

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO AIKEN COUNTY  
Doyet A. Early, III, Trial Judge  
Courtney Clyburn Pope, PCR Judge

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Appellate Case No. 2021-001358

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**RECEIVED**

**Jul 13 2022**

**S.C. SUPREME COURT**

FRANK MUNS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **ISSUE PRESENTED**

### **Petitioner's Issue**

Whether the PCR court erred when it found counsel provided effective representation in Petitioner's trial for attempted murder, where the jury was not instructed that specific intent to kill was an element of attempted murder, and where the PCR court found the jury was properly instructed on intent, since attempted murder required proof of specific intent to kill.

### **Respondent's Counterstatement of Issue**

The PCR court properly found Petitioner failed to prove counsel was ineffective for not objecting to the attempted murder charge because the charge complied with the law that existed at the time of Petitioner's trial and instructed the jury on specific intent.

## STATEMENT OF THE CASE

Petitioner Frank Muns is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence. In October 2013, the Aiken County Grand Jury indicted him for attempted murder and possession of a weapon during the commission of a violent crime. These charges arose after Petitioner fired a gun at his ex-wife (Victim), causing a bullet to lodge in her ribcage.<sup>1</sup> On February 4-5, 2014, Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. Assistant Public Defender Michael Routzong represented Petitioner and Assistant Solicitors Virginia Sheftall and Jeffrey Slocum, Jr. prosecuted the case. Petitioner was convicted as indicted, and the trial court sentenced him concurrently to fifteen years' imprisonment for attempted murder and five years' imprisonment for the weapon charge.

Petitioner filed a direct appeal arguing the trial court erred in denying his request to charge the jury on self-defense and accident. On June 22, 2016, the Court of Appeals issued an opinion affirming his conviction. Petitioner filed a Petition for Rehearing, which was denied. Thereafter, Petitioner filed a Writ of Certiorari in the South Carolina Supreme Court, which was also denied.

On April 2, 2018, Petitioner filed an application for post-conviction relief (PCR). On January 22, 2020, the Honorable Courtney Clyburn Pope held an evidentiary hearing. Arthur K. Aiken represented Petitioner and Assistant Attorney General Janell H. Gregory represented the State. On October 11, 2021, Judge Pope denied relief and dismissed the application.

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<sup>1</sup> Although Victim was married to a different man at the time of the shooting, she was living in a home on Petitioner's parents' property, where Petitioner also lived, in an attempt to reconcile with him. However, the night before the shooting she spent the night in a hotel with her husband. Victim testified Petitioner was aware of this and had driven to the hotel and damaged her car. The altercation that led to the shooting occurred as Victim was returning home the following morning. The State acknowledges Petitioner claimed the gun accidentally discharged.

## **STANDARD OF REVIEW**

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR court properly found Petitioner failed to prove counsel was ineffective for not objecting to the attempted murder charge because the charge complied with the law that existed at the time of Petitioner’s trial and instructed the jury on specific intent.**

Petitioner asserts specific intent to kill was an element of attempted murder at the time of Petitioner’s trial, and counsel was deficient for not requesting a charge on specific intent to kill or objecting to the trial court’s charge on attempted murder as insufficient. (Pet. 8-10). He contends that although King<sup>2</sup> had not been decided at the time of Petitioner’s trial, King did not change the law. (Pet. 8-9). Petitioner contends he was prejudiced by counsel’s failure to object to the charge or request a charge on specific intent because intent was a critical issue in this case, yet the charge did not instruct the jury that it had to find Petitioner possessed a specific intent to kill. (Pet. 12).

However, the trial court *did* charge the jury on specific intent. Further, the charge constituted a proper statement of the law of attempted murder that existed at the time of Petitioner’s trial, rendering counsel’s failure to object reasonable under prevailing professional norms. Finally, because the charge properly instructed the jury on the law of attempted murder and specific intent, Petitioner was not prejudiced by counsel’s failure to object or otherwise raise this issue.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.”

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<sup>2</sup> State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (holding specific intent is an element of attempted murder).

Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

At trial, Petitioner testified he did not try to kill Victim. (App. 168). He contended he was simply trying to prevent her from running over a septic tank and became afraid she would “smush” him between his truck and her vehicle. (App. 165-68). In response, he pulled out his gun and began hitting her window with the barrel, intending “to break her window to make her stop.” (App. 167-68). Petitioner claimed the gun “discharged” the third time he hit the window. (App. 168).

In contrast, Victim testified that as she was returning home, Petitioner “came from nowhere” in his truck and blocked her, jumped out of his truck with a pistol in his hand, and began hitting her window. (App. 101-02). She continued, “[W]e were still saying stuff back and forth to each other through the window, but he pointed the gun at me and looked at me straight in my face and he caught the trigger and he smirked at me.” (App. 102). Victim heard the gun go off and “felt the spray all over.” (App. 102). When she looked up, “he had the gun pointed at [her] to shoot [her] again.” (App. 103). Victim testified that while Petitioner was pointing the gun at her, he said he was going to kill her. (App. 105).

During a charge conference, Petitioner requested charges on accident and self-defense; the trial court denied those requests. (App. 187-88, 194-97). The trial court also denied the State’s request to charge the lesser-included offenses of assault and battery of a high and aggravated nature and the permissive inference of malice based on the use of a deadly weapon. (App. 189-94).

The trial court gave the following charge on attempted murder:

In the first indictment, we’re dealing with the charge of attempted murder. Our law defines the word attempt as an effort to accomplish a crime which does not succeed. **An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended.** The State must show more than mere preparation and intent; there must be some overt act committed in the effort to commit the crime. Intent means intending the result which actually occurs, not

accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonable infer intent. So in this case, the defendant is charged with attempted murder.

In order to prove the offense of attempted murder, the State must prove beyond a reasonable doubt that the defendant attempted to kill another person with malice aforethought, that malice aforethought being either expressed or implied. Pretty simple. **The State must prove beyond a reasonable doubt that the defendant attempted—and I defined attempt to you already—to kill another person with malice aforethought, and that malice must be either expressed or implied.**

(App. 228-29, emphasis added). After defining malice, the court concluded, “So to prove the offense of attempted murder, the State must prove to you, beyond a reasonable doubt, that the defendant attempted to kill another person with malice aforethought, that malice aforethought being either expressed or implied.” (App. 231). Later, after explaining the lesser-included offense of second-degree assault and battery, the trial court charged,

So in making your analysis of whether or not the State has proven the case of attempted murder beyond a reasonable doubt, if you find that the State has failed to do that, then you would then consider whether or not they’ve proved the lesser included offense of assault and battery in the second degree, which basically just does not require the specific intent that the attempted murder—this is the unlawful injuring of a person.

(App. 232). Notably, the trial court never charged the jury on general intent or even used the phrase general intent.

At his PCR hearing, Petitioner averred trial counsel was ineffective for not objecting to the charge because it did not clearly state “that there must be a specific intent to kill.” (App. 452-53). Trial counsel testified the trial court *did* charge specific intent, and he did not see anything wrong with the charge overall. (App. 444-45). The PCR denied relief, finding (1) the instruction was proper and instructed the jury that attempt requires the State to prove specific intent, and (2) Petitioner failed to show counsel was deficient or that he was prejudiced by any alleged deficiency. (App. 479-80).

**A. Trial counsel was not deficient for not objecting because the charge constituted a proper statement of the law as it existed at the time of Petitioner’s trial and instructed the jury on specific intent.**

“Generally, the trial judge is required to charge only the *current* and correct law of South Carolina.” State v. Adkins, 353 S.C. 312, 317, 577 S.E.2d 460, 463 (Ct. App. 2003) (emphasis added). “In reviewing jury charges for error, we must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” Id. at 318, 577 S.E.2d at 463. “A jury charge is correct if, *when the charge is read as a whole*, it contains the correct definition and adequately covers the law.” Id. at 318, 577 S.E.2d at 464 (emphasis added). “The substance of the law is what must be charged to the jury, not any particular verbiage.” Id. at 318-19, 577 S.E.2d at 464.

In 2010, the attempted murder statute was enacted as part of the Omnibus Crime Reduction and Sentencing Reform Act. It provides, “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” S.C. Code Ann. § 16-3-29.

Although our Supreme Court had previously found the *common law* offense of attempted murder would require specific intent,<sup>3</sup> at the time of Petitioner’s trial it had not addressed whether the *statutory* offense of attempted murder required specific intent. In 2017—more than three years after Petitioner’s trial—our Supreme Court determined the statutory offense of attempted murder is a specific intent crime.<sup>4</sup> King, 422 S.C. at 64, 810 S.E.2d at 26-27. In reaching this conclusion, the Court acknowledged “the phrase ‘with intent to kill’ in the attempted murder statute does not

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<sup>3</sup> State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (recognizing the common law offense of attempted murder “would require the specific intent to kill” but declining to recognize common law attempted murder as an offense in South Carolina).

<sup>4</sup> The Court of Appeals reached the same conclusion in 2015, which was also after Petitioner’s trial. State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

identify what level of intent is required.” Id. at 55, 810 S.E.2d at 22. It also acknowledged the common law offense of assault and battery with intent to kill (ABWIK), like murder, did not require specific intent. Id. at 58-60, 810 S.E.2d at 23-24. After examining cases addressing the intent required for ABWIK and the common law offense of attempted murder, the Court concluded the addition of the phrase “with intent to kill” to the phrase “malice aforethought, express or implied”<sup>5</sup> indicated the General Assembly intended “to require a higher level of *mens rea* for attempted murder than that of murder.” Id. at 61, 810 S.E.2d at 25.

Notably, the Court “acknowledge[d] the ambiguity created by the language in section 16-3-29.” Id. at 62, 810 S.E.2d at 25-26. Likewise, our Supreme Court has since acknowledged the uncertainty of this aspect of attempted murder law prior to King. See State v. Williams, 427 S.C. 148, 154 & 154 n.5, 629 S.E.2d 702, 705 & 705 n.5 (2019) (noting trial counsel did not object to charge that attempted murder was a general intent crime but further acknowledging, “[t]o be fair to counsel, at the time of Petitioner’s trial, we had not yet handed down our decision in King”).

Here, trial counsel was not deficient for not objecting because the charge constituted a correct statement of the law at the time of Petitioner’s trial. See Adkins, 353 S.C. at 317, 577 S.E.2d at 463 (“Generally, the trial judge is required to charge only the *current* and correct law of South Carolina.” (emphasis added)). The trial court first defined attempt as “a specific intent to do a particular criminal act along with an act falling short of the act intended.” (App. 229). This was consistent with the definition of attempt as set forth in Sutton. See Sutton, 340 S.C. at 397, 532 S.E.2d at 285 (“[A]ttempt is a specific intent crime. The act constituting the attempt must be done with the intent to commit that particular crime.” (internal citation omitted)).

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<sup>5</sup> “Malice aforethought” encompasses both general intent and specific intent. State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007), overruled on other grounds by Burdette, 427 S.C. at 490, 832 S.E.2d at 575.

Thereafter, the court charged, “The State must prove beyond a reasonable doubt that the defendant attempted—and I defined attempt to you already—to kill another person with malice aforethought, and that malice must be either expressed or implied.” (App. 229). Viewed as a whole, this charge is consistent with the language of the attempted murder statute and was an accurate statement of the law as it existed at the time of Petitioner’s trial. See § 16-3-29 (“A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.”); Adkins, 353 S.C. at 318, 577 S.E.2d at 464 (“A jury charge is correct if, *when the charge is read as a whole*, it contains the correct definition and adequately covers the law.” (emphasis added)).

Further, contrary to Petitioner’s assertions, the Court *did* charge the jury that attempted murder requires specific intent. It did so by first defining attempt as “a specific intent to do a particular criminal act along with an act falling short of the act intended” and then referencing its definition of attempt when instructing the jury on attempted murder. (App. 228). Thus, viewed as a whole—as the Court must do when analyzing the charge—the charge adequately instructed the jury on the law as it existed at the time of Petitioner’s trial, and there was no basis for counsel to object. Because there was no basis to object, Petitioner has not shown counsel was deficient.

**B. Petitioner cannot show prejudice because the charge was consistent with both the law that existed at the time of Petitioner’s trial and the law as set forth in King.**

Although King was decided more than three years after Petitioner’s trial, the trial court’s charge is consistent with the law as set forth in King. The trial court charged the jury that attempt included “a specific intent to do a particular criminal act along with an act falling short of the act intended.” (App. 229). Likewise, the court referenced its “attempt” definition when charging the jury on attempted murder. (App. 229). Thus, the charge was consistent with the law in King.

Unlike the trial court here, the trial court in King charged the jury that “specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm.” 422 S.C. at 54, 810 S.E.2d at 21. The trial court here did *not* charge the jury that attempted murder was a general intent crime or even give an instruction on general intent at all. (App. 228-31). The absence of any instruction on general intent removes any likelihood that the jury may have been confused about the necessary level of intent.

Petitioner takes issue with the charge primarily because it did into include the words “specific intent to kill” as part of its definition of attempted murder. However, our law on jury charges does not require such strictness. See Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464 (“The substance of the law is what must be charged to the jury, not any particular verbiage.”). Further, King did not proscribe certain language to use or require the use of the language “specific intent to kill” as part of the definition of attempted murder.<sup>6</sup> Rather, King clarified that attempted murder is a specific intent crime—not a general intent crime. Thus, the charge here is consistent with the law as set forth by King.

The trial court adequately instructed the jury on the law that existed at the time of trial. Further, although the requisite level of intent had not been clarified, the court correctly charged that attempted murder requires specific intent. Finally, although King was decided three years later, this charge was consistent with King. Thus, Petitioner cannot show a reasonable likelihood exists that the outcome would have been different had trial counsel objected to the charge.

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<sup>6</sup> Even if King can be construed as requiring the language “specific intent to kill” to be included in the charge, King was not decided until three years after Petitioner’s trial. Trial counsel is not expected “to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). The State submits that Petitioner’s repeated assertion throughout his brief that King did not change the law is a concession that King did not proscribe certain language that must be used as part of the attempted murder charge since no case prior to King can be construed as requiring any specific language.

**CONCLUSION**

Based on the foregoing, the PCR court properly found Petitioner failed to prove trial counsel was ineffective for not objecting to the trial court's attempted murder charge. Thus, this Court should deny certiorari.

Respectfully Submitted,

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This 13<sup>th</sup> day of July, 2022