STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

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

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

APPELLATE CASE NO. 2019-001601

APPENDIX

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ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ahshaad Mykiel Owens, Appellant

Appellate Case No. 2016-000298

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-042
Heard October 9, 2018 – Filed January 23, 2019

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Ahshaad Mykiel Owens appeals his convictions for murder, armed robbery, and possession of a weapon during the commission of a violent crime,

contending the trial court erred in (1) refusing to clarify a jury instruction on the defense of accident and (2) admitting a photograph of Jarrod Howard (Victim) in violation of Rule 403, SCRE. We affirm.

I.

Owens shot Victim while he, Victim, and Victim's best friend, Hunter Bessinger, were transacting a drug deal in the back seat of a parked car near the intersection of Percy and Bogard streets in Charleston. Bessinger testified Owens pulled a gun on him and Victim while they were in the back seat of the car and shot Victim in the back while Victim was attempting to flee. Testifying in his own defense, Owens stated Bessinger got in the car first and sat next to him, while Victim got in second. Owens explained he told Victim he wanted to purchase five Xanax pills, and Victim told him the price. According to Owens, as he reached into his book bag to get his wallet, Bessinger pointed a gun in his face and demanded Owens hand him the book bag. Owens testified he knocked the gun out of Bessinger's hand and, as he wrestled the gun from Bessinger, he accidentally fired the gun, hitting Victim. Owens testified he did not bring a gun to the scene (no gun was ever found) and did not try to rob Victim or Bessinger.

The trial judge instructed the jury on murder, involuntary manslaughter, self-defense, accident, and armed robbery. Regarding accident, the judge 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 . . . 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.

Owens objected to the instruction, arguing the jury might interpret it to mean Owens could not claim accident because he was involved in the unlawful activity of a drug deal. Owens requested 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. The judge declined, explaining it would be

an impermissible comment on the facts and he had adequately charged the elements of the defense.

One of the purposes of jury instructions is to not only charge the jury on the applicable law, but to give counsel the opportunity in closing argument to argue how the law applies to the facts to his client's benefit. Owens' counsel did just that, advocating how the facts warranted the defense of accident. The issue of proximate cause or any suggestion that Owens' drug dealing barred him from claiming accident was never mentioned by either the defense or the State.

Nevertheless, we share Owens' concern that the charge did not adequately convey the scope and meaning of the term "unlawful activity" and explain its relation to the defense of accident. *Cf. 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 even though he was acting unlawfully in possessing a concealed weapon); *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 decedent, and the gun accidentally discharged, the jury would have to find her not guilty).

We need not decide whether the charge was incorrect, however, because the defense of accident requires the jury to find as an element that the defendant acted unintentionally or otherwise lacked criminal intent. By finding Owens guilty of murder—and rejecting Owens' claim of self-defense and the lesser included offense of involuntary manslaughter—the jury necessarily found he acted intentionally, a finding that precluded accident as a defense. *Cf. State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) (defendant stabbed victim who later died at hospital; defense asserted death was caused by intervening medical procedure rather than stabbing; no error in failing to charge ABWIK and ABHAN where jury convicted defendant of murder: "The jury's verdict of guilty of murder necessarily included a finding adverse to appellant on the causation issue, which excluded a verdict for an offense not involving the victim's death"); *see, e.g.*, *Wade v. State*, 815 S.E.2d 875, 880 (Ga. 2018) (finding failure to charge accident did not warrant reversal because the accident defense only applies where evidence negates a defendant's criminal intent, and "the jury was properly and fully instructed that the State had the burden of proving beyond a reasonable doubt that [Appellant] acted with the requisite malicious intent to commit each of the crimes charged," and "[t]he jury's conclusion that [Appellant] acted with malice thus necessarily means that it would have rejected any accident defense, which is premised on the claim that he acted without any criminal intent" (quoting *Sears v. State*, 717 S.E.2d 453, 455 (Ga. 2011))); *McClain*

v. State, 810 S.E.2d 77, 80 (Ga. 2018) (finding the trial court's failure to charge the jury on accident harmless despite defendant's theory that he accidentally shot the victim where "[i]t [was] undisputed . . . the trial court properly instructed the jury on the elements of malice murder and the requisite malicious intent, an intent that is absolutely incompatible with [defendant's] theory of accident. When the jury found [defendant] guilty of malice murder, it necessarily must have discredited his account of the shooting"); *State v. Riddick*, 457 S.E.2d 728, 732 (N.C. 1995) ("[T]he jury verdict finding the defendant guilty of first-degree murder, and not the unintentional act of involuntary manslaughter, precludes the possibility that the same jury would have accepted the defendant's claim that the shooting was accidental."). The trial court informed the jury the State bore the burden of proving criminal intent as an element of each crime. Owens' requested clarification would not have had any effect, as the jury would not have even reached the causation issue of the accident defense if it found, as it did, that Owens intentionally shot Victim.

II.

The trial court, over Owens' objection, admitted a photograph of Victim embracing his brother in a setting unrelated to the shooting. The State argues the photograph was relevant because it showed Victim's size, evidence that bore on how the crime unfolded. The State contends that, given the available space in the back seat of the car, Victim's size was relevant to the jury's fact-finding task.

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 to 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 unduly prejudicial, photographs must have a 'tendency to suggest an improper basis, commonly, though not necessarily, an emotional one.'"); *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).

To warrant reversal, however, Owens must show the error prejudiced him, meaning the challenged evidence likely influenced the verdict. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). 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 issue at trial or otherwise influence the verdict.

One reason the photograph should have been excluded under Rule 403 was because it had scant relevance to the jury's task of determining the germane facts. Our conclusion that the evidence was unduly prejudicial within the context of Rule 403 does not mean the prejudice was potent enough to infect the fairness of the trial or pollute the verdict. The prejudice, like the relevance it dwarfed, had little effect when considered alongside the other evidence. Owens admitted he shot Victim, so the only issue for the jury was whether Owens was guilty of the lesser manslaughter offense or whether he was entitled to acquittal based on self-defense or the defense of accident. This issue turned on intent, a subject a family photograph of Victim could not 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 reasonably have affected the result of the trial.").

Owens' convictions are

AFFIRMED.

KONDUROS, MCDONALD, and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

APPELLATE CASE NO. 2016-000298

Opinion No. 2019-UP-042

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner respectfully requests rehearing because this Court may have overlooked the fact that it is *not the law* in South Carolina that because the jury convicted the defendant of a greater offense, murder, that the failure to charge, (or correctly charge as here), a lesser-included offense or an absolute defense such as accident is immaterial or harmless. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The Supreme Court in Casey, in a published opinion, initially affirmed the refusal to charge involuntary manslaughter on the basis that "the jury returned a verdict of murder, which, necessarily embraced a finding of malice." Opinion at 14, attached to this petition as Exhibit A. The Casey Court cited State v.

Patrick, 289 S.C. 301, 306, 345 S.E.2d 481, 484 (1986) for the proposition that when the jury convicts of murder, finding malice, "the correctness of the instructions relating to manslaughter become immaterial." Opinion at 15, attached as Exhibit A.

Casey sought rehearing through then Assistant Appellate Defender Daniel T. Stacey. See rehearing petition attached as Exhibit B. The Supreme Court then withdrew the published opinion referenced above, and issued Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991), which reversed the trial court's refusal to instruct on involuntary manslaughter *citing* State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969), for the principle that "to warrant the court in eliminating the offense of manslaughter it should very clearly appear there is *no evidence whatever* tending to reduce the crime from murder to manslaughter." (Court's emphasis). This again was the Supreme Court's opinion after the prior opinion, Opinion No. 23402 (filed May 20, 1991), affirming, was withdrawn.

In the revised opinion, in Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991), the Court overruled State v. Patrick, 289 S.C. 301, 306, 345 S.E.2d 481, 484 (1986) where the Court had reasoned that "the judge clearly instructed the jury that manslaughter is distinguished from murder by the absence of malice and that if the jury found only criminal negligence by the appellant in the handling of a firearm, the jury could consider manslaughter. The jury returned a verdict of murder which, as clearly instructed in the jury charge, necessarily *included a finding of malice. Since the jury determined that the appellant acted with malice, it could not have returned a verdict for manslaughter, voluntary or involuntary.*" (emphasis added).

In the present case, accident was charged, but this Court respectfully employed the erroneous analysis originally applied in Casey in finding the charging error here immaterial or harmless because the jury found appellant's conduct intentional by convicting him of murder.

This Court correctly was concerned that the judge's accident instruction did not adequately convey the scope and meaning of the term "unlawful activity" when it charged accident. The instruction told the jury that appellant had to be acting "lawfully" to be not guilty by reason of accident where it was undisputed a low level "college student like" drug deal was in progress when the decedent, according to appellant, was accidently shot.

Further, as discussed at oral argument, an argument by defense counsel on this issue was not evidence, and it certainly was so substitute for adequate and correct instructions on the law. Appellant was entitled to a correct instruction on accident which explained what "unlawful" meant given the highly unusual facts of this case. The purpose of jury instructions are to enlighten and educate the jury so that it reaches a correct result. The jury was the trier of fact, and it had the right to correct and not confusing instructions on the law. 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).

This Court did not decide this issue because it respectfully erroneously found that by finding appellant guilty of murder the jury implicitly found his conduct was intentional. Therefore, any charging error as to accident was irrelevant and harmless.

Yet, by this reasoning every case where a jury found a defendant guilty of murder would result in a finding of harmless error where there was also evidence of a lesser-included offense -- voluntary or involuntary manslaughter. That is not the law. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)(murder conviction reversed because involuntary manslaughter instruction not given); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003)(voluntary manslaughter conviction -- which means an intentional killing in a heat of passion on a sufficient legal provocation -- reversed because an involuntary manslaughter charge was not given).

The jury here could have found appellant guilty of murder because the judge's accident instruction misled the jury into thinking that accident was not a possible verdict because dealing in drugs was "unlawful." Because this Court's legal reasoning, respectfully on this issue was incorrect, appellant respectfully requests rehearing.

As to the "in happier times of life" photograph issue, this Court found it was erroneously admitted in violation of Rule 403, SCRE. This Court rejected the state's transparent argument that the photograph was relevant to any objective measure of size. However, this Court found there was not prejudice that was "potent enough to infect the fairness of the trial or pollute the verdict." Again, because rehearing should be granted on the failure to clarify the "unlawful activity" portion of the accident instruction, this harmless error holding should be reevaluated also.

Further, and respectfully, there was no charging error in State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), or State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), and the Supreme Court reversed in both cases on the issue this Court found harmless. This was respectfully so because seeking the sympathy of the jury through an inadmissible photograph should not be found harmless error since it was a blatant attempt to garner a jury verdict on an impermissible ground: Sympathy for the victim.

This goes to the core of disrespect for the jury system. Trying to convict a citizen and take his freedom away based on a cynical and impermissible play for sympathy should not be dismissed as "harmless" error, respectfully, for policy reasons alone. The same would be true of an attempt to convict a person because he or she was a bad person and the state thought needed to be punished regardless of their guilt for the crime for which they were on trial.

Most respectfully, what happened here, considering the clear holdings of Livingston and Langley encourages disrespect for our system because solicitors will conclude, if they have not already, that they can impermissibly garner sympathy from the jury, and the appellate court -- this Court -- will still affirm despite their misconduct. Rehearing respectfully should be granted on these two important legal issues.

Respectfully Submitted,

ROBERT M. DUDEK
Chief Appellate Defender

This 7th day of February, 2019.

Exhibit A

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Thomas Junior Casey, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Greenville County
Frank P. McGowan, Jr., Judge

Opinion No. 23402

Heard April 1, 1991 - Filed May 20, 1991

AFFIRMED

Assistant Appellate Defender Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General W. Teresa Nesbitt, all of Columbia, for Respondent.

CHANDLER, A.J.: In this Post-Conviction Relief (PCR) matter, we granted certiorari, pursuant to Davis v. State,[1] to review the direct appeal issues of Petitioner, Thomas Junior Casey (Casey).

We affirm.

FACTS

On October 28, 1976, Casey shot and killed Howard Westbrook (Victim) with a shotgun. According to testimony of the only available eyewitness, Janie Marlowe (Marlowe), sister of Casey, Victim threatened to "cut" Casey as he sat

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[1] 288 S.C. 290, 342 S.E.2d 60 (1986).

in his car in Marlowe's front yard. When Victim approached the car, Casey exited with a shotgun. Marlowe observed a scuffle over the gun between Casey and his cousin, Linda, a passenger in the car. While headed back to her house, Marlowe heard a shotgun blast. She turned and saw that Victim had been shot, from which injury he died.

At trial, the judge refused Casey's request to charge the law of involuntary manslaughter; he did, however, charge the law of murder, voluntary manslaughter, accident and self-defense. Casey was found guilty of murder and sentenced to life.

ISSUE

Did the Court err in refusing to charge the law of involuntary manslaughter?

DISCUSSION

Manslaughter is the unlawful killing of another without malice. S. C. Code Ann. §16-3-50 (1985). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. S. C. Code Ann. §16-3-60 (1985). Involuntary and voluntary manslaughter are distinguished from murder "because the vital element of malice is missing." State v. Gandy, 283 S.C. 571, 573, 324 S.E.2d 65, 67 (1984).

Evidence of a struggle between a defendant and a Victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). This principle is no less applicable where the defendant, in struggling with a third person over a gun, shoots the victim. While Marlowe's testimony supports an involuntary manslaughter charge, trial court's refusal to do so does not constitute reversible error here.

The trial judge charged on murder, manslaughter, accident and self-defense. He advised the jury that murder requires a finding of malice aforethought. He further charged that manslaughter is the killing of a human being without malice, and that it is "the element of malice that distinguishes the offense of murder from that of manslaughter."

The jury returned a verdict of murder which, necessarily, embraced a finding of malice. Since the jury

determined that Casey acted with malice, "it could not have returned a verdict for manslaughter, voluntary or involuntary." Patrick, supra, 289 S.C. at 306, 345 S.E.2d at 484. (Emphasis supplied). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984).

Patrick and Gandy are consistent with decisions in a majority of jurisdictions which hold that, when a defendant has been convicted of murder, the correctness of instructions relating to manslaughter becomes immaterial. See, generally, Annotation, 15 A.L.R.4th 118. As was stated by the Supreme Court of Kansas in State v. Metcalf, 203 Kan. 63, ___, 452 P.2d 842, 845 (1969):

> * * * where the jury, under proper instruction, have found a defendant guilty of every element of the superior offense, erroneous instructions, or a total failure to instruct, with reference to an offense inferior in degree, and including less criminality cannot, logically, be said to have influenced the jury. The failure of the court can only be said to be prejudicial to the defendant on the theory that the jury failed to fully comprehend the definition of the superior degree, or misconstrued and misapplied the law to the facts. To indulge in such presumptions, even though we know that mistakes are made by juries and courts alike, is to overturn the whole theory of the administration of justice. (Citations omitted). (Emphasis supplied).

Here, we find no prejudice in the failure to instruct on involuntary manslaughter.

Casey's remaining exception is affirmed pursuant to Supreme Court Rule 23: State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983).

AFFIRMED.

GREGORY, C.J., HARWELL, FINNEY and TOAL, JJ., concur.

Exhibit B

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Thomas Junior Casey, Petitioner,

v.

The State, Respondent,

Appeal from Greenville County

Frank P. McGowan, Jr., Judge

Opinion No. 24402

PETITION FOR REHEARING

Petitioner respectfully moves for rehearing on these grounds:

1. The Court may have overlooked that, "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction." Respondent's Brief at page 4; Petitioner's Brief, page 2.

2. The case of State v. Metcalf, 203 Kan. 63, ___, 452 P.2d 842, 545 (1969) appears to be no longer followed in Kansas. State v. Roberson, 210 Kan. 209, 499 P.2d 1137 (1972); State v. Weyer, 210 Kan. 721, 504 P.2d 178 (1972). "Another consequence of enactment of [statute requiring charges on lesser offenses supported by evidence] is that the principle referred to in State

v. Metcalf, supra, no longer remains valid." [Emphasis added] 504 P.2d, at 183.

3. This case appears to over-rule sub silentio a long and unbroken line of cases finding that it is reversible error to not grant a requested charge on a lesser included offense that has evidentiary support:

State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914);

State v. Hughes, 107 S.C. 439, 93 S.E. 5 (1917);

State v. Shaw, 226 S.C. 501, 85 S.E.2d 858, (1955);

State v. Gorey, 235 S.C. 301, 11 S.E.2d 560 (1960);

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981);

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987);

State v. Ritter, 296 S.C. 51, 370 S.E.2d 610 (1988);

State v. Gilliam, 296 S.C. 295, 371 S.E.2d 596, (1988)

4. That the cited language with reference to finding of malice taken from State v. Patrick and State v. Gandy is obiter dictum only in those cases.

5. That trial judges could be free to ignore their duty to charge the law under Article V, §21 of our State Constitution, as there exists no appellate check upon refusal to submit lesser included offenses supported by the evidence, as the judge did in this case because he did not believe the evidence.

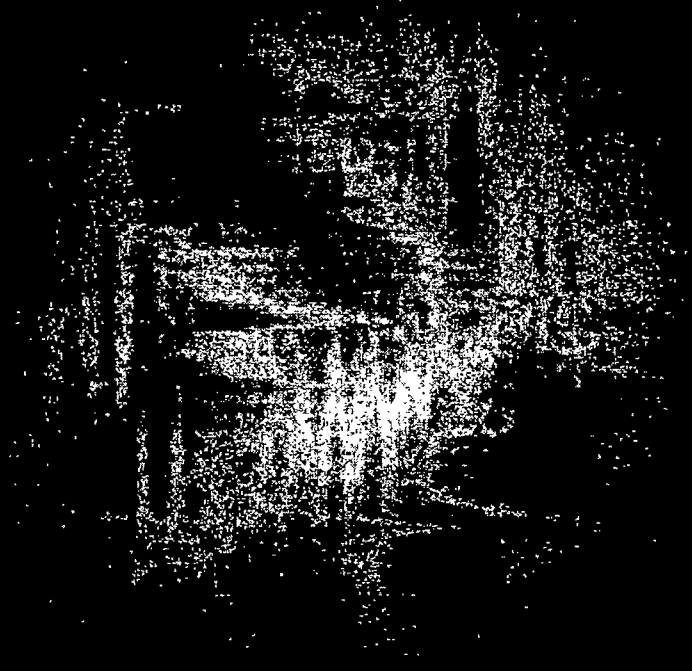
WHEREFORE, Petitioner respectfully asks for rehearing in this case.

Respectfully Submitted,

Daniel T. Stacey
Assistant Appellant Defender

By _____

This 29th day of May, 1991.



STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Frank P. McGowan, Jr., Judge

THE STATE,

RESPONDENT,

v.

THOMAS JUNIOR CASEY,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above entitled case has been served upon opposing counsel by mailing same in an envelope properly addressed with postage prepaid this 29th day of May, 1991.

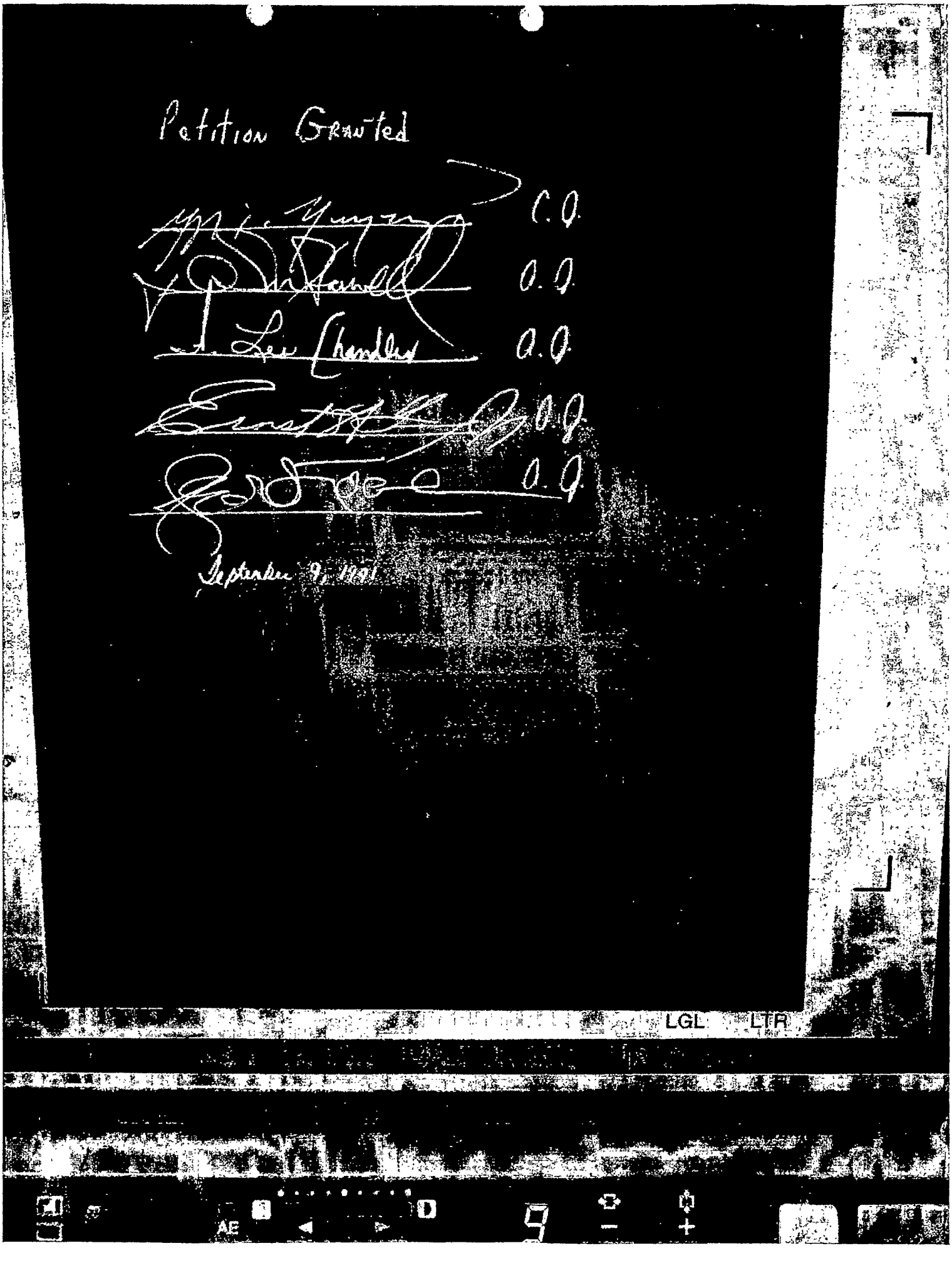
Daniel T. Stacey
Assistant Appellant Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day of May, 1991.

Notary Public for South Carolina (L.S.)

My Commission Expires: 05/09/99.


Petition Granted
C.J.
A.J.
A.J.
A.J.
A.J.
September 9, 1991
LGL
LTR
AE

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

CERTIFICATE OF SERVICE

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 7th day of February, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of February, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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
Opinion No. 2019-UP-042

RETURN TO PETITION FOR REHEARING

Comes now Respondent, above named, by and through the South Carolina Attorney General, hereby makes its Return to the Petition for Rehearing filed by Appellant on February 7, 2019. Respondent submits the Court of Appeals reached the correct result in affirming Appellant's convictions. As a result, the Petition for Rehearing should be denied and dismissed.

1. Appellant first contends this Court applied the wrong analysis of the accident instruction in concluding Owen's clarification would have had no effect on the jury because the jury determined Owens intentionally shot the victim. Specifically, Appellant cites *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) for the holding that a trial court's refusal to charge a lesser included offense of involuntary manslaughter was error when the jury convicted the defendant of murder. Respondent submits this argument was not overlooked or misapprehended by this Court.

Casey concerned a jury instruction on a lesser included offense of murder. In the instant case, the disputed charge is one of defense of accident. This Court correctly found the jury's conclusion Appellant intentionally shot the victim meant the jury did not reach the causation element of accident. Significantly, and distinguishable from *Casey*, the trial court **did** instruct the jury on accident. The instruction was a correct and comprehensive statement of law. Moreover, because Appellant only asked for the clarification after the charge was given to the jury, any clarification by the court that drug dealing would not preclude a charge of accident would constitute an impermissible comment on the facts.

Thus, even if this Court were persuaded by Appellant's argument that *Casey* requires the court to instruct on accident to prevent reversible error, the trial court here did, in fact, do so. 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. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The testimony was undisputed the men were involved in an unlawful drug purchase, and the jury was extensively instructed on the defense of accident (R. p. 309) and proximate cause (R. p. 305). 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. There is no reasonable likelihood the jury applied the instruction in a way that violated the constitution.

Respondent also respectfully notes that 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.) Thus, Appellant's argument on appeal was not made to the trial court below. Given the

posture of this issue before the trial court, this Court reached the correct result in finding no reversible error in the trial court's instruction.

2. Appellant argues that because this Court should grant rehearing "on the failure to clarify the 'unlawful activity' portion of the accident instruction," the harmless error holding concerning the admission of the photograph should also be re-evaluated. To the contrary, because there was no error in this Court's assessment of the accident instruction, Respondent contends there is no need to re-evaluate the harmless error analysis of the admission of the photograph. The photograph appears to be a cropped or narrowly focused image of the victim and his brother in an outdoor setting. Unlike in *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), where a photograph of the victim and her husband was introduced during the husband's testimony, and *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), where the photograph depicted a much younger victim during a celebratory period, here the photograph is fairly unremarkable. Appellant argues *Livingston* and *Langley* required reversal even without a jury instruction issue, but that is because the pictures submitted in those cases were substantially more prejudicial than in the instant case. In a Rule 403, SCRE, analysis, the courts must always weigh the prejudicial impact of any piece of evidence on a case by case basis. Significantly, the State presented testimony that the victim was a drug dealer. Clearly, the State's theory of the case did not include portraying the victim as an innocent bystander. Thus, as this Court correctly concluded, the photograph of him "in life" had limited, if any, prejudicial value.

WHEREFORE, premises considered, for the reasons stated herein, Respondent respectfully requests this Court deny the Petition for Rehearing.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

The Honorable Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

Appellate Case No. 2016-000142

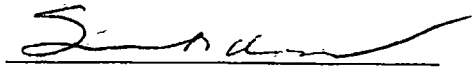
CERTIFICATE OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing by depositing copies of the same in the United states mail, postage paid, first class, addressed to Appellant's attorney of record:

Robert M. Dudek, Chief Appellate Defender
SCCID/Div. of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 21th day of February, 2019.



Susannah R. Cole
Assistant Attorney General

The South Carolina Court of Appeals

The State, Respondent,

v.

Ahshaad Mykiel Owens, Appellant

Appellate Case No. 2016-000298

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Susannah Rawl Cole, Esquire
Scarlett Anne Wilson, Esquire

FILED
July 10, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ahshaad Mykiel Owens, Appellant

Appellate Case No. 2016-000298

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5663
Originally Filed as 2019-UP-421
Heard October 9, 2018 – Filed January 23, 2019
Withdrawn, Substituted and Refiled July 10, 2019

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

HILL, J.: In criminal law, the defense of accident is a recluse: it is seldom seen and often misunderstood. This appeal requires us to examine in full light the defense and the language trial courts use when explaining it to juries, focusing on when a defendant who is engaged in unlawful conduct may still be entitled to the defense. While we conclude the charge given here was sufficient, we propose a recommended

charge for future cases. We also hold the trial court erred by admitting a family photograph of Jarrod Howard (Victim) in violation of Rule 403 of the South Carolina Rules of Evidence (SCRE), but find the error harmless. We therefore affirm appellant Ahshaad Mykiel Owens' convictions.

I.

Owens shot Victim while he, Victim, and Victim's best friend, Hunter Bessinger, were transacting a drug deal in the back seat of a parked car near the intersection of Percy and Bogard streets in Charleston. Bessinger testified Owens pulled a gun on him and Victim and shot Victim in the back when Victim tried to flee. Testifying in his own defense, Owens stated Bessinger entered the car first and sat in the middle of the back seat next to him, while Victim got in second and sat next to Bessinger. Owens explained he told Victim he wanted to purchase five Xanax pills, and Victim told him the price. According to Owens, as he reached into his book bag to retrieve his wallet, Bessinger pointed a gun in his face and demanded Owens hand him the book bag. Owens testified he knocked the gun out of Bessinger's hand and, as he wrestled the gun from Bessinger, he accidentally fired the gun, hitting Victim. Owens testified he did not bring a gun to the scene (no gun was ever found).

The trial judge instructed the jury on murder, involuntary manslaughter, self-defense, accident, and armed robbery. Regarding accident, the judge 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 th[e] act was not an accident . . . but was caused by the negligence or carelessness on the part of the defendant in [the] handling of a dangerous instrumentality or by unlawful activity by the defendant himself.

Owens objected to the instruction, arguing the jury might interpret it to mean Owens could not claim accident because he was involved in the unlawful activity of a drug deal (although neither the State nor Owens mentioned such an interpretation in their closing arguments). Owens requested 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. The judge declined,

explaining it would be an impermissible comment on the facts and he had adequately charged the elements of the defense.

The jury convicted Owens of murder, armed robbery, and possession of a weapon during the commission of a violent crime. He now appeals, contending the trial court erred in (1) refusing his request for specific language in a jury instruction on the defense of accident, and (2) admitting a photograph of Victim in violation of Rule 403, SCRE.

II.

Owens claims the trial court's accident charge did not adequately convey the scope and meaning of the term "unlawful activity" and explain its relation to the defense of accident.

We review jury instructions for abuse of discretion, meaning that to warrant reversal the instruction must have both misstated the law and prejudiced the defendant. *See State v. Jenkins*, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014).

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 done while the perpetrator was engaged in a lawful enterprise, and 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. 384, 389 (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 *182.

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 in self-defense and then intentionally harms the victim. Only the defendant in the former situation is entitled to the 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 the 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.

As long as a jury charge mirrors the law, it need not mimic a party's chosen language. *See Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 473 (2004) ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) ("The substance of the law must be charged to the jury, not particular verbiage."). We note too that drug dealing is an unlawful activity that can under certain circumstances preclude an accident charge altogether. *See State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011). In a recent 3-2 decision, our supreme court held that a defendant who brought a concealed pistol to a drug deal brought on the difficulty and is therefore not entitled to a self-defense charge. *State v. Williams*, Op. No. 27895 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 13) ("Williams' actions proximately caused the difficulty as a matter of established law because his act of taking a loaded, unlawfully-possessed pistol into an illegal drug transaction was not 'merely incidental' to the act of arming himself in self-defense" (internal citations omitted)).

Nevertheless, we recognize the challenges of explaining the defense of accident to jurors. In crafting jury instructions, as in any architecture, less is often more. But as Frank Lloyd Wright is reputed to have said, "less is more only when more is too much." It is the trial court's job to explain the general principles of law raised by the evidence to the jury; it is the lawyers' job to explain to the jury how the specific facts

in evidence relate to those general principles. We recommend the following language when instructing jurors on the defense of accident:

> The defendant has raised the defense of accident. Harm to another, including death, is excusable on the ground of accident if the harm was caused by the unintentional and lawful act of a defendant exercising due care. For the defense of accident to apply, you must find: (1) the act of the defendant that caused the harm was accidental and not intentional; (2) the act was lawful; and (3) the act was not careless, negligent, or reckless.
>
> If you find the defense of accident applies, you must find the defendant not guilty. However, if the State has proven beyond a reasonable doubt that any of the three elements of the defense of accident do not apply, then the defendant is not entitled to the defense. A defendant engaged in unlawful conduct, including the unlawful possession of a weapon, is entitled to claim the defense of accident unless the State has proven beyond a reasonable doubt that the unlawful conduct was not merely incidental to but was the direct and foreseeable cause of the Victim's harm.

When the evidence supports an accident charge on behalf of a defendant who has lawfully armed himself in self-defense, we suggest the following additional instruction consistent with *Burriss* and *McCaskill*:

> 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.

III.

The trial court, over Owens' objection, admitted a photograph of Victim embracing his brother in a setting unrelated to the shooting. The State argues the photograph was relevant because it showed Victim's size, evidence that bore on how the crime unfolded. The State contends that, given the available space in the back seat of the car, Victim's size was relevant to the jury's fact-finding task.

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).

To warrant reversal, however, Owens must show the error prejudiced him, meaning the challenged evidence likely influenced the verdict. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). 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.

One reason the photograph should have been excluded under Rule 403 was because it had scant relevance to the jury's task of determining the germane facts. Our conclusion that the evidence was unduly prejudicial within the context of Rule 403 does not mean the prejudice was potent enough to infect the fairness of the trial or pollute the verdict. The prejudice, like the relevance it dwarfed, had little effect when considered alongside the other evidence. Owens admitted he shot Victim, so the only issue for the jury was whether Owens was guilty of the 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 reasonably have affected the result of the trial.").

Owens' convictions are

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

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

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.[1]

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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[1] 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 accidently 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,

Robert M. Dudek
Chief Appellate Defender

July 25, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

CERTIFICATE OF SERVICE

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.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

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

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Ahshaad Mykiel Owens, Appellant

Appellate Case No. 2016-000298

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Susannah Rawl Cole, Esquire
Scarlett Anne Wilson, Esquire

FILED
August 22, 2019

RWD