

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

PETITIONER.

APPELLATE CASE NO. 2016-000298

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 5663

**RECEIVED**

JUL 25 2019  
SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner respectfully requests rehearing because this Court may have overlooked the fact that in its substituted opinion it recognized the problem with the accident instruction in this case which charged the jury that: "An act may be excluded on the ground of accident if it is shown the act was unintentional, that *the defendant was acting lawfully*, and that reasonable care was used by the defendant in handling the weapon." (emphasis added). State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse's Adv. Sh. #28, at 8 (refiled July 10, 2019). From there, this Court then observed that defense counsel took exception to this jury charge because the jury might interpret it to mean petitioner could not claim accident

because he was involved in the unlawful activity of a drug deal. Defense counsel requested that the trial judge “clarify to the jury that a defendant engaged in unlawful activity is still entitled to the defense of accident *unless the unlawful activity proximately caused the death.*” State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse’s Adv. Sh. #28, at 8 (refiled July 10, 2019) (emphasis added). This Court then agreed with the trial judge that a jury instruction conveying that correct charge on the law to address defense counsel’s concern may result in an impermissible charge on the facts.

However, this Court then recommended the following accident jury instruction, which would not be a charge on the facts, in future cases where a jury could find a defendant was involved in unlawful activity such as in State v. Burriss, 334 S.C. 256, 259-64, 513 S.E.2d 104, 106-09 (1999), because the defendant possessed the gun unlawfully, but where he could still be not guilty by reason of accident:

A defendant exercising due care who accidentally harms another while acting in self-defense is acting lawfully. Therefore, a defendant can be acting lawfully, *even if he is in unlawful possession of a weapon*, if you find he was entitled to arm himself in self-defense and the victim was shot by accident by the unintentional discharge of the weapon.

State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse’s Adv. Sh. #28, at 12 (refiled July 10, 2019) (emphasis added). This recommended or suggested jury instruction could have been the difference in a full informed jury finding petitioner not guilty in this case by reason of accident in this low level drug sale case, yet this Court nonetheless found the lacking jury instruction in this case “*was sufficient.*” State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse’s Adv. Sh. #28, at 12 (refiled July 10, 2019) (emphasis added). Again, it would not have been a charge on the facts that the trial judge was concerned about, and, respectfully, that is why rehearing should be granted in fairness in this case.

Further, while always wary of crossing the line into charging on the facts, a trial court must still ensure that it fashions its instructions “to the facts and circumstances of the case,” and that its instructions “enlighten the jury” in reaching a correct verdict when applying the facts of the case to the applicable law. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989).

Finally, on this instruction issue, petitioner would urge that for complete clarity this Court’s recommended jury charge should also incorporate the majority’s State v. Williams, Op. No. 27895, Shearouse’s Adv. Sh. 25 at 20 (filed June 19, 2019) holding by instructing the jury that it is only where the unlawful possession of a weapon itself during the illegal drug transaction *produced the violent occasion* that the defendant cannot claim accident or self-defense as a complete defense.<sup>1</sup>

### **Inadmissible photograph**

This Court correctly held that what little relevance the photograph of the victim embracing his brother on a prior happy occasion had was “vastly outweighed by its danger of undue prejudice. Rule 403, SCRE.” State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse’s Adv. Sh. #28, at 13 (refiled July 10, 2019). This Court then found harmless error reasoning, “viewing the record as a whole, *it is unlikely the emotional pull of the photograph was enough to distract a rational juror* from the main issues at trial or otherwise influence the verdict.” State v. Ahshaad Mykiel Owens, Op. No. 5663, Shearouse’s Adv. Sh. #28, at 13 (refiled July 10, 2019). (emphasis added). This was a close, legally complex, and difficult factual case, and petitioner respectfully is perplexed at why this Court reached the conclusion above.

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<sup>1</sup> The 3-2 majority opinion in State v. Williams is pending on rehearing as of the filing of this rehearing petition.

Here, a young petitioner, apparently only nineteen at the time of the incident, was going to purchase Xanax from the decedent as he had in the past. Petitioner testified this was his” party drug of choice,” and that he was going to Columbia with friends for a football game the next day. R. 226, ll. 3-20.

Petitioner did not know Hunter Bessinger at the time, and petitioner described for the jury the unforeseen chaos that ensued from the low level drug deal. Petitioner explained how he saw Bessinger walking with the decedent that day. R. 228, ll. 2-13. “Hunter actually entered the car first and slid next to me. Got in the car next to me and was in the middle seat, and then Jarrod got in.” Jarrod had a book bag with him. R. 229, ll. 1-20.

Petitioner testified while they were talking Bessinger told the decedent to “hurry up.” Petitioner told the decedent he wanted “five” Xanax pills, and he was told the price. Petitioner said as he was reaching down to get his wallet out of the book bag: *“I look up and the gun is in my face.”* R. 230, ll. 4-14. It was “Hunter [Bessinger] who pulled the gun out. R. 230, ll. 20-21. (emphasis added). This sudden need for self-defense ended with petitioner accidentally shooting the decedent. In that moment, petitioner went from buying a few Xanax pills “to party” at a football game over the weekend in Columbia to being convicted of murder.

Bessinger was twenty-one years old at the time of trial, and he was working at Boeing. R. 39, l. 22 - 43, l. 14. Bessinger said that the decedent sold drugs “mainly weed and Xanax” to “our group of friends. Inner circle pretty much.” R. 43, ll. 8-14. (emphasis added). Bessinger described the decedent as “one of the nicest kids I’ve ever met. And I know everyone says that when stuff like this happens, but he really was. *I mean he was awesome. That kid would do anything for anyone. It didn’t matter. Good guy.*” R. 40, ll. 17-20. (emphasis added).

This Court properly rejected the solicitor's purported reasons for wanting the emotional photograph before the jury in this difficult case. The solicitor offered the photograph for its emotional tug at the heartstrings of the jurors.

When the solicitor showed Bessinger the photograph of the decedent, Bessinger said the photograph was "perfect." R. 41, ll. 5-7.; R. 42, ll. 1-4. (emphasis added). The solicitor then asked to introduce the photograph of the decedent with his arms around his brother. The judge overruled the objections to the photograph, and admitted it. R. 41, ll. 8-18. Bessinger testified: "That is Jarrod [the decedent] on the left and that is Holland on the right." The solicitor asked Bessinger: "If Jerrod is his friend, and Bessinger responded: "Jerrod is my friend." R. 41, l. 23 – 42, l. 1. The illegitimate mission was accomplished.

However, there respectfully was no more reason for finding the inadmissible photograph in this case harmless error than there was in State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997). In Livingston, the inadmissible photograph and the testimony surrounding it was admitted in a felony DUI case where the only issues were whether the driver of the other car was driving impaired and whether he failed to properly follow all traffic laws. The defendant in that case had marijuana in his system. He was driving at high rate of speed, he lost control of his car for that reason, he hit the victim's car, and that killed her instantly. Yet, the Supreme Court properly found reversible error in a seemingly straightforward case.

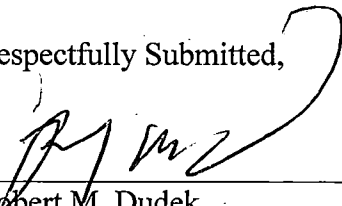
Further, in State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), the decedent was involved in a higher level brand of drug deal. Langley's sister identified a photograph of the decedent wearing his graduation garb for the jury. As in this case, the photograph was calculated to arouse the sympathy and prejudice of the jury.

The Supreme Court found the jury could have found Langley guilty of murder if he actually shot the victim, or under the “hand of one is the hand of all theory,” or if he was an accomplice in the shooting. The Court found there was sufficient evidence to convict under all three legal theories but held the evidence against Langley was not overwhelming, and it reversed. These emotional photographs create an evidentiary and testimonial sideshow that impermissibly appeals to the sympathy and passions of the jury.

There was respectfully no reliable way to conclude in this complex accident or murder (killing with malice aforethought) case that “it was *unlikely the emotional pull of the photograph was enough to distract* a rational jury.” Most respectfully, the state here violated well settled rules against presenting photographs of victims for the emotional reaction they are almost sure to garner from the jury, and thereby impermissibly urge a verdict on a spurious basis. This was a tough case involving young people seemingly involved in a college atmosphere Xanax sale that went terribly awry.

The state, respectfully, is not entitled to the benefit of the doubt here for its wrongful action pertaining to the admission of this inadmissible emotional photograph. The evidence of guilt to the crime of murder in this complex close case was not overwhelming, and rehearing should be granted on this issue as well.

Respectfully Submitted,



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Robert M. Dudek  
Chief Appellate Defender

July 25, 2019

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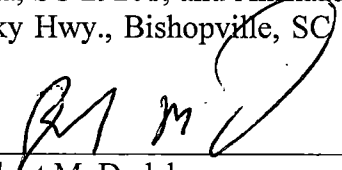
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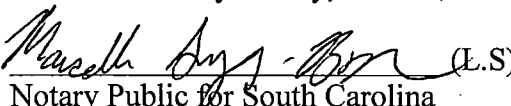
APPELLANT

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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ahshaad Mykiel Owens, #366983, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 25th day of July, 2019.

  
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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 25th day of July, 2019.

  
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Notary Public for South Carolina  
My Commission Expires: July 26, 2028