

STATE OF SOUTH CAROLINA
In The Supreme Court

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Honorable R. Markley Dennis, Circuit Court Judge

May 13 2020
S.C. SUPREME COURT

Appellate Case No. 2019-001601

THE STATE,RESPONDENT

v.

AHSHAAD MYKIEL OWENS, PETITIONER.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED

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?

(BOP, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUE PRESENTED

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

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner, Ahshaad Mykiel Owens, in March of 2015 for murder, armed robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime involving the death of Jarrod Howard on October 14, 2014. (R. pp. 328-33). On February 8, 2016, the case was called to trial before the Honorable R. Markley Dennis. (R. p. 1). Jason T. King, Esquire and John J. Kozelski, III, Esquire, represented Petitioner. (R. p. 1). Assistant Solicitor Stephanie Linder represented the State. (R. p. 1). At the conclusion of the three-day trial, the trial court directed a verdict on the criminal conspiracy charge and the jury returned a verdict of guilty on the remaining charges. (R. p. 1; p. 257, lines 5-9; p. 326, lines 1-23). Judge Dennis sentenced Petitioner to concurrent terms of thirty years for the murder and armed robbery charges and a concurrent term of five years for the weapons charge. (R. p. 327, lines 8-13). Petitioner appealed.

After briefing, the South Carolina Court of Appeals heard oral argument on October 9, 2018. The Court of Appeals subsequently issued an unpublished opinion on January 23, 2019, that affirmed the convictions and sentence. (App. pp. 1-5). Petitioner sought rehearing on February 7, 2019. (App. pp. 6-21). The State made its return to the petition on February 21, 2019. (App. pp. 22-25). On July 10, 2019, the Court of Appeals granted the petition, and, without further briefing or argument, issued a substituted opinion, again affirming. (App. pp. 26-34). Petitioner, again, sought rehearing, (App. pp. 35-41), which the Court of Appeals denied on August 22, 2019, (App. p. 42).

On October 14, 2019, Petitioner filed a petition for certiorari review in this Court raising two issues. The State made its return on November 25, 2019. By Order dated

March 12, 2020, the Court granted the petition on one issue, and denied on the other. Petitioner filed his Brief of Petitioner on April 13, 2020. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

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

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

When they approached the car, Hunter got into the backseat in the middle position, then Jarrod climbed in beside him. (R. p. 45, line 24 – p. 46, line 1.) Petitioner, who was the man in the backseat, had a book bag between his legs, and the three of them were squeezed together in the small backseat of the car. (R. p. 46, lines 12-15.) Hunter said they tried to start a conversation, but as soon as the men were seated in the car, Petitioner pulled a gun from his book bag and pointed it at them. (R. p. 46, lines 19-24.) Petitioner waived his gun and yelled at the men to “give him the shit,” but Jarrod and Hunter were frozen in fear. (R. p. 47, lines 10-17.) Jarrod attempted to get out of the car, and Petitioner shot him in the back as he tried to step out. (R. p. 47, lines 14-20.) Hunter could smell the burning gunpowder and his ears were ringing from the shot, but he heard Petitioner tell him to “get out,” and he jumped from the car and ran. (R. p. 48, lines 4-20.) Hunter heard the tires screeching as the car sped away. (R. p. 49, lines 2-3.) He tried to call 911 as he returned to his friend, but the call would not go through. (R. p. 49, lines 2-10.) A bystander was with Jarrod, lying on the ground, and she told Hunter she had called 911. (R. p. 49, 11-12.) Hunter tried to keep Jarrod awake as they waited for an ambulance. (R. p. 49, 15-20.) When the police arrived on the scene, Hunter told them he saw the crime and cooperated with the police in their efforts to find the perpetrators. (R. p. 49, line 23 – p. 51, line 9.) Eventually, Hunter identified Petitioner in a police lineup as the shooter. (R. p. 51, lines 5-9.)

Anna Faenza, who owned the business across from the crime scene, was cleaning paintbrushes when she saw the red car waiting outside her business. (R. p. 80, lines 2-7.) Faenza heard voices arguing, then heard the gunshot. She saw Jarrod fall to the ground, clutching his book bag, and then she saw Petitioner run to where Jarrod had fallen and

grab the book bag. (R. p. 80, lines 8-25.) When she noticed the gun in Petitioner's hand, she ran to lock the doors of her business and called 911. (R. p. 81, lines 1-9.) Faenza noticed Petitioner's distinctive shoes, and saw him take a few steps down the street before she ducked down. (R. p. 83, line 18 – p. 84, line 7.) She then heard the car speed away. (R. p. 84, line 10.)

Another witness saw Jarrod and Hunter approach and then get into the car. The witness heard a gunshot, and then saw the victim struggle to get out of the car. (R. pp. 21-23.)

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

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

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

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

away. (R. p. 232, lines 22-23.) On cross examination, Owens acknowledged he lied to police in his initial interview. (R. p. 238, lines 16-20.) Owens admitted he told police they could not find the gun, and on the stand he denied stopping on Interstate 26 to dispose of the gun. (R. p. 241, lines 12-17; p. 242, lines 17-25.) However, Owens told the police he threw the gun out of the window on the interstate. (R. p. 250, lines 18-23.)

STANDARD OF REVIEW

Appellate Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

Jury Instructions

The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The substance of the law must be charged to the jury, not any particular verbiage. *State v. Adkins*, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003). If, in its entirety, the instructions are free from error, any isolated portions which may be misleading do not constitute reversible error.” *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard of review when considering an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution. *Id.* at 27, 538 S.E.2d at 251 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

ARGUMENT

The Court of Appeals appropriately found no abuse of discretion when the trial court declined to supplement the jury instruction on the defense of accident. The charge given was a correct statement of the law, and the trial court correctly reasoned an addition as suggested may constitute an impermissible comment on the facts.

“The trial court must charge the jury on the law applicable to the jury’s deliberations.” *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 905 (2019). Further, it is a “general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused.” *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). The Court of Appeals correctly applied these rules in this appeal and properly affirmed.

The Court of Appeals, citing *State v. Burris*, 334 S.C. 256, 259-64, 513 S.E.2d 104, 106-09 (1999) and *State v. McCaskill*, 300 S.C. 256, 258-59, 387 S.E.2d 268, 269-70 (1990), recognized that this Court “has stressed the need for clarity when charging accident” where theories of criminal responsibility or excuse are also presented. (App. p. 30). In this case, the Court of Appeals critically considered that Petitioner wanted a charge that simply being involved in a drug deal would not preclude the jury from finding accident. (App. p. 30, “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 cause the Victim’s death.”). As this Court has recently set out in *State v. Williams*, 427 S.C. at 254, 830 S.E.2d at 908, if the jury believed Petitioner brought a gun to the deal – *i.e.*, “illegally armed himself before he chose to enter a situation he knew to be unlawful, and which he knew was likely to be violent,” *id.* – he is not entitled to claim self-defense. (App. p. 31). He would similarly

not be entitled to the defense of accident. *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011). There was competing testimony on whether Petitioner had a gun, or took another's gun. (See R. p. 46, lines 19-24 (Hunter testifying Petitioner pulled a gun from Petitioner's bag); R. 230, lines 1-14 (Owens claimed Hunter pulled a gun on him)).

The Court of Appeals considered that the charge given instructed the jury the State had the burden of proving the shooting was caused by the unlawful activity. The Court of Appeals also shared the trial court's concern that further more specific instruction "approached a comment on the fact." (App. p. 31). The Court of Appeals resolved the law as charged was correct and rejected Petitioner's claim of error. (App. p. 31). The facts and law support this conclusion.

The record shows the trial court instructed the jury on murder, involuntary manslaughter, self-defense, and accident, and the elements of armed robbery. (R. p. 259, lines 16-25; p. 302, line 8 – p. 310, line 19). In his closing arguments to the jury, defense counsel told the jury, "Now I am not saying that he shot Jarrod in self-defense. What I am saying is when there is a gun in his face he has the right to grab that gun and defend himself. And when he does that he is acting lawfully. And the gun went off. And that is an accident." (R. p. 272, lines 14-18.)

During his charge to the jury, after the involuntary manslaughter instruction, the trial judge further instructed: "The State must also prove beyond a reasonable doubt that the defendant's act was the proximate cause of the death," and explained proximate cause to the jury. (R. p. 305, line 13- p. 306, line 8). Then regarding accident, the trial court instructed: "The burden is on the State to prove beyond a reasonable doubt that that act was not an accident – **that the act was not an accident but was caused by the**

negligence or carelessness on the part of the defendant in handling of a dangerous instrumentality or **by unlawful activity by the defendant himself.**” (R. p. 309, lines 3-13(emphasis added).)

After the jury recessed following the charge, defense counsel told the court he was concerned about the “unlawful activity” language in the accident charge. He argued the jury could believe that if Petitioner was involved in a drug deal, then he may not be able to claim the defense of accident. (R. p. 317, lines 12-16.) He did not make a specific request to re-charge the jury, nor did he offer specific language for further instruction. (R. p. 317.) In response to his argument, however, the trial judge pointed out that he charged proximate cause. (R. p. 317, line 23.) When defense counsel expressed more concern about the unlawfulness of the drug deal, the court said it could not explain how the specific facts of the case are relevant to the defenses because it would be an improper comment on the facts. (R. p. 317, line 13 – p. 319, line 9.) The court found the charge as a whole addressed Petitioner’s concerns. (R. p. 319, lines 8-9.)

In light of the totality of the charge given, and in light of the constitutional prohibition on a trial judge commenting on the facts, the Court of Appeals correctly resolved this issue. The testimony was undisputed the men were involved in an unlawful drug purchase and the jury was instructed on the defense of accident. There is no reasonable likelihood the jury applied the instruction in a way that violated the constitution. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). It is a reasonable belief that if the unlawfulness of the drug activity precluded a charge of accident in the victim’s shooting death, Judge Dennis would not have instructed the jury with that option. Critically, Petitioner does not contest what was said, but is requesting more. In

considering the total charge, the trial court did not abuse its discretion in refusing to amend the charge on the defense of accident as (though somewhat vaguely) requested. The trial court instructed the jury thoroughly and correctly in his initial charge. Any further attempts to clarify the accident instruction would risk an impermissible comment on the facts.

For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon. *State v. Brown*, 205 S.C. 514, 32 S.E.2d 825 (1945). Homicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). In *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 107–08 (1999), this Court held “that the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.” (citing *State v. Goodson*, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1.5(1994)). See also 40 Am.Jur.2d Homicide § 75 (1968) (“The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible ... where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law”). “The charge is sufficient if, when considered as a whole, it covers the law applicable to the case.” *State v. Burton*, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990).

As outlined above, the trial court instructed the jury on the concept of proximate cause directly after the court charged involuntary manslaughter, and charged something very similar in its instruction on the State's burden to prove the homicide was not an accident. The instruction specifically said the State must prove "that the act was ... caused by ... unlawful activity by the defendant himself." (R. p. 309, lines 10-13.) Read in its entirety, the charge clearly communicated to the jury the required nexus between the unlawful activity and the act. The jury was told numerous times in the proximate cause charge that the defendant's act must be the direct cause of the victim's death. The jury was also reminded of the State's burden to prove the victim's death was not an accident but caused by the defendant's unlawful activity. These instructions, combined with the presence of the accident instruction in the wake of undisputed testimony of unlawful drug activity, would not have been confusing to the jury. And again, further instruction by the court, particularly calling the jury back to recharge them particularly on one point, could run afoul of the S.C. Constitution's prohibition against charging the facts. S.C. Const. Art. V, Section 21 (2009) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

In sum, the trial judge appropriately and correctly charged the jury. Read as a whole, as it must be, *Burton, supra*, and in addition to the jury's exercise of logic, the instruction sufficiently informed the jury the unlawful activity must not cause the victim's death to be entitled to a charge on the defense of accident. Thus, there is no error in the Court of Appeals' opinion for this Court to correct. The Court of Appeals appropriately found no error in the trial court's decision.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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¹ Respondent's counsel acknowledges a substantial portion of the foregoing is taken from the brief written by Assistant Attorney General Cole as submitted in the Court of Appeals. Ms. Cole is no longer in the section of the Office handling this appeal and signing counsel is assuming representation in her absence.