

1 of 2 DOCUMENTS

**Ex parte Larry Douglas Childers (Re: Larry Douglas Childers v. State)**

**1920060**

**SUPREME COURT OF ALABAMA**

**640 So. 2d 16; 1994 Ala. LEXIS 34**

**January 21, 1994, Released**

**SUBSEQUENT HISTORY:** Released for Publication July 26, 1994.

**PRIOR HISTORY:** **[\*\*1]** PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS. (Colbert Circuit Court, CC-91-16, Court of Criminal Appeals, CR-91-554).

This Opinion Substituted by the Court for Withdrawn Opinion of September 10, 1993, Reported at: 1993 Ala. LEXIS 907.

**DISPOSITION:** ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED; APPLICATION OVERRULED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review from his conviction for manslaughter by a trial court, which was affirmed by the Court of Criminal Appeals (Alabama). The court granted certiorari.

**OVERVIEW:** Defendant argued that appeals court erred in finding that defendant's objection to the introduction of a city ordinance was not sufficiently particular to preserve for review a question as to the legality of the ordinance. The court agreed and reversed the judgment for prejudicial error. Defendant argued that he shot a man in self-defense. Defendant introduced testimony he defendant was licensed to carry a pistol. The State introduced evidence that defendant had violated a city ordinance. Defendant's counsel objected to the admission of the ordinance as unconstitutional. To preserve an issue for review, defendant had to object with sufficient particularity to permit the trial court to make an informed decision on the particular legal issue involved. The court concluded that defendant's objection was sufficiently particular to apprise the trial court that he questioned the legality of the ordinance. Furthermore, the court held that the admission of the ordinance was prejudicial error because the jury might have found that defendant shot the man in self-defense instead of convicting defendant of manslaughter, thinking that he had no legal right to carry a pistol.

**OUTCOME:** The court reversed the judgment and remanded the cause with instructions to reverse the conviction and order a new trial.

**CORE TERMS:** ordinance, firearm, pistol, shot, state statute, license, legality, prejudicial, pass a law, valid permit, particularity, manslaughter, conflicted, convicted, preserved, apprise, lounge, self-defense, substituted, withdrawn, aggressor, handguns, knocked, shoot, fight, floor

**LexisNexis(R) Headnotes**

***Civil Procedure > Appeals > Reviewability > Preservation for Review***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN1] To preserve an issue for review, appellant must object with sufficient particularity to permit the trial court to make an informed decision on the particular legal issue involved.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Licenses > General Overview***

***Governments > Legislation > General Overview***

***Governments > Local Governments > Ordinances & Regulations***

[HN2] Ala. Code § 11-45-1.1 (1975) reads: no incorporated municipality shall have the power to enact any ordinance, rule or regulation, which shall tax, restrict, prevent or in any way affect the possession or ownership of handguns by the citizens of this state. The entire subject matter of handguns is reserved to the state legislature.

***Civil Procedure > Judgments > General Overview***

***Civil Procedure > Appeals > Reviewability > Preservation for Review***

***Criminal Law & Procedure > Appeals > Reversible Errors > General Overview***

[HN3] Error in the proceedings at trial is not necessarily grounds for reversing a judgment. No judgment may be reversed or set aside, unless in the opinion of the court to which the appeal is taken. After an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties. Ala. R. App. P. 45.

**COUNSEL:** For Petitioner: Donald E. Holt and Lindsey Mussleman Davis of Holt, Mckenzie, Holt & Mussleman, Florence.

For Respondent: James H. Evans, atty. gen., and Stephen N. Dodd, asst. atty. gen.

**JUDGES:** HORNSBY, Maddox, Shores, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

**OPINION BY:** HORNSBY

**OPINION****[\*17] On Application for Rehearing**

HORNSBY, CHIEF JUSTICE.

The opinion of September 10, 1993, is withdrawn and the following is substituted therefor.

On September 29, 1990, Larry Douglas Childers and Jerry Wayne Collins were fighting in the Wagon Wheel lounge in Muscle Shoals, Alabama, when Childers shot Collins with a pistol, killing him. Although Childers was indicted for the murder of Collins, a jury convicted him of manslaughter. On appeal, the Court of Criminal Appeals remanded for further proceedings in regard to restitution, and this Court denied the State's petition for certiorari review. *Childers v. State*, 607 So. 2d 350 (Ala. Crim. App. 1992). **[\*\*2]** Following the Proceedings on remand, the Court of Criminal Appeals, on September 3, 1993, affirmed; see \_\_\_ So. 2d \_\_\_. On certiorari review granted on the defendant's petition, we reverse and remand for a new trial.

Childers presents three issues for review. After carefully reviewing the record, we conclude that the Court of Criminal Appeals properly held that the trial court did not err in permitting the prosecution to introduce evidence of prior threats made by Childers, and that it properly held that the prosecution's striking of three black veniremembers did not violate *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). However, we must conclude that that court

incorrectly held that Childers's objection to the introduction of a city ordinance was not sufficiently particular to preserve for review a question as to the legality of that ordinance.

Childers argued at trial that he shot Collins in self-defense. While cross-examining Muscle Shoals police captain David Bradford, Childers's attorney elicited testimony that Childers was licensed to carry a pistol. Childers's attorney then introduced copies of Childers's state pistol license and his federal license [\*\*3] to sell firearms, which the court admitted into evidence. On redirect examination of Bradford, the prosecution introduced copies of Muscle Shoals, Alabama, Ordinance 1036, § 5 (December 6, 1983), which prohibits the possession of a firearm "upon a premises of a business establishment maintaining a lounge retail liquor license." According to § 5(a) of the ordinance, a valid permit to carry the firearm is no defense to a charge of violating this ordinance.

[\*18] Childers's attorney objected to the introduction of the ordinance:

"We object. ... The law is that a city cannot pass a law that violates an existing state statute."

"....

"... It's illegal, irrelevant, immaterial, prejudicial. The proper predicate is not laid. It has no relevance to the issues in this case because it is contrary to existing State law and does not direct any question as to whether or not it would affect the federal gun license that's been received into evidence.

"It has no probative value. It's prejudicial to the defendant and injects an issue into the evidence to confuse the jury on an issue that is clear by the applicable law that he had a right to possess a firearm at the time."

Overruling this objection, the [\*\*4] trial court admitted the ordinance into evidence.

On appeal, Childers argued that the trial court erred in allowing the Muscle Shoals ordinance into evidence, because, he argued, the ordinance violates the Alabama Constitution and state laws derived therefrom authorizing citizens with valid permits to carry firearms. Childers cited Article I, § 26, Ala. Const. of 1901, as a provision with which the Muscle Shoals ordinance conflicted. Section 26 provides, "Every citizen has a right to bear arms in defense of himself and the state." Childers cited no particular state statute that the ordinance conflicted with.

The Court of Criminal Appeals refused to review the constitutionality of the Muscle Shoals ordinance, because, it concluded, when the ordinance was offered into evidence, Childers did not object with sufficient particularity to apprise the trial court of a question of its constitutionality. Therefore, it held, he had waived his right to argue the issue on appeal. *Childers v. State*, 607 So. 2d at 351-52 (citing *Ex parte Frith*, 526 So. 2d 880, 882 (Ala. 1987)).<sup>1</sup>

<sup>1</sup> The Court of Criminal Appeals stated further that even if Childers had preserved the issue for review on appeal, his argument that the ordinance was illegal was without merit because the court had rejected a similar argument in *Hyde v. City of Birmingham*, 392 So. 2d 1226 (Ala. Crim. App. 1980), *cert. denied*, 392 So. 2d 1229 (Ala. 1981).

[\*\*5] [HN1] To preserve an issue for review, the appellant must object with sufficient particularity to permit the trial court to make an informed decision on the particular legal issue involved. *Lewis v. State*, 488 So. 2d 1362, 1365 (Ala. Crim. App. 1986); *McDonald v. State*, 448 So. 2d 460, 463 (Ala. Crim. App. 1984); *Turner v. State*, 406 So. 2d 1066, 1069 (Ala. Crim. App.), *cert. denied*, 406 So. 2d 1069 (Ala. 1981); *Bland v. State*, 395 So. 2d 164, 168 (Ala. Crim. App. 1981); *Ward v. State*, 376 So. 2d 1112, 1115 (Ala. Crim. App.), *cert. denied*, 376 So. 2d 1117 (Ala. 1979). Objecting to the prosecution's introduction of the Muscle Shoals ordinance, Childers argued that the ordinance was "illegal" and that "a city cannot pass a law that violates an existing state statute." Although Childers's attorney failed to specify which state statute he believed the Muscle Shoals ordinance violated, the ordinance conflicts with [HN2] Ala. Code 1975, § 11-45-1.1. That statute reads:

"No incorporated [\*\*6] municipality shall have the power to enact any ordinance, rule or regulation, which shall tax, restrict, prevent or in any way affect the possession or ownership of handguns by the citizens of this state. The entire subject matter of handguns is reserved to the state legislature."

We conclude that the objection made by Childers's attorney was sufficiently particular to apprise the trial court that he questioned the legality of the Muscle Shoals ordinance. Moreover, had we concluded that the objection lacked the requisite specificity, we believe the general objection he made would have sufficed to preserve this issue for review, because the ordinance was illegal for any purpose and could not be made legal by supplying additional evidence. *See, e.g., Ward*, 376 So. 2d at 1116; *Dyess v. State*, 418 So. 2d 208, 211 (Ala. Crim. App. 1982); *Lawrence v. State*, 409 So. 2d 987, 989 (Ala. Crim. App. 1982); *Todd v. State*, 380 So. 2d 370, 373 (Ala. Crim. App. 1980); *Moates v. State*, 40 Ala. App. 234, 237, 115 So. 2d 277, 280, [\*\*7] *cert. denied*, 269 Ala. 698, 115 So. 2d 282 (1959).

[\*19] Because we have concluded that Childers properly preserved for review the question of the legality of the Muscle Shoals ordinance and because under § 11-45-1.1 the Muscle Shoals ordinance is illegal, we must conclude that the trial court erred in admitting the ordinance into evidence. However, [HN3] error in the proceedings at trial is not necessarily grounds for reversing a judgment. "No judgment may be reversed or set aside, ... unless in the opinion of the court to which the appeal is taken ..., after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties." Rule 45, Ala. R. App. Proc.

At Childers's trial, the jury heard testimony from 10 witnesses who saw Childers shoot Collins on September 29, 1990. 2 Their testimony indicated that, in the fight between Collins and Childers, Collins was the primary aggressor. He knocked Childers to the floor, then jumped on top of him and began punching him around the face and head. David Tippet, another patron at the bar, pulled Collins off Childers and attempted [\*\*8] to restrain him. Childers stood up and headed for the door as if to exit the bar. Collins pursued Childers and knocked him to the floor a second time. As Tippet was pulling Collins away from Childers for the second time, Childers shot at Collins six times with a semi-automatic pistol. Collins was approximately two to three feet away from Childers at the time. All six shots hit Collins in the chest area. One shot also struck Tippet in the left hand.

2 Eight of those witnesses testified for the prosecution and two testified for the defendant.

Because there was evidence that Collins was the aggressor in this fight, we conclude that the jury could have found that Childers had a right to shoot Collins in self-defense, but convicted Childers of manslaughter because of the erroneously admitted evidence indicating that he had no legal right to have a pistol in the bar. Accordingly, the admission of the illegal ordinance constituted prejudicial error. The judgment of the Court of Criminal Appeals is due to be reversed and [\*\*9] the cause remanded with instructions to reverse the conviction and order a new trial.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED;  
APPLICATION OVERRULED.

Maddox, Shores, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.