ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 5663 (S.C. Ct. App. Filed July 10, 2019)

2015-GS-10-01107;09

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

PETITIONER

APPELLATE CASE NO. 2019-001601

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 22, 2019.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by finding the error of the trial judge in admitting a photograph of the decedent with "his arm around his friend" during happy times was harmless since the photograph was an "emotional pull" on the jury in a close, complex legal case where the application of the defense of accident was critical and the impermissible appeal to the sympathy of the jury cannot be underestimated?

2.

Whether the Court of Appeals erred by finding the trial judge's accident instruction "sufficient" where it acknowledged the problematic nature of the charge as it instructed the jury that the defendant must have been "acting lawfully" to be entitled to an acquittal based on accident since a reasonable juror could have concluded that because the drug deal was illegal that petitioner could not be acquitted based on an accidental shooting, and the trial court could have clarified the matter by merely instructing that any unlawfully activity had to be the "proximate cause of death" to disqualify petitioner from invoking accident as a defense?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Charleston County Grand Jury for the offenses of murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. R. 328 – 333. His case was called to trial on February 8, 2016 before the Honorable R. Markley Dennis and a jury. Jason King and John Kozelski represented Petitioner. Stephanie Linder and John Sowards were the assistant solicitors. R. 1.

Judge Dennis directed a verdict on conspiracy count after finding no evidence to support it. On February 10, 2016 the jury found Petitioner guilty on all of the other counts. R. 326, ll. 2-23. Judge Dennis sentenced Petitioner to thirty years prison terms concurrent, and he imposed a five year concurrent term for possession of a firearm during a violent crime. R. 327, ll. 7-13.

The Court of Appeals affirmed petitioner's convictions in State v. Ahshaad Mykiel Owens, 2019-UP-042 (January 23, 2019). App. 1-5. Petitioner sought rehearing. App. 6-21. The state filed a return to this rehearing petition. App. 22-25. Rehearing was granted by order dated July 10, 2019. App. 26.

The original opinion was withdrawn and a substituted opinion was filed in State v. Ahshaad Mykiel Owens, Op. No. 5663 (July 10, 2019) which affirmed petitioner's convictions. App. 27-24. Petitioner again sought rehearing. App. 35-41. Rehearing was denied. App. 42.

This petition for a writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by finding the error of the trial judge in admitting a photograph of the decedent with "his arm around his friend" during happy times was harmless since the photograph was an "emotional pull" on the jury in a close, complex legal case where the application of the defense of accident was critical and the impermissible appeal to the sympathy of the jury cannot be underestimated

Introduction

It was undisputed that the decedent was a low level drug dealer. The shooting in this case occurred during a drug deal. The state's star witness, Hunter Bessinger, admitted he was with the decedent at the time of the drug deal. Bessinger was twenty-one years old at the time of trial, and he was working at Boeing. R. 39, l. 22 - 43, l. 14.

The two versions of events the jury heard were diametrically different. Petitioner testified in own defense that on October 10, 2014, he was going to purchase Xanax from the decedent as he had in the past. Petitioner said 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. Unexpectedly, a gun was pulled on him, he fought in self-defense, and the gun went off accidentally. Bessinger claimed petitioner was the one who unexpectedly pulled the gun which led to the decedent being shot.

The "perfect" photograph of the decedent

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.

The solicitor told the judge prior to Bessinger's testimony that she wanted to admit a photograph of the decedent while he was alive. Defense counsel King objected to the photograph -- correctly arguing: "It seems to be an appeal to the sympathy of the jury," and that it was not probative. R. 37, l. 12 - 41, l. 13.

The solicitor said it showed the decedent's "height." The judge ruled: "W*e are entitled to see a person* that -- we have a name. We are entitled to know the name of the person. So that is fine." The judge ruled that the photograph was relevant, and he confirmed that the defense was also objecting under Rule 403, SCRE. He overruled these objections to the photograph of the decedent. R. 37, l. 12 - 41, l. 13.

When the solicitor showed Bessinger the photograph of the decedent, Bessinger described the photograph as *"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 photograph, State's Exhibit 49, was before the Court of Appeals and is now before this Court for viewing.

The drug deal

As stated above, and as will be seen infra, the testimony of petitioner and Bessinger about what happened could not be more different. Bessinger portrayed himself as the "innocent" party during the low level "seemingly among friends" low level drug deal. He testified that on October

10, 2014, he went to the decedent's house on Sires Street in downtown Charleston. There would be testimony that this was a "mixed neighborhood" of college students, young people, and people who had lived in the neighborhood for a long time. Bessinger remembered the decedent received a phone call about a drug deal. Bessinger claimed: "He said he had to go make a deal and he wanted me to go with him because he was I guess like scared." R. 42, l. 17 - 43, l. 14.

Bessinger testified that the decedent always carried "a small pocket knife on him." The decedent also had a "book bag with him" that day. The two men walked down Sires Street, and he saw two people sitting in a car. "The kid driving was in the driver's seat and the other guy was in the back seat on the passenger side." R. 45, ll. 19-21.

"I remember I hopped in the backseat first to get in the middle and then Jarrod got in after me on the driver's side. The car was running." Bessinger maintained after he and the decedent got in the backseat he noticed that the other man "had a book bag in-between his legs in the backseat." "We were like what is up, how is it going. And that is when he [Petitioner] pulled the gun out of this book bag and pointed it at me and Jarrod." R. 45, l. 22 – 46, l. 24.

Bessinger claimed: "The kid in the backseat pulled the gun out of his book bag, and then he was pointing it at me and Jarrod." Bessinger said while the young man was waving the gun around "then all of a sudden Jarrod swings the door open and tried to make a move out of the car real quick. And that is when he was shot [him] in the back." Bessinger said: "He [the decedent] fell to the ground immediately." R. 47, l. 2 – 48, l. 20.

Bessinger testified the shooter then told him to get out of the car, and Bessinger ran around the corner. He heard tires "screeching, like a car pulling off." R. 48, l. 9 – 49, l. 18.

Bessinger was taken to the police station, and he was shown a photographic lineup. "I immediately identified the shooter." R. 51, ll. 8-9.

Petitioner testifies

Petitioner took the stand in his own defense to describe what happened. As stated, Petitioner had purchased Xanax from the decedent as he had in the past. 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 usually met the decedent at the "In-Town Suites on Rivers Avenue. But he told me when I called to meet him downtown." R. 226, l. 3 – 227, l. 15. Petitioner had his friend Phillip drive him downtown.

Petitioner described to the jury how he saw Bessinger walking with the decedent down the street. R. 228, ll. 2-13. Petitioner did not know Bessinger at the time. R. 228, ll. 19-24. "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.

Petitioner recalled: "And from there he tells me to give me -- give him [Bessinger] my book bag. So I hand him my book bag. And he hands my book bag to Jarrod [the decedent], he turns his head away from me not paying attention and I hit the gun out of his hand, and it fell by both of our feet." R. 230, ll. 7-23.

"[W]e were continuing to tussle for the gun, and I was basically getting full possession of the gun [from Hunter Bessinger]. And *we were tussling, and I accidently fired the gun by accident.*" Petitioner confirmed that he was "trying to get the gun away from Hunter, because he

was the closet person to me . . . [and] Jerrod had my backpack." R. 231, l. 20 – 232, l. 3. Petitioner said he had gotten the gun away from Bessinger when it accidentally fired. R. 232, l. 2-11.

Petitioner told Bessinger to get out of the car, and he told his friend Phillip to drive away. Petitioner admitted he knew that the decedent had been shot by accident at that time. R. 232, l. 12 – 233, l. 15. Petitioner testified that he did not bring a gun with him to purchase the Xanax, and that he did not try to rob the decedent or Bessinger that night. R. 237, ll. 10-20. Petitioner acknowledged on cross-examination he was not totally forthcoming with the police. R. 238, l. 1 – 243, l. 20. Petitioner said he *did tell the police* that he was able to knock the gun out of Bessinger's hands before the shooting. R. 243, l.1 – 244, l. 4.

Petitioner went to Phillip's house and watched the news to see if anything had been reported. When nothing was on the news about the shooting they went to a beer and tobacco outlet. R. 235, ll. 3-21.

The judge charged murder, involuntary manslaughter, self-defense and accident. R. 302, l. 8 – 309, l. 13.

Court of Appeals

The Court of Appeals found error in the admission of the photograph of the decedent "embracing his brother in a setting unrelated to the shooting" harmless:

> "What little relevance the photograph had was vastly outweighed by its danger of unfair prejudice. Rule 403, SCRE. Victim's identity was not at issue and the photograph did not depict an objective measure of his size; Victim's actual height and weight were included in the autopsy results the jury heard. *All the photograph could accomplish was to counteract testimony that Victim was selling Owens drugs when he was shot, and arouse sympathy for Victim.* The trial court therefore exceeded its discretion in admitting it. Morin v. Innegrity, LLC, 424 S.C. 559, 576, 819 S.E.2d 131, 140 (Ct. App. 2018) ("Abuse of discretion occurs when the ruling rests

> on a legal error or inadequate factual support.") See State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) ("To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228-29 (2010))); see also State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (holding photograph of murder victim in high school graduation regalia irrelevant to prove the defendant's guilt, victim's identity was not in issue, and photo was an attempt to distance victim from drug dealing activity); State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (holding photograph of victim and husband taken before she was killed in an automobile accident irrelevant to the determination of defendant's guilt for felony DUI)."

App. 33 (emphasis added).

However, the Court of Appeals reasoned that Owens admitted he shot the decedent, "[s]o the only issue for the jury was whether Owens was guilty of he lesser involuntary manslaughter offense or whether he was entitled to acquittal based on self-defense or the defense of accident. This issue turned on Owens' credibility and intent, a subject a family photograph of Victim could not directly impact. Any error, therefore, was harmless beyond a reasonable doubt. Hawes, 423 S.C. at 133, 813 S.E.2d at 521. ("Error is harmless when it could not have affected the result of the trial). App. 33.

Discussion

Petitioner argued before the Court of Appeals that what happened in this case is virtually identically to what occurred in State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). In Langley, the decedent was also involved in a drug deal. Langley's sister identified a photograph of the decedent wearing his graduation garb. As in this case, the photograph in Langley was calculated to arouse the sympathy and prejudice of the jury, where the decedent had been involved in criminal wrongdoing—a drug deal – at the time he was killed. This Court reversed in Langley.

In State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), also relied upon by petitioner in the Court of Appeals, this Court also reversed where the photograph of victim and husband taken before she was killed in an automobile accident was simply irrelevant, and it was introduced to garner sympathy even though the victim was not engaged in any wrongdoing at the time of her untimely death. This Court also reversed in Livingston.

The Court of Appeals acknowledged here: "All the photograph could accomplish was to counteract testimony that Victim was selling Owens drugs when he was shot, and arouse sympathy for Victim." App. 33. A verdict infected by the impermissible arbitrary factor such as sympathy, respectfully, should not be quickly dispatched to the scrap heap of harmless error as was done in this case by the Court of Appeals.

This case involved two diametrically different versions of what occurred. One constant was present: This was a low level drug deal. The decedent and petitioner were not innocent parties in that respect. The state therefore sought to tip the scales in its favor by making an impermissible appeal for sympathy on behalf of the decedent through the introduction of this photograph. It cannot, respectfully, given the two diametrically different versions of what occurred in this case be said with confidence that the impermissible play to sympathy did not taint the jury's verdict.

Further, accident was a very viable defense if the jury had understood how to apply it to the facts of this case where both the decedent and petitioner were involved in unlawful activity – a low level drug sale – at the time the shooting occurred. As argued in issue two, if the jury had understood that "unlawful activity" only disqualified petitioner from an accident defense if it was the "proximate cause" of the shooting -- as defense counsel requested -- it likely would have acquitted petitioner based on accident.

Moreover, the sympathy seeking photograph error in this case was even more prejudicial than it was in State v. Langley where this Court found it to be reversible error. This case was a swearing match between Petitioner and Bessinger. Petitioner testified that he was the robbery victim, and that he was struggling over the gun, and the gun went off accidentally. Accident was a very viable defense given the evidence petitioner was acting in self-defense when he shot the decedent. Respectfully, the error should not have found to be harmless under the circumstances of the swearing match evidence the jury considered in this case.

Finally, the state continues to ignore this Court's clear precedent of State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) and State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), and it introduces photographs of the deceased victim when he or she was alive to garner sympathy because of the likelihood the error will be found harmless on appeal. Respectfully, such disrespect for precedent on this evidentiary matter will not be stopped by finding harmless error, where as here, invoking the harmless error doctrine was a stretch anyway.

2.

The Court of Appeals erred by finding the trial judge's accident instruction "sufficient" where it acknowledged the problematic nature of the charge as it instructed the jury that the defendant must have been "acting lawfully" to be entitled to an acquittal based on accident since a reasonable juror could have concluded that because the drug deal was illegal that petitioner could not be acquitted based on an accidental shooting, and the trial court could have clarified the matter by merely instructing that any unlawfully activity had to be the "proximate cause of death" to disqualify petitioner from invoking accident as a defense.

As seen, Petitioner testified that he was attempting to purchase Xanax for a party weekend from the decedent as he had done in the past. Petitioner told the jurors that Hunter Bessinger put a gun in his face. Petitioner struggled over the gun, got it away from Bessinger, and the gun discharged accidentally killing the drug dealing decedent.

Given this testimony, the judge correctly charged the jury on the defense of accident. R. 309, ll. 3-13. However, the judge instructed the jury that three things had to be shown to constitute an accident defense: "(1) the act was unintentional; (2) t*hat the defendant was acting lawfully*, and (3) that reasonable care was used by the defendant in handling a weapon." R. 309, ll. 3-13. (emphasis added).

In taking exception to this jury charge, defense counsel argued the instruction should be that if a defendant was involved in unlawful activity he could not claim accident *if the unlawful activity "proximately caused the death."* Counsel told the judge he was concerned the jury, based on his present instruction, would conclude that because Petitioner was involved in a drug deal that he could not claim accident. "I do not think that is the law." R. 317, ll. 4-22. (emphasis added).

The judge reasoned that he had charged proximate cause as "part of *involuntary manslaughter*," and he said "*it doesn't really matter whether it is a lawful or unlawful does it*?" As defense counsel continued to express his concern about the drug deal evidence and the "lawful activity instruction," the judge nonetheless refused to clarify his instruction to include that if the defendant was not acting lawfully he was only disqualified from an accident defense if the unlawful activity was the proximate cause of the decedent's death. R. 317, l. 23 – 319, l. 11. (emphasis added).

Court of Appeals

After the Court of Appeals granted petitioner rehearing, it substituted an opinion that recognized the jury instruction here was problematic. The Court nonetheless found the charge "sufficient," but it then went so far as to produce a model jury instruction for cases with similar facts in the future. App. 26-32.

As to the defense of accident, and this case, the Court of Appeals wrote:

> The defense of accident (sometimes called misadventure) protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. The defense has three elements: (1) the harm was unintentional, (2) the defendant was acting lawfully, and (3) due care was used in the handling of the weapon. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011); see also State v. Brown, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945) ("If it be shown that the killing was unintentional; that it was not the result of negligence, the homicide will be excused on the score of accident."). If the harm was caused by accident, the defendant is not criminally responsible because of the absence of criminal intent. It is precisely this lack of intent that separates accident from self-defense, for self-defense "admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." State v. McDaniel, 68 S.C. 304, 317, 47 S.E.2d 384, 398 (1904). The defense of accident sometimes surfaces in homicide cases, often alongside self-defense. Despite their varying levels of intent, accident and self-defense are not always mutually exclusive

defenses. See State v. White, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018); State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012). Of course, accident may appear in contexts far removed from self-defense. Blackstone gives the example of a man lawfully working with a hatchet when the head flies off and kills a bystander. 4 W. BLACKSTONE, COMMENTARIES.

The confusion in explaining the defense of accident crops up when no distinction is made between a defendant who has lawfully armed himself with a weapon in self-defense and then accidentally harms the victim (e.g., he stumbles and his finger slips and pulls the trigger) and a defendant who has lawfully armed himself with a weapon and then intentionally harms the victim. Only the defendant in the former situation is entitled to the self-defense of accident, and he is also entitled to have the jury charged that his conduct in arming himself in self-defense was lawful.

Layered upon this is the rule that the defense fails if the State proves beyond a reasonable doubt that the defendant's unlawful activity *proximately caused the harm*. State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994). The confusion deepens when the defendant's unlawful activity (e.g., pointing and presenting a firearm) is so intertwined with a lawful activity (self-defense) that the conduct may appear indivisible. Whether the shooting was caused by the lawful or unlawful activity is an issue that would vex jurors as well as philosophers. See generally W. LAFAVE, CRIMINAL LAW, § 7.13(b) (3d ed. 2000) (discussing causation requirement of unlawful activity in context of voluntary manslaughter).

Our supreme court has stressed the need for clarity when charging accident amidst such evidence. State v. Burriss, 334 S.C. 256, 259-64, 513 S.E.2d 104, 106-09 (1999) (holding defendant was entitled to an accident instruction because evidence showed his use of a weapon could have been lawful self-defense, even though minor defendant may have possessed the weapon unlawfully and violated the law against "pointing and presenting" a firearm); State v. McCaskill, 300 S.C. 256, 258-59, 387 S.E.2d 268, 269-70 (1990) (error in failing to charge that if the defendant *lawfully armed herself* in self-defense because of a threat to her safety in her home created by the victim, and the gun accidentally discharged, the jury would have to find her not guilty). Burriss and McCaskill dealt with situations when a trial court should have told the jury that a defendant who lawfully arms himself in self-defense is still entitled to an acquittal based on the defense of accident, even where the defendant's use or possession of the weapon would have otherwise

> been unlawful. As McCaskill explained in such situations, because "the defense of accident is not applicable unless the defendant was acting *lawfully*, it is necessary to instruct the jury as *to what constitutes a lawful enterprise.*" McCaskill, 300 S.C. at 259, 387 S.E.2d at 270. In Burriss and McCaskill, the "lawful enterprise" was self-defense.
>
> The situation here is different. Under Owens' version of events, he did not possess the gun until he grabbed it to arm himself in self-defense. He did not ask the court to clarify that arming himself was lawful conduct; he asked the court to specify what his unlawful conduct was and that, to preclude his accident defense, it must have caused Victim's death.
>
> We share the trial court's concern that Owens' requested clarification may have approached a comment on the facts. See S.C. Const., art V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The charge as given informed the jury that to bar the defense of accident, the State bore the burden of proving that the "act" (i.e., the shooting) was caused by the defendant's unlawful activity. Again, it appears Owens wanted the trial court to tell the jury that the fact he was involved in a drug deal does not, without more, prevent him from being found not guilty based on the defense of accident. Viewing the charge in the light most favorable to Owens, as we must, Commander, 396 S.C. at 271, 721 S.E.2d at 422, we conclude the charge as delivered permitted the jury to reach such a verdict, a verdict Owens' counsel argued the facts and the law warranted.

App. 29 – 31. (emphasis added).

Discussion

The judge was correct to instruct the jury on accident given Petitioner's testimony that he was simply buying five Xanax pills from the decedent -- as he had done in the past -- so he could use them to "party" with his friends over the weekend in Columbia. Petitioner testified that Bessinger unexpectedly pulled a gun on him, that he was momentarily able to get the gun away from Bessinger in **self-defense**, and that the gun discharged accidentally, killing the decedent.

In State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990), this Court held that the homicide would be excused if the defendant lawfully armed herself in self-defense because of threat

to her safety, and her gun accidentally discharged. In McCaskill, the case involved a strange love triangle. During one heated encounter, Petitioner picked up a plastic flower arrangement and threw it at her boyfriend, Glenn. Glenn told Petitioner he would beat her up if she did not stop. Petitioner testified that she was frightened by Glenn's threat, and that she went into the bedroom to get a gun to protect her unborn child. Glenn testified he was scared Petitioner was going to shoot him so he ran and threw himself on her. The gun fired, hitting Glenn's ex-wife, Donna, and killing her.

This Court reversed in McCaskill because the judge's instructions, as here, were inadequate given the facts of the case. This Court reasoned that: "The trial judge erred in failing to charge t*hat Petitioner had a right to possess a weapon in her home. This instruction would have aided the jury in evaluating the lawfulness of Petitioner's actions.* The trial judge also erred in failing to charge that if Petitioner lawfully armed herself in self-defense because of a threat to her safety created by the decedent, and the gun accidentally discharged, the jury would have to find her not guilty. The trial judge's traditional self-defense charge which focused only on the right to *use* the weapon in self-defense was inadequate. Braxton v. Commonwealth, 195 Va. 275, 77 S.E.2d 840 (1953)." State v. McCaskill, 300 S.C. 256, 259, 387 S.E.2d 268, 270 (1990).

In this case, defense counsel requested that the judge clarify his instructions so that the jury would not conclude Petitioner was excluded from an accident instruction because he voluntarily was involved in an unlawful drug deal. An ordinary juror could very well have understood the jury instruction above on "lawful activity" as to preclude accident as a jury verdict since the shooting occurred during a drug deal.

However, if *a properly instructed jury* believed Bessinger or the decedent drug dealer introduced the deadly weapon into the low level drug deal, pointed the gun in Petitioner's face, and Petitioner grabbed the gun in self-defense to protect himself -- then the fact the gun accidentally

discharged killing the decedent should not have precluded Petitioner from being found not guilty by reason of accident.

The judge should have clarified his instruction by charging the jury that the defendant's participation in unlawful activity must have been the proximate cause of the decedent's death as the defense requested. Otherwise, the mere attempt to purchase Xanax could be reasonably interpreted by the jury as an unlawful action precluding accident as a verdict.

The judge had a duty to craft his instructions to the facts of the case. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Further, the finding of the Court of Appeals that the requested clarification "may have approached a comment on the facts" did not make it a charge on the facts. The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict when applying the facts it finds to the law. The jury was the trier of fact, and it had the right to correct and not instructions that were confusing given the facts of the case. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). As this Court aptly explained in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), at times this means the trial court cannot merely rely on standard instructions – self-defense in Fuller – where the unusual facts of a case called for further clarification in a jury charge.

In fact, the Court of Appeals recommended the following language, given the facts of this case, and despite its holding that the jury instruction in this case was *sufficient*: "[A] defendant engaged in unlawful activity, including the unlawful possession of a weapon, is entitled to claim the defense of accident unless the State has proven beyond a reasonable doubt the unlawful conduct *was not merely incidental to but was the direct and foreseeable cause of the Victim's harm.*" App. 32. (emphasis added).

In State v. Burriss, 334 S.C. 256, 262 513 S.E.2d 104, 108 (1999), this Court held that the defendant was entitled to an accident instruction even though *he was acting unlawfully* in possessing a concealed weapon. This Court, quoting, 40 Am.Jur.2d *Homicide* § 75 (1968) noted, "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 weapo*n, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law") [hereinafter 40 Am.Jur.2d]. (emphasis added).

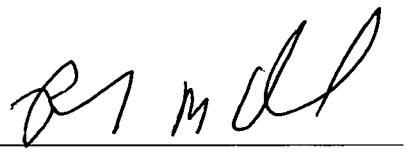
Petitioner respectfully had the right to have the judge clarify that a defendant was not precluded from an accident defense where his violation of the law was not the proximate cause of the decedent's death. Defense counsel's fears on how an ordinary juror would have understood the judge's instructions on "acting lawfully" were reasonable, and the judge committed reversible error by refusing to clarify his instruction in this regard. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989); State v. McCaskill, 300 S.C. 256, 259, 387 S.E.2d 268, 270 (1990); State v. Burriss, 334 S.C. 256, 262 513 S.E.2d 104, 108 (1999); State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944).

Petitioner respectfully should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, the opinion of the Court of Appeals should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2019.

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Certiorari to Charleston County
Honorable R. Markley Dennis, Circuit Court Judge

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PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 14th day of October, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 14th day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028