The Supreme Court of South Carolina

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N O T I C E

In the Matter of Kelly C. Evans

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on January 16, 2013 beginning at 9:30 p.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

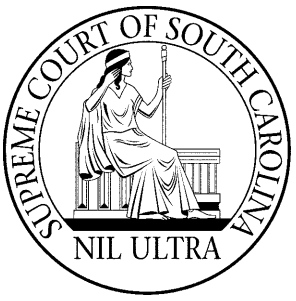
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

December 28, 2012

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 2, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Devon F. Frazier, Appellant.

Appellate Case No. 2010-171626

Appeal From Lancaster County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5069
Heard October 30, 2012 – Filed January 2, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender Breen R. Stevens, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

THOMAS, J.: Devon F. Frazier appeals his convictions for murder and possession of a firearm during the commission of a violent crime. He argues the

trial court committed reversible error in (1) declining to charge self-defense; (2) declining to charge voluntary manslaughter; and (3) charging that malice may be inferred from the use of a deadly weapon. We affirm in part, reverse in part, and remand for a new trial.

FACTS & PROCEDURAL HISTORY

Frazier shot Jermaine Richardson, "Baldy," in the head at the Pardue Street Apartments in Lancaster around 9:30 pm on March 9, 2007. Baldy and Andre Hood drove to the incident in a blue, four-door Cadillac, Baldy in the driver's seat and Hood in the front passenger's seat. When the police arrived, only Baldy remained in the car, and the front two doors of the car were open. No weapons were recovered. The windows were tinted, and the driver's side window had four bullet holes in it. The window had not shattered because the tint kept it together.

Baldy later died from his wounds, and a Lancaster County grand jury indicted Frazier for murder and possession of a firearm during the commission of a violent crime. The State presented twenty-five witnesses. A number of the witnesses testified Baldy attacked Frazier earlier in the night. They also testified Frazier never calmed down after the attack and immediately made threats to James Ross ("Pop Charlie") that he would kill Baldy and Pop Charlie. Six of the witnesses testified they later saw Frazier walk up to Baldy's car, look in the driver's side window, and shoot into the window three to four times.

Frazier testified he and Baldy were initially friends until they had a falling out. As a result of the decline in their friendship, Baldy initiated an altercation in early February 2007 during which he punched and shot at Frazier, who escaped unharmed. Later that month, they had words during a concert. About a week later, Frazier began seeing Tawanna Stalk. Around that time, he purchased a nine millimeter pistol for protection from Baldy.

Frazier recounted that he arrived at Stalk's apartment at 7:30 pm on the night of the shooting. He brought the gun and placed it under a chair in the apartment's front room. Stalk, Ayana Parker, and a number of others were also present. Everyone began to smoke marijuana and drink alcohol. An hour later, Pop Charlie knocked on the apartment door. At Pop Charlie's suggestion, Frazier along with two others left the apartment. Frazier testified he did not bring his gun because he was comfortable with the group and did not expect to see Baldy.

The group went to the apartment of Stalk's rear neighbor, Parker, and entered her kitchen. Frazier sold Pop Charlie a blunt, and Frazier then lit his own. Frazier testified that he looked down and, upon looking up, Pop Charlie slapped him, knocking him to the floor. Frazier testified he had not seen Baldy in Parker's apartment, but while he lay on the floor, Baldy jumped on and began to beat him. Frazier passed out from the beating and awoke on the kitchen floor. He testified he looked outside and saw Baldy getting in a car, leaving.

According to Frazier, he did not suffer any bruises or bleeding as a result of the fight. However, he was "mad" and "pissed off," and he asked Pop Charlie why they jumped him. He and Pop Charlie began to argue, and a third party eventually held Frazier back from the argument. Pop Charlie left Parker's apartment, and shortly thereafter, Frazier did as well.

Frazier testified he walked back to Stalk's apartment. He knocked on the door, and Pop Charlie answered. He and Pop Charlie resumed arguing, and they walked into the kitchen. Pop Charlie got a knife, and Frazier grabbed his gun in response, aiming it at Pop Charlie.

Frazier stated he stepped outside to leave, when a friend of his arrived. The friend joined Frazier's argument with Pop Charlie in the doorway of the apartment, and Stalk intervened, eventually separating them.

Frazier testified that the blue Cadillac drove up to the front of Stalk's apartment while he and his friend argued with Pop Charlie. At that time, Frazier was standing on the sidewalk outside Stalk's apartment, with his hands by his side and his gun tucked in his pants. Frazier heard Pop Charlie yell, "There goes your man," and then he heard gunshots behind him. As he turned around, he saw Hood at the passenger side of the Cadillac, door open, leaning over the car, shooting at him with a rifle. Frazier ran toward and ducked behind the front corner of a Ford Explorer on the sidewalk in front of a next-door apartment. From that position, he stood up and shot back at the blue Cadillac three times.

Frazier testified he first noticed the blue Cadillac when he heard gunshots behind him. He did not know Baldy owned the blue Cadillac, nor did he know Baldy was driving the car. He claimed he did not see anyone other than Hood exit the blue

Cadillac, nor did he see anyone else with a weapon. According to Frazier, he did not know Baldy had been shot until the next morning.

Frazier testified six minutes elapsed from the time he awoke on the floor of Parker's kitchen until the shooting began in front of Stalk's apartment.[1] He testified he did not have enough time to calm down between the time he was jumped and the time of the shooting. He also testified he shot at the blue Cadillac to defend himself and because he was still "worked up" about the earlier attack. However, he denied ever threatening Pop Charlie or leaving the area to retrieve a gun.

An investigating officer testified Frazier "initially" told the officer he saw Baldy driving the blue Cadillac earlier "in the area that night" but subsequently changed his story to indicate he knew nothing about the shooting and never saw the car or Baldy that evening.

An expert in trace analysis of gunshot residue introduced tests during trial that revealed "quantities of metal consistent with gunshot residue" on the back of Baldy's right hand. Moreover, the gunshot residue expert explained that it was possible for the residue to end up on Baldy's hands even if he did not shoot a firearm because, when a bullet perforates an object—such as a car window—the lead in the bullet can vaporize and land on either side of the perforated object. The expert could not testify, however, as to whether it was more likely that the residue occurred this way or by Baldy firing a weapon. Investigators also found copper bullet jackets in the vehicle, and the State's bullet expert testified it would not be impossible for the jackets to separate from the bullets when the bullets went through the tinted window if the gun was shot from inside the car.

After the parties presented their cases, they talked with the trial court about whether to charge self-defense, voluntary manslaughter, and the inference of malice based upon the use of a deadly weapon. The court denied the motions to charge the jury on self-defense and voluntary manslaughter. In declining to charge self-defense, the court reasoned Frazier failed to comply with a duty to retreat by firing back once he ducked behind the Explorer because he was safe at that point and could have returned to Stalk's apartment. Relying on *State v. Childers*, 373

[1] Parker explained that 30 minutes elapsed from the scuffle in her kitchen until after Baldy was shot.

S.C. 367, 645 S.E.2d 233 (2007) (plurality), the court declined to charge voluntary manslaughter for three reasons: (1) no evidence showed Frazier was "under the sway of a prior provocation"; (2) no evidence showed Frazier knew Baldy was in the automobile during the shooting; and (3) the evidence showed Frazier's reason for shooting was not to shoot Baldy but to retaliate to the shots he heard.

The court further charged the jury the following:

> Inferred malice may arise also when the deed is done with a deadly weapon, and a revolver pistol is a deadly weapon. This inference regarding malice being inferred from the use of a deadly weapon is simply an evidentiary fact to be considered by you along with the other evidence in this case and you can give it such weight as you decide it should have, if any.

The court reasoned *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), did not preclude the charge because the case did not involve self-defense or voluntary manslaughter.

The jury found Frazier guilty of both murder and possession of a firearm during the commission of a violent crime. He received concurrent sentences of 50 years' imprisonment for murder and 5 years' imprisonment for possession of a firearm. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in declining to charge self-defense?

2. Did the trial court err in declining to charge voluntary manslaughter?

3. Did the trial court err in charging the jury that malice may be inferred from the use of a deadly weapon?

LAW & ANALYSIS

I. SELF-DEFENSE

Frazier contends the trial court erred in declining to charge self-defense because the record contains evidence he was shot at with a rifle from behind, ducked behind the front corner of a nearby vehicle, and shot back at his assailants. He contends evidence shows Baldy was not only a driver but also a gunman himself, Frazier was not in a place of safety when he ducked behind the corner of the Explorer, and Frazier would have exposed himself to further danger if he ran to Stalk's apartment from the Explorer.[2] We agree.

"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." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). Self-defense requires four elements:

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[2] The State argues Frazier failed to preserve his arguments that (1) Baldy was not simply a driver but also a shooter and (2) Frazier could not return to the apartment without risking further serious injury. We disagree. On the record during the charging stage, Frazier argued evidence existed that "the victim was actually firing the weapon" and that Frazier "was being attacked by the victim and his confederate." Moreover, Frazier argued he was entitled to fire back at the blue Cadillac because he was in an unsafe position. The trial court responded that Frazier could have run to Stalk's apartment, and Frazier disputed that assertion by arguing "he had to expose himself to fire to" run to the apartment. Thus, the arguments have been raised to and ruled upon by the trial court, and they are preserved for review. *See State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (noting an argument on a jury charge is not preserved for appeal if it is not made below); *State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) ("[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions.").

> (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.

Id. at 649, 664 S.E.2d at 469. "[C]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998).

Here, evidence in the record supports Frazier's contention he had no probable means of avoiding the danger other than to fire upon the blue Cadillac. Frazier testified he fired his weapon because Hood was shooting at him from the car that Baldy was driving. Once the right to fire in self-defense arises, a person is not required to wait until his adversary is on equal terms in order to defend himself. *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Thus, assuming Frazier satisfied the other elements of self-defense, he was not required to risk serious injury by running toward Stalk's apartment or waiting for his alleged assailants to flank or shoot through the Explorer. *See also id.* (providing one "doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him" (internal quotation marks omitted)); *State v. Jackson*, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955) ("[I]t 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.").

Moreover, taken in the light most favorable to Frazier, evidence in the record supports the remaining elements of self-defense.

First, evidence in the record indicates Frazier was in actual, imminent danger of death or serious bodily injury. No gun was found in the blue Cadillac, but four bullet holes passed through Baldy's car window even though Frazier testified he fired his weapon only three times. Further, the State's expert witnesses explained the gun-shot residue on Baldy's hands and the location of the bullet jackets in the Cadillac could indicate that Baldy fired upon Frazier in addition to Hood. This evidence could reasonably indicate Baldy was a gunman himself.

Second, evidence in the record could also reasonably support a finding that Frazier was without fault in bringing on the difficulty. According to Frazier, Baldy returned to the apartment armed after attacking Frazier without cause. Frazier testified he was in an argument with Pop Charlie at that time. But that argument was not the proximate cause of Baldy and Hood's shooting. Frazier and Pop Charlie were not engaged in a physical altercation, and although Frazier's gun was in his pants at the time, nothing in Frazier's story indicates that he was clutching the firearm or that the firearm was visible to Hood or Baldy when he was arguing with Pop Charlie. Frazier testified that when Baldy and Hood fired, his back was to the blue Cadillac, his gun was in his pants, and his hands were not on the weapon. *Cf. State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (holding the defendant was not without fault in bringing on the difficulty because the defendant "carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement" and his "actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim"). Because there is evidence in the record from which a jury could find Frazier's conduct was not reasonably calculated to bring on the difficulty, as well as evidence supporting the other elements of self-defense, we reverse his convictions and remand for a new trial.

II. VOLUNTARY MANSLAUGHTER

Frazier contends the trial court erred in declining to charge voluntary manslaughter because evidence showed he fired at Baldy out of anger arising from the initial jumping and in response to shots fired by both Baldy and Hood. We affirm the trial court's denial of Frazier's request for a voluntary manslaughter charge.

To warrant the court declining to give a manslaughter charge, there must be no evidence whatsoever tending to support the charge. *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. If there is, the defendant is entitled to the charge. *Id.* In determining whether to give the charge, "the court must view the evidence in the light most favorable to the defendant." *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14 (2011). "The sudden heat of passion, upon sufficient legal provocation, . . . while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Childers*, 373 S.C. at 373, 645 S.E.2d at 236 (internal quotation marks omitted). The sudden heat of passion "must cause a person to lose control." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609. "[I]n determining whether an act which caused death was impelled by heat of passion[, as with manslaughter], or by malice[, as with murder], all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

Here, the record is devoid of any evidence Frazier shot Baldy in a "heat of passion." Frazier testified he was "mad" and "worked up" from the earlier beating. However, despite the earlier incident, Frazier testified he never attacked anyone until fired upon. At that time, he ran to the Explorer, ducked behind it for cover, and then stood and returned fire. Considering the circumstances surrounding the incident, it is clear he shot back as a calculated, strategic move to protect himself. Frazier's story does not establish he fired his weapon in a heat of passion causing an *uncontrollable impulse* to do violence, and no other evidence in the record could reasonably support such a contention. The trial court properly declined Frazier's request to charge the law on voluntary manslaughter. *See Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. . . . Turning to the facts of this case, viewing the

evidence in the light most favorable to Appellant, there is no evidence to support a voluntary manslaughter charge. . . . While . . . Appellant was in fear, there is no evidence Appellant was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense.").

III. INFERRED MALICE

Frazier argues the trial court erred in permitting an inference of malice based upon his use of a firearm under *Belcher*. We agree.

As said above, evidence in the record could reasonably support Fraizer's claim of self-defense. Thus, the trial court erred in charging that malice may be inferred from the use of a deadly weapon. *See Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 ("[W]here evidence is presented that would reduce, mitigate, excuse or *justify* a homicide . . . caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon."); *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 ("A person is *justified* in using deadly force in self-defense when . . . .").

IV. CONCLUSION

We affirm the denial of Frazier's motions for charges on voluntary manslaughter.[3] We reverse the denial of Frazier's motion for a charge on self-defense and against a charge on malice. Thus, we remand for a new trial on the murder and firearm convictions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[3] A recurring issue throughout this case has been whether Frazier was entitled to a castle doctrine charge. However, we decline to address that issue because we reverse for a new trial on the self-defense issue. *See Belcher*, 385 S.C. at 613 n.11, 685 S.E.2d at 811 n.11 (declining to address a remaining issue because the court reversed and remanded for a new trial due to an erroneous jury charge).

HUFF and GEATHERS, JJ., concurring.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lincoln General Insurance Company, individually and as subrogee of Jose Salgado, Blanca Acosta, Miguel S. (age 14), Ofelia S. (age 10), and Cathy Alafaro, Respondents,

v.

Progressive Northern Insurance Company, Avery Strickland, and Jennifer Strickland, Defendants,

Of whom, Progressive Northern Insurance Company is the Appellant.

Appellate Case No. 2011-196347

Appeal From Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 5070
Heard December 12, 2012 – Filed January 2, 2013

REVERSED

Adam J. Neil, of Murphy & Grantland PA, of Columbia, for Appellant.

Jeffrey J. Wiseman, Stephen Lynwood, and Russell G. Hines, all of Young Clement Rivers LLP, of Charleston, for Respondents.

THOMAS, J.: After a car accident, Lincoln General Insurance Company, individually and as subrogee of Jose Salgado, Blanca Acosta, Miguel S., Ofelia S. and Cathy Alafaro (collectively, Respondents) sued Progressive Northern Insurance Company, Avery Strickland, and Jennifer Strickland. Lincoln General sought a declaratory judgment that Jennifer Strickland's policy with Progressive covered the accident, pursuant to the South Carolina Motor Vehicle Financial Responsibility Act (the MVFRA), for the mandatory minimum policy limits, even though the driver was disqualified from coverage under Jennifer Strickland's policy. The trial court granted summary judgment to Lincoln General. Progressive appeals. We reverse.

FACTS & PROCEDURAL HISTORY

The facts are not disputed. Jennifer Strickland and Avery Strickland were married. Jennifer took out an insurance policy with Progressive on a motor vehicle she owned. The record does not contain the entire insurance policy. The record contains an endorsement that provides the following:

> You have named the following person as excluded drivers under this policy:
>
> Avery Strickland Date of Birth: March 25, 1978
>
> No coverage is provided for any claim arising from an accident or loss involving a motorized vehicle being operated by an excluded person. This includes any claim for damages made against any named insured, resident relative, or any other person or organization that is vicariously liable for an accident or loss arising out of the operation of a motorized vehicle by the excluded driver.
>
> . . . .
>
> I declare that either the driver's license of the excluded persons named in this Named Driver Exclusion election has been turned into the Department of Motor Vehicles, or that an appropriate policy of liability insurance or

> other security as may be authorized by law has been properly executed in the name of the person to be excluded.

The named driver endorsement was signed by Jennifer and indicated that Avery surrendered his license to the Department of Motor Vehicles. No party disputes the accuracy of this representation.

In March 2009, Jennifer entrusted the vehicle to Avery. While operating the car, he was involved in an accident with a vehicle owned by Jose Salgado. Avery was at-fault, but Progressive refused coverage, contending Jennifer's policy was inapplicable while he was driving. Lincoln General paid uninsured motorist benefits to the occupants of Salgado's car under his policy.

Respondents brought suit against Progressive, Jennifer, and Avery. Among other claims and prayers for relief, Respondents sought declaratory judgment that Jennifer's policy with Progressive covered the minimum limits mandated by the MVFRA.

Respondents and Progressive both moved for summary judgment. The trial court granted summary judgment to Lincoln General. It found the MVFRA required Progressive to cover the claim up to the mandatory minimum limits of liability, despite the named driver endorsement in Jennifer's policy. The court reasoned the MVFRA provides that an owner's liability policy is "absolute" when injury occurs and South Carolina case law requires liability carriers to cover losses up to the statutory limits regardless of the endorsement. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in granting Lincoln General summary judgment based upon a finding that Progressive must afford automobile liability insurance coverage up to the minimum limits despite the named driver endorsement?

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court

under Rule 56(c), SCRCP." *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 177, 700 S.E.2d 283, 286 (Ct. App. 2010). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP.

LAW & ANALYSIS

Progressive argues the trial court erred in awarding minimum limits liability coverage because the named driver endorsement in Jennifer's policy was statutorily authorized and therefore is not inconsistent with the public policy established by the MVFRA. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). However, statutes relating to an insurance contract are generally part of the contract as a matter of law. *Nakatsu*, 390 S.C. at 178, 700 S.E.2d at 287. To the extent a policy conflicts with an applicable statute, the statute prevails. *Id.*

Under the MVFRA, an insurance carrier's liability for "insurance required by this chapter" is "absolute whenever injury or damage covered by the motor vehicle liability policy occurs." S.C. Code Ann. § 56-9-20(5)(b)(1) (2006). Automobile insurance policies may not be issued unless they "contain[] a provision insuring the persons defined as the insured" in liability coverage at a minimum of $25,000 per person for bodily injury, $50,000 per accident for bodily injury, and $25,000 per accident for injury to property. S.C. Code Ann. § 38-77-140(A) (Supp. 2011). An "insured" is statutorily defined to include the named insured and resident relative. S.C. Code Ann. § 38-77-30(7) (2002). As a result, resident relatives of the named insured are generally covered as an "insured" under the named insured's policy regardless of whether the named insured gave them permission to operate the covered vehicle. *See* S.C. Code Ann. § 38-77-140(A) (Supp. 2011) (providing that

automobile insurance policies must provide coverage to "the persons defined as the insured"); § 38-77-30(7) ("'Insured' means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . .").

The purpose of the MVFRA is to give greater protection to those injured through the negligent operation of automobiles. *Penn. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). The legislation requires insurance for the benefit of the public, and an insurer may not "nullify its purposes through engrafting exceptions from liability as to uses which it was the evident purpose of the statute to cover." *Id.* Therefore, our courts will strike down policy provisions that have "the effect of limiting the coverage requirements of the statute[s]." *See id.* (striking an omnibus provision purporting to provide coverage to certain automobiles "not used for business or commercial purposes other than farming" because it had the effect of limiting an insured's coverage in contravention of the mandatory minimum limits).

Nevertheless, our courts have consistently cautioned that "[r]easonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted." *Id.* In fact, our Code specifies certain exclusions that may be included in automobile insurance policies. For example:

> The automobile policy need not insure any liability under the Workers' Compensation Law nor any liability on account of bodily injury to an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor vehicle nor any liability for damage to property owned by, rented to, in charge of, or transported by the insured.

S.C. Code Ann. § 38-77-220 (2002). Section 56-9-20(5)(c) of the MVFRA contains similar language. *See* S.C. Code Ann. § 56-9-20(5)(c) (2006) ("The motor vehicle liability policy need not insure any liability under the Workers' Compensation Law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor

vehicle, nor any liability for damage to property owned by, rented to, in charge of, or transported by the insured.").

Further, under section 38-77-340 of our Code, the named insured may agree with the insurer that the named insured's policy "shall not apply" while certain persons operate the motor vehicle:

> Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code Ann. § 38-77-340 (Supp. 2011). The purpose of this section is to "alleviate the problem often faced by the owner of a family policy, who . . . has a relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage." *Lovette v. U.S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980) (internal quotation marks omitted) (discussing predecessor statute).

Here, Progressive is not required to provide minimum limits. The named driver endorsement statute says that, "[n]otwithstanding the definition of 'insured' in Section 38-77-30, . . . *a policy of liability insurance shall not apply*" when the named driver is operating the vehicle. Thus, "the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes" specifies that an insurer's obligation to provide minimum limits for

"insureds" is inapplicable when the person named in the endorsement is driving and the statute's remaining requirements are satisfied. Because the policy is not in effect when the named driver is operating the vehicle and *such an endorsement is part of our state's public policy*, the MVFRA's mandate that "[t]he liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage *covered by the motor vehicle liability policy* occurs" does not apply.

We have expounded similar principles in a case addressing a predecessor to the current named driver endorsement statute in *South Carolina Insurance Company v. Barlow*, 301 S.C. 502, 392 S.E.2d 795 (Ct. App. 1990). There, we repeated the longstanding principle that insurers may limit liability to certain persons if the limitation "is not in contradiction of some statutory inhibition or public policy." *Id.* at 506, 392 S.E.2d at 797. We then recognized that our legislature intended to protect the public by adopting an "omnibus clause statute" that required insurance policies to cover not only the named insured but also the named insured's resident spouse. *Id.* at 508, 392 S.E.2d at 797. However, we also noted the predecessor endorsement statute "*is not inhibited by*" that public policy. *Id.* (emphasis added). While the omnibus clause statute protected the public, the predecessor endorsement statute "protect[ed], in limited situations, the right of the parties to make their own contract." *Id.*

Respondents cite to a number of cases to support their argument that the named driver endorsement does not obviate Progressive's duty to provide minimum limits because the General Assembly promulgated the MVFRA to protect third parties. *See S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989); *Parker*, 282 S.C. 546, 320 S.E.2d 458. We agree the MVFRA was created to protect third parties. But our cases that hold an injured party can obtain coverage for the minimum limits on a policy despite purportedly falling within an exclusion do not address policy provisions explicitly authorized by statute at the time of the injury. *See, e.g., Am. Mut. Fire Ins. Co. of Charleston, Inc. v. Aetna Cas. & Sur. Co.*, 303 S.C. 301, 303-04, 400 S.E.2d 147, 148 (1991) (holding a provision in a car dealership's policy that "excluded liability coverage for an individual using a covered vehicle while working in the business of servicing automobiles" was invalid with respect to a permissive user who was an employee of another car dealership because the exclusion contravened the MVFRA's requirement that the policy to cover persons defined as "insured," including permissive users, and noting: "certain statutes provide specific exemptions which

may be properly included in an automobile liability policy, thus giving rise to a strong inference that no other exceptions were intended" (overruling *Stanley v. Reserve Ins. Co.*, 238 S.C. 533, 121 S.E.2d 10 (1961), and *Am. Fire & Cas. Co. v. Sur. Indem. Co.*, 246 S.C. 220, 143 S.E.2d 371 (1965), to the extent they were inconsistent with the opinion)); *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975) (holding exclusion purporting to relieve the insurer of liability for injuries sustained by the named insured, resident spouses and relatives as well as permittees was unenforceable because it was contrary to the MVFRA: "While parties are generally permitted to contract as they desire, freedom to contract is not absolute and coverage required by law may not be omitted. . . . It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid"); *Mumford*, 299 S.C. at 18, 382 S.E.2d at 13 (holding a provision that excluded third party liability coverage for "intentional acts" was invalid because (1) it contravened the minimum limits requirement; (2) sections of the MVFRA "list certain exclusions which may properly be placed in an automobile liability policy," none of those sections list an intentional acts exclusion, and "[t]his omission suggests such an exclusion is not valid"; and (3) "[s]ection 38-77-310 expressly authorizes an intentional acts exclusion for personal injury protection coverage," which suggests the legislature did not intend to authorize a similar provision for third party liability coverage); *Parker*, 282 S.C. at 554-55, 320 S.E.2d at 463 (holding void a provision purporting to provide coverage to certain automobiles "not used for business or commercial purposes other than farming" as contravening the minimum limits requirement under the MVFRA and "find[ing] support for[the] holding" in the existence of other sections under the MVFRA because "[t]hese sections list certain exemptions which may properly be included in an automobile liability policy," "[a] business use or other use exclusion is not included," and the expressions of these exclusions "give rise to a strong inference that no other exceptions were intended").

In contrast, and consistent with the principles stated in *Barlow*, we have held that claimants were validly excluded from all automobile coverage due to a statutorily permitted exclusion despite the MVFRA's mandate. *See State Farm Mut. Auto. Ins. Co. v. N. River Ins. Co.*, 288 S.C. 374, 375-76, 342 S.E.2d 627, 627 (Ct. App. 1986) (holding a policy provided "no coverage" because an exclusion for bodily injury to "any employee of an insured arising out of his or her employment" was "consonant with two provisions" of the MVFRA that provided "a motor vehicle liability policy need not insure any liability covered by the worker's compensation

law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the motor vehicle"). In *Barlow* and *North River*, the exclusions did not contravene public policy because the exclusions were public policy themselves.

Respondents also rely heavily upon *United Services Automobile Association v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000), and *Allstate Insurance Company v. United States Fidelity & Guaranty Company*, 619 P.2d 329 (Utah 1980), in support of their arguments. However, those cases are not applicable.

In *Markosky*, an insured failed to notify its insurer of a traffic accident, and this court rejected an argument that the MVFRA required the insurer to pay more than the mandatory minimum liability limits to a third party despite the existence of greater policy limits. 340 S.C. at 230-31, 530 S.E.2d at 664. The court acknowledged that an insured's failure to follow the notice provisions of a minimum limits policy does not void the policy. *Id.* at 227-28, 530 S.E.2d at 663 (citing *Shores v. Weaver*, 315 S.C. 347, 354-55, 433 S.E.2d 913, 916-17 (Ct. App. 1993)). But it noted that other courts have addressed "identical" mandatory limits statutes and held similar conduct on the insured's part could defeat entitlement to recovery of more than the minimum limits because the protection afforded by the MVFRA to the policy applied only to coverage required by that legislation. *Id.* at 228, 530 S.E.2d at 663 (citing *Odum v. Nationwide Mut. Ins. Co.*, 401 S.E.2d 87, 91-92 (N.C. Ct. App. 1991), and *Swain v. Nationwide Mut. Ins. Co.*, 116 S.E.2d 482, 487-88 (N.C. 1960)). The court opted to adopt such an approach in light of the legislative directive to construe the MVFRA so as to make its application uniform with substantially identical legislation. *Id.*

In recognizing the need to construe the MVFRA uniformly with similar statutes, this court footnoted thirteen opinions from other states. One of those opinions was the aforementioned *Allstate Insurance Company v. United States Fidelity & Guaranty Company*, which contains a proposition that summarizes the heart of Respondents' argument on appeal:

> Contracting parties are free to limit coverage in excess of the minimum required limits, and the [named driver] exclusion found in the contract is valid in relation to any coverage exceeding the minimum amounts. Thus, a

> balance is struck between the necessity of securing minimum automobile liability coverage and the availability of lower premiums because of the exclusion of high insurance risks.

Allstate Ins. Co, 619 P.2d at 333.

Neither *Markosky*, its citation of *Allstate*, nor *Allstate* itself provide good authority for holding that an insurer is required to provide coverage in this case. First, *Allstate* held that a named driver provision was void under Utah law to the extent it purported to avoid the protection of mandatory minimum limits established by Utah's No-Fault Insurance Act. *Allstate Ins. Co*, 619 P.2d at 333. The *Allstate* opinion did not address whether any Utah statute specifically authorized named driver exclusions. After the Utah court decided *Allstate*, the Utah legislature promulgated a statute that provided a policy may include a named driver provision to "specifically exclude" certain named drivers "from coverage." *See* Utah Code Ann. § 31A-22-302.5 (2011). Second, the issue in *Markosky* involved whether the insured's conduct in breach of its duty to notify the insured of an accident would result in minimum coverage. *Markosky* did not address the issue here—whether the MVFRA required minimum limit coverage despite a statute that specifically authorized a provision as *part of the state's public policy*. Third, the citation in *Markosky* that included *Allstate* also included decisions from state courts that have adopted positions consistent with ours. *Cf. State Farm Auto. Ins. Co. v. Dressler*, 738 P.2d 1134, 1138 (Ariz. Ct. App. 1987) ("[I]t is inconceivable that the legislature would purposely enact statutory language that authorized the insurer to exclude coverage for personal liability incurred by the unacceptable driver and to exclude vicarious liability incurred due to the unacceptable driver's conduct, but not to exclude coverage for the named insured's personal liability for negligently entrusting a vehicle to the same unacceptable driver. Accordingly, we hold that State Farm's driver exclusion endorsement validly insulated State Farm from *any liability or obligation* under appellant Donald Dressler's automobile liability policy for any claim generated as a result of Joyce Dressler's operating the insured vehicle." (emphasis added)); *Detroit Auto. Inter-Ins. Exch. v. Comm'r of Ins.*, 272 N.W.2d 689, 691 (Mich. Ct. App. 1978) ("It is defendant's position that since the Legislature enacted a comprehensive, compulsory insurance scheme, it would be inconsistent to permit named driver exclusions, as this would force accident victims to obtain a recovery from the personal holdings of those responsible. Defendant contends that the Legislature

would not permit a class of drivers, named excluded drivers, to drive totally uncovered by some residual liability insurance. While such a class might have existed before No-Fault, that situation was remedied by the requirement of uninsured motorist coverage. Defendant's position is appealing until one confronts M.C.L. s 500.3009(2); M.S.A. s 24.13009(2). That statute expressly permits the exclusion from coverage of a named person, and provides that the vehicle owner and others legally responsible for the excluded section remain fully, personally liable.").[1]

"'[T]he legislature has determined that for all vehicles registered in South Carolina, at least minimal coverage is necessary to protect the public.'" *Markosky*, 340 S.C. at 230, 530 S.E.2d at 664 (quoting *Shores*, 315 S.C. at 355, 433 S.E.2d at 917)). However, the legislature has also determined that "coverage under such a policy of liability insurance shall not apply" while a named driver is operating the vehicle so long as the remaining statutory requirements are satisfied. § 38-77-340. As in *Barlow*, the named driver endorsement statute "*is not inhibited by*" the MVFRA's public policy because it constitutes separately approved public policy. *Barlow*, 301 S.C. at 507-08, 392 S.E.2d at 797 (emphasis added). While the MVFRA protects the public, the named driver endorsement statute "protects, in limited situations, the right of the parties to make their own contract." *Id.*

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[1] States disagree as to whether a named driver exclusion authorized by statute is completely or only partly enforceable, but these decisions often turn upon the language and existence of applicable statutes. *Compare Nelson v. Progressive Cas. Ins. Co.*, 162 P.3d 1228 (Alaska 2007), *Dressler*, 738 P.2d 1134, *Associated Indem. Corp. v. King*, 109 Cal. Rptr. 190 (Cal. Ct. App. 1973), *Sersion v. Dairyland Ins. Co.*, 757 P.2d 1169 (Colo. Ct. App. 1988), *St. Paul Fire & Marine Ins. Co. v. Smith*, 787 N.E.2d 852 (Ill. App. Ct. 2003), *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678 (Iowa 2008), *Beacon Ins. Co. of Am. v. State Farm Mut. Ins. Co.*, 795 S.W.2d 62 (Ky. 1990), *Bellard v. Johnson*, 694 So.2d 225 (La. 1997), *Detroit Auto. Inter-Ins. Exch.*, 272 N.W.2d 689, *Garza v. Glen Falls Ins. Co.*, 731 P.2d 363 (N.M. 1986), *and Tapio v. Grinnell Mut. Reinsurance Co.*, 619 N.W.2d 522 (S.D. 2000), *with State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449 (Del. 1994), *Iowa Mut. Ins. Co. v. Davis*, 752 P.2d 166 (Mont. 1988), *Federated Am. Ins. Co. v. Granillo*, 835 P.2d 803 (Nev. 1992), *and Ward v. Baker*, 425 S.E.2d 245 (W.Va. 1992).

CONCLUSION

The MVFRA does not permit recovery of minimum limits liability coverage on a motor vehicle liability insurance policy when a person named in a policy provision pursuant to section 38-77-340 is operating the motor vehicle and the requirements of the statute are satisfied because the policy "shall not apply" under those circumstances. Consequently, we reverse the grant of summary judgment to Lincoln General because the MVFRA does not require Progressive to cover the Respondents' claim up to the statutorily set minimum limits of liability.

REVERSED.

HUFF and GEATHERS, JJ., concur.