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Dec 12 2022

S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually,

Respondents

Appellant's Reply Brief

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Reply Argument

In reply, appellants make only two points:

1. The trial court recognized two possibilities in the jury's final question, but erred by neither clarifying which of the possibilities the jury intended nor recharging as to both.

This appeal turns on the standard for abuse of discretion in what appears to be an unprecedented situation: does a trial judge abuse discretion when she recognizes two ways to interpret a jury's question but fails to either ask the jury to clarify its question or to recharge so as to respond to both interpretations?

The Court of Appeals majority was content to have the trial court respond to one of two recognized interpretations of the jury's question, inherently finding the trial court had discretion to pick one of the interpretations, even though doing so undisputedly incorrectly stated the law. Judge Geathers' dissent would require a trial court to give a correct statement of law in response, and not permit a trial judge by omission to recharge with an incorrect statement of law by ignoring recharge on the second recognized interpretation of the jury's question.

We set aside for this appeal that when the trial judge chose for recharge one of the two interpretations she recognized in the jury's question that she chose what we argue was an incorrect interpretation of the jury's final question. Working solely with the trial court's statement that the jury's last (of multiple) questions could be interpreted two different ways,[1] it

[1] For ease of reference, those interpretations were "proximate cause or damages," R. App. at 499, with the proposed recharge to "reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven" for liability. By omission the recharge then stated the law incorrectly. R. App. 509. Proving damage is not an element of liability under 42 U.S.C. 1983.

is undisputed that the trial court omitted from the recharge the language that was responsive to one of those two recognized interpretations, as Judge Geathers observed. R. App. 975.

As the trial court is required to recharge "the parts of the initial charge which are *necessary* to answer the jury's request," *Rauch v. Zayas*, 284 S.C. 594, 597 (Ct. App. 1985), omitting one of the two interpretations distinguishes this record from *Rauch* and from *Winthrop University Trs. v. Roofing*, 418 S.C. 142, 165 (Ct. App. 2016) and every other case we could find. The trial court has failed to include that which was "necessary" when it omitted a correct recharge on the second of the two interpretations it gave to the jury's last question.

We contend the court abuses discretion in neither clarifying the jury's question, to properly understand it, nor in recharging so as to cover both possible interpretations. The Court of Appeals majority, and the respondents, would affirm as long as the trial court recharged on one of the two meanings the court perceived. Unlike *Rauch* and *Winthrop*, where the court charged in response to a specific, undisputed question, in this record the trial court recognized two possibilities and elected to neither get clarity from the jury nor to cover each possible interpretation in its recharge, removing any salutary effect of the original charges by omitting the language that would respond to the alternative interpretation the trial court recognized.

When responding to a jury question the trial court's obligation is to "narrowly tailor [her] response to the specific jury question asked." *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991) ("Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to *fit the question.*") (emphasis added).

The reason the Court of Appeals majority conceded, "There is much force and appeal to the reasoning in the dissent," R. App. 973, is because jury charges are required to address all possible scenarios presented. The trial court having recognized two possibilities in the jury's

final question elected to recharge as to one but then by omission gave an incorrect recharge as to the other, making the recharge an *incorrect* statement of law as to one of the recognized possibilities about which the jury was asking.[2]

The trial judge picked one of two possible readings of the jury's final question.[3] Discretion should not include a trial court guessing rightly or wrongly about which of two interpretations of a jury question to use when recharging. If a trial court perceives two interpretations the correct procedure for recharge should not be to flip a coin. Nor should the standard of review on appeal be to find no abuse of discretion as long as the trial court flipped a coin and chose one interpretive option or the other.

It is a simple, reasonable, and entirely workable standard to require a trial judge to either clarify the jury's question or to recharge correctly so as to respond to each interpretation the trial court perceives.[4]

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[2] As set out in the Initial Brief at p. 14, the Court of Appeals majority also erred as a matter of law in imposing a "threshold" among the three elements for liability under 42 U.S.C. § 1983.

[3] For ease of reference, the jury's question is at Court's Exhibit 25, R. App. 499, the correct answer to which is "no":

> For there to be a violation of civil rights, 4th Amendment, the plaintiff must demonstrate through a preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

[4] Compare, for example, criminal convictions reversed because a jury charge failed to consider "the complete picture." *State v. Rye*, S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (jury charge addressed only one possible scenario when differentiating two defenses and another scenario also applied); *State v. Workman*, No. 5922 (S.C. Ct. App. July 13, 2022), ("the trial court erred in its jury instruction on first-degree CDV by not defining second-degree CDV); *State v. Ezell*, 321 S.C. 421, 426, 468 S.E.2d 679, 681 (Ct. App. 1996) (per curiam) (error to instruct a jury on only one part of the statute defining an offense when the offense could be accomplished in multiple manners). Those are not recharge cases, but the point is that just as with initial charges, the obligation to "narrowly tailor" a recharge to "the specific question asked," as required by *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991), does not include the latitude to

"[Even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury." *State v. Mollison*, 319 S.C. 41, 48, 459 S.E.2d 88, 93 (Ct. App. 1995) (internal citation and quotation omitted).

This may be easier to conceptualize by comparing what the trial court's obligation would be if faced with two separate jury questions, asking separately each of the two possibilities conceived by the trial judge in response to the final jury question at issue in this record. If there had been two separate questions, each asking one of the two aspects the trial court perceived, plainly the trial court would abuse discretion in either (a) refusing to respond to one of the questions, or (b) giving a recharge that was an incorrect statement of law by omitting the pertinent part of the initial charge that was responsive to the question.

2. Of course the trial court's error was prejudicial.

Respondents contend, Brief at p. 8, that even assuming the trial court incorrectly stated the law by its omission there is no prejudice, given that the trial court had correctly instructed the jury on 1983 liability.

In *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978),[5] a new trial was granted when the trial court inadvertently recharged incorrectly in response to a jury question, even though the correct charge had been initially given. As is typical in recharge cases, the respondent argued on appeal that the original charge covered the trial court's inadvertent error in the recharge. The Supreme Court disagreed, distinguishing the original charge from the

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ignore one possible meaning of a jury's question or omit giving the instruction that responds to that possibility. Exacerbated by the instruction given in this record having, by omission, *incorrectly* stated the law as to the trial court's second interpretation of the jury question.

[5] Reversed on a different issue, *State v. Patton*, 322 S.C. 408 (S.C. 1996).

recharge, recognizing that by asking the question the jury implicitly displayed "critical attention" on the specific question addressed, and would give the trial court's response to its own question "special consideration":

> The erroneous instruction given by the trial judge was an inadvertence, and the correct definition of manslaughter was given elsewhere in his charge. The State argues that when the charge is considered in its entirety, it was not misleading or prejudicial. We do not agree. It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of these two offenses and was in the process of deciding upon its verdict based upon one or the other, but wanted to be readvised of the definitions of each. The additional words which the trial judge would relay to the jury would be given special consideration by the jury since they were in response to its own inquiry. Under these circumstances the charge of the trial judge constituted prejudicial error requiring a new trial.

State v. Blassingame, 271 S.C. 44, 46-47 (S.C. 1978). Unlike any prior case we could find, the trial judge affirmatively misstated the law by omission in response to a specific question from the jury. The error of law is plainly prejudicial, for the same reasons as the dynamic is described in *Blasingame* as prejudicial.

While we contend the trial court's error in this record is profound, given that she interpreted the jury's question incorrectly, assuming *arguendo,* as we do above, that the trial court correctly assessed the jury's question as having two possible interpretations, the trial court's obligation in that circumstance, if the trial court elects to ignore the best practice and ask that the jury clarify its question, ought to be to recharge so as to respond to each possible interpretation. Having failed to do so, and by that omission *misstating* the law in the recharge, a new trial is appropriate, as Judge Geathers concluded. *Blasingame* is as close a parallel as we could find in this otherwise unprecedented trial court error.

Conclusion

The trial court erred as a matter of law and abused discretion when instead of either getting clarification or recharging as to both the interpretations it found, it instead discerned two ways to interpret the jury's question then chose to discard one of the possible interpretations and recharge only on one, not both. By doing so, the trial judge omitted "the only language" (as Judge Geathers put it) responsive to the second possible interpretation the trial court perceived.

When a trial judge perceives, rightly or wrongly, that a jury's question can be read two ways, the better practice, and we submit the trial court's obligation, is to either ask the jury to clarify its question or recharge so as to correctly address both interpretations. A trial judge abuses her discretion when she recognizes two possible ways to interpret a jury's questions, but then discards one of the recognized possibilities to respond to only one of the possibilities, and by doing so recharges with an incorrect statement of law as to the second recognized interpretation. Doing so is an error of law.

The case should be remanded for a new trial on the warrantless entry which does not require damage as a precondition of liability, as the trial court incorrectly implied by omission in its recharge was required for liability under 42 U.S.C. § 1983.

Respectfully submitted,

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