated nature. As a result to counsel's failures to ask the Court for a jury charge of assault and battery with high and aggravated nature makes the applicant's conviction and sentence unreliable.

(10 G): Applicant was denied the right to due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1 § 3 and 14 of the South Carolina Constitution - during the guilt or innocence phase of his trial.

(11C): Supporting facts: Trial Judge during the guilt or innocence phase failed below a reasonable standard that was prejudicial to the fairness of the applicants trial.

(11): Trial judge failed to instruct the Sheriff's Deputy's to keep there distance from the applicant during the trial. There were three Deputies hovering over the applicant through out the trial until the applicants Attorney objected to Deputy Melnick moving in right behind the defendant giving the inference that the jury would believe that Ms. Turner was in danger of the applicant. See Trial Transcript Page 141 and 142. Trial Court judges refusal to grant Mr. Mons a mistrial was an error of Law and violated the applicants substantial right to a fair trial. As a result the applicants conviction and sentence is unreliable.

(10H): Applicant was denied the right to due process of Law guaranteed by the sixth and Fourteenth Amendments to the United States Constitution and by article 183 and 14 of the South Carolina Constitution - during the guilt or innocence phase of his trial.

(11H): Supporting facts: Trial Judge during the guilt or innocence phase fail below a reasonable standard that was prejudicial to the fairness of the applicants trial.

(1): Trial Judges comment suggesting that he did not believe the applicants story prejudiced the applicant when he the Judge made the decision to refuse to allow the jury to be the triers of the facts in the requested Jury charge of Self-defence and accidental, (See Trial Transcript Page 187-189)

(2): Trial Judges failure to properly allow the jury to be the triers of the facts concerning the requested jury charge of self-defence and accident deprived the applicant of a fair trial making the applicants conviction and sentence unreliable.

(10I): Applicant was denied the right to effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments of the United States constitution and by Article 133 and 14 of the South Carolina Constitution during the guilt-or-innocence phase of his trial.

(11I): Supporting facts: Appellate Counsels performance during the direct appeal phase was both unreasonable and prejudicial. See *Strickland v. Washington* 466 U.S. 668 (1984). Counsels acts or omissions included but are not limited to the following:

(1): Appellate Counsels performance failed to accurately argue the trial Judges failure to allow the jury to be the ones to decide if the applicant was acting in self-defense when he accidentally shot Ms Turner.

(2): Appellates Counsels failure to investigate and present a proper argument on direct appeal makes the applicants conviction and sentence unreliable.

(10J): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States constitution and by Article 13 and 14 of the South Carolina Constitution during the guilt or innocence phase of his trial.

(11J): Supporting facts: Trial counsel refused to respond to applicants request to speak with him before trial was both unreasonable and prejudicial. See *Strickland v. Washington* 466 U.S. 668 (1984). Counsels acts or omissions included but are not limited to the following:

(1): Trial counsel only spoke with the applicant one time about the trial for just a brief moment. This meeting took place only days before the trial and only lasted a matter of minutes. This was in no way sufficient enough to prepare any kind of defense on behalf of the applicant.

(2): Applicant filed a motion to request that he be relieved of his trial Counsel on October 25, 2013 with the Aiken County Court clerks office. The applicant spoke with his trial Counsel about this motion. The applicants Counsel refused to except this motion and bring it to the trial courts attention and would not remove himself from or request that the court relieve him from representing the applicant. Trial Counsels failure to adequately descuse and prepair a defence before trial with the applicant deprived the applicant of effective counsel and as a result the applicants conviction and Sentence is unreliable.

(10K): The applicant believes he has additional claims for Post-Conviction relief but does not yet have collateral Counsel, access to the discovery Process or funds for expert services to investigate claims.

Mr. Frank Muns #358883
KCI B2-36
4344 Broad River Road
Columbia, SC 29210

ATTORNEY-CLIENT MATERIAL

Re: State v. Muns
June 28, 2016

Dear Mr. Muns:

I hope that you are doing well, and I know you have been eager to hear of any developments about your case. As we stated in our last letter, we were waiting for the opinion of the South Carolina Court of Appeals, but now we have received it. In case you have not seen the opinion, I have included a copy in this letter for you to read.

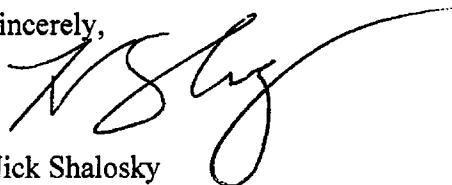
As you can see from the Court's opinion, the Court disagreed with the arguments we put forth and agreed with the trial judge.

First, the Court decided that one of the arguments we made was not preserved. That means that the Court found that your trial attorney did not make an argument at trial on one of the aspects of our self-defense argument, which prevents us from arguing it on appeal. Second, the Court decided that they did not believe that you were using the gun properly during the encounter in order to have a valid argument for claiming that the discharge of the weapon was an accident.

I know this news is disheartening and comes as a great disappointment, but please know that we will be asking for the Court to reconsider it's ruling, because we disagree with the Court's ruling. This process generally does not take very long (generally just a couple of weeks). If the Court does not agree to reconsider it's ruling, the current plan is to ask the South Carolina Supreme Court to step in and hear our arguments.

Please stay positive in light of this news. It is a setback, but we plan to push forward. Mr. Eberle, Bob Dudek, and I are discussing the best way to move forward, and as always, we will keep you updated with any new developments as your case progresses.

Sincerely,



Nick Shalosky

Liz Godard,
I would like to File a Motion For
Reheaf of councile. Is This the Right
address? Can this letter take care of it?
Please Respond. I'm Currently at A.C.D.C,
and my Public Defender will not respond.
please help

Thank you

Frank Muns

Frank Muns
A.C.D.C. D-245
435 wire Rd.
Aiken SC.

29801

FILED 25 October 2013

Liz Godard
C.C.C.P. & G.S.
Angel Miles am
Deputy Clerk

Cert. Copies to: Defendant

SOL

M. Routzong

PD. ~~A. Smith~~

D. Hayes

Judge Early

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

25 day of October 2013

Liz Godard
C.C.C.P. & G.A., Aiken County, S.C.
Angel Miles am
Deputy Clerk



Aiken County Sheriff's Office
General Sessions Packet

Initial ☐
Final ☒
Supplemental ☐

Deputy Name	Inv Wertz	Division/Shift	4	CID	Select
Case Number	13 - 018638				
Lot Number					

BLUE 6

Case Sworn		
Incident Report		
Supplemental		
Minor Offense		
Arrest Warrant		
Booking Sheet		
Search Warrant		
Crime Scene Sketch		

Defendant	Frank Muns	10 M. Kowlong	
Address	107 Beard Rd	DATE 10-2-13	
City	Beech Island	State	SC
Race	White	Sex	Male
Social Security Number	249 - 15 - 4193	Date of Birth	03 - 01 - 65

RULE 6
TO M. Rouzong
DATE 10-2-13

199 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip
200 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip
300 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip
100 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip
200 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip
300 Name			
Social Security Number	- -	Date of Birth	- -
Address			
City		State	Zip

EMS/PA	☐	Bloodhound Call Out	☐
Hospital	☐	Fire Run Report	☐
Autopsy	☐	Damage/Loss Estimate	☐
Coroner	☐	Tow Sheet	☐
Sanctuary/Kill	☐	Warrant Service Supp	☒

Linear Copy	☐	☐	☐
Evidence Receipts	☐	☐	☐
Evidence Analysis	☐	☐	☐
Lab Reports	☐	☐	☐
Property Recovered	☐	☐	☐
Photographs	☒	☐	☐
Video	☐	☐	☐
Audio	☐	☐	☐
Defendant	☒	☐	☐
Victim	☐	☐	☐
Witness	☐	☐	☐

2013A0210200353	Attempted Murder		
2013A0210200354	Poss of Firearm During V C		
UTTA		Date	- - -
UTTA		Date	- - -
		☐ Yes	☐ No
Videotape	☐	In Cash	☐ BA Room ☐
Preliminary	☐	Grand Jury	☐ Trial ☐
Disposition			

RECEIVED

MAY 03 2013

SOLICITOR

By JR

4cd's received
10-12-13

but that did not workout and they separated. She stated that she went back to Frank because she did not have any where else to go. She stated that they made an agreement that she and the kids could live in the trailer at 107 Beard Rd. and Frank would live in the camper / RV that is parked behind the trailer. Kim stated that they made that arraignment because they were not back in a physical relationship. She stated that even though they were not in a relationship Frank was very controlling and did not like for her to talk to any other men or go anywhere that he did not know about, but he was constantly running around with "some trashy meth-head slut". Kim stated that she was tired of being treated the way he had been treating her so she went out Friday night. She stated that she ended up meeting up with her current husband, who she's separated from, and they stayed in a motel in Augusta that night because she knew she could not have him come back to her place because of how Frank would react. She stated that she knew Frank was mad because he had been calling her cell phone all night so she waited until it was time for her to go to work before she returned home. She stated that as soon as she pulled up to her residence she observed that Frank had put up a cable across the driveway, so she went around the cable to get to her residence. She stated that she did not see Frank until after she got around the cable. She stated that he was sitting in his truck and he pulled up and tried to block her in once she got past the cable. Kim stated that Frank got out of his truck with a pistol in his hand and walked up to the driver side door of her vehicle. She stated that she had the window down at first but he began yelling at her as he approached so she began rolling it up. Kim stated that he told her that he was going to kill her and then he pointed the gun at her as he stood next to the car door and shot her. Kim stated that she knew she had been hit, but did not know how bad it was at that point, so she tried to put the car in drive to get away. Frank then hit the window with the gun trying to break it out. Kim stated that she was able to get the car turned around and away from Frank so she drove to River Bend Rd. where she called 911. Kim stated that she does not know what type of pistol or gun it was that Frank had. She stated that all she knows is that he loads his own bullets. I/O photographed the injuries to Kim and advised her that after she was out of the hospital and feeling ok she would need to come to the ACSO and provide a statement. Kim advised that she would do that and that she wished to pursue charges. On 04/07/13 I/O applied for and obtained warrants charging Frank Muns with Attempted Murder and Possession of a Firearm During the Commission of a Violent Crime.

On 04/28/13 I/O received information that Frank Muns had been located and arrested in Richmond County GA. I/O was informed that he was being held in the Richmond County Detention Center pending extradition.

AGENCY I. D
SC0020000

SUPPLEMENTARY REPORT

CASE NUMBER

13-018638

NCIC

ELECTRONICALLY FILED - 2013 Apr 02 1:23 PM - AIKEN - COMMON PLEAS - CS#008002020

☐ ORIGINAL REPORT	☒ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	Page 1 Of 2 Pages
☐ MODIFIES ORIGINAL	☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	
Incident Type	Attempted Murder		Date	04/06/13
Victim's Name	Turner, Kim	Subject Name	Muns, Frank	

I/O responded to 121 River Bend Rd., Beech Island SC, and met with Dep. Warchol who advised that the incident location is 107 Beard Rd., Beech Island, in Aiken County SC but the victim (Kim Turner) drove to River Bend Rd. to get help. I/O was advised that Mrs. Turner came home at approx 11:50 am from being out all night and when she pulled up to the drive way it was chained off. She stated she went around the chain and then she saw the subject (Frank Muns) who was in his green Ford Truck pull in and try to block her from going any further. She stated he got out of the truck with a pistol in his hand and approached her vehicle. He was yelling at her and told her he would kill her so she rolled her window up. As she was rolling the window up Muns shot her. She stated that she does not know if he shot before the window was up or after. He then began beating on the window with the gun busting a hole in it. She advised she believes he shot a second time thru the glass. Kim advised that she started blowing her horn trying to get someone to hear and call for help. She finally put the car in drive and was able to drive away where she drove to River Bend to call for help. Dep. Warchol advised that there were injuries to the victim's right arm and left side under her breast. He advised it appeared a small caliber round entered under her breast. He stated that the victim was stable and alert when she was transported to MCG. Forensic Inv Johnson responded to process the scene and the car.

I/O then responded to 107 Beard Rd., Beech Island SC, where the shooting was said to have occurred. I/O observed a cable to be blocking the driveway and just beyond the cable there were tire tracks in the dirt where a vehicle appeared to have spun the tires. Behind the residence there was an area found with shattered glass in the dirt, which is believed to have been from the victim's window. No bullets or shell casings were found. Inv Johnson responded to that location and photographed the scene.

I/O then responded to MCG Hospital and met with the victim, Kim Turner. I/O observed her to have multiple contusions on the inside of her right arm and what appeared to be a bullet wound below her left breast. I/O spoke with the doctor that was treating her and was advised that the bullet appeared to have penetrated the skin but was stopped by the rib cage. The Doctor advised that they were not going to remove the bullet because it would cause more damage removing it than necessary. The Doctor advised that it would not cause her any harm to leave the bullet where it is. They advised that she would be released from the hospital that day, but due to the fact that the subject is not in custody and is a threat to Mrs. Turner, they planned to keep her in the hospital over night. I/O asked Mrs. Turner what happened that triggered this incident. She stated that she and subject have been married 3 times and have 3 kids together. She stated that after the last time they divorced she remarried another man, which is how she has the last name Turner,

SUBJECT IDENTIFIED YES ☒ NO ☐	SUBJECT LOCATED YES ☒ NO ☐	☐ ACTIVE ☐ UNFOUNDED	☐ ADM CLOSED	☐ ARRESTED UNDER 18 ☒ ARRESTED 18 & OVER	☐ EX-CLEARED UNDER 18 ☐ EX-CLEARED 18 & OVFR
Reason For Exceptional Clearance ☐ Offender Death ☐ No Prosecution ☐ Extradition Denied ☐ Victim Declines Cooperation ☐ Juvenile No Custody					
REPORTING OFFICER Inv Brad Wertz	DATE 04/30/13	UNIT # 5015	APPROVING OFFICER [Signature]	DATE 5/02/13	UNIT # 2704
Follow up Investigation ☐ Yes ☐ No ☐ Officer					

Aiken County Sheriff's Office

706-294-4284

VOLUNTARY STATEMENT

Time 1:50p Date 4/6/13Page 1 of 1 pagesLocation where statement was obtained [REDACTED]Name THERESA MASONDate of Birth [REDACTED]Address [REDACTED]City [REDACTED]State [REDACTED]Zip [REDACTED]I completed the 12 grade in school, and (CAN) CANNOT read and write (Circle one)

TEM Kim TURNER + FRANK MULLINS / Kim pulled up at my house AS I WAS LEAVING + had BEEN SHOT. SHE TOLD US THAT FRANK had SHOT her, THAT SHE had GONE TO THEIR RESIDENCE ON BEARD RD TO CHECK ON KIDS AND GET READY FOR WORK. SHE SAID FRANK CAME TO THE CAR + CALLED HER A SLUT THEN TRIED TO BREAK WINDOWS THEN SHOT HER WITH A PISTOL. I CALLED 911 FOR AN AMBULANCE.

FRANK + Kim had BEEN ARGUING RECENTLY. HE IS A FRIENDLY PERSON BUT I THINK HE HAD JUST HAD ENOUGH. HE had MOVED FROM TRAILER TO BUS. WANTING her to MOVE, BUT LOVES his KIDS + Kim.

TEM

I have read or have had read to me this statement consisting of 1 page(s) This statement is true I have initialed all corrections and initialed the bottom of each page containing the statement I declare that the voluntary statement is made of my own free will, without promise or reward, without fear or threat of physical harm/punishment, without coercion, unlawful influence or unlawful inducement

This statement was completed at 1:40 a.m. on 6 day of April, 20 13Theresa Mason

Signature of person giving voluntary statement

[Signature]

Witness

Witness

I have been given a copy of this statement consisting of 1 pagesInitials of person making statement TEM

Aiken County Sheriff's Office

640-4231

VOLUNTARY STATEMENT

Time 1:30pm Date 4/6/13 Page 1 of 1 pages

Location where statement was obtained

Name JANICE BELGER

Date of Birth

Address

City

State

Zip

I completed the grade in school, and I CAN CANNOT read and write (Circle one)

13. LISA, DAWSON, CHRIS + MYSELF WAS GETTING READY TO LEAVE
COMING OUT DOOR WE SAW KIM Pull up IN HER CAR. WE WENT
OVER TO SAY HELLO, THAT IS WHEN SHE SAID FRANK HAD SHOT
HER. WE LOOKED AND DID SEE BLOOD ON HER SHIRT AND HER
RIGHT FOREARM. WE ASK WHAT HAPPENED, SHE SAID SHE
CAME BACK TO THE HOUSE TO SHOWER AND GO TO WORK.
HE HIT THE WINDOW WITH THE BUTT OF THE GUN AND THEN
SHOT AT HER. SHE LEFT HER HOUSE AND CAME OVER HERE

I have read or have had read to me this statement consisting of 1 page (s) This statement is true I have initialed all corrections and initialed the bottom of each page containing the statement I declare that the voluntary statement is made of my own free will, without promise or reward, without fear or threat of physical harm/punishment, without coercion, unlawful influence or unlawful inducement

This statement was completed at 1:40 a m./p.m. on 6 day of April, 20 13

M. B. Vanier Belger
Signature of person giving voluntary statement

Witness

Witness

I have been given a copy of this statement consisting of 7 pages

Initials of person making statement D.B.

ELECTRONICALLY FILED - 2018 Apr 02 11:23 PM - TAKEN - CONFIDENTIAL - CASE#2018CP0200/bs

18. ³⁸⁶ The Name and address of Each Attorney
who represented you

1. Trail

Michael Routzong
Public Defender For the Second Judicial circuit court
410 Barnwell Avenue N.W.
PO Box Drawer 2247
Aiken SC. 29803

Carmen V. Ganjehsani
Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC. 29201-3322
PO Box 11589
Columbia, SC. 29211-1589

Robert Dudek
Chief, Appellate Defender
Division of Appellate Defense
PO Box 11589
Columbia, SC. 29211-1589

Nicholas A. Shalosky, Esquire
Charleston School of Law
256 W. Poplar Street
Charleston, SC. 29403

Kevin R. Eberle
Charleston School of Law
414 King Street
Charleston, SC 29403

Feb 6, 2014 attempted
murder 15
Possession of Firearm
during commission of
Violent Crime 5

18-B

1. Trail

Michael Routzong

2. Appeal

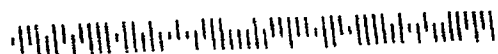
Carmen v. Ganjehsani

Robert Dudek

Nicholas A. Shalosky

Kevin R Eberle

KMuns # 358883



Broad River Rd.
Columbia, SC 29210

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MAR 28 2018

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Robert J. Harte
Clerk of Court

PO Box 583

Aiken, SC 29802-0583

ELECTRONICALLY FILED 2018 Apr 02 1:23 PM AIKEN COMMON PLEAS CASE#2018CP0200759

Red River Rd
SC 29210



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Robert J. Harte
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

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MAR 28 2018

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BALFOUR

Exhibit #



Aiken County Sheriff's Office

Investigative Summary Report

ELECTRONICALLY FILED 2013

Case Number	Defendant Name	Offense
13-018638	Frank Muns	Attempted Murder/ Poss Firearm

On April 6, 2013 at approx 11:45 am Deputy Warchol, of the Aiken County Sheriff's Office, responded to a shooting incident that occurred at 107 Beard Rd., Beech Island SC. Deputy Warchol met with the victim, Kim Turner, at 121 River Bend Dr., where she went to get help. Mrs. Turner stated that she went out Friday night and stayed with a friend and when she returned home she found Frank Muns, her ex-husband, sitting in his truck waiting on her. She stated that he pulled up behind her blocking her in and got out of the truck with a pistol in his hand. She stated that as he approached her driver side door he was yelling at her with the gun in his hand so she began to roll her window up. Mrs. Turner stated that once he was next to her door he told her that he was going to kill her and he pointed the gun at her and fired a shot thru the car window, striking her in the side. He then began to hit the window with the gun but she was able to get the car in gear and get away before he could get to her in the vehicle. Mrs. Turner was transported to MCG Hospital by EMS. Frank Muns fled the scene before Deputies arrived.

Inv. Wertz responded to MCG and met with Mrs. Turner and medical personnel. Mrs. Turner advised that she did not know what caliber gun Frank shot her with. The doctor advised that the bullet entered just below her left breast and was stopped by her rib cage. They advised that they were not going to remove the bullet because it was not causing her any danger and it would cause more damage to remove it.

On April 7, 2013 Inv. Wertz applied for and obtained warrants charging Frank Muns with Attempted Murder and Possession of a Firearm During the Commission of a Violent Crime.

On April 28, 2013 Frank Muns was located and arrested in Richmond County Ga. He was transported to the Richmond County Detention Center where he will await extradition to the Aiken County Detention Center.

Officer Signature	Inv Brad Wertz	Employee Number	5015	Date	5/1/13

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Frank Muns, #358883,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEA
FOR THE SECOND JUDICIAL CIRCUIT

Case No.: 2018-CP-0200759

**RETURN AND PARTIAL
MOTION TO DISMISS**

The State (Respondent), making its return to the application for Post-Conviction Relief (PCR) filed on April 2, 2018, would respectfully show this Court:

I.

Frank Muns (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the County of Aiken Clerk of Court. In October 2013, the Aiken County Grand Jury indicted Applicant for attempted murder (2013-GS-02-01657) and possession of a firearm during the commission of, or attempt to commit a violent crime (2013-GS-0201664). The charges arose from an incident occurring April 6, 2013. Applicant shot Victim, Kim Turner, in the chest as she was sitting in the driver's seat of her car. Applicant admittedly was unlawfully in possession of a loaded revolver. He struck the driver side window with the barrel of the gun several times before ultimately discharging the firearm directly at Victim. Applicant was unable to be found or arrested until April 28, 2013, twenty-two days after the shooting. He was located at a motel in Augusta, Georgia. (Tr. 72, line 11-p.120, line 3; Tr. 137, line 19- 159, line 9).

Applicant was represented by Assistant Public Defender Michael Routzong, Esquire Assistant Solicitors Virginia Sheftall and Jeffrey "Jay" Slocum, Jr., prosecuted the case. On

February 4, 2014, Applicant proceeded to trial before the Honorable Doyet Early III, and was found guilty as indicted. Judge Early sentenced Applicant to fifteen years' imprisonment for attempted murder and five years' imprisonment for possession of a firearm, to run concurrently.

Applicant filed a timely notice of appeal. Kevin R. Eberle, Esquire, and Nicholas Shalosky, Esquire, represented Applicant on appeal. On appeal, Applicant argued the trial court erred in refusing to issue a self-defense charge, the trial court erred in refusing to issue an accident charge, and the weapons charge should be retried because his attempted murder conviction was invalid. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed June 22, 2016. Applicant filed a petition for rehearing on July 7, 2016, which the Court of Appeals denied on August 22, 2016. Applicant filed a Petition for Writ of Certiorari on September 21, 2016. The State filed its Return to Petition for Writ of Certiorari on October 21, 2016. The Supreme Court of South Carolina denied the petition for writ of certiorari on May 30, 2017. The remittitur was issued June 12, 2017.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel failed to file a motion to have a pre-trial hearing to determine if applicant was entitled to immunity under subsections 16-11-440".
 - b. "Trial Counsel failed to investigate and present all [of] the facts in a pretrial hearing that could have established that Applicant was immune from prosecution under the Castle Doctrine by the preponderance of the evidence".
 - c. "Trial Counsel failed to argue and present in a pre-trial hearing that the Applicant was not the cause of [Victim's] Actions".
 - d. "Trial Counsel failed to argue and present in a pretrial hearing that Applicant did not need create the need for force and was rightfully defending himself from the dangerous action he encountered from [Victim]".
 - e. "Trial Counsel failed to move the court to determine in a pre-trial hearing whether or not Applicant obligated to remove himself from the confrontation".

- f. "Trial Counsel failed to ask the court for a pre-trial hearing to determine if Applicant could have removed himself from the dangerous situation".
 - g. "Trial Counsel failed to object to and file pre-trial motion in limine impeachment evidence showing contradiction in [Victim's] statements at trial".
 - h. "Trial Counsel failed to properly argue and show that [Applicant] was in lawful possession of the hand gun and was not engaged in unlawful activity and had the right to self-defense".
 - i. "Trial Counsel failed to ask the court for a lesser included charge of assault and battery with high and aggravated nature".
 - j. "Trial Counsel refused to respond to Applicant's request to speak with him before trial was both unreasonable and prejudicial".
 - k. "Trial Counsel refused to accept Applicants motion to request that he be relieved of his trial counsel (filed on October 25, 2013 with the Aiken County Clerk of Court)."
2. Denial of Due Process of Law
3. Trial Court Errors
- a. "Trial Judge failed to instruct the Sherriff's deputies to keep their distance from Applicant during the trial.
 - i. "There were three deputies hovering over [Applicant] throughout the trial until Counsel objected to Deputy Melnick moving in right behind [Applicant], giving the inference that the jury would believe that [Victim] was in danger of [Applicant]"
 - b. "Trial Judge's refusal to grant Applicant a mistrial was an error of Law and violated Applicant's substantial right to a fair trial".
 - c. "Trial Judge's comment suggesting that he did not believe Applicant's story prejudiced Applicant".
 - d. "Trial judge made the decision refused to allow jury to be the triers of fact in the requested jury charge of self-defense and accidental".
4. Ineffective Assistance of Appellate Counsel
- a. Failure to accurately argue trial court error in self-defense determination
 - b. "Failure to investigate and present a proper argument on direct appeal makes Applicant's conviction and sentence unreliable".

Attached to this Return and incorporated by reference are the records of the Aiken County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, direct appeal records and the application.

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, Applicant bears the burden of proving the allegation presented in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The court uses a two-pronged test set forth in *Strickland* when evaluating allegations of ineffective assistance of counsel. *Strickland*, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 116, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures counsel's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland* 466 U.S. at 690). The proper measure of performance is whether counsel provided Applicant representation within the range of competency required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to qualify for relief to be granted by the court. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient

performance must have also prejudiced the applicant such that “there is a reasonable probability that but for, counsel’s unprofessional errors, the result of the proceeding would have been different”. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the *Strickland* test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits Applicant’s allegations of ineffective assistance of appellate counsel are meritless. A defendant is entitled to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel’s duty of professional responsibility extends to choosing among the potential issues according to their merits. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the decision to exclude certain issues in an appeal is strategic and based on reasonable professional judgement, the failure to appeal all trial errors is not sufficient grounds for ineffective assistance of counsel.

Here, Applicant must show that Appellate Counsel’s performance was deficient and that he was prejudiced by that deficiency, under the same standards as set forth in *Strickland* for all ineffective assistance of counsel claims. *Smith v. Robinson*, 528 U.S. 259, 120 S.Ct. 746 (2000); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).; *Gilchrest v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003).

When a claim of ineffective assistance of counsel is based upon Counsel's failure to raise viable issues, the court must examine the record to determine whether there was a failure to present significant and obvious issues on an appeal. *Davila v. Davis*, 137 S.Ct. 2058, 2067 (2017). For judges to undermine or to "impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Jones v. Barnes*, 463 U.S. 745, 77 L.Ed.2d 987 (1983); *Anders v. State*, 386 U.S. 738, 87 S.Ct. 2094 (1967). It is specifically necessary for counsel to use their professional judgement to winnow out the weaker arguments on appeal under the constraints of a limited time for oral arguments and to ensure that good arguments are not buried amongst much weaker ones, or ones of no merit at all. *Id.* at 746.

Respondent submits that Applicant cannot satisfy either requirement of the *Strickland* test regarding either trial or appellate counsel. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant claims that he was denied his constitutional right to due process during his trial based on the trial judge's failure to grant his motion for a mistrial. This claim should have been raised as a direct appeal issue and is improper for post-conviction relief, as it is procedurally barred in a post-conviction relief proceeding by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). An application for post-conviction relief cannot assert any issues that could have been raised at trial or on direct appeal. *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's failure

to raise this issues in one of those proper forums has waived this allegation as a ground for relief. Therefore the Court should summarily dismiss this allegation.

VI.

Respondent also moves to summarily dismiss Applicant's allegations of trial court error, as they should have been raised on direct appeal and are improper for post-conviction relief. Direct appeal issues are procedurally barred in a post-conviction relief proceeding by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). An application for post-conviction relief cannot assert any issues that could have been raised at trial or on direct appeal. *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's failure to raise this issues in one of those proper forums has waived this allegation as a ground for relief. Therefore the Court should summarily dismiss this allegation.

VII.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCPP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCPP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCPP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VIII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[signature page to follow]

IX.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

Respectfully submitted,

ALAN WILSON
Attorney General

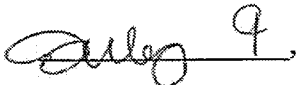
W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2018-CP-02-0200759
	)	
FRANK MUNS, #358883	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Frank Muns, 358883
 B2-0062-B
 Kirkland Reception and Evaluation Center
 4334 Broad River Road
 Columbia, South Carolina 29210

DATED this 9TH day of July, 2018.



Carmen A. Nord
 Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Frank Muns,

CA No.: 2018-CP-02-00759

Plaintiff,

vs.

**AMENDMENT TO PCR
APPLICATION**

State.,

Defendant.

The Applicant, Frank Muns amends his response to items 10 and 11 to add the following

10(L) Ineffective assistance of counsel.

11(L). The trial Court gave inferred malice instructions to Muns' jury. (Tr. 229-231)

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), our Supreme Court required that inferred malice instructions include a permissive inference instruction that "[I]f facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court also cautioned the bench hereafter only slight deviations from this charge will be tolerated." Elmore, 279 S.C. at 421 S.E.2d at 784.

The Elmore permissive inference instruction was not given by the trial court during Muns' trial, and this failure to give the permissive inference charge was reversible error. (Tr. pp. 915-917). Muns' counsel did not object to the trial court's failure to give the permissive inference instruction. (Tr. pp. 925-926). Muns' counsel's failure to object to the trial court's

CONIC

9.3

EA3 - CA

failure to give the Elmore permissive inference instruction rendered Muns' counsel performance deficient. This deficiency in the performance of Johnson's counsel prejudiced Muns in that the failure to include the permissive inference language in the inferred or implied malice instructions contributed to the verdict based on all the evidence submitted to the jury. See, Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016) (denial of PCR application reversed on findings that failure to object to Elmore error deficient performance and that erroneous instruction contributed to the verdict).

10(M). Ineffective assistance of counsel

11(M) At trial, the State proceeded with two Indictments. One of the Indictments charged Muns with attempted murder the other Indictment charged Muns with possession of a firearm during an attempt to commit a violent crime. South Carolina's attempted murder statute states that "[A] person who, with intent to kill, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29.

The language of the statute makes clear that a conviction of attempted murder requires the State to prove beyond a reasonable doubt that the defendant had the specific intent to kill the victim. The trial judge gave an intent instruction, but that instruction did not include a requirement that the jury find beyond a reasonable doubt that Muns specifically intended to kill the victim. (Tr. 228-229)

The trial judge committed reversible error when he failed to give the specific intent to kill instruction at Muns' trial. Muns' trial lawyer failed to object to the absence of the specific intent to kill instruction in the intent instruction. (Tr. 235) Muns' trial counsel's performance was deficient in his failure to make this objection. Muns suffered prejudice from this deficiency.

performance in that the absence of the specific intent to kill instruction contributed to the verdict based on all the evidence submitted to the jury.

Respectfully Submitted,

AIKEN & HIGHTOWER, P.A.

BY: 

Arthur K. Aiken SC Bar #12983

2231 Devine Street, Suite 201

Columbia, SC 29205

Tel: (803) 799-5205

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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
January 21, 2019

**STATE OF SOUTH CAROLINA
COUNTY OF AIKEN**

Frank Muns #358883

Applicant,

vs.

State of South Carolina

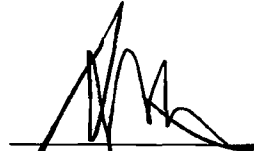
Respondent.

**COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT**

Case Number: 2018-CP-02-01980

CERTIFICATE OF SERVICE

I certify that on January 22, 2019 I served the Applicant's Amendment to PGE Application in this case on the government by delivering a copy of the Amendment to the Office of the Attorney General by mail addressed to Assistant Attorney General Samuel L. Key, PO Box 11549, Columbia, SC 29211.



 Arthur K. Aiken
 Aiken & Hightower, PA
 2231 Devine Street, Suite 201
 Columbia, SC 29205
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 art@aikenandhightower.com

Columbia, South Carolina
January 22, 2019

State of South Carolina)	In the Court of Common Pleas
)	Second Judicial Circuit
County of Aiken)	2018-CP-02-00759

Frank Muns,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

January 22, 2020
Aiken County Courthouse
Aiken, South Carolina

B E F O R E:

The Honorable Courtney Clyburn Pope, Judge

A P P E A R A N C E S:

Arthur K. Aiken, Esquire
Attorney for Applicant

Janell H. Gregory, Esquire
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit
Realtime Verbatim Reporter - Master

I N D E X

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Michael Routzong, Esq.,	
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>

(	No exhibits were marked for identification		
	or entered into evidence during proceeding.)		

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:48 a.m.)

THE COURT: All right. I do not have a packet ---

MS. GREGORY: Oh. You're right.

THE COURT: --- for this morning.

MS. GREGORY: Because I do not give it to you.

THE COURT: That's okay.

(Off the record briefly.)

MS. GREGORY: And, Your Honor, if there's not an amended application in there, I'm not sure -- I have a new legal assistant. I'm not sure it's made its way in there. But if you don't have it, I have a copy here.

(Off the record briefly.)

THE COURT: I do not see a -- I don't -- I don't have the amended return.

MS. GREGORY: All right.

(Off the record briefly.)

THE COURT: Thank you.

MS. GREGORY: Thank you.

THE COURT: All right. So we have the PCR of Mr. Muns. Is the state -- is the AG's office ready to proceed?

MS. GREGORY: Yes, Your Honor.

THE COURT: All right. And, Mr. Aiken, you are ready to proceed as well?

MR. AIKEN: That's correct, Your Honor.

1 THE COURT: All right. Very good.

2 MS. GREGORY: Your Honor, before you is Frank Muns.
3 This is Case No. 2018-CP-02-0759. In October of 2013, Mr.
4 Muns was indicted by the Aiken County Grand Jury for
5 amended murder and possession of a firearm during the
6 commission of a violence crime. On February 4th, 2014, Mr.
7 Muns proceed to a jury trial before Judge Early. On
8 February 5th, 2014, Mr. Muns was convicted as indicted by
9 the jury. Judge Early sentenced Mr. Muns to 15 years for
10 attempted murder and a concurrent 5 years for reckless --
11 for possession of a weapon during the commission of a
12 violent crime, I believe.

13 Mr. Muns filed a timely notice of appeal. In his
14 appeal Mr. Mr. Muns argued the trial court erred in
15 refusing to issue a self-defense charge, refusing to issue
16 an accident charge, and the weapon charge should be retried
17 because his attempted murder conviction was invalid.

18 The South Carolina Court of Appeals affirmed Mr.
19 Muns's conviction in an unpublished opinion on June 22nd,
20 2016. Applicant was then filed -- then filed a petition
21 for rehearing, which was denied on August 22nd, 2016. The
22 South Carolina Supreme Court denied cert on May 30th, 2017,
23 and the remittitur was issued June 12th of 2017.

24 Applicant did file a timely application for PCR on
25 April 2nd, 2018, alleging -- Your Honor, there are several

1 allegations here. I will go through them: failure to file
2 a motion to have a pretrial hearing to determine if
3 applicant was entitled to immunity; failure to investigate
4 and present all of the facts in a pretrial hearing that
5 could've established applicant -- applicant was immune from
6 prosecution under the castle doctrine by a preponderance of
7 the evidence; failed to argue and present in pretrial
8 hearing that applicant did not create the need for force
9 and was rightfully defending himself from the dangerous
10 actions he encountered from the victim; failed to move the
11 Court to determine in a pretrial hearing whether or not
12 applicant obligated -- was obligated to remove himself from
13 the confrontation; failed to ask for a pretrial hearing to
14 determine if applicant could have removed himself from the
15 dangerous situation; failed to object and file a pretrial
16 motion in limine to impeachment evidence, showing
17 contradiction in victim's statements at trial; failed to
18 properly argue and show applicant was in lawful possession
19 of the handgun and was not engaged in unlawful activity and
20 had the right to self-defense; failed to ask the Court for
21 a lesser-included charge of assault and battery of a high
22 and aggravated nature; refused to respond to applicant's
23 request to speak with him before trial was both
24 unreasonable and prejudicial; refused to accept applicant's
25 motion to request that he be relieved of his trial counsel.

1 It is my understanding that applicant is waiving the
2 appellate=counsel allegations.

3 MR. AIKEN: That's correct, Your Honor.

4 THE COURT: Is that -- and that's the remaining of
5 these?

6 MS. GREGORY: Yes, Your Honor.

7 THE COURT: Okay.

8 MS. GREGORY: And then, obviously, trial-court error:
9 We did file a return and motion to dismiss regarding trial-
10 court error, as that's not a proper -- proper allegation
11 for postconviction relief and he did have a direct appeal.

12 Applicant did file an amended application, which Your
13 Honor has a copy of. And in that application, he has
14 alleged ineffective assistance of counsel for failure to
15 object to the trial court's failure to get the permissive-
16 inference instruction and failure to object to the absence
17 of the specific-intent-to-kill instruction.

18 Applicant is present today and represented by Mr.
19 Aiken. And I believe they're ready to go forward today.

20 THE COURT: All right.

21 MR. AIKEN: We are, Your Honor.

22 THE COURT: All right. Very well, Mr. Aiken.

23 MR. AIKEN: Your Honor, the applicant calls Frank
24 Muns.

25 THE COURT: All right.

1 (Whereupon, the witness came forward.)

2 FRANK MUNS, having been first duly sworn,
3 testified as follows:

4 DEPUTY CLERK OF COURT: Please take a seat in the
5 witness box and state your full name for the Court.

6 THE WITNESS: Frank Muns.

7 DIRECT EXAMINATION

8 BY MR. AIKEN:

9 Q Good morning, Mr. Muns.

10 A Good morning.

11 Q How old are you, Mr. Muns?

12 A 54.

13 Q Could you sit -- sit up a little closer to the mic so
14 everybody -- we have to make sure everybody can hear you.

15 A (Complied.)

16 Q Okay. You got any children?

17 A Yes, sir.

18 Q Okay. Now, you're -- you're the applicant in this
19 postconviction-relief case; is that correct?

20 A Yes, sir.

21 Q Okay. Now, you were convicted of attempted murder and
22 possession of a firearm during the commission of a violent
23 crime, right?

24 A Yes, sir.

25 Q Okay. And you received a 15-year sentence on

1 attempted murder ---

2 A Yes, sir.

3 Q --- right?

4 And then, you received a 5-year sentence on the
5 handgun-possession charge, right?

6 A Yes, sir.

7 Q And those were concurrent?

8 Q Yes, sir?

9 Q So in effect, you're serving a 15-year sentence?

10 A Yes, sir.

11 Q Okay. Now, you understand, do you not, that if you
12 win this PCR, your convictions and sentences get unwound
13 and then you go back to being charged with attempted murder
14 and -- and possession of a handgun during the commission of
15 a violent crime?

16 A Yes, sir.

17 Q Okay. And you understand that those two charges carry
18 sentencing exposure of a total of 35 years?

19 A Yes, sir.

20 Q Okay. So I can't tell you what the chances of this
21 are. But I just know that it's a situation where matters
22 could get worse. You understand that?

23 A Yes, sir.

24 Q Okay. And you still want to go forward with your PCR?

25 A Yes, sir.

1 Q All right. If you want to take that risk, I'll take
2 it with you.

3 A Thank you.

4 Q Now, you went to trial on February 4th and 5th of
5 2014; is that correct?

6 A Yes, sir.

7 Q Okay. Now, at any time prior to the commencement of
8 your trial, did anybody on your behalf file a motion for
9 immunity under the castle doctrine?

10 A No, sir.

11 Q Okay. Now, as I understand the government's
12 allegations against you in the criminal case, the
13 government alleged that you attempted to murder a lady by
14 shooting her; is that correct?

15 A Yes, sir.

16 Q All right. And they also alleged that during the
17 commission of that alleged crime, you allegedly had
18 possession of a firearm?

19 A Yes, sir.

20 Q Okay. Now, this all happened on April the 6th of
21 2013; is that correct?

22 A Yes, sir.

23 Q Now, tell me where it happened.

24 A It was on 107 Beard Road ---

25 Q And ---

1 A --- at my -- my residence.

2 Q It was your residence?

3 A Yes, sir.

4 Q Okay. And tell -- tell me what happened that day,
5 starting with your first encounter with Ms. Turner. Ms.
6 Turner is the alleged victim, right?

7 A Yes, sir.

8 Q Okay. Tell -- tell me what happened in your first
9 encounter that day with Ms. Turner.

10 A I was leaving to go to the store before I went to
11 work. And when I was pulling out of my driveway, she was
12 coming in. And I have a cable, a steel cable, across my
13 driveway so nobody can enter unless I -- I was letting the
14 cable down.

15 And when she was pulling in, I seen her coming down
16 the road, so I backed my truck up to let her in. But she
17 went on past. She went out past to a -- the vacant lot
18 beside my residence.

19 And when she went on past, she -- she swerved around
20 some barriers I had up so nobody to drive on the empty lot.
21 And she come in. And when I backed up, I pulled into the
22 empty lot. And she come and -- around facing my truck.

23 Q All right.

24 A And she was -- she was facing my truck. I got out of
25 my truck and told her to stop, because there was a septic

1 tank to the left and a water meter that I didn't want her
2 to run over. That's why I had the lot blocked off and the
3 cable up, so nobody could just drive in and drive over the
4 septic tank.

5 But she was -- she was forcing -- trying to force her
6 way in. And I got out of the truck and told her to stop,
7 stop, but she wouldn't stop. And the way my truck was and
8 the -- the angle her car was at, she was trying -- she
9 wouldn't stop.

10 And when she went to back up, the front end of her car
11 was forcing me back to the front end of my truck. And I
12 had -- I had my hand on her car, and my back was to --
13 against my truck. And she kept trying to maneuver to get
14 around the front of my truck to drive around. She wouldn't
15 stop.

16 So once she backed up and forced me -- forced --
17 pinned me against my truck, I took a -- I had my revolver
18 and I tried to break the window of the car to turn the car
19 off. And the third time I hit the window, the gun went
20 off.

21 Q All right. Let me ask you this: In that encounter
22 with Ms. Turner, did you bring about that difficulty? Did
23 you provoke that encounter?

24 A No, sir.

25 Q Now, the lot you were talking about, the vacant lot,

1 is that your lot?

2 A Yes, sir.

3 Q It belongs to you?

4 A No. It's -- it belongs to my mother.

5 Q Okay.

6 A All the property belongs to my mother. But I -- you
7 know, I was staying there.

8 Q But you're -- you were staying there?

9 A Yes, sir.

10 Q Okay. Now, when you were pinned up against your truck
11 and she was moving the car, were you -- did you consider
12 yourself to be in imminent danger?

13 A Yes, sir.

14 Q And were you actually in danger?

15 A Yes, sir.

16 Q Now, the force that you used, was that reasonable
17 force?

18 A I think so. Yes, sir. But I didn't -- I didn't shoot
19 her. I -- I was trying to break the glass of the window.
20 I never -- I never intended to shoot her. I was trying to
21 break the window and the gun went off.

22 Q Now -- now, you have an allegation in your original
23 application about statements of Ms. Turner. Tell me --
24 tell me about those.

25 A Her -- the statements that she made, she -- I think it

1 was the different statements, they always -- you know, they
2 was never the same. She was saying one thing one time and
3 something different the next time.

4 Q Did you ---

5 A And then ---

6 Q --- make ---

7 A --- she said something in trial that was totally --
8 totally different to that.

9 Q Did you make that observation before your trial?

10 A No, sir.

11 Q You didn't -- you didn't realize it until later when
12 you went over everything?

13 A Yes, sir.

14 Q You got all the materials?

15 A Yes, sir.

16 Q Did -- did your lawyer, Mr. Routzong, focus in on
17 those inconsistencies?

18 A No, sir.

19 Q Was that even part of what was presented at trial?

20 A No, sir.

21 Q Now, you also say that your lawyer failed to properly
22 argue and show that you were lawfully in possession of a
23 handgun. Tell me about that.

24 A The -- the record I had was they saying there's a
25 misdemeanor.

1 Q Okay. What -- what was the charge?

2 A Theft by taking.

3 Q Theft by taking?

4 A Yes, sir.

5 Q That wasn't a South Carolina ---

6 A No. It ---

7 Q --- case ---

8 A --- was in ---

9 Q --- was it?

10 A --- Georgia.

11 Q Georgia case?

12 A Yes, sir.

13 Q So it was a misdemeanor?

14 A Yes, sir.

15 Q So you were not disabled from possessing a firearm
16 under federal law?

17 A Yes, sir.

18 Q Because you were not a felon?

19 A Yes, sir.

20 Q And federal law is felon in possession. I know it's a
21 little more complicated than that, but you at least have to
22 have a felony?

23 A Yes, sir.

24 Q Okay. And your -- your testimony is you had a Georgia
25 conviction for theft by taking, which was a misdemeanor?

1 A Yes, sir.

2 Q Did your lawyer argue that at the trial?

3 A No, sir.

4 Q That your prior crime was not a felony and that you
5 were not disabled under federal law from possessing a
6 firearm?

7 A The state brought it up, but he never said anything
8 about it.

9 Q Now, was there any time prior to your trial when you
10 requested to speak with your lawyer and he wouldn't speak
11 with you?

12 A Yes, sir.

13 Q Tell me -- tell me about that.

14 A Well, I tried to call him, you know, a couple months
15 before trial even came up. And he -- he would never come.

16 Q Never come to the jail?

17 A I never talked to him on the phone, or he never came
18 to the jail.

19 Q Were ---

20 A The only ---

21 Q --- you in ---

22 A --- time he came to the jail was -- I think it was
23 February 1st, a Saturday, and said we was going to court
24 that Monday.

25 Q All right. Were you in jail pretrial?

1 A Yes, sir.

2 Q So you were in jail from the time of your arrest and
3 you stayed in jail?

4 A Yes, sir.

5 Q Now, how many times did your lawyer talk to you about
6 a trial?

7 A Before trial?

8 Q Yes.

9 A None.

10 Q No -- no -- no discussions at all?

11 A He came the Saturday before court and said we was
12 going to court, and that was it.

13 Q So that would've been the Saturday before the week of
14 February 4th and 5th?

15 A I think it was February 1st or 2nd. I'm not sure. I
16 know he came on a Saturday and said we was going to court
17 Monday.

18 Q Now, did you ever file a motion for your lawyer to be
19 relieved?

20 A Yes, sir.

21 Q And that filing was in -- in October 25th of 2013?

22 A Yes, sir.

23 Q Was that motion ever heard?

24 A No, sir.

25 Q Did you ever discuss that motion question with your

1 lawyer?

2 A He said not to -- he said it was -- it had -- I
3 couldn't choose my own lawyer.

4 Q Okay.

5 A And that was all that was said about it.

6 Q So there was never a hearing on that motion?

7 A No, sir.

8 Q Tell me why you wanted him to be relieved.

9 A He didn't know anything about the case. He wasn't
10 helping me.

11 Q And it -- was there any other reason why you thought
12 he should be relieved?

13 A I didn't -- he didn't -- he -- I didn't think he was
14 doing his job. I -- he would -- you know, he never came to
15 talk to me or anything or let me know what was happening or
16 ---

17 Q Did -- did he correspond with you? Did he send you
18 letters or anything?

19 A No, sir.

20 Q How many times did you meet him before the trial?

21 A Before trial?

22 Q Before ---

23 A None.

24 Q --- trial.

25 A Once. The Saturday he came and told me I was going to

1 trial.

2 Q That was the one and only time you've ever met with
3 him?

4 A At my -- I had a -- I had a bond hearing. And he was
5 there then. But other than that, I've never seen him
6 before trial.

7 Q Is there anything else you'd like to add?

8 A I'd just -- just like to say that this is a accident.
9 I never tried to shoot anybody. I was trying to break the
10 window with the gun and it -- it went off.

11 MR. AIKEN: Your Honor, I have other grounds but they
12 are -- they are supported exclusively by the record.

13 THE COURT: Okay.

14 MR. AIKEN: And I see no reason to go into those with
15 Mr. Muns. I'll argue those at the close.

16 THE COURT: Very good.

17 MR. AIKEN: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 Cross-examination?

20 MR. AIKEN: Thank you, Mr. Muns.

21 THE WITNESS: Thank you.

22 MS. GREGORY: Thank you, Your Honor.

23 (Off the record briefly.)

24

25

1 CROSS-EXAMINATION

2 BY MS. GREGORY:

3 Q Mr. Muns, Mr. Muns you admit that you were a convicted
4 felon at trial?

5 A Yes.

6 Q Yeah. Okay. And you had a loaded gun going to the
7 store? You said you were going to the store that morning?

8 A It -- it was in my truck.

9 Q It was in your truck and you were just going to the
10 store?

11 A Yes, sir.

12 Q So you ---

13 A Yes, ma'am.

14 Q --- typically carry around a loaded weapon with you?

15 A Yes, ma'am.

16 Q Okay. And you're maintaining that you accidentally
17 shot the victim; is that ---

18 A Yes, ma'am.

19 Q --- accurate?

20 And you were holding the gun to break the window?

21 A Yes, ma'am.

22 Q Okay. How were you holding the gun?

23 A the gun was like this. And I had my hand over, and I
24 was hitting the window with the end of it. And the -- and
25 only thing I know, the hammer part -- and when I hit the

1 window, it compressed that so much that it made it go off.

2 Q Okay. So this -- this is a revolver; is that right?

3 A Yes, ma'am.

4 Q Okay. And the gun went off once or twice?

5 A Once.

6 Q Once. Okay.

7 And it hit the victim in the chest; it is accurate?

8 A It says below her left breast.

9 Q Okay.

10 A But if somebody would look at the evidence and her
11 statement, she says I'm standing there beside the car,
12 pointing the gun at her.

13 Q Uh-huh.

14 A But if you look at the hole in the window and where
15 she is shot, it's below the doorjamb. There's no way I
16 could be standing beside the car, pointing a gun at her.
17 And she gets shot below her left breast, when all this is
18 below the door panel and the bullet hole was way up here.

19 Q So you think the trajectory is off?

20 A Right.

21 Q Okay.

22 A Nobody's ever looked at

23 Q Well, how ---

24 A --- ballistics or anything.

25 Q How did the trigger get pulled, if you're holding the

1 gun like a hammer?

2 A When I -- the hammer -- the gun had a hammer on it.

3 Q Uh-huh.

4 A And when I hit the barrel, it pushes the hammer down
5 and -- to the bullet.

6 Q Okay.

7 A You know, when you cock a pistol, the -- the hammer on
8 it ---

9 Q Uh-huh.

10 A --- to release it, it has the bullet. And when I had
11 my fingers on it and I hit the barrel, it ---

12 Q Uh-huh.

13 A --- pressed it down enough to make the gun go off.

14 Q Okay. And what were some of the examples of the
15 inconsistencies that Mr. Routzong did not bring up?

16 A No ballistics ---

17 Q No. The inconsistencies in the victim's statement?
18 You're saying he didn't bring up the inconsistencies in the
19 victim's statements.

20 A The way she -- she said in trial, it was different
21 from what her police statements were.

22 Q The -- how the event unfolded? Is that what you're
23 talking about?

24 A Yes, ma'am.

25 Q Okay.

1 A Yes, ma'am.

2 Q Okay. And you're saying that you never saw him prior
3 to the trial?

4 A Saturday -- we had a bond hearing, and I saw him then;
5 and then, the Saturday before trial. But I only saw him a
6 second during the -- during the bond hearing.

7 Q All right. You only saw him a second during the bond
8 hearing and the Saturday before trial, and no other
9 communication with him whatsoever, not over ---

10 A Not but ---

11 Q --- the phone ---

12 A Not before ---

13 Q --- not with ---

14 A --- trial.

15 Q --- letters -- okay.

16 And you filed your motion to relieve him. The Court
17 talked to you quite a few times prior to -- during your
18 trial. They discussed a plea offer with you. There was a
19 lot of times that the Court reached out to you and spoke to
20 you. Did you ever explain to them that you didn't want Mr.
21 Routzong representing you?

22 A He -- no. He said it was -- the -- the motion was no
23 good. I didn't ---

24 Q Who said ---

25 A --- know if ---

1 Q --- that? Who said that?

2 A Routzong.

3 Q Okay. Mr. Routzong.

4 A I don't know any different, so . . .

5 Q But you didn't tell the Court that you weren't happy
6 with your representation?

7 A No, sir.

8 Q Okay.

9 A No, ma'am. But the Court received a copy of the -- so
10 I thought they had went over it. The copy I got back said
11 he got a copy and the Court got a copy ---

12 Q Uh-huh.

13 A -- and the prosecution got a copy.

14 Q Okay.

15 A So I ---

16 Q And you proceeded through your trial with him without
17 saying anything that you did not want him as your attorney.
18 Okay.

19 MS. GREGORY: No further questions, Your Honor.

20 THE COURT: Thank you.

21 Any redirect?

22 MR. AIKEN: No redirect, Your Honor.

23 THE COURT: All right. This witness may be excused.

24 Thank you, Mr. Muns.

25 THE WITNESS: Thank you.

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 25

1 (Whereupon, the witness exited the witness stand.)

2 (Off the record briefly.)

3 THE COURT: All right. Mr. Aiken, do you have any
4 other witnesses to present?

5 MR. AIKEN: I'm sorry, Your Honor. No, ma'am.

6 THE COURT: Okay.

7 MR. AIKEN: And we rest.

8 THE COURT: All right. Very good.

9 Does the state have any witnesses?

10 MS. GREGORY: Yes, Your Honor. The state would call
11 Mr. Routzong.

12 THE COURT: Okay.

13 (Whereupon, the witness came forward.)

14 MICHAEL ROUTZONG, having been first duly sworn,
15 testified as follows:

16 DEPUTY CLERK OF COURT: Please take a seat in the
17 witness box and state your full name for the Court.

18 THE WITNESS: My name is Michael Routzong. It's
19 spelled R-o-u-t-z-o-n-g.

20 DIRECT EXAMINATION

21 BY MS. GREGORY:

22 Q Good morning, Mr. Routzong.

23 A Good morning.

24 Q How long have you been practicing law?

25 A Since '05.

1 Q And how much of that has been in criminal law?

2 A All.

3 Q All of it?

4 A (No audible response.)

5 Q Okay. And how did you come to represent Mr. Muns?

6 A I was appointed.

7 Q You were the P.D.'s office at that time?

8 A That's correct.

9 Q Okay. And how long did you represent him prior to
10 this trial?

11 A I'm sorry. I don't know the answer -- I'm sorry. I
12 don't know ---

13 Q That's all right.

14 A --- the answer to that right offhand. It would have
15 been several months.

16 Q Okay. And you were his only attorney that you're
17 aware of?

18 A That I'm aware of. Yes, ma'am.

19 Q Okay. Mr. Muns has alleged you refused to accept his
20 motion to request that he be relieved as counsel. He
21 actually testified you told him the motion was no good. Do
22 you recall him filing a motion to have you relieved prior
23 to trial?

24 A Well, he wouldn't have been able to file it. That
25 would be hybrid representation. I would've had to file it

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 27

1 on his behalf. I don't specifically have any recollection,
2 but I can tell you what normally happens.

3 We have an office policy. We had -- I guess -- when I
4 say "we," the Second Judicial Circuit Public Defender's
5 Office had a policy that -- that -- that we would not just
6 reassign the case because a client becomes dissatisfied
7 about some issue. That's pretty normal in criminal
8 representation.

9 If it's really an issue that the defendant is wanting
10 to push, we normally bring them in front of the judge and I
11 would kind of call it a status-of-counsel hearing. That's
12 probably not what they call it the second circuit --
13 circuit. But normally, give the opportunity for the
14 defendant to present the reasons to a judge why he wants
15 that somebody be relieved. The idea is that just because
16 somebody is dissatisfied, everybody becomes dissatisfied
17 ---

18 Q Right.

19 A --- at some point in time, usually, especially on
20 cases that are serious.

21 Q Do you recall telling him that the motion was no good?

22 A I don't recall that at all.

23 Q Okay. Do you recall ever discussing him wanting you
24 relieved?

25 A Not specifically. And I've looked at my notes. I --

1 I don't really see any -- any notes. That's probably not
2 necessarily unusual. Probably what I would have said, if I
3 can speculate -- and I know we're not here to speculate --
4 but I can say what I normally would say is: "You can go
5 and bring this -- your concerns before the judge. We can
6 make that happen."

7 A lot of times, just the conversation causes a person
8 to -- to realize that they're going to have a -- not
9 necessarily going to get the attorney that is going to tell
10 them what they want to hear.

11 Q Okay. And how many times did you meet with him? He -
12 - I'm sure you heard his testimony, but he testified he saw
13 you at the bond hearing briefly and then only once, the
14 Saturday before trial?

15 A That's not true. I've ---

16 Q Okay.

17 A --- met with him either on -- I've spoken to him
18 either on the phone or met with him at the jail several
19 times.

20 Q Okay. And that was throughout the course of your
21 representation, or was that just prior to trial?

22 A That's throughout.

23 Q Okay. Throughout the course of your representation?

24 A (No audible response.)

25 Q Okay. And do you recall specifically refusing to

1 speak with him before trial?

2 A That would be silly. No, ma'am. I wouldn't ---

3 Q Okay.

4 A --- do that. I don't recall that.

5 Q Okay. Did you file your Rule 5 and *Brady* motions in
6 this case?

7 A Yes, ma'am.

8 Q Okay.

9 A I did not -- well, that's automatically generated by
10 my ---

11 Q Okay.

12 A --- paralegal.

13 Q So those were filed, and discovery was provided to
14 you. Did you review that with Mr. Muns?

15 A Yes, ma'am. And I think -- I think there's some
16 evidence that I understood the case. I guess that would be
17 the point of this allegation ---

18 Q Right.

19 A --- since I -- no one's -- no one's alleged that
20 during my direct examination of him, that I didn't bring
21 out some fact that he wanted to bring out.

22 Q Correct. Did you explain to him the charges he was
23 facing and the potential sentences?

24 A I always do. Yes, ma'am. But I don't specifically
25 remember. But that would be ridiculous not to do that.

1 Q Okay. What were the facts of the case here?

2 A There's a lot of things that -- a consensus between
3 the victim and Mr. Muns. There was consensus. It's not in
4 dispute that she was on -- I -- I -- I want to say it was
5 on his mother's property, but I think he resided -- it
6 might've been his property.

7 And I -- it wasn't in dispute that there was a cable
8 that -- that blocked a road. There wasn't a -- a dispute
9 that Mr. Muns was present; that she was present; that her
10 car was next to his car. I don't think I was in dispute.

11 I think she agreed to those things, to the best of my
12 recollection. I think she agreed with a -- a vast amount
13 that Mr. Muns said happened. She just disagreed that her
14 being shot was accidental.

15 Q Okay. And he maintained that it was an accident
16 throughout your representation?

17 A Yes, ma'am.

18 Q Okay. And was there also evidence that the state had
19 that Mr. Muns had gone to a hotel in Georgia the night
20 before?

21 A Yes, ma'am.

22 Q What was that about it?

23 A I don't recall this, except from the -- from the
24 transcript. But I think there was something along the
25 lines -- and I guess, from state's point of view, this

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 31

1 would've been a kind of evidence maybe of a motive for him
2 to be angry at her. But I think he was -- found out that
3 -- Mr. Muns, as I understand -- it might my refresh my
4 memory from the transcript -- he had been married and
5 divorced three times. And she was now with -- I think she
6 was married to another man, and but that may have been on
7 the rocks and maybe she was going to get back with Mr.
8 Muns.

9 Q Okay.

10 A And perhaps he was going there to investigate that. I
11 think that the state would probably say that was why he was
12 mad.

13 Q Okay. So he had been married and divorced from the
14 victim three times?

15 A I think so. That's my ---

16 Q Okay.

17 A --- recollection ---

18 Q And ---

19 A --- based on the transcript.

20 Q And you -- she was currently married to another man?

21 A I think so. Yes, ma'am.

22 Q And that's where she was in Georgia -- is that
23 correct? -- with him?

24 A That's what was ---

25 Q Okay.

1 A --- alleged. Yes, ma'am.

2 Q And were there also text messages that the state
3 brought up where the ---

4 A That's what they alleged. Yeah.

5 Q Okay. And Mr. Muns has alleged that you failed to
6 file pretrial motion in limine to prevent inconsistent
7 statements from the the victim from coming in? Do you
8 recall any inconsistent statements made by the victim
9 between her testimony and what she told the police?

10 A Well, the answer to you question is there were
11 inconsistencies. But the allegations is, on its face,
12 counterproductive to what you would try to do because if
13 there is inconsistent statements, you wouldn't want to keep
14 them out; you'd want to bring them in.

15 Q Okay. And did you cross-examine the victim on those
16 inconsistent statements?

17 A I did cross-examine her on inconsistencies. I didn't
18 -- I didn't examine the transcript thoroughly enough to --
19 to be able to delineate the -- the content of the
20 statements. But I did cross-examine the victim, I think,
21 on -- on inconsistencies. Particularly, what struck me was
22 the allegation that she been threatened and yet she seeks
23 him out.

24 Q Okay.

25 A That seems to be inconsistent behavior.

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 33

1 Q Okay. And he also has alleged that you failed to have
2 a pretrial motion to determine if he was entitled to
3 immunity, regarding, like, a castle-doctrine-type argument.
4 Did you consider that in this case?

5 A I disagree that that would've been, based on his
6 story, that would be a -- a motion that I would make. In
7 his testimony today, he's alleging accident. And a person
8 -- I'm -- I'm reading from the statute, Section 16-11-440.
9 This is the Protection of Property and Persons Act.

10 (As read): "A person is presumed to have a reasonable
11 fear" -- I'm sorry -- "presumption of reasonable fear of
12 imminent peril when using deadly force against another
13 unlawfully entering a residence, occupied vehicle, so on
14 and so forth. A person is presumed to have reasonable fear
15 of imminent peril of death, great bodily injury to himself
16 or another person, when using deadly force that is intended
17 to cause death or great bodily injury to another person."

18 You've got to intend that it happen.

19 Q Okay.

20 A And his argument, even til today, is that it's an
21 accident.

22 Q Okay. And what about the allegation that you failed
23 to argue he was in lawful possession of a handgun? Was he
24 allowed to be carrying a weapon?

25 A Not in South Carolina, because he had conviction for

1 domestic violence in '05, 2005.

2 Q Okay. And did you argue this point in court -- do you
3 have a copy of the transcript?

4 A I do.

5 Q If you'd turn to page 194.

6 A (Complied.)

7 Q I believe this is your argument that he was acting
8 lawfully. Did you attempt to make that argument in -- in
9 court? And it goes to page 196, basically, your argument.

10 A I can read from -- this is from line 23 on page 194.
11 I can actually publish. You start at line 20; this is the
12 Court. It says (as read): "Felony and under the law of
13 this state and federal law, a convicted felon cannot be in
14 possession of a weapon."

15 "That's correct, Your Honor, under federal law. But
16 then, the question is: What does this statute mean by
17 'lawful'? It doesn't say federal law or state law. It
18 just says 'lawfully.' I think with that ambiguity, Your
19 Honor, it should be construed against the state. So" ---

20 Q You attempted to make the argument?

21 A I attempted to make an argument.

22 Q Okay.

23 A But I can't say that it's not -- it -- that he -- he
24 could possess it under state law, since domestic violence
25 is one under South Carolina law that precludes you from

1 having a firearm.

2 Q And did you discuss self-defense with Mr. Muns?

3 A I've reviewed my notes. I don't see anything
4 specifically about that.

5 Q Would he have met the elements for self-defense?

6 A I don't think he meets the elements. It's -- he
7 claimed -- well, the answer to your question is no, he
8 doesn't meet the elements. But this is kind of a
9 interesting, maybe a perhaps more complex case that just
10 saying he doesn't meet those elements.

11 Because he's clearly alleging that he's acting in
12 self-defense. He says that he -- he had a pistol; he uses
13 it at a -- as a hammer and attempts to break the glass to
14 make her stop. So clearly, he's acting in self-defense.
15 He's trying to do something.

16 But it's not -- there's no intent to -- to shoot her,
17 he says. And that's what he testified to today. It's what
18 he testified at trial.

19 So although it's got elements of self-defense nested
20 in it, it's not, strictly speaking, a self-defense case,
21 since he -- he alleges he did not intend to shoot her ---

22 Q Okay.

23 A --- in self-defense.

24 Q And you made the argument regarding accident, like
25 charging what -- the jury with accident and self-defense;

1 is that right?

2 A Yes, ma'am.

3 Q Okay. And what did the Court rule?

4 A That he was not entitled to a self-defense charge, nor
5 was he entitled to an accident charge.

6 Q And you provided a ton of argument. I don't know if
7 you want to review it. It's on page 188, starting on line
8 19, to 189 for self-defense and accident.

9 But despite your argument, the Court found that he
10 wasn't entitled to either charge; is that right?

11 A That's correct.

12 Q Okay. Now, he's also alleged that you failed to ask
13 for lesser-included charge of assault and battery of a high
14 and aggravated nature. Was ABHAN requested in this case?

15 A I actually -- I -- I -- the state requested that, I
16 think. But I argued against it. And actually, I was kind
17 of following up on the judge's observation that the state
18 had not provided evidence that would support an ABHAN
19 charge. And I think the court specifically focused in on
20 the serious-bodily-injury issue.

21 The state was assuming, perhaps, that the use of a
22 firearm -- from the use of firearm, that the jury would
23 conclude that that could've caused serious bodily injury
24 and the judge didn't let it in. As to the reason why I
25 didn't want it in, prior to this, Mr. Muns was offered by

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 37

1 the state assault and battery in the first degree, and he
2 turned it down. That was during -- that was after the -- I
3 think the state rested. This is right before the jury came
4 in before final arguments. This is clearly an all-or-
5 nothing.

6 Q For Mr. Muns, you're saying?

7 A For Mr. Muns.

8 Q Okay.

9 A And anyway, he was sentenced to 15 years. A&B high
10 and aggravated nature is zero to 20 years. There is no
11 evidence -- it's completely speculative to say he would
12 have gotten less than that. He could certainly could've
13 gotten up to 20 years; 15 is less than 20. He's not
14 prejudiced by this.

15 Q Right. Okay. So the ABHAN instruction ultimately was
16 not given because the state didn't meet the great bodily
17 injury to come in of that; is that correct?

18 A That's correct.

19 Q Okay. And we already went over it. You did ask for
20 self-defense and accident and that was not charged either?

21 A (No audible response.)

22 Q Was any lesser-included offense charged?

23 A I -- I believe, looking at the transcript, A&B second
24 and maybe A&B third. That would also be what I would've as
25 a matter of trial strategy, because if it's an all-or-

1 nothing case and if -- if the state -- I kind of look at it
2 like this.

3 And by the way, Mr. -- according to my notes -- I do
4 have these notes -- when offered A&B first and at a prior
5 time, another offer was made of 12 years, he turned both of
6 those down, those offers down. Now, if the state's
7 offering that after having rested, that means you know that
8 they are probably not happy with the way things are going.
9 My experience has been once the trial begins, the state
10 tends not to want to make a plea offer, unless they are
11 afraid they're not going to get a conviction.

12 So -- but anyway, clearly, this was an all-or-nothing
13 situation. He had turned down A&B first, which I -- my
14 recollection -- I don't have a specific recollection of --
15 because that offer was made earlier in the day. I don't
16 have a specific recollection, except I do remember Mr. Muns
17 and I were back in the holding area and I believe I asked
18 my investigator to join me, Robert Anderson.

19 I -- this is my recollection. I know it happened one
20 time, and I think it was this time. And I tried very hard
21 to persuade him to take the A&B first. He would've been
22 out a long time ago, had he ---

23 Q Right.

24 A --- taken that offer.

25 Q And he refused that on the record as well; is that

1 correct?

2 A That's correct.

3 Q Okay. And he's also alleged that you failed to
4 request a permissive-inference instruction to the jury.
5 Did the state request that? It's 180 -- 199 if you need
6 the transcript for it, but ---

7 A The state did ---

8 Q Okay.

9 A --- request that.

10 Q And was it -- was it ultimately given?

11 A No, I don't think so.

12 Q What did the Court say, in providing that analysis?
13 And that's on 189, if you . . .

14 A It may not be on 189.

15 Q No -- 199.

16 A 199.

17 Q Sorry.

18 A Okay. On page 199, line 6, the Court says -- this was
19 after the state argued for the permissive-inference charge.
20 The Court said (as read): "I understand I'm going to stay
21 away from that. I'm just going to say that there are two
22 types of malice, implied and expressed. And I'm not going
23 to use the infer can be from the use of a deadly weapon.
24 There is no reason I can think of why I would want the jury
25 to -- to believe that malice could be -- could be inferred

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 40

1 from the use of a deadly weapon, since that's what Mr. Muns
2 admitted to, in the sense that he possessed the firearm and
3 it -- not in dispute -- discharged. Somehow -- and it hit
4 her."

5 Q Okay. So the fact that malice -- the instruction that
6 malice wasn't going to be inferred by the use of a deadly
7 weapon wasn't going to be charged, and that was not
8 charged; is that correct?

9 A That's correct.

10 Q Would you need a permissive-inference instruction?

11 A I don't -- based on what I just said, I don't know why
12 I would do that.

13 Q Okay. And looking at the jury instructions again --
14 and this is on page 229 -- he's alleged that you were
15 deficient for failing to object to the trial court's
16 failure to give a specific-intent-to-kill instruction at
17 Muns' trial. Do you recall the specific intent ---

18 A I think the ---

19 Q --- on the attempted ---

20 A --- I think the ---

21 Q --- murder?

22 A --- judge -- refresh my memory from the transcript.

23 Q Sure.

24 A I think he did charge that.

25 Q Okay. And do you recall how many times he explained

DIRECT EXAMINATION BY MS. GREGORY - MICHAEL ROUTZONG 41

1 that specific intent -- that attempted murder was a
2 specific-intent crime?

3 A I think it starts at page 229, line 4. I have a note
4 about that ---

5 Q Yeah.

6 A --- somewhere in here. I'm sorry. Well, this is --
7 this is from page 229, but this is the -- the judge's
8 instructions. And I'm kind of jumping into the middle of
9 it. But it says (as read): "An intent -- an attempt
10 includes a specific intent to do a particular criminal act,
11 along with an act falling short of that act intended." So
12 he charged specific intent.

13 Q Okay. Any he reiterated that later on, on page 229 --
14 229 on line 20 and 21; is that accurate?

15 A I'm sorry. I only see it once, but I may be missing
16 it. What ---

17 Q He refers to his previous defining of the attempt
18 later that page. But it's fine. Did you believe there
19 were any issues with the jury instructions overall?

20 A Not overall. I wish I would've gotten an accident
21 charge. But under the facts -- under the facts of this
22 case, there would be -- I -- I'll just put it this way: I
23 wish I would have gotten an accident charge.

24 Q But you requested an accident charge, correct?

25 A I did.

1 Q Are you -- are -- and what was the reason it wasn't
2 given?

3 A Judge felt it -- that the evidence did not -- and I
4 ---

5 Q Was it regarding ---

6 A I believe it was -- it was at -- at least twofold: It
7 was that he negligently handled the weapon. And -- let me
8 see. I'm not sure what ---

9 Q Was he acting lawfully?

10 A Not -- yes. Yes, ma'am. He didn't find he was
11 possessing the -- the firearm lawfully ---

12 Q Okay.

13 A --- which would be true because of the prior CDV
14 conviction, I think.

15 Q Okay. So he found he wasn't entitled to that charge,
16 despite your argument?

17 A That's correct.

18 Q Okay.

19 MS. GREGORY: No further questions, Your Honor.

20 THE COURT: Thank you.

21 MR. AIKEN: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. AIKEN:

24 Q Hello, Mr. Routzong.

25 A Good morning, Mr. Aiken.

1 Q Now, Mr. Muns testified at trial; is that correct?

2 A Yes, sir.

3 Q All right. And any -- any question in your mind that
4 -- that he testified that he felt he was in imminent peril
5 of losing his life or incurring serious bodily harm?

6 A I believe that was -- that's exactly what he testified
7 to.

8 Q Now, when an immunity motion is filed, a pretrial
9 motion seeking a declaration that somebody is immune under
10 the castle doctrine, the defendant has to show the elements
11 of self-defense, except for retreat?

12 A That's correct.

13 Q Okay. So in other words, it's the basic self-defense
14 law, absent the obligation of the defendant to retreat?

15 A I agree.

16 Q Are you familiar with what the Court of Appeals did in
17 this case on appeal?

18 A I have not read that -- that -- that appeal.

19 Q As I understand it, you think that you shouldn't have
20 filed a immunity motion because it would've been
21 inconsistent with the defense of accident; is that right?

22 A I agree.

23 Q Okay. In the immunity motion, couldn't you --
24 couldn't you sort of couch it, "My guy says he's -- it was
25 an accident, but even if it weren't, he's immune under the

1 immunity statute"?

2 A I agree that it -- that is a possibility it would be
3 normal to argue in the alternative. Yes, sir.

4 Q I see. So the -- that argument could've actually been
5 made?

6 A I -- well, any argument can be made. But the answer
7 to your question, I think that argument could've have been
8 made. Yes, sir.

9 Q Okay. Without doing undue damage to the case?

10 A Well, I think I'd have to agree with that. Because
11 that would be not in front of the jury. The jury -- if it
12 were denied, the jury would never hear it. So I don't
13 think it would do any damage to the case. No, sir.

14 Q They would never hear about what positions have been
15 taken at the pretrial hearing?

16 A That's correct.

17 Q Because that -- that just simply wouldn't be
18 admissible during the trial?

19 A That's correct.

20 MR. AIKEN: May I have just one moment please, Your
21 Honor?

22 THE COURT: Yes, sir.

23 (Off the record briefly.).

24 MR. AIKEN: Thank you Mr. Routzong.

25 THE WITNESS: Yes, sir.

1 MS. GREGORY: No redirect, Your Honor.

2 THE COURT: All right. This witness may be excused.

3 Thank you. Mr. Routzong.

4 THE WITNESS: Thank you, Your Honor.

5 (Whereupon, the witness exited the witness stand.)

6 MR. AIKEN: Are you finished?

7 MS. GREGORY: Yeah.

8 MR. AIKEN: Okay.

9 MS. GREGORY: Oh. Sorry. Yes.

10 No -- no further witnesses, Your Honor.

11 THE COURT: Okay. Very good.

12 Yes, sir, Mr. Aiken.

13 MR. AIKEN: Your Honor, in this case, the case went up
14 on appeal and there was argument about whether the Court
15 should have given a self-defense charge. Well, the Court
16 of Appeals decided the case on an unpublished opinion and
17 said that Mr. Muns was not entitled to a self-charge
18 because he did not -- there was no evidence in the case
19 that he had attempted to retreat.

20 Well, the important thing about this case, Your Honor,
21 is had the immunity motion been made, then retreat wouldn't
22 even have been on the table. Because under the immunity
23 statute, you -- the defendant has to show by a
24 preponderance of the evidence that he or she meets the
25 elements of self-defense except for retreat.

1 And in this case, you heard from the testimony of Mr.
2 Muns here today. And, Your Honor, I urge you to go over
3 his testimony in the -- in the trial record as well. He
4 met all the elements of self-defense, and I -- my position
5 is he met retreated too. But the Court decided he didn't.
6 And the Court of Appeals decided the case on that basis.
7 So it was vitally important that a immunity motion be filed
8 this case because of that retreat issue, which would have
9 been off the table at -- in the context of that immunity
10 motion.

11 Now, Your Honor, just -- just to go over some things I
12 didn't cover during the hearing, which would be the grounds
13 for postconviction relief that are based upon the record,
14 the first is, Your Honor, the failure to give a permissive-
15 inference charge. And that is under the case of *State v.*
16 *Elmore*, which has been overruled but on other grounds.
17 It's a 1983 case. Okay?

18 Anytime the court the Court gives an inferred-malice
19 charge in the context of a murder charge or an attempted
20 murder charge, the Court is required to give this
21 permissive-inference instruction. Because the inferred-
22 malice charge says from the surrounding facts, you can
23 infer malice. That -- that's the permissive-inference
24 charge.

25 Well, the *Elmore* charge has to go along with that

1 permissive-inference charge. And the *Elmore* charge says --
2 and this is verbatim what it's supposed to say -- "If facts
3 are proved beyond a reasonable doubt sufficient to raise an
4 inference of malice to your satisfaction, this inference
5 would be simply an evidentiary fact to take -- to be taken
6 into consideration by you, the jury, along with other
7 evidence in the case and you may give it such weight as you
8 determine it should receive." Okay?

9 Following *Elmore* -- well -- or in the *Elmore* case, the
10 -- the *Elmore* court said that hereafter only slight
11 deviation from this charge will be tolerated. So anytime
12 there is an inferred-malice charge in jury instructions,
13 this permissive -- or -- or this -- this instruction saying
14 basically this is not a presumption; this is a mere
15 inference, that has to be given.

16 Because like I said, in the *Elmore* case, it says that
17 hereafter only slight deviations from this charge will be
18 tolerated. And that charge was not given at all in this
19 case. And there is actually a postconviction-relief case
20 in which this -- this issue came up about the failure to
21 give the *Elmore* charge. And it's a case called *Gibson v.*
22 *State*. And in that case, a denial of a postconviction-
23 relief application in a murder case was reversed on a
24 finding that the failure to give the *Elmore* charge was
25 deficient performance and the erroneous instruction

1 contributed to the verdict.

2 Now, there was -- because of the evidence that was
3 presented, there was a substantial issue concerning whether
4 there was, in fact, malice in this case. And when you are
5 talking about the prejudice inquiry in a PCR case when
6 you're dealing with a jury instruction, the -- the relevant
7 inquiry is whether the erroneous jury instruction
8 contributed to the verdict.

9 Now, with the substantial issue in the case concerning
10 malice, my position is that this erroneous jury instruction
11 contributed to the verdict. Because it permitted the jury
12 to believe or -- or it allowed the jury to think that this
13 was some sort of presumption of malice, instead of an
14 inference of malice. And that's what the *Elmore* charge is
15 all about, Judge.

16 And then, Your Honor, I -- I -- I have gone through
17 the transcript. And I did -- I did see that discussion of
18 attempt in the jury instructions concerning intent --
19 intent in a -- on attempt crimes. But I think the
20 important thing is you have a -- you have a charge on the
21 statute of attempted murder. And in the context of the
22 charge of the statute and the description of the specific
23 charge that had been made against the defendant, there is
24 no clear statement that there must be a specific intent to
25 kill.

1 Also, Your Honor, what they're talking about here, an
2 attempt includes a specific act to do a particular criminal
3 act, what's required on the specific-intent charge for
4 attempted murder is intent to kill, not intent to commit
5 murder, the intent to kill, the specific intent to carry
6 out the result of taking somebody's life. That's the
7 specific intent that's required.

8 And, Your Honor, the -- the actual case which clearly
9 sets forth that specific intent has to be shown -- specific
10 intent to kill has to be shown in an amended murder case is
11 *State v. King*. All right. *State v. King* ---

12 THE COURT: Do you have a copy of that ---

13 MR. AIKEN: I -- I do ---

14 THE COURT: --- by any chance?

15 MR. AIKEN: --- right here.

16 THE COURT: Okay.

17 MR. AIKEN: *State v. King* -- I'll give it to you.

18 Thank you very much.

19 DEPUTY CLERK OF COURT: You're welcome.

20 MR. AIKEN: *State v. King* was decided in 2018, which
21 -- which, of course, is three years after this trial. But
22 I think the important point that needs to be made, Your
23 Honor, is the language of the statute. The language of the
24 statute says (as read): "A person who, with intent to
25 kill, attempts to kill another person with malice

1 aforethought, either express or implied, commits the
2 offense of amended murder."

3 Specific intent to kill -- it -- it says "with intent
4 to kill." My argument is specific intent to kill is in --
5 is -- is -- is brought forth by that language in the
6 statute itself.

7 And also, it is a -- it is a, I think, universally
8 recognized proposition of law that for attempt crimes,
9 specific intent is required. And that, of course, was the
10 general law of substantive criminal law of the United
11 States, not -- not least of which South Carolina on -- in
12 the area of attempt crimes.

13 So my position is even if *King* -- even though *King* was
14 2018, there was ample authority that in this particular
15 circumstance, intent to kill -- specific intent to kill had
16 to be shown. It -- that charge was not given to the jury.
17 There was objection. And, of course, that issue was never
18 raised on appeal.

19 Thank you, Your Honor.

20 THE COURT: Yes, ma'am.

21 MS. GREGORY: I will pick up where he left off.

22 THE COURT: Uh-huh.

23 MS. GREGORY: Regarding the attempted murder, on page
24 229, as Mr. Routzong testified -- and it's very clear from
25 the record -- the jury was properly instructed that it is a

1 specific-intent crime; that had specifically intend --
2 that's -- that it's an attempt crime and that is the proper
3 instruction in the case. They were also properly
4 instructed regarding the state's burden of proof as to that
5 specific intent within that instruction.

6 And if, at all, the *State v. King* changes anything,
7 which I don't believe it does, but defense counsel can't be
8 held to be clairvoyant. So the -- whatever *King* held that
9 may have changed this, which I don't think it did, but if
10 it did, certainly, since it happened after the fact and the
11 holding would've been, as he said, a few years after the
12 case, it certainly wouldn't have any bearing on the matter
13 at hand.

14 But again, after -- and Mr. Routzong's testimony of
15 the attempted murder jury instruction, I believe it was
16 proper. And it was proper overall for the instruction
17 regarding the state's burden and everything else regarding
18 the presumption of innocence and all the other charges from
19 the bench book that are typically given at the trial.

20 Regarding the permissive inference, as Mr. Routzong
21 testified, he says he wouldn't have wanted a permissive-
22 inference charge, which was brought up by the state, which
23 I think was interesting. Because typically, if it's going
24 to be favorable for the defense, the defense counsel would
25 bring it up. So the fact that it was brought up by the

1 state is very interesting as well.

2 But the trial court did an evaluation on the
3 permissive-inference instruction and indicated that they
4 weren't going to go that route; that they were going to
5 just provide the malice instruction and not allow the jury
6 to be charged that malice can be inferred from the use of a
7 deadly weapon. If that jury instruction had been given,
8 where the inference could've been made that based on the
9 deadly weapon malice could be inferred, the permissive
10 inference would make more sense.

11 But because that instruction was not given, in the
12 cases like *Elmore* and the other cases that he cited in his
13 amended application, the inference for the deadly weapon
14 was given in those cases. So here it's distinguishable
15 because the -- malice can be inferred by the use of a
16 deadly weapon was not given in *Elmore* -- or -- I'm sorry --
17 in this case at hand. But it was provided in the other
18 cases where it was found to -- where a permissive-inference
19 instruction was determined to be needed.

20 Regarding the accident charge, he fails two of the
21 three prongs of accident. He was not acting lawfully,
22 because he is a convicted felon. And he admits that in the
23 trial and here today. And he was not exercising due care
24 while acting unlawfully.

25 So clearly, he -- the trial court provided a very

1 thorough analysis of the accident charge, and he was not
2 entitled to that. Additionally regarding the self-defense,
3 even with the idea that under immunity, he wouldn't needed
4 to retreat. He's still not acting intentionally. He's
5 still claiming this is accident.

6 So self-defense just does not apply here, because his
7 own testimony today is that he was acting in self-defense.
8 And Mr. Routzong explained he maintained that it was an
9 accident the entire time he was representing him. So
10 self-defense does not apply.

11 And we don't believe he's met his burden under
12 *Strickland* to show that the trial outcome would've been
13 different based on any of his allegations he brought forth
14 today. And we would ask that you deny and dismiss his
15 application in full.

16 THE COURT: All right. Thank you.

17 Again, I'll take some time to read through the
18 material that I've been given and the applications, as well
19 as the returns. And I will let you know decision, once
20 I've had the opportunity to do that.

21 MS. GREGORY: Thank you, Your Honor.

22 MR. AIKEN: Thank you ---

23 THE COURT: Thank you.

24 MR. AIKEN: --- Judge.

25 THE COURT: Thank you.

1 MR. AIKEN: It was a pleasure to be with you this
2 week.

3 THE COURT: Yes, Mr. Aiken.

4 (Whereupon, the proceeding was concluded at 10:51 a.m.)

5 **--- END OF TRANSCRIPT OF RECORD ---**

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CERTIFICATE

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR, RVR-M, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Aiken County, South Carolina, on the 22nd day of January, 2020.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.



Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Official Court Reporter

West Columbia, South Carolina
October 10, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEA
FOR THE SECOND JUDICIAL CIRCUIT

Frank Muns, #358883,)

Case No.: 2018-CP-02-0759

Applicant,)

ORDER OF DISMISSAL

v.)

FILED 10-25 20 21 11:34

State of South Carolina,)

Robert J. White
C.C.P. & G.S.

Respondent.)

Shadell Parks
Deputy Clerk

This matter comes before this Court by way of an application for post-conviction relief filed on April 2, 2018, by Frank Muns (Applicant). The State (Respondent) filed a return and partial motion to dismiss on July 11, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on January 22, 2020, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Assistant Public Defender Michael D. Routzong (Counsel) of the Third Circuit Public Defender's Office¹ also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. During the October 2013 term, the

¹ Assistant Public Defender Michael D. Routzong was a public defender with the Second Circuit Public Defender's Office at the time he represented Applicant, however, he is currently employed by the Third Circuit Public Defender's Office.

Aiken County Grand Jury indicted Applicant for attempted murder (2013-GS-02-01657) and possession of a firearm during the commission of, or attempt to commit a violent crime (2013-GS-0201664).

Applicant was represented by Counsel. Assistant Solicitors Virginia Sheftall and Jeffrey “Jay” Slocum, Jr., of the Second Circuit Solicitor’s Office prosecuted the case. On February 4, 2014, Applicant proceeded to trial before the Honorable Doyet Early III, and was found guilty as indicted. Judge Early sentenced Applicant to fifteen years’ imprisonment for attempted murder and five years’ imprisonment for possession of a firearm, to run concurrently.

Applicant filed a timely notice of appeal. Kevin R. Eberle, Esquire, and Nicholas Shalosky, Esquire, represented Applicant on appeal. On appeal, Applicant argued the trial court erred in refusing to issue a self-defense charge, the trial court erred in refusing to issue an accident charge, and the weapons charge should be retried because his attempted murder conviction was invalid. The South Carolina Court of Appeals affirmed Applicant’s conviction in an unpublished opinion filed June 22, 2016. Applicant filed a petition for rehearing on July 7, 2016, which the Court of Appeals denied on August 22, 2016. Applicant filed a Petition for Writ of Certiorari on September 21, 2016. The State filed its Return to Petition for Writ of Certiorari on October 21, 2016. The Supreme Court of South Carolina denied the petition for writ of certiorari on May 30, 2017. The remittitur was issued June 12, 2017.

Applicant filed a timely application for post-conviction relief on April 2, 2018, alleging:

1. Ineffective Assistance of Counsel:

- i. Failure to file a motion to have a pre-trial hearing to determine if applicant was entitled to immunity
- ii. Failed to investigate and present all of the facts in a pretrial hearing that could have established Applicant was immune from prosecution under the Castle Doctrine by a preponderance of the evidence

- iii. Failed to argue and present in a pretrial hearing that Applicant did not create the need for force and was rightfully defending himself from the dangerous actions he encountered from Victim
- iv. Failed to move the court to determine in a pre-trial hearing whether or not Applicant obligated to remove himself from the confrontation
- v. Failed to ask the court for a pre-trial hearing to determine if Applicant could have removed himself from the dangerous situation
- vi. Failed to object to and file pre-trial motion in limine impeachment evidence showing contradiction in Victim's statements at trial
- vii. Failed to properly argue and show Applicant was in lawful possession of the handgun and was not engaged in unlawful activity and had the right to self defense
- viii. Failed to ask the court for a lesser included charge of assault and battery with high and aggravated nature.
- ix. Refused to respond to Applicant's request to speak with him before trial was both unreasonable and prejudicial
- x. Refused to accept Applicant's motion to request that he be relieved of his trial counsel (filed Oct 25, 2013)

2. IAC – Appellate Counsel

- i. Failure to accurately argue trial court error in self-defense determination
- ii. Failure to investigate and present a proper argument on direct appeal makes Applicant's conviction and sentence unreliable.

3. Denial of Due Process of Law

4. Trial Court Error

On January 24, 2019, Applicant filed an amended application setting forth two additional allegations of ineffective assistance of counsel:

1. Ineffective Assistance of Counsel

- i. Counsel was ineffective for failing to object to the trial court's failure to give the permissive inference instruction.
- ii. Counsel was ineffective for failing to object to the absence of the specific intent to kill instruction

On January 22, 2020, Applicant proceeded to an evidentiary hearing before the Honorable Courtney C. Pope at the Aiken County Courthouse. Applicant was represented by Arthur K. Aiken. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the State. At the hearing, Counsel and Applicant testified. At the conclusion of the evidentiary hearing, this Court took the matter under advisement.

SUMMARY OF FACTS

Applicant and Kim Turner (Victim) are divorced, but, at the time of the incident, they were living together and raising their children as a family. (Trial Tr. 94-95.) Victim was remarried to Tony Turner (Turner), but the two were separated at the time of the incident. (Trial Tr. 94-95.) On April 5, 2013, Victim spent the night with Turner at a motel in Georgia. (Trial Tr. 95.) Victim testified Applicant had shown up at her motel and ripped the side mirror off of the vehicle she borrowed from her mother. (Trial Tr. 96.) Victim also testified Applicant called her several times and sent her text messages that scared her. (Trial Tr. 96.) On April 6, 2013, Victim returned home to check on her children and get ready for work. (Trial Tr. 97.)

As Victim approached the property, she observed Applicant's truck in the backyard, but did not see him. (Trial Tr. 100.) Victim could not drive into the driveway because it was blocked with a cable, so she attempted to enter the property on a go-kart path. (Trial Tr. 100-101.) As Victim pulled onto the path, Applicant's truck came out of nowhere and blocked her. (Trial Tr. 101.) Applicant jumped out of the truck with a pistol in his hand and started arguing with Victim and attempted to bang on the car window. (Trial Tr. 101-102.) Victim rolled her window down to prevent Applicant from breaking the window. (Trial Tr. 102.) Applicant began to hit Victim through the window and Victim rolled the window back up. (Trial Tr. 102.) Applicant was still yelling at Victim through the closed window when he pointed the gun at her, looked her straight in the face, and pulled the trigger. (Trial Tr. 102.) Victim heard the gun go off, and felt the spray of the glass. (Trial Tr. 102.) Victim looked up and saw Applicant still had the gun pointed at her and believed he was going to shoot her again. (Trial Tr. 102.) Victim floored her vehicle and jumped over some yard debris to get away from Applicant. (Trial Tr. 103.) Victim's eleven year-old daughter, Lydia Muns (Daughter), testified she heard a gunshot and came running out of the

residence and saw her mother pulling up to the house. (Trial Tr. 146.) Daughter testified Victim told her to call the police and that Applicant shot her. (Trial Tr. 146.) Daughter testified she observed Applicant running to the school bus on the property with a long gun in his hand. (Trial Tr. 146.)

Victim fled the property after she observed Applicant yelling and coming at her with the gun again. (Trial Tr. 106-107.) Victim drove to a nearby residence where Lisa Mason (Mason) was visiting her boyfriend, Dawson Mullins (Mullins). (Trial Tr. 39.) Victim pulled into Mullins' yard and told Mason she had been shot and asked her to call 911. (Trial Tr. 39.) Aiken County EMS arrived at Mullins' residence and found Victim sitting in the front seat suffering from a puncture wound directly under her left breast. (Trial Tr. 40.)

Victim testified she was in the hospital two or three days. (Trial Tr. 118.) Victim testified she eventually had the bullet removed in November of 2013 because she could feel it every day and it was causing her pain. (Trial Tr. 118-119.)

Applicant testified on the morning of April 6, 2016, he observed Victim attempt to pull into the driveway, but swerve to avoid the cable across the driveway and proceed to the go-kart path. (Trial Tr. 161, 165.) Applicant blocked Victim with his truck because she was about to run over the septic tank. (Trial Tr. 165.) Applicant testified he walked over to Victim's vehicle, she cursed at him and refused to stop trying to maneuver her car onto the property. Applicant testified he was afraid Victim was going to "smush" him between their vehicles. (Trial Tr. 167.) Applicant testified the front of Victim's vehicle was pinning him between his truck and her vehicle, but she would not respond to his repeated commands to stop. (Trial Tr. 167.) Applicant testified he pulled out his revolver to hit her window in an effort to get her to stop. (Trial Tr. 168.) Applicant testified he was not trying to kill Victim, and was only trying to get her to stop. (Trial Tr. 168.) Applicant

testified after the gun went off, he dropped it as Victim drove past his truck and over the septic tank. Applicant testified Victim drove onto the property and yelled for someone to call police before driving off the property through his mother's yard. (Trial Tr. 169.) Applicant then picked up the gun and walked to the bus that was also on the property. (Trial Tr. 170.) Applicant testified he did not know Victim was shot until about three hours later, however, he did not turn himself in to the police. (Trial Tr. 170.) Applicant was eventually arrested in Augusta, Georgia on April 28, 2013. (Trial Tr. 170.)

ALLEGATIONS RAISED

On January 22, 2020, Applicant's post-conviction relief hearing was held at the Aiken County Courthouse. During the hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel

- a. Counsel refused to accept Applicant's motion to request that he be relieved of his trial counsel.
- b. Counsel failed to respond to Applicant's request to speak with him before trial and that prejudiced him.
- c. Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.
- d. Counsel failed to file a pre-trial motion in limine for impeachment evidence showing contradiction in the victim's statements at trial.
- e. Counsel failed to argue Applicant was in lawful possession of a handgun and had the right to self-defense.
- f. Counsel failed to ask the court for a lesser included charge of assault and battery of a high and aggravated nature.
- g. Counsel failed to request a permissive inference instruction to the jury.
- h. Counsel failed to object to the trial court's failure to give the specific intent to kill instruction at Muns's trial.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

convictions, the trial transcript, the appellate records, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Counsel refused to accept Applicant's motion to request that he be relieved of his trial counsel and Counsel refused to respond to Applicant's request to meet with him prior to the trial.²

Applicant alleges he filed a motion to have Counsel relieved as his attorney, and Counsel failed to respond to his requests to meet with him prior to the trial.

Applicant testified he filed a motion to have Counsel relieved, however, Counsel told him the motion was "no good." Applicant testified he only saw Counsel during his bond hearing and on the Saturday before trial. Applicant testified he did not tell the court he was unhappy with his representation of Counsel. Applicant testified he proceeded through the trial without telling the court he did not want Counsel as his attorney.

Counsel testified he did not specifically recall Applicant filing a motion to have him relieved. Counsel testified the policy of the Second Circuit Public Defender's Office is not to reassign cases just because a client has an issue with the attorney. Counsel testified they would normally have a status of counsel hearing if a client wanted an attorney relieved. Counsel testified he does not recall telling Applicant his motion to relieve him was "no good." Counsel testified he spoke to Applicant on the phone and met with him at the jail several times. Counsel testified he would not have refused to meet with Applicant as that would have been silly. Counsel testified he explained the elements of Applicant's charges and potential sentences to Applicant.

This Court finds the testimony of Counsel credible as to this allegation. This Court finds

² This section addresses Applicant's allegations a and b.

Applicant's testimony regarding Counsel's failure to meet with him and his claim that Counsel told him his motion to relieve counsel was "no good" not credible. This Court finds Counsel was not constitutionally ineffective as he met with Applicant numerous times prior to trial and discussed his charges and potential sentences with him during those meetings. Applicant has failed to establish any deficiency on behalf of Counsel or any resulting prejudice. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective and this allegation is denied and dismissed with prejudice.

Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.

Applicant alleges Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.

Applicant testified he believes he was entitled to immunity under the Castle Doctrine. Applicant testified the shooting occurred at his residence as he was leaving to go to the store before work. Applicant testified Victim was coming in as he was leaving and he backed his truck up to let her in, but she went past him to a vacant lot beside his residence. Applicant testified Victim was trying to force her way onto the property and she would not stop. Applicant testified she pinned him against his truck, so he used his revolver to try to break her window. Applicant testified he never intended to shoot her. Applicant testified he did not provoke this encounter. Applicant testified he believed he was in imminent danger. Applicant testified he believes he used reasonable force.

Counsel testified Applicant maintained the shooting was an accident. Counsel testified he does not believe he should have made a motion for immunity because Applicant maintains – and continues to maintain – the shooting was an accident. Counsel testified Applicant would have to

meet the elements of self-defense, with the exception of retreat, in order to be entitled to immunity. Counsel testified a motion for immunity would be inconsistent with the facts.

Here, the record and testimony before this Court fails to establish the Protection of Persons and Property Act applied to Applicant's case. Applicant presented no evidence or testimony to support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(A) would apply. S.C. Code § 16-11-440(A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A)(emphasis added).

“Consistent with the Castle Doctrine and the text of the Act, *a valid case of self-defense must exist*, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity” save the duty to retreat. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, Applicant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

Here, Applicant testified at trial and during the evidentiary hearing that the shooting was an accident. The record also shows Applicant was not without fault in bringing about the difficulty. Applicant testified at trial he blocked Victim from driving onto the property from the go-kart path, which is what led to the altercation between Applicant and Victim that ultimately resulted in the shooting. (Trial Tr. 166.)

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Counsel evaluated Applicant's case for a motion for immunity, however, the facts of the case did not support such a motion in Applicant's case. Applicant has failed to show how Counsel was deficient as to this allegation as Applicant's own testimony at trial and the evidentiary hearing show he was not entitled to immunity since he maintains the shooting was an accident and he was not without fault in bringing about the difficulty in this case. Further, Applicant has failed to show any resulting prejudice from the alleged deficiency as Applicant has failed to establish the outcome of his trial would have been different had Counsel pursued an immunity hearing prior to trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel failed to file a pre-trial motion in limine for impeachment evidence showing contradiction in the victim's statements at trial.

Applicant alleges Counsel was ineffective for failing to file a motion in limine for impeachment evidence showing contradiction in the victim's statements. Applicant testified Victim made inconsistent statements and Applicant did not realize it until after trial. Applicant testified Counsel did not realize the inconsistencies in Victim's statements. On cross-examination,

Applicant could not provide any specific examples of Victim's inconsistent statements, but claimed Victim changed her story about what happened during the incident.

Counsel testified there were some inconsistencies in Victim's statements, however, Counsel testified he would not have wanted to keep out those inconsistent statements at trial. Counsel testified he cross-examined Victim on her inconsistent statements during the trial.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Gentry, 540 U.S. at 8 (quoting Massaro, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632. See also Ingle, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead, 308 S.C. at 122, 417 S.E.2d at 531.

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. After reviewing the record and Counsel's testimony, this Court finds Counsel did cross-examine Victim on her inconsistent statements. Further, Counsel credibly testified he would not want to keep those statements from being addressed at trial and this Court finds that is a valid trial strategy. This Court finds Applicant has failed to prove deficiency on behalf of Counsel.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to show this Court how Counsel moving to keep Victim's inconsistent statements from being addressed during the trial had a reasonable probability of changing the outcome of his trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel failed to argue Applicant was in lawful possession of a handgun and had the right to self-defense.

Applicant alleges Counsel failed to argue Applicant was in lawful possession of a handgun and had a right to self-defense. Applicant testified he was in lawful possession of a handgun because he was not a felon and only had a conviction on his record from Georgia.

Counsel testified Applicant had a conviction of domestic violence in 2005, so he could not be in lawful possession of a handgun in South Carolina. Counsel testified he made the argument to the trial court regarding the ambiguity between federal and state law. However, despite Counsel's argument, the trial court found Applicant was a convicted felon and under the law of "this state and federal law, a convicted felon cannot be in possession of a weapon." (Trial Tr. 194.) Counsel testified Applicant's case did not meet the elements of self-defense because Applicant repeatedly claimed he did not intend to shoot Victim. Counsel testified he requested an instruction on self-defense, but the trial court denied his request.

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. After a review of the record, this Court finds Counsel presented argument to the trial court that Applicant was acting lawfully in possessing a firearm during the incident, however, the trial court disagreed and found Applicant was unlawfully in possession of the firearm despite Counsel's argument. (Trial Tr. 194-195.) This Court finds

Applicant has failed to prove deficiency on behalf of Counsel as Counsel testified Applicant was not in lawful possession of a firearm, but presented an argument to the trial court attempting to justify Applicant's possession of a firearm.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to show this Court what Counsel could have argued or presented to the trial court that would have had a reasonable probability of changing the outcome of his trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel failed to ask the court for a lesser included charge of assault and battery of a high and aggravated nature.

Applicant alleges Counsel was ineffective for failing to ask the trial court for a lesser-included charge of assault and battery of a high and aggravated nature (ABHAN).

Counsel testified the State requested the lesser-included offense of ABHAN. Counsel testified the State did not provide evidence to substantiate a charge on ABHAN as they did not prove serious bodily injury. Counsel testified he requested the lesser-included offenses of assault and battery first degree and second degree. Counsel testified that it would be completely speculative to say Applicant would have been convicted of ABHAN had the trial court agreed to charge that to the jury. Counsel testified Applicant was provided with a plea offer prior to trial for assault and battery, first degree, but he turned that down.

A review of the record shows Counsel also asked for a jury charge on accident and self-defense. The trial court ruled that Applicant was not entitled to the charge of accident or self-defense. (Trial Tr. 188.) The trial court also found the State failed to prove beyond a reasonable doubt that the victim suffered serious bodily injury under the new statute. (Trial Tr. 190.) The

trial court did not charge assault and battery, first degree, because the lack of evidence of "great bodily injury." (Trial Tr. 190.) Finally, the trial court did charge assault and battery, second degree, because the evidence in the record supported the victim suffering "moderate bodily injury." (Trial Tr. 191.)

The law to be charged is determined by the evidence presented at trial. 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). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). "A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

This Court finds the testimony of Counsel credible as to this allegation. This Court finds, based on the record and Counsel's credible testimony, that the lesser-included offense of ABHAN was requested and subsequently rejected by the trial court. Further, Counsel asked for assault and battery, first degree, and second degree on Applicant's behalf, and the trial court agreed to provide a charge on assault and battery, second degree. (Trial Tr. 190.) Applicant has failed to show this Court how Counsel was deficient for failing to request the ABHAN charge when the ABHAN

charge was requested and rejected by the trial court. Furthermore, this Court finds Applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel failed to request a permissive inference instruction to the jury

Applicant alleges Counsel was ineffective for failing to request a permissive inference instruction to the jury. Applicant argued under State v. Elmore, 279 S.C. 417, 803 S.E.2d 781 (1983) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)), Counsel was ineffective for failing to request the trial court give a permissive inference charge to the jury.

Counsel testified he did not want the jury to imply malice from the use of a deadly weapon in Applicant's case. Counsel testified he does not know why Applicant would want him to request such an instruction.

A review of the record shows the State requested the permissive inference charge be provided to the jury. (Trial Tr. 198-199.) The trial court explained it was going to only provide the jury with the charge explaining the two types of malice, implied and express. (Trial Tr. 199.) The trial court stated, "And I'm not going to use the [inference] can be from the use of a deadly weapon." (Trial Tr. 199.)

In Elmore, the Supreme Court of South Carolina held that the trial court's instruction on malice as it related to the use of a deadly weapon constituted a mandatory presumption, and set forth a jury charge consistent with the Due Process Clause for trial courts to utilize in the future:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt,

sufficient to raise an inference of malice to your satisfaction, this inference would simply [be] an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court firmly advised the bench “that hereafter only slight deviations from this charge will be tolerated.” Id.

The Supreme Court returned to the inference of malice from the use of a deadly weapon more than 25 years later in State v. Belcher, and held that the first sentence of the above charge could not be instructed to juries where the record contained evidence to reduce, excuse, mitigate, or justify a homicide or assault and battery with intent to kill. 385 S.C. 597, 685 S.E.2d 802 (2009). The Court distinguished the remainder of the charge as the “general permissive inference instruction,” and noted that it remained valid. Id., 385 S.C. at 612, n. 9, 685 S.E.2d at 810, n. 9.

A few years later, in Gibson v. State, the Supreme Court reversed a denial of post-conviction relief where the trial court charged the inference of malice from the use of a deadly weapon, but failed to include the remainder of the Elmore charge. 416 S.C. 260, 785 S.E.2d 121 (2016). Gibson was decided without briefing or oral arguments, based on the observation that total omission of the general permissive inference language was no “slight deviation” from the Elmore charge, in clear disregard for Elmore’s admonition.

Here, in Applicant’s case, the inference of malice from the use of a deadly weapon was not charged. In its instruction to the jury, the trial court defined malice and explained to the jurors that malice may be “shown by expressed evidence or inferred from the circumstances which were proven.” (Trial Tr. 230-231.) As the trial court did not provide the charge that malice may be inferred from the use of a deadly weapon, the trial court did not have to provide Elmore’s general permissive inference instruction. The general permissive inference of malice portion of Elmore was only necessary and required as part of a complete instruction on the inference of malice from

the use of a deadly weapon, and there is no requirement to charge the language in a stand-alone fashion.

This Court finds there is no obligation under our current jurisprudence to charge the general permissive inference of malice instruction where, consistent with Belcher, there is no charge on the implication of malice from the use of a deadly weapon. The language of the Elmore charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred *from the use of a deadly weapon*, and represents a solution to the then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the Elmore charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing. Furthermore, even if the Supreme Court subsequently holds that the general permissive inference instruction was required in every case involving malice aforthought, the absence of any clear precedent to that effect at this time and at the time of trial provides that Counsel could not have possibly known to demand the language, or object to its exclusion. For all of these reasons, Applicant cannot show any deficiency on the part of Counsel by way of this allegation.

As to prejudice, even if the charge were required, the Court finds Applicant has failed to show how he was prejudiced by the absence of the general permissive inference instruction. The Court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a general permissive inference instruction. Thus, Applicant has failed to meet his burden of showing Strickland prejudice.

Counsel failed to object to the trial court's failure to give the specific intent to kill instruction at Applicant's trial.

Applicant alleges Counsel was ineffective for failing to object to the trial court's failure to give the specific intent to kill instruction to the jury at trial. Applicant argued that there was no clear statement from the trial court that there must be a specific intent to kill, which is required pursuant to State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

Counsel testified the judge charged specific intent to the jury when providing the instruction on the attempted murder charge. Counsel testified he did not see an issue with the jury instructions overall.³

Attempted murder is defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. In 2017, the Supreme Court decided King, 422 S.C. at 56-57, 810 S.E.2d at 23 (2017), aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found "[T]he Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder...."

During its instruction, the trial court stated:

In the first indictment, we're dealing with the charge of attempted murder. Our law defines the word attempt as an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation and intent; there must be some overt act committed in

³ Applicant relies on King in support of this allegation. However, the Court of Appeals' decision in King was delivered in June 2015 and the Supreme Court's decision in October 2017, well after Applicant's trial in February 2014. Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; see also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765.

the effort to commit the crime. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

(Trial Tr. 228-229.) The trial court goes on to state,

The State must prove beyond a reasonable doubt that the defendant attempted - - and I defined attempt to you already - - to kill another person with malice aforethought, and that malice must be either expressed or implied.

(Trial Tr. 229.)

This Court finds the testimony of Counsel credible as to this allegation. This Court finds that the trial court's instruction on attempted murder was proper and instructed the jury that attempt requires the State to prove specific intent. The trial court later refers to that definition in defining the State's burden to prove Applicant's intent to kill another with malice aforethought. (Trial Tr. 229.) "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

This Court finds Applicant has failed to show any deficiency on behalf of Counsel for failing to object to the trial court's instruction. Furthermore, this Court finds Applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite

burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

CONCLUSION

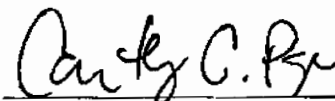
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

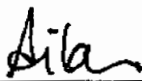
IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is to remain in the custody of Respondent.

AND IT IS SO ORDERED this 12 day of October, 2020.



COURTNEY C. POPE
Presiding Judge
Second Judicial Circuit



South Carolina

WITNESSES

Aiken County Sheriff

Brad Wertz

Law Enforcement Case #: 13-018638

VLS

ARREST WARRANT NUMBER

2013A0210200353

Oct 3, 2013

ACTION OF GRAND JURY

TRUE BILL

Ronnie M. Hall

Foreperson of Grand Jury

Date: October 3, 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013GS0201657**The State of South Carolina****County of Aiken**COURT OF GENERAL SESSIONSOCTOBER TERM 2013

THE STATE

vs.

FRANK MUNS

CDR #: 3410Indictment for

ATTEMPTED MURDER

§ 16-03-0029(A)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

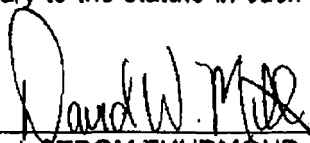
INDICTMENT FOR
ATTEMPTED MURDER

§ 16-03-0029(A)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That **FRANK MUNS** did in Aiken on or about April 6, 2013, feloniously, wilfully and with malice aforethought, attempt to murder **Victim** by means of shooting the victim in the side with a firearm. All in violation of Section 16-3-29 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Brad Wertz

Law Enforcement Case #: 13-618638

VLS

ARREST WARRANT NUMBER

2013A0210200354

Oct 3, 2013

ACTION OF GRAND JURY

TRUE BILL

Ronnie M. Hall

Foreperson of Grand Jury

Date: October 3, 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013GS0201664**The State of South Carolina****County of Aiken****COURT OF GENERAL SESSIONS****OCTOBER TERM 2013**

THE STATE

vs.

FRANK MUNS

CDR #: 0549

Indictment forPOSSESSION OF A FIREARM DURING
THE COMMISSION OF OR ATTEMPT TO
COMMIT A VIOLENT CRIME

§ 16-23-0490

J. STROM THURMOND, SOLICITOR

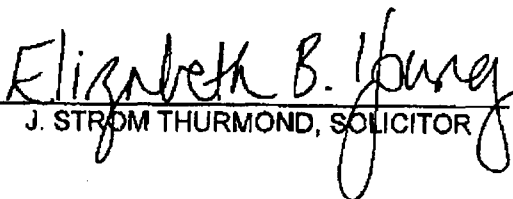
STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
 INDICTMENT FOR
 POSSESSION OF A FIREARM DURING THE
 COMMISSION OF OR ATTEMPT TO COMMIT
 A VIOLENT CRIME

§ 16-23-0490

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That **FRANK MUNS** did in Aiken County on or about April 6, 2013, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Attempted Murder, all in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Aiken
 STATE VS.
Frank Muns

AKA:

Race: White Sex: M Age: 48

DOB: 1965 SS# [REDACTED]

Address:

City, State, Zip: Beech Island, SC 29842

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Murder / Attempted Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS0201657

A/W#: 2013A0210200353

Date of Offense: 4/6/2013

S.C. Code §: 16-03-0029(A)

CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0029(A) of the S.C. Code of Laws, bearing CDR Code # 3410

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature]

100435

Sheftall, Virginia Lauren

SC Bar#

Defendant

Attorney for Defendant

718601
 SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(B)(1) Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

COUNTY OF Aiken
 STATE VS.
Frank Muns

AKA:

Race: White Sex: M Age: 48DOB: 1965 SS# [REDACTED]

Address:

City, State, Zip: Beech Island, SC 29842DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Weapons / Possession of weapon during violent crime, if not also sentenced to life without parole or deathin violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Sheffall, Virginia Lauren100435
SC Bar#

Defendant

[Signature]
Attorney for Defendant71861
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 13-65-02-1657☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$300	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

5yrs.

INDICTMENT/CASE#: 2013GS0201664A/W#: 2013A0210200354Date of Offense: 4/6/2013S.C. Code § : 16-23-0490CDR Code #: 0549

SENTENCE SHEET

Presiding Judge

Judge Code:

Sentence Date: