STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

The Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

Appellate Case No. 2016-000298

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Whether the court erred by admitting a photograph of the decedent with "his arm around his friend" during happy times since the photograph was an impermissible appeal to the sympathy of the jury, and it was also inadmissible pursuant to Rule 403, SCRE?

II. Whether the court erred in refusing to clarify its instruction that the defendant must have been "acting lawfully" to be entitled to an acquittal based on accident since defense counsel correctly argued a reasonable juror could conclude being involved in a drug deal was illegal, and therefore appellant could not be acquitted based on an accidental shooting, and the court could have clarified by merely instructing that any unlawful activity had to be the "proximate cause of death" to disqualify accident?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion in admitting a photograph of the victim indicating his comparative size to another man when the State sought to disprove Appellant's claim he accidentally shot the victim and the State's theory of the case turned on the size and position of the three men in the back seat of a car.

II. The trial court did not abuse its discretion in refusing to amend a jury instruction on the defense of accident when the charge correctly stated the law, the Appellant asked for clarification only after the jury was charged, and the court found an amendment would constitute an impermissible comment on the facts of the case.

RESPONDENT'S STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant, Ahshaad Mykiel Owens, in March of 2015 for murder, armed robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime involving the death of Jarrod Howard on October 14, 2014. (Indictments R. pp. 328-333). On February 8, 2016, Appellant's case was called to trial before the Honorable R. Markley Dennis. (R.p. 1.) Appellant was represented by Jason T. King, Esquire and John J. Kozelski, III, Esquire. (R.p. 1.) Assistant Solicitor Stephanie Linder represented the State. (R.p. 1.) At the conclusion of the three-day trial, the trial court directed a verdict on the criminal conspiracy charge and the jury returned a verdict of guilty on the remaining charges. (R.p. 1; p. 257, lines 5-9; p. 326, lines 1-23.) Judge Markley sentenced Appellant to concurrent terms of thirty years for the murder and armed robbery charges and a concurrent term of five years for the weapons charge. (R.p. 327, lines 8-13.) Thereafter, Appellant filed a timely notice of appeal and this appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of October 10, 2014, police responded to a call of shots fired in downtown Charleston. (R.p. 8, lines 4-20.) Jarrod Howard was lying on the sidewalk and had a gunshot wound to his lower back. (R.p. 11, lines 14-25.) Approximately ten to fifteen bystanders were gathered around the victim. (R.p. 16, lines 9-16.) When the police asked whether anyone gathered there had any information about the shooting, Hunter Bessinger came forward as a witness to the murder. (R.pp. 16-18.)

Hunter Bessinger testified Jarrod Howard was his best friend and the men had known each other since high school. (R.p. 40, lines 9-15.) Hunter described Jarrod as "one of the nicest kids I've ever met" and small in build. (R.p. 40, lines 17-23.) Hunter described how the men were celebrating Hunter's new job at Boeing, so they agreed to meet at Jarrod's house on that Friday afternoon. (R.p. 42, lines 6-14.) Jarrod received a phone call from someone he did not appear to know very well, and he stepped into a back bedroom to take the phone call. (R.p. 42, lines 17-24.) Hunter testified Jarrod sold drugs to a small group of friends, and following the phone call, Jarrod asked Hunter to accompany him to a drug deal. (R.p. 43, lines 5-14.) Hunter had not accompanied Jarrod on these deals before, so the request was unusual, but Jarrod seemed nervous. (R.p. 43, lines 17-24.) Jarrod gave Hunter a pocket knife for protection, which Hunter said was also unusual, and took his book bag. (R.p. 44, lines 2-20.) The men walked a few blocks down the street to the corner of Bogard and Percy. (R.p. 45, lines 4-8.) The men spotted a red car at the corner with two unfamiliar men inside. (R.p. 45, lines 10-18.) One man was in the driver's seat and the second man sat in the backseat of the passenger's side. (R.p. 45, lines 20-21.)

When they approached the car, Hunter got into the backseat in the middle position, then Jarrod climbed in beside him. (R.p. 45, line 24 – p. 46, line 1.) Appellant, who was the man in

the backseat, had a book bag between his legs, and the three of them were squeezed together in the small backseat of the car. (R.p. 46, lines 12-15.) Hunter said they tried to start a conversation, but as soon as the men were seated in the car, Appellant pulled a gun from his book bag and pointed it at them. (R.p. 46, lines 19-24.) Appellant waived his gun and yelled at the men to "give him the shit," but Jarrod and Hunter were frozen in fear. (R.p. 47, lines 10-17.) Jarrod attempted to get out of the car, and Appellant shot him in the back as he tried to step out. (R.p. 47, lines 14-20.) Hunter could smell the burning gunpowder and his ears were ringing from the shot, but he heard Appellant tell him to "get out," and he jumped from the car and ran. (R. p. 48, lines 4-20.) Hunter heard the tires screeching as the car sped away. (R.p. 49, lines 2-3.) He tried to call 911 as he returned to his friend, but the call would not go through. (R. p. 49, lines 2-10.) A bystander was with Jarrod, lying on the ground, and she told Hunter she had called 911. (R.p. 49, 11-12.) Hunter tried to keep Jarrod awake as they waited for an ambulance. (R.p. 49, 15-20.) When the police arrived on the scene, Hunter told them he saw the crime and cooperated with the police in their efforts to find the perpetrators. (R.p. 49, line 23 – p. 51, line 9.) Eventually, Hunter identified Appellant in a police lineup as the shooter. (R.p. 51, lines 5-9.)

Anna Faenza, who owned the business across from the crime scene, was cleaning paintbrushes when she saw the red car waiting outside her business. (R. p. 80, lines 2-7.) Faenza heard voices arguing, then heard the gunshot. She saw Jarrod fall to the ground, clutching his book bag, and then she saw Appellant run to where Jarrod had fallen and grab the book bag. (R. p. 80, lines 8-25.) When she noticed the gun in Appellant's hand, she ran to lock the doors of her business and called 911. (R. p. 81, lines 1-9.) Faenza noticed Appellant's distinctive shoes, and saw him take a few steps down the street before she ducked down. (R. p. 83, line 18 – p. 84, line 7.) She then heard the car speed away. (R. p. 84, line 10.) Another witness saw Jarrod and Hunter

approach and then get into the car. The witness heard a gunshot, and then saw the victim struggle to get out of the car. (R. pp. 21-23.) Other witnesses saw two men exit the vehicle, one described as a "light skinned black male" "followed by a white male." (R. p. 34, lines 2-6.) One of the men who ran from the car returned a few minutes later to the scene where the victim lay on the ground. (R. p. 29, line 8 – p. 30, line 21.)

Shortly after the shooting, a witness saw the passenger of the red Mazda throw the gun from the passenger's side window on Highway 26. (R. p. 97, line 14 – p. 98, line 22; p. 99, line 21 – p. 100, line 3.) The car pulled over to the side of the road, and the passenger got out of the car. The witness drove onward and did not see if the passenger picked up the gun. The witness obtained the license plate number of the car and reported what she saw to the police. (R. pp. 101-105.) The responding officer was not able to locate the gun. (R. p. 110, lines 1-11.) The red 2005 Mazda 6 was registered to a man named Phillip Jewel. (R. p. 117, lines 2-11.) Police put out a BOLO for the red vehicle, which was located at approximately 10:00 pm that evening. (R. p. 117, line 15 –p. 118, line 3.) Mr. Jewell's brother contacted the police to inform them his brother wanted to come in to talk to investigators about the crime. (R. p. 119, lines 4-9.)

According to the pathologist, Jarrod was nineteen years old, one hundred fifty-six pounds, and five feet, eight and one-half inches tall. (R. p. 208, line 24, p. 209, line 6.) He had scrapes on his face, and a gunshot wound in the middle of his lower back. (R. p. 209, lines 7-23.) The bullet had passed through the spinal cord and travelled upward through Jarrod's body and stopped in the right front rib in the front of his chest. (R. p. 210, lines 1-16.) Blood samples revealed traces of marijuana, Xanax, and amphetamines in Jarrod's system at his death. (R. p. 213, lines 16-21).

Ahshaad Owens testified Jarrod was his drug supplier of approximately three months. (R. p. 226, lines 3-18.) Owens said he called Jarrod that day to try to buy some Xanax before he left for Columbia for the weekend. (R. p. 227, lines 3-8.) Owens claimed Jarrod told him to meet him downtown, so Owens' friend Phillip Jewel drove him to the location. (R. p. 227, lines 14-22.) Owens said he noticed Jarrod and another larger man walking down the street, so he called him and told Jarrod to make sure his friend stayed outside the car. (R. p. 228, line 10-18.) Owens said he did not understand why Hunter got into the car first, after Jarrod had just agreed he would stay outside. (R. p. 229, lines 1-8.) Owens said the men had some conversation, and then Hunter interrupted the men and asked Owens how many Xanax he wanted. Owens claimed he reached down into his book bag for the money, and when he looked up, Hunter is pointing a gun at him. (R. p. 230, lines 1-14.) Owens claimed Hunter grabbed his bag, but then he knocked the gun out of Hunter's hand, and the gun fell to passenger's side rear floorboard. (R. p. 231, lines 5-10.) The men began fighting for the gun, and Owens accidentally fired the gun in the tussle. (R. p. 231, lines 12-14.) Owens said he told Hunter to get out of the car, and then he grabbed his book bag from Jarrod. (R. p. 232, lines 16-23.) Owens told Jewell to drive away. (R. p. 232, lines 22-23.)

On cross examination, Owens acknowledged he lied to police in his initial interview. (R. p. 238, lines 16-20.) Owens admitted he told police they could not find the gun, and on the stand he denied stopping on Interstate 26 to dispose of the gun. (R. p. 241, lines 12-17; p. 242, lines 17-25.) However, Owens told the police he threw the gun out of the window on the interstate. (R. p. 250, lines 18-23.)

ARGUMENT

I. The trial court did not abuse its discretion in admitting a photograph of the victim indicating his comparative size to another man when the State sought to disprove Appellant's claim he accidentally shot the victim and the State's theory of the case turned on the size and position of the three men in the back seat of a car.

The State sought to introduce a photograph of the Jarrod Howard before his death in order to corroborate the testimony of Hunter Bessinger, an eyewitness to the murder. The trial court found the photograph was probative of the victim's size. It is not an abuse of discretion to admit photographs that corroborate testimony. *State v. Hambright*, 310 S.C. 382, 388, 426 S.E.2d 806, 809 (Ct. App. 1992). The State posited Appellant shot the victim as he attempted, with some difficulty, to exit the cramped back seat of the vehicle. The State could also reasonably deduce Appellant would claim self-defense or the defense of accident in the victim's death. Thus, the victim's stature was relevant to both the State and the defense's theory of the case.

How the Issue Was Presented at Trial

During the pre-trial motions, Appellant objected to the introduction of a photograph of the victim with his arm around someone. (R. p.379, lines 16-20; State's Ex. 49.) Appellant argued the photo was not probative and appealed to the sympathies of the jury. (R. p. 37, lines 18-20.) When the court inquired why the State sought to introduce the picture, the solicitor told the court the purpose was to show the victim's size in relation to the back seat of the car. Because the State knew there would be testimony concerning how difficult it was for the victim to exit the car, the photograph was probative of the cramped space in the rear seat. (R. p. 37, line 24 – p. 38, line 3.)

The trial court ruled the photograph was admissible, finding it had probative value and the State was entitled to use the picture to show the size of the victim. The trial court noted the

size of the car, said the picture would aid the fact finders in determining the credibility of the witnesses. (R. p. 38, lines 6-18.) Later, during the State's case in chief, Hunter Bessinger was describing the victim physically when the State moved to introduce the picture, State's Exhibit 49, into evidence. (R. p. 41, line 18.) At the trial court's prompting, Appellant renewed his objections to the photo for the record, claiming the picture was irrelevant and unfairly prejudicial. (R. p. 41, lines 10-12.)

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of discretion. *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008.) Ordinarily, it is not an abuse of discretion to admit photographs that corroborate testimony. *State v. Hambright*, 310 S.C. 382, 388, 426 S.E.2d 806, 809 (Ct. App. 1992). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

Analysis

Appellant argues that the trial court erroneously admitted a photograph of the victim and his brother because the photograph was irrelevant and was only offered to arouse sympathy for the victim. During Hunter's testimony, the State offered a photograph of Jarrod and his brother taken before his death. In the picture, Jarrod has his arm around his friend. The State established, through testimony of Hunter and other witnesses, that three men were seated in the back seat of the red Mazda, and that the victim had trouble getting out of the car and fell to the ground. The State also argued that the size of the men together in the cramped back seat of the car would have prevented Hunter from presenting the weapon in the manner Appellant claimed, and contradicted Appellant's story of how the two men tussled over the gun.

Appellant maintains that this Court's decisions *in State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), and *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), establish the admission of the photograph was improper. The *Livingston* Court reversed a conviction for felony driving under the influence (DUI) of marijuana where the appellant had caused a car accident, killing a woman in the other car. The woman's husband testified at trial, and a photograph of the two was admitted. The South Carolina Supreme Court held that the photograph was not relevant to the trial because the DUI was the only charge in dispute. The Court stated that "a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or *unnecessary to substantiate facts*." *Id.* at 20, 488 S.E.2d at 314 (emphasis added). The Supreme Court found the testimony and photograph were irrelevant to any matter at issue and not harmless.

In *State v. Langley*, the Court found the introduction of a photograph of the victim in his high school graduation regalia, in addition to his sister's testimony about the family history of

the victim and how he received a particular nickname in high school was irrelevant to proving the identity of the perpetrator of a drug-related shooting years later. The Court said that because the evidence of the guilt was not overwhelming, it could not find the improperly admitted evidence did not affect the outcome of the trial under a harmless error analysis. *Langley*, 334 S.C. at 648, 515 S.E.2d at 100.

The prohibition against the admission of a victim's photograph is not absolute, however. South Carolina does allow such an admission when the State demonstrates the relevancy and probative value of the evidence in accordance with Rule 403, SCRE. *See State v. Gay*, 343 S.C. 543, 551–52, 541 S.E.2d 541, 545–46 (2001) *abrogated on other grounds by Holmes v. South Carolina*, 547 U.S. 319 (2006) In *Gay*, the State argued that the victim's photograph was relevant to establish a pair of broken eyeglasses found near the body were actually the victim's eyeglasses. The Court found the photo was relevant to establishing that a struggle had occurred where the glasses were found and its admission was not "calculated to arouse the sympathy or prejudice of the jury." The Court found the picture substantiated the facts surrounding the circumstances of the murder. *Gay*, 343 S.C. at 551–52, 541 S.E.2d at 545–46. Similarly, in *State v. Elders*, 386 S.C. 474, 688 S.E.2d 857 (2010), the South Carolina Court of Appeals approved the admission of photographs of the victims of an armed robbery and assault of a high and aggravated nature. The photographs depicted the male victim in a hospital, attached to medical equipment, and the female victim in a wheelchair with injuries to her knee. *Elders*, 386 S.C. at 484, 688 S.E.2d at 863. The court found the photographs were probative evidence of the crimes committed by the defendant and were distinguishable from those in *Livingston* and *Langley*. *Id.* "Furthermore, while the photograph may have aroused some sympathy among the jury, we conclude that the photograph was not unduly prejudicial." *Id*

Unlike in *Livingston* and *Langley*, here the State offered a valid explanation of the probative value of the photograph to substantiate the facts in dispute. How the men were crammed into the back seat of the car, how the men held the gun while sitting in such close proximity to each other, and how the men compared to each other in their various sizes were all relevant to determining whether Appellant shot the victim accidentally or with malice aforethought.

In the case before the court, at the time the State sought to introduce the photograph, the State knew Hunter's testimony would explain where the men were seated in the car and how Jarrod was shot after he attempted to leave the vehicle. The State also knew a witness would testify to the width of the back seat of the Mazda, and the pathologist would testify about the path the bullet took through Jarrod's body before it stopped in his front chest wall. The State also had Appellant's statements to police on the night of the murder, in which he claimed he did not pull the trigger when Jarrod was shot. (R. p. 239, lines 12-16.) Appellant also told police Phillip Jewell was not present during the crime. (R. p. 240, lines 13-15.) In short, the State could reasonably predict Appellant would claim he did not shoot the victim, but Hunter did. Alternatively, Appellant might claim he shot Jarrod in self-defense. Under either theory, the size and stature of each man in the back seat was critical for the jury's assessment of their credibility. Moreover, two of the three occupants of the back seat of the vehicle would be physically present at trial for the jury to evaluate. Unlike other victims of crime, whose testimony can be physically and visually demonstrated for the jury, a victim of a homicide cannot. In a case in which the physical appearance is relevant to the State's theory of the case, or the defense's for that matter, a photograph in which the victim's comparative size is on display is the most practical way to substantiate those facts.

Given that the trial court specifically found the photograph was relevant "to show the size of the person" (R. p. 38, lines 12-13), Appellant has not and cannot present this Court with any sound reason to find the trial court abused its discretion in finding the photograph admissible under the facts of this case.

Furthermore, any error in the admission of the photograph was harmless beyond a reasonable doubt. The photograph appears to be a cropped or narrowly focused image of the victim and his brother in an outdoor setting. (State's Exhibit 49.) In the photo, Jarrod's relative height to his brother is clearly demonstrated because the two men are standing close together. The image reflects Jarrod is considerably smaller than as brother, which corroborated the testimony of Hunter Bessinger. (R. p. 40, lines 21-23.) Unlike in *Livingston,* where a photograph of the victim and her husband was introduced during the husband's testimony, and *Langley,* where the photograph depicted a much younger victim during a celebratory period, here the photograph is fairly unremarkable. Significantly, the State presented testimony from Bessinger that Jarrod was a drug dealer. Clearly, the State's theory of the case did not include portraying the victim as an innocent bystander. Thus, the photograph of him "in life" had limited, if any, prejudicial value.

II. The trial court did not abuse its discretion in refusing to amend a jury instruction on the defense of accident when the charge correctly stated the law, the Appellant asked for clarification only after the jury was charged, and the court found an amendment would constitute an impermissible comment on the facts of the case.

The trial court did not err in refusing to amend the jury instruction after the jury was charged on the defense of accident because the charge was a correct and comprehensive statement of law. Because the testimony was undisputed the men were involved in an unlawful drug purchase and the jury was instructed on the defense of accident, there is no reasonable

likelihood the jury applied the instruction in a way that violated the constitution. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Clearly, if the unlawfulness of the drug activity precluded a charge of accident in the victim's shooting death, Judge Dennis would not have instructed the jury with that option. Further, recalling the jury to instruct them that the unlawful activity, or the drug deal, must be the proximate cause of the victim's death could constitute an impermissible comment on the facts. Thus, the trial court did not abuse its discretion in refusing to amend the charge on the defense of accident.

How the Issue Was Presented at Trial

At the conclusion of the testimony, the trial court granted Appellant's motion for a directed verdict on the conspiracy charge, but denied the motion on the remaining crimes. (R. p. 257, lines 5-9.) The trial court asked for defense counsel's argument on self-defense. Counsel said the following:

> So I am not arguing that he shot this guy in self-defense, but when a gun is in – he testified a gun was in his face. I think he has a right to defend himself from that and grab the gun. Now once he grabs the gun he is acting lawfully by arming himself ... and then he is negligent in handling that gun, then I think that is where involuntary manslaughter comes in. And if he is not negligent then I think that is where accident comes in. So I am requesting self-defense –

(R. p. 258, lines 3-13.) The court reasoned that, according to the testimony, the shooting did not have anything to do with Appellant's defending himself, but defense counsel pointed out the jury could consider Appellant's handling of the gun as accidental or negligent. (R. p. 259, lines 2-8.) Ultimately, the court agreed to charge murder, involuntary manslaughter, self-defense, and accident, and the elements of armed robbery. (R. p. 259, line 16 – p. 343, line 25; p. 309, lines 14-24.) In his closing arguments to the jury, defense counsel told the jury, "Now I am not saying that he shot Jarrod in self-defense. What I am saying is when there is a gun in his face he has the

right to grab that gun and defend himself. And when he does that he is acting lawfully. And the gun went off. And that is an accident." (R. p. 272, lines 14-18.)

During his charge to the jury, the trial court charged involuntary manslaughter, and then said the following: "The State must also prove beyond a reasonable doubt that the defendant's act was the proximate cause of the death." (R. p. 305, lines 13-15.) The court then went on the further explain proximate cause to the jury:

> The State must also prove beyond a reasonable doubt that the defendant's act was the proximate cause of the death.
>
> Proximate cause is a direct cause. It is the immediate cause. It is the efficient cause. It is the cause without which the death of the victim would not have resulted and in order for there to be a proximate cause there must be a chain of causation from the time of the injury inflicted until the time of the victim's death.
>
> Proximate cause does not necessarily mean that it occurred immediately prior to the death. There may be more than one proximate cause, and the acts of 2 or more persons may combine together to be a proximate cause of death.
>
> The defendant's act may be regarded as a proximate cause if it is a contributing cause to the death of the victim. The fact that other causes also contribute does not relieve the defendant from responsibility
>
> The defendant's act need not be the sole cause of death but must be regarded as a proximate cause contributing cause to the death of the victim.

(R. p. 305, line 16 – p. 306, line 8.) Then regarding accident, the trial court instructed:

> The defendant has also raised the defense of accident. An act may be excluded on the ground of accident if it is shown that the act was unintentional, that the defendant was acting lawfully, and that reasonable care was used by the defendant in handling the weapon.
>
> The burden is on the State to prove beyond a reasonable doubt that that act was not an accident – **that the act was not an accident but was caused** by the negligence or carelessness on the part of the defendant in handling of a dangerous instrumentality or **by unlawful activity by the defendant himself.**

(R. p. 309, lines 3-13(emphasis added).)

After the jury recessed following the charge, defense counsel told the court he was concerned about the "unlawful activity" language in the accident charge. He argued the jury could believe that if Appellant was involved in a drug deal, then he may not be able to claim the

defense of accident. (R. p. 317, lines 12-16.) Defense counsel said he thought "the unlawful activity must proximately cause the death." (R. p. 317, lines 15-16.) Defense counsel did not make a specific request to re-charge the jury, nor did he offer the specific language for a re-charge on accident. (R. p. 317.) In response to his argument, however, the trial judge pointed out that he charged proximate cause. (R. p. 317, line 23.) When defense counsel expressed more concern about the unlawfulness of the drug deal, the court said it could not explain how the specific facts of the case are relevant to the defenses because it would be an improper comment on the facts. (R. p. 317, line 13 – p. 319, line 9.) The court found the charge as a whole addressed Appellant's concerns. (R. p. 319, lines 8-9.)

Analysis

Appellant now argues on appeal the trial court, after giving the instruction on proximate cause and the defense of accident, should have recharged the jury on the defense of accident and added language that "if the defendant was not acting lawfully he was only disqualified from an accident verdict if the unlawful activity was the proximate cause of death." (IBOA p. 10.) However, a judge is not bound to instruct a jury in the exact language of a request made; it is sufficient if he does so substantially in his own language. *State v. Clary*, 222 S.C. 549, 73 S.E.2d 681 (1952); *State v. Roof*, 106 S.C. 281, 91 S.E. 314 (1917); *State v. Jones*, 101 S.C. 111, 85 S.E. 239, 240 (1915); *State v. Harris*, 282 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009). Respondent submits the court instructed the jury thoroughly and correctly in his initial charge and in his own language, and any further attempts to clarify the accident instruction would risk an impermissible comment on the facts.

A trial court is required to charge only the current and correct law of South Carolina.*Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). 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). Further, the substance of the law must be charged to the jury, not any particular verbiage. *State v. Adkins*, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003). If, in its entirety, the instructions are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard of review when considering an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution. *Id.* at 27, 538 S.E.2d at 251 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Under this standard, the trial court's instruction on the defense of accident was not error and does not warrant reversal.

For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon. *State v. Brown*, 205 S.C. 514, 32 S.E.2d 825 (1945). Homicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). In *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 107–08 (1999), the South Carolina Supreme Court held "that the 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." (*citing State v. Goodson*, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1.5(1994)). S*ee also* 40 Am.Jur.2d Homicide § 75 (1968) ("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").

In accordance with the premise of law, the trial court instructed the jury on the concept of proximate cause directly after the court charged involuntary manslaughter. The trial court then charged something very similar in its instruction on the State's burden to prove the homicide was not an accident. The instruction specifically said the State must prove "that the act was ... caused by ... unlawful activity by the defendant himself." (R. p. 309, lines 10-13.) Read in its entirety, the charge clearly communicated to the jury the required nexus between the unlawful activity and the act. The jury was told numerous times in the proximate cause charge that the defendant's act must be the direct cause of the victim's death. The jury was also reminded of the State's burden to prove the victim's death was not an accident but caused by the defendant's unlawful activity. These instructions, combined with the presence of the accident instruction in the wake of undisputed testimony of unlawful drug activity, would not have been confusing to the jury. The propriety of a jury charge is measured by what a reasonable juror would have understood the charge to mean. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991). Appellant cannot show a reasonable juror would misunderstand the charge.

Lastly, in this case, because Appellant did not clearly articulate the language he wanted the court to re-charge to the jury, the court's concern any further clarification of accident would constitute an impermissible comment on the facts was warranted. *See State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000)(defendant was not entitled to the charge requested as it was an improper charge on the exact facts he presented) *overruled on other grounds Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (mercy charge); *See also State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001)(explaining the decision in *Hughey*); *State v. Patterson*, 337 S.C. 215,

522 S.E.2d 845 (1999). Although on appeal Appellant crafts an innocuous, if redundant, addition to the accident charge, at trial Appellant essentially wanted the court to tell the jury that Appellant's unlawful participation in the drug deal would not preclude his primary defense. Understandably, the court was reluctant to do so for fear of inappropriately commenting on the facts in this case. Here, given the admitted testimony about the drug sale, the jury could easily deduce Appellant was entitled to claim accident despite his unlawful activity because the court instructed them it was an option. Any further instruction by the court, particularly calling the jury back to recharge them, could run afoul of the S.C. Constitution's prohibition against charging the facts. S.C. Const. Art. V, Section 21 (2009) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

In sum, Judge Dennis appropriately charged the jury on the lesser included offense of involuntary manslaughter and appropriately defined for the jury the elements of that lesser included offense. The court further charged the jury on proximate cause, and self-defense and accident. A judge's charge to a jury is sufficient if, as a whole, it is substantially correct and covers the law applicable to the case. *State v. Burton*, 302 S.C. 494, 397 S.E.2d 90 (1990); *State v. Jackson*, 297 S.C. 523, 377 S.E.2d 570 (1989); *State v. Rabon*, 175 S.C. 459, 272 S.E.2d 634 (1980). Read as a whole, and in addition to the jury's exercise of logic, the instruction sufficiently informed the jury the unlawful activity must not cause the victim's death to be entitled to a charge on the defense of accident. Appellant cannot show the trial court abused its discretion in refusing to amend the charge.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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June 16, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 16 2017
SC Court of Appeals

Appeal from Charleston County

The Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

Appellate Case No. 2016-000298

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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Appeal from Charleston County

The Honorable Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

Appellate Case No. 2016-000142

CERTIFICATE OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Final Brief of Respondent by depositing copies of the same in the Interagency mail, addressed to Appellant's attorney of record:

Robert M. Dudek, Chief Appellate Defender
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I further certify that all parties required by Rule to be served have been served.

This 16th day of June, 2017.

Susannah R. Cole
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

June 16, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Ahshaad Mykiel Owens*
Appeal from Charleston County
Appellate Case No. 2016-000298

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and nine (9) copies of the Final Brief of Respondent in the above-referenced case, together with Certificate of Compliance and Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

Susannah R. Cole,
Assistant Attorney General

SRC:csm
Enclosures
cc: Robert M. Dudek, Esq. (w/three copies of encls.)
The Honorable Scarlett A. Wilson, Solicitor 9th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)