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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
In the Court of General Sessions

Paul M. Burch, Circuit Court Judge

THE STATE,

PETITIONER,

V.

JOHN ERNEST PERRY, JR.,

RESPONDENT.

APPELLATE CASE NO. 2021-000947

AMENDED BRIEF OF RESPONDENT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATE'S ISSUE PRESENTED 1

COUNTER ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

The Court of Appeals properly held the trial court erred by charging the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," since attempted murder was a specific intent crime, where defense counsel correctly argued this was essentially a general intent instruction, and this was highly prejudicial in this case where respondent told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase, and the erroneous confusing jury instruction on "intent" was given at a critical time in response to a jury question where critical attention was focused on the question asked. 3

Relevant Facts **3**
Standard of review **9**
Discussion **9**

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

State v. Adkins, 353 S.C. 318, 577 S.E.2d 463 8

State v. Aleksey, 343 S.C. 27, 538 S.E.2d 251 8

Allen v. United States, 164 U.S. 492 (1896) 6

State v. Blassingame, 271 S.C. 46, 244 S.E.2d 529 .... 8, 11

State Blurton, 352 S.C. 203, 573 S.E.2d 802 (2002) 11

State v. Brandt, 393 S.C. 549, 713 S.E.2d 603 8

State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) 11

State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) 11

State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944) 11

State v. Hicks, 330 S.C. 218, 499 S.E.2d 215 7

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 9, 10

State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) 11

State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) 11

State v. Perry, 434 S.C. 92, 862 S.E.2d 451 .... *passim*

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) 6, 10

State v. Washington, 338 S.C. at 400, 526 S.E.2d 713 7

United States v. Hammond, 642 F.2d 248 (8th Cir. 1981) 6, 7

Other Authorities

22 C.J.S. *Criminal Law: Substantive Principles* § 156 (2016) 9

South Carolina Evidence 319 (2d ed. 2000), Danny R. Collins 6, 10

PETITIONER'S ISSUE PRESENTED

The trial court did not commit reversible error in charging the jury with a correct statement of law that "[w]hen the intent to do an act that violates the law exists motive becomes immaterial" as part of his definition of intent as requested by the jury. Even if it was improper to charge the statement, there was no resulting prejudice from the jury instruction.

COUNTER ISSUE PRESENTED

Whether the Court of Appeals properly held the trial court erred by charging the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," since attempted murder was a specific intent crime, where defense counsel correctly argued this was essentially a general intent instruction, and this was highly prejudicial in this case where respondent told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase, and the erroneous confusing jury instruction on "intent" was given at a critical time in response to a jury question where critical attention was focused on the question asked?

STATEMENT OF THE CASE

Respondent was indicted by the York County Grand Jury for the offense of attempted murder. R. 243-244. His case was called to trial on September 18, 2017, before the Honorable Paul M. Burch, and a jury. Bill Nowicki represented respondent. Chris Epting and Jessica Holland were the assistant solicitors. App. 4.

On September 21, 2017, the jury found respondent guilty of attempted murder. App. 241, ll. 17-23. The state sought a sentence of life imprisonment without parole based on respondent's prior record, and the judge imposed that sentence. App. 244, ll. 1-13.

The Court of Appeals (Konduros, J., and Williams and Hill, JJ.), reversed in State v. John Ernest Perry, 862 S.E.2d 451 (Withdrawn, Substituted and Refiled August 4, 2021). Rehearing was sought, and subsequently denied. The state then sought certiorari from this Court. This Court granted certiorari on October 7, 2022.

The state filed its brief of petitioner on November 15, 2022. This brief of petitioner follows.

ARGUMENT

The Court of Appeals properly held the trial court erred by charging the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," since attempted murder was a specific intent crime, where defense counsel correctly argued this was essentially a general intent instruction, and this was highly prejudicial in this case where respondent told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase, and the erroneous confusing jury instruction on "intent" was given at a critical time in response to a jury question where critical attention was focused on the question asked.

Relevant facts

SLED agent Melissa Wallace testified during the Jackson v. Denno[1] hearing about respondent's statement. The police alleged this case involved a police chase on foot of respondent after a traffic stop, and a gunshot exchange between them. Respondent told Wallace that he was shot during the police chase on foot. It was undisputed respondent suffered "a gunshot wound to his lower left side." He was taken to the hospital in an ambulance and Agent Wallace rode with respondent in the ambulance. App. 7, l. 2 – 10, l. 4.

Respondent "said that he was involved in the shooting with Officer Taylor, that he fired a weapon during the interaction, and that the officer had fired back at him and shot him in the back." App. 9, ll. 3-8. Respondent told Wallace that he could not be caught with a gun in his possession, which was why he jumped the fence and attempted to throw the gun away when "it went off." The officers "proceeded to fire their weapons at him." App. 9, ll. 3-16.

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1 378 U.S. 368 (1964).

Later, in the presence of the jury, SLED Agent Wallace repeated her testimony that she rode with respondent in the ambulance after he was shot by the police officer. App. 174, l. 8 – 176, l. 7. Wallace told the jury "he told me that he was involved in the shooting with the police, that he had the gun, he ran because he had some unpaid warrants. He was jumping what he called the gate *and the gun went off while he was trying to get it out of his pants.*" App. 176, ll. 8-12 (emphasis added).

Dalton Taylor was the Rock Hill police officer involved in the shootout. The incident in this case happened on June 22, 2016. Taylor had been on the police force for only fourteen weeks at the time. App. 28, l. 11 – 29, l. 11.

Taylor saw respondent "make an improper turn from Oakland Avenue onto Cherry Road without using a turn signal, when he did we initiated a traffic stop on him." App. 29, ll. 8-17. When Taylor turned on his blue lights, "he [Respondent] decided to jump out of the car without putting it in [park] and ran. He jumped the fence, I exited the vehicle, Officer Bailey went to the vehicle to secure the vehicle, I continued to pursue John Perry." App. 29, ll. 8 – 30, l. 13.

Taylor claimed that respondent intentionally fired at him, "and I proceeded to fire back at him. Unknown at the time I had struck him one time in the side and he ran off into the woods." R. 30, ll. 3-13. Taylor said he shot at respondent six more times. App. 40, ll. 21-23.

On cross-examination, Taylor admitted he put in his report that respondent fired "a shot in the air." App. 47, l. 19 – 48, l. 5. However, Taylor continued to maintain that respondent shot at him intentionally and "in my mind, [he] had every intention of doing whatever it would take to get away from me." App. 47, ll. 15-23.

In moving for a directed verdict, defense counsel Nowiki argued there was no evidence respondent had a specific intent to kill the officer as required for the attempted murder charge.

The solicitor argued the disputed evidence created a jury question, and the judge denied the motion for a directed verdict. App. 188, l. 18 – 189, l. 14.

During jury deliberations, the jury requested to be re-charged on the crime of attempted murder "and various degrees of assault and battery." App. 230, l. 4 – 232, l. 7.

The jury returned again, asking, "Is malice only associated on the attempted murder or is malice also associated to assault and battery?" The judge said: "[T]he defense and the state agree that malice was not an element of assault and battery and both sides agree." App. 231, ll. 8-21.

The judge also noted there was another question, "What is meant by intent? It was not charged." App. 232, l. 24 – 233, l. 4. The judge said he was inclined to charge "when the *intent* to do an act that violates the law exists, *motive becomes immaterial*." Defense counsel objected to this instruction, saying "I don't like the end of that with motive being in there." App. 233, l. 5 – 236, l. 1. (emphasis added).

The solicitor said under the state's theory of the case "the motive of why he was shooting the officers is not an element of the case we have to prove and therefore charging the jury that would not be prejudicial in any way to the defendant. Motive versus -- intent to kill versus the motive of why he intended to kill." App. 233, l. 3 – 234, l. 20.

The judge then charged the jury that "while motive is the inducement to do some act, intent is the mental resolution or determination to do it. *When the intent to do an act that violates the law exists, motive becomes immaterial*." App. 235, l. 22 – 236, l. 17 (emphasis added).

Defense counsel took exception to this instruction: "Your Honor, I just renew my objection to the intent that you just read based on about the motive being immaterial. Also my

concern is that *attempted murder with case law out there saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so that's my -- I'm objecting to the charge*." App. 235, l. 20 – 236, l. 1 (emphasis added). The judge refused to alter his instruction to the jury, noting the defense exception. App. 236, ll. 2-7.

After further deliberations, the judge gave the jury an Allen[2] charge. App. 236, l. 18 – 239, l. 10. The jury then informed the judge it wished to go home for the evening and come back in the morning. App. 239, l. 15 – 240, l. 7.

Respondent was ultimately convicted after these deliberations, and the Allen charge, and he received a sentence of life without parole based on his prior record, as seen above.[3]

Court of Appeals

The Court of Appeals, in reversing based on this jury instruction wrote that:

> "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or state of mind is in issue." State v. Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (*quoting* Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)). "State of mind is an issue any time malice or willfulness is an element of the crime." *Id.* at 124-25, 606 S.E.2d at 512 (*quoting* Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).
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> In United States v. Hammond, 642 F.2d 248, 249-50 (8th Cir. 1981), the Eighth Circuit Court of Appeals found a "prosecutor's

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2 Allen v. United States, 164 U.S. 492 (1896).

3 A miscellaneous, the record showed the defense and solicitor had reached a plea agreement during final jury deliberations. However, before respondent could sign the plea agreement, the assistant solicitor said, "After consultation with our elected solicitor, we have been told to accept the verdict of whatever the jury is." Defense counsel objected, noting a plea agreement had been reached "and we were in the process of filling out the paperwork, it shouldn't be held against my client and this has been worked out." R. 237, ll. 11-15. The judge said he had not accepted the guilty plea and that the court would receive the jury verdict, which was guilty. R. 237, l. 16 – 238, l. 23.

statement of the law was misleading" when "[i]t suggested that motive had no relevance to the issues in this case, when in fact motive may have been very relevant to a determination of whether [the defendant] knowingly committed the acts charged in the indictment and purposely intended to violate the law by so doing." Additionally, the Eighth Circuit found "somewhat confusing" the following jury instruction by the trial court:

> I advise you that intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two recognized motives for much of human conduct. These laudable motives or others may prompt one person to do voluntary acts of good, and others to do voluntary acts of crime.
>
> Good motive alone is never a defense where the act done or admitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of the state of mind or intent of the defendant.

Id. at 250.

However, the Eighth Circuit ultimately affirmed the trial court, finding that when the instructions were read together with earlier portions of the charge, they correctly stated the law and sufficiently presented that element of the offenses to the jury. *Id.* at 250-51. It noted that although the trial court asked for any misstatements or errors and objections to any instructions it had given or had failed to give, the defendant did not object or request additional instructions and had earlier endorsed most of the instructions. *Id.*

In the present case, the trial court erred in the definition of intent it provided the jury. The State contended at trial because motive was not an element it had to prove, charging the last sentence of the definition would not be prejudicial to Perry. The State argued, "It says motive is immaterial, which we think motive is immaterial under the attempted murder statute ...." Because motive was not material, the mention of it in the definition of intent could have confused the jury. See Washington, 338 S.C. at 400, 526 S.E.2d at 713 ("Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error."); see also Hicks, 330 S.C. at 218, 499 S.E.2d at 215 ("The

> test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean."). The jury could have found the sentence unclear when it had asked for the definition of intent. Because motive had not been mentioned during the trial, the jury could have been confused by the definition.
>
> The trial court only referenced intent in the original jury instructions when describing the offense of attempted murder, defining the offense as when a "person who with intent to kill attempts to kill another person with malice aforethought, either express or implied." The trial court repeated this same statement when the jury asked to be recharged on the offenses. In light of these limited statements about intent, we cannot say the trial court's later definition of intent in response to the jury's question was not misleading. See Aleksey, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."); see also Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (providing that in reviewing jury charges, a charge is correct if when read as a whole, it adequately explains the law and contains the correct definition); *Id.* ("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." (*quoting* Adkins, 353 S.C. at 318, 577 S.E.2d at 463)).
>
> Further, because the definition of intent was given in response to the jury's question, it was unduly emphasized as well, instead of just being part of the original instructions given. See Blassingame, 271 S.C. at 46-47, 244 S.E.2d at 529-30 (noting when a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and the information relayed by the trial court to the jury is given "special consideration"). Additionally, because attempted murder and the pertinent subsections of the lesser included offenses with which Perry was charged are all specific intent crimes, the definition of intent could have been confusing for the jury as only specific intent was applicable here. Therefore, the trial court erred in its response to the jury's question about intent.

State v. Perry, 434 S.C. 92, 862 S.E.2d 451, 456-457 (2021). App. 318.

Standard of review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

Discussion

The Court of Appeals opinion in this case was factually and legally correct. The crime of attempted murder requires proof that the defendant had a specific intent to kill the victim. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). As the Court of Appeals noted, *quoting* this Court's opinion in King:

> "The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act." Thus, "[a]s the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter." *Id.* at 56, 810 S.E.2d at 22-23 (alteration by court) (*quoting* 22 C.J.S. *Criminal Law: Substantive Principles* § 156 (2016)).

Defense counsel here correctly argued to the jury that respondent did not intend to kill the police officer, and that attempted murder required a specific intent to kill. "He did not, he did not shoot to kill or attempt to hurt or anything for Officer Dalton, absolutely not." App. 213, l. 10 – 214, l. 13.

Therefore, if the jury believed respondent that he did not intend to kill Officer Dalton Taylor, and that his gun "just went off" while he was fleeing because he was a felon in illegal possession of a weapon or because of "unpaid warrants," then pursuant to a proper, non-confusing instruction on the law, respondent was entitled to be acquitted of attempted murder. The jury continuously struggled to reach a verdict in this case and the judge finally instructed the jury "when *the intent to do an act that violates the law exists motive becomes immaterial*." App. 235, ll. 3-7. (emphasis added). Defense counsel correctly argued that attempted murder was a specific intent crime and that this instruction from the judge was confusing because it made attempted murder out to be a general intent crime, which was the reason for defense counsel's objection. App. 235, l. 20 – 236, l. 6. Respondent's purpose or intent – his motive in shooting his gun during the police chase -- was instructed to be *immaterial* where it was in reality *critical* to a proper verdict in this case. This instruction was easily or commonly understood to mean that "When the intent to an act that violates the law exists – motive -- or the reason behind doing the act or acting negligently or accidently do not matter because your intent was to violate the law. Respondent was failing to stop for a blue light, a serious crime, he was a felon illegally armed with a gun, another serious crime, and he was fleeing from the police. In the context of the facts of this case, and this instruction being given at a time when the jury's critical attention was focused on its question, there should be no real question as to its prejudicial effect.

Petitioner cited State v. Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (*quoting* Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)) as did the Court of Appeals in its opinion reversing respondent's convictions while petitioner now urges reversal of that opinion with that same case and treatise cite. Brief of Petitioner at 8. The Court of Appeals also noted that: "State of mind is an issue any time malice or willfulness is an element of the

crime. *Id.* at 124-25, 606 S.E.2d at 512 (*quoting* Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000))." State v. Perry, 434 S.C. 92, 862 S.E.2d 451, 456-457 (2021). App. 318.

Petitioner writes that "The trial court's instruction definitely separated the concepts of motive and intent, explaining intent is the state of mind in doing the act, whereas motive is the reason behind doing the act." Brief of Petitioner at 9. That respectfully is not helpful for purposes of clarity at the time of this jury question where the jury's critical attention was focused on the answer to its question pursuant to State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978), and the Court of Appeals correctly so held.

This Court in State v. King wrote that it agreed with the Court of Appeals that the legislature intended to require the state to prove specific intent to commit murder as an element of attempted murder, and that the trial judge erred inasmuch as he charged attempted murder as a general intent crime. State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 23 (2017).

Respondent's statement that the gun "went off" would seem at worst an admission that the crime was assault and battery or some degree of that general intent crime rather than attempted murder. Moreover, in murder cases, evidence the gun "went off accidentally" entitled the defendant to an instruction on involuntary manslaughter, essentially criminal negligence. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003).

It is also important that the judge's erroneous charge that "when the intent to do an act that violates the law exists, motive becomes immaterial," came after long jury deliberations where the jury had focused its "critical attention" -- as the Court of Appeals properly found -- on the meaning between attempted murder, and various other lesser counts of assault and battery. R. 223, l. 16 – 22. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978).

The jury struggled long and hard to reach a verdict in this case, and the court's confusing instruction at this critical time which strongly implied attempted murder was a general intent and not a specific intent crime was extraordinarily prejudicial. Again, motive to a reasonable juror is going to be the same as the defendant's intent or the reason for his actions. Here, however, respondent had to have a specific intent to kill the officer for him to be correctly found guilty of attempted murder.

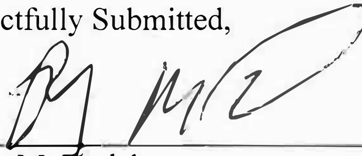
Jury instructions should not be a mathematical problem to solve or an exercise in advanced logic. "The purpose of a jury instruction is `to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)'" State Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). See, also, State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944).

An instruction that "when the intent to do an act that violates the law exists, motive becomes immaterial" was the antithesis of a proper specific intent to kill charge. Petitioner is respectfully incorrect in urging otherwise. The Court of Appeals opinion in this case was correct, and it should respectfully be affirmed.

CONCLUSION

The opinion of the Court of Appeals reversing respondent's conviction should respectfully be affirmed.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

This 16th day of December, 2022.

ATTORNEY FOR RESPONDENT