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Unpublished Opinion No. 2019-UP-042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.