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

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

1.

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

2.

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

STATEMENT OF THE CASE

Appellant 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 appellant. 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 appellant guilty on all of the other counts. R. 326, ll. 2-23. Judge Dennis sentenced appellant 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.

This appeal follows.

ARGUMENT

1.

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

Relevant Facts

It was undisputed that the decedent was a 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 "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: "We *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, is before this Court for viewing.

The drug deal

Bessinger said 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.

Bessinger testified: "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 said 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 [appellant] pulled the gun out of this book bag and pointed it at me and Jarrod." R. 45, l. 22 – 46, l. 24.

Bessinger maintained: "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.

Appellant takes the stand

Appellant took the stand in his own defense to describe what happened. Appellant testified that on October 10, 2014, he was going to purchase Xanax from the decedent as he had in the past. Appellant 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.

Appellant said he 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. Appellant had his friend Phillip drive him downtown.

Appellant described to the jury how he saw Bessinger walking with the decedent. R. 228, ll. 2-13. Appellant 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.

Appellant testified while they were talking Bessinger told the decedent to "hurry up." Appellant told the decedent he wanted "five" Xanax pills, and he was told the price. Appellant 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.

Appellant 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." Appellant 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. Appellant said he had gotten the gun away from Bessinger when it accidentally fired. R. 232, l. 2-11.

Appellant told Bessinger to get out of the car, and he told his friend Phillip to drive away. Appellant admitted he knew that the decedent had been shot by accident at that time. R. 232, l. 12 – 233, l. 15. Appellant said 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. Appellant acknowledged on cross-examination he was not totally forthcoming with the police. R. 238, l. 1 – 243, l. 20. Appellant 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.

Appellant testified they then 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 the jury with all of murder, involuntary manslaughter, self-defense and accident. R. 302, l. 8 – 309, l. 13.

Discussion

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 was calculated to arouse the sympathy and prejudice of the jury.

The state will obviously always have some purported reason – other than sympathy for the decedent and his family -- that it is submitting a photograph of the decedent during happy times. Here, defense counsel properly objected to this admissible photograph. This photograph was highly prejudicial as were the photographs warranting reversal in State v. Langley and State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997).

As in Langley and Livingston, the photograph of the decedent with his arm around another man was not relevant to proving the guilt of appellant. The judge erred by finding the photograph in this case was relevant to appellant's guilt, and that it **was admissible under Rule 403, SCRE**.

The error in this case was even more prejudicial than it was in State v. Langley where the Supreme Court found it to be reversible error. This case was a swearing match between appellant and Bessinger. Appellant testified that **he was the robbery victim**, and that he was able to knock the gun away, and that the gun went off accidentally. The jury could have found appellant not guilty by reason of self-defense or because the shooting was accidental. The error cannot be found

to be harmless under the circumstances of the swearing match evidence the jury considered in this case.

It should be apparent that the state wanted sympathy for the decedent, and it did not want the jury thinking of him as just another drug dealer, and making the natural inference that dealing in drugs is a dangerous business where people sometimes get hurt and killed. Appellant should be granted a new trial. See, State v. Langley, State v. Livingston, supra.

2.

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

As seen above, appellant testified that he was attempting to purchase Xanax for a party weekend from the decedent as he had done in the past. Appellant told the jurors that Hunter Bessinger put a gun in his face. Appellant 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 must be shown to constitute accident: "(1) the act was unintentional; (2) that the defendant was acting lawfully, and (3) that reasonable care was used by the defendant in handling a weapon." R. 309, ll. 3-13.

In taking exception to this 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 instruction, would conclude that because appellant 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.

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 verdict if it the unlawful activity was the proximate cause of death. R. 317, l. 23 – 319, l. 11.

Discussion

The judge was correct to instruct the jury on accident given appellant'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. Appellant testified that Bessinger unexpectedly pulled a gun on him, that he was 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), our Supreme Court held that the homicide would be excused if the defendant lawfully armed herself in self-defense because of threat to her safety, and defendant's gun accidentally discharged. In McCaskill, the case involved a strange love triangle. During one heated encounter, appellant picked up a plastic flower arrangement and threw it at her boyfriend, Glenn. Glenn told appellant he would beat her up if she did not stop. Appellant 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 appellant 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.

Our Supreme Court reversed in McCaskill because the judge's instructions, as here, were inadequate given the facts of the case. The Court reasoned that: "The trial judge erred in failing to charge t*hat appellant had a right to possess a weapon in her home. This instruction would have aided the jury in evaluating the lawfulness of appellant's actions.* The trial judge also erred in failing to charge that if appellant 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 appellant 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.

However, if Bessinger or the decedent drug dealer introduced the deadly weapon into the low level drug deal, pointed the gun in appellant's face, and appellant grabbed the gun in self-defense to protect himself -- then the fact the gun accidentally discharged killing the decedent should not have precluded appellant 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. 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).

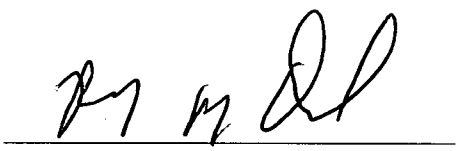
In State v. Burriss, 334 S.C. 256, 262 513 S.E.2d 104, 108 (1999), our Supreme Court held that the defendant was entitled to an accident instruction even though **he was acting unlawfully** in possessing a concealed weapon. The Court, quoting, 40 Am.Jur.2d *Homicide* § 75 (1968) noted, "The fact that 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 weapon*, 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).

Appellant respectfully had the right to have the judge clarify that a defendant is 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). The jury was the trier of fact, and it had the right to correct and not confusing instructions. 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).

CONCLUSION

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



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Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of June, 2017.

CERTIFICATE OF COUNSEL

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

June 15, 2017

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