RECEIVED
Dec 12 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to the Court of Common Pleas
Appeal from Richland County
Honorable Grace Gilchrist Knie, Circuit Court Judge
Appellate Case No. 2022-000652

MAURICE ROBERTS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

"Whether the PCR court erred where it denied post-conviction relief where counsel did not object to a jury instruction that specific intent to kill was not an element of attempted murder, since attempted murder required proof of a specific intent to kill, and since Petitioner was prejudiced by the improper instructions?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by finding defense counsel was not constitutionally ineffective for failing to object to a jury instruction on the requisite intent for statutory attempted murder that was only later declared to be incorrect when: (1) at the time of Roberts's trial, the issue of the intent required to prove that newly-created statutory offense had not yet been addressed by any South Carolina appellate courts and remained an unsettled question upon which reasonable minds could disagree; and (2) the issue was only addressed and settled through later appellate decisions—including a divided one from our Supreme Court—that were issued *after* Roberts's trial had already concluded?

STATEMENT OF THE CASE

In January of 2013, Petitioner Maurice Roberts, who was just a few months short of his eighteenth birthday at the time, was arrested following an investigation into a violent home invasion and shooting that had occurred a few days earlier. In February of 2013, the Richland County Grand Jury indicted Roberts for one count of murder, two counts of attempted murder, one count of first-degree burglary, and one count of attempted armed robbery. On February 24, 2014, a jury trial was commenced in the Richland County Court of General Sessions with the Honorable Doyet A. Early, III, circuit court judge, presiding. At the conclusion of the five-day trial, the jury convicted Roberts as indicted. Following the verdict, the trial judge sentenced Roberts to concurrent terms of imprisonment of forty-five years for murder, forty-five years for first-degree burglary, thirty years for each of the attempted murder convictions, and twenty years for attempted armed robbery. Thereafter, Roberts—through defense counsel—timely submitted a post-trial motion seeking a new trial, and the trial judge conducted a hearing on the matter on March 11, 2014.[1] At the conclusion of that hearing, the trial judge orally denied Roberts's motion. Roberts then timely initiated an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—affirmed Roberts's five convictions through an unpublished decision.[2] State v. Roberts, Op. No. 2016-

[1] Both Roberts's post-trial motion and the transcript from the hearing on that motion are presently available through the Richland County Public Index. Records for Maurice A. Roberts, Richland County Fifth Judicial Circuit Public Index, https://publicindex.sccourts.org/richland/publicindex.

[2] The records from the appellate proceedings in the Court of Appeals in connection to Roberts's direct appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for State v. Maurice Alphonso Roberts, Jr., South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=56129.

UP-358 (S.C. Ct. App. filed July 13, 2016). Following that, Roberts did *not* petition for rehearing, and the remittitur was issued on August 11, 2016.

Subsequent to the issuance of the remittitur, Roberts timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing, a more definite statement, and summary dismissal in part.[3] On March 28, 2022, an evidentiary hearing was conducted in the Richland County Court of Common Pleas with the Honorable Grace Gilchrist Knie, circuit court judge, presiding.[4] At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on May 5, 2022, the PCR judge denied and dismissed Roberts's PCR application with prejudice. Roberts then timely filed a notice of appeal.

After initiating his appeal, Roberts filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals.[5] [6] Subsequently, on February 27, 2024, the Court of Appeals granted the petition as to a single issue and denied it as to the remaining issue.

---

[3] The complete records from the PCR proceedings are presently available through the Richland County Public Index. Records for Maurice A. Roberts, Richland County Fifth Judicial Circuit Public Index, https://publicindex.sccourts.org/richland/publicindex.

[4] During the hearing, it was noted the proceedings in Roberts's PCR case had been stayed for several years to address an issue related to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), and that issue was apparently resolved by the time of the hearing. (App'x pp. 965-66; p. 1025).

[5] The records from Roberts's current PCR appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for Maurice Roberts v. State, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=76490.

[6] The State acknowledges the deeply-appreciated work of Senior Assistant Attorney General David Spencer, who previously represented the State in Roberts's case at both the circuit court level and the appellate level. (App'x p. 962; Return to Cert., pp. 1-17).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); see also Strickland v. Washington, 466 U.S. 668, 698 (1984) (recognizing the question of whether defense counsel was constitutionally ineffective "is a mixed question of law and fact"). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR judge correctly found defense counsel was not constitutionally ineffective for failing to object to a jury instruction on the requisite intent for statutory attempted murder that was only later declared to be incorrect because: (1) at the time of Roberts's trial, the issue of the intent required to prove that newly-created statutory offense had not yet been addressed by any South Carolina appellate courts and remained an unsettled question upon which reasonable minds could disagree; and (2) the issue was only addressed and settled through later appellate decisions—including a divided one from our Supreme Court—that were issued *after* Roberts's trial had already concluded.

Relevant Facts

On the night of January 25, 2013, two brothers, Troy Scott and Trenton Scott, were hanging out in the lower level of their two-story residence with a group of friends that included Joshua Williams and Brandon Jones.[7] (App'x pp. 231-233; p. 264; pp. 327-328; p. 467). Around 10:00 p.m. that night, Vincent Nelson, Jr.—who was also known as "J School"—unexpectedly arrived at the Scotts brothers' house and came downstairs. (App'x pp. 326-327; p. 468). Previously, Troy and Trenton's mother had permitted Nelson to live at their home for a period of time, but Nelson had not been around in a few months, which made his unannounced visit somewhat unusual. (App'x pp. 326-327; pp. 330-331; p. 517). Nevertheless, the Scott brothers and the others welcomed Nelson that night and allowed him to join the group's socializing. (App'x pp. 326-327; pp. 532-534; p. 557). That decision unfortunately proved to be a tragic and deadly one. (App'x p. 550; p. 557; pp. 634-636; p. 681).

Unbeknownst to the Scott brothers and their friends, Nelson's visit that night was not for the purpose of socializing or finding a place to stay. (App'x p. 529). Instead, Nelson—aware of his ability to gain access to the residence based on the Scott family's past kindness toward him—had hatched a plan to perpetrate a robbery of the home earlier that day along with several

[7] In addition to being a friend, Jones was also the Scott brothers' cousin. (App'x p. 325).

conspirators, including Roberts.[8] [9] (App'x pp. 529-530; pp. 667-670). In accordance with that shocking plan, Nelson—after being allowed entry into the home—repeatedly used Roberts's cell phone, which he had brought with him, to communicate with Roberts and the other conspirators and alert them of who all was inside. (App'x p. 236; pp. 529-530; pp. 534-535; pp. 670-671; p. 751). Nelson then proceeded to separate the group by repeatedly pestering Jones for a cigarette until Jones finally relented, and he headed outside with Jones and Williams to smoke. (App'x pp. 237-238; p. 447; p. 470; pp. 535-536). Once outside, Nelson then resumed his communications with his conspirators, alerted them he had two of the friend group with him, and encouraged them to come on. (App'x p. 671; p. 752). Ominously, one of the conspirators responded: "On the way." (App'x p. 752).

Shortly after that, Williams noticed three men walking back and forth nearby. (App'x pp. 239-240). Shortly after that, one of the men charged at Jones, Williams, and Nelson as they continued smoking outside the residence, and that man quickly pulled out a gun and struck both Jones and Williams with it, knocking them to the ground. (App'x pp. 239-240; p. 246; pp. 489-490; pp. 538-540; pp. 672-673). The gunman then demanded car keys from Jones before rushing into the Scott brothers' residence with one of his accomplices. (App'x pp. 240-242; pp. 541-542; pp. 674-675).

After getting inside, the gunman—Roberts—quickly encountered Trenton and pointed a gun at his head. (App'x pp. 332-333; pp. 349-351; p. 672). As he did with the others, Roberts

---

[8] Inside the lower level of the residence, the Scott brothers had a recording studio set up, and it contained an "expensive" microphone along with other equipment used to record music. (App'x p. 250; p. 324; p. 518). A desire to steal that equipment was the motive for the senseless and horrible crimes that followed. (App'x p. 412; pp. 521-522; p. 529; pp. 668-669; p. 679).

[9] According to even Roberts himself, the illicit scheme was hatched at Roberts's apartment. (App'x pp. 408-409; pp. 521-524; p. 529; pp. 667-669; pp. 740-741).

then approached Trenton and struck him with the gun, knocking him to the floor. (App'x p. 334). Following that, Trenton, who was trained in karate, promptly got back up and hit Roberts in the face, which caused Roberts to crash into a glass table, break it, and drop his gun in the process. (App'x p. 334; p. 351). Trenton and Roberts then began scuffling with one another in an effort to gain control of the now-loose gun. (App'x p. 334; p. 490). Seeing the scuffle, the other would-be robber who had entered the residence—Demetrice James—quickly joined the fray, and he was able to get control of the gun. (App'x p. 335; pp. 492-493). Trenton then began fighting with James, and Troy, who had not been in the room when the burglars first entered, joined in, too, when he responded to the sound of the glass breaking and saw what was happening. (App'x pp. 335-336; pp. 447-449).

As the struggle continued, Roberts attempted to get farther into the Scotts' home, but Trenton chased after him and knocked him to the ground. (App'x p. 336; pp. 450-451). In response to that, James—who was still armed with Roberts's gun at that point—threatened to shoot him, so Trenton grabbed Roberts and held him up to shield himself from being shot. (App'x pp. 336-337; pp. 450-451). Trenton then flung Roberts toward James as a distraction and, along with his brother, attempted to barricade himself behind an inner door inside the residence. (App'x pp. 337-338). However, James quickly began pushing back on that door, and another struggle ensued. (App'x pp. 337-338). During it, Trenton decided they needed to do something to get James and Roberts out of the residence to avoid being shot, so he opened the door and charged at them in an effort to force them back outside. (App'x pp. 339-340). During the ensuing conflict, James fired a shot that struck Trenton in the arm.[10] (App'x pp. 340-341; p.

[10] Later on, James denied being the one that shot Trenton. (App'x p. 511).

348; p. 452; p. 675). James and Roberts then fled out the home's back door as Trenton remained behind bleeding from his gunshot wound. (App'x pp. 341-342; p. 676).

Once back outside, Roberts—who had reobtained his gun by that point—stood over one of the victims he had earlier knocked to the ground and fired a shot at him. (App'x p. 496; pp. 676-677). As his co-conspirators—including Nelson—hastily fled from the scene, Roberts then fired another volley of gunshots before fleeing himself. (App'x p. 243; p. 496; p. 543; pp. 676-677; p. 681).

After the perpetrators absconded, the incident was quickly reported, and officers from the Richland County Sheriff's Office rapidly responded to the scene along with emergency medical personnel. (App'x pp. 223-226; p. 255; pp. 258-261; pp. 354-357; pp. 377-390; p. 689; p. 691; p. 764; p. 767). Based on their injuries, Trenton, who had been shot inside the residence, along with Williams and Jones, who were both shot outside the residence, were rushed to the hospital for treatment. (App'x pp. 243-244; p. 384; pp. 388-390). Fortunately, Trenton's and Williams's gunshot injuries were not fatal, and both were able to be successfully treated. (App'x p. 245; p. 343). Sadly though, Jones had been shot five times, including twice in the back, and he quickly succumbed to his injuries and died. (App'x p. 262; pp. 632-644).

During the rapidly-ensuing investigation into the incident, Nelson was swiftly identified as a suspect since Troy, Trenton, and the rest of their group were already familiar with him. (App'x pp. 691-693; p. 726; pp. 765-766; pp. 768-769). Two days later, officers was able to track Nelson down at Roberts's apartment, and he was taken into custody there. (App'x p. 728; pp. 773-774; pp. 776-778; pp. 801-803). Following that, Nelson, Roberts, and an individual named Juwan Duckett were all brought to the Richland County Sheriff's Office's headquarters

for questioning.[11] [12] (App'x pp. 732-733; p. 739; p. 777; p. 779; pp. 803-804). During that questioning, Roberts—who had a black eye at the time—initially denied any involvement in or knowledge about the incident. (App'x pp. 512-513; p. 738; p. 745; p. 808). However, upon being confronted with incriminating admissions made by both Nelson and Duckett, Roberts pivoted his account, admitted he was present at the scene on the night of the incident, and acknowledged he actively participated in and helped with the botched heist. (App'x pp. 739-742; p. 806). However, despite making some admissions, Roberts tried to minimize his own responsibility to the greatest extent possible and denied ever having a gun or shooting anyone. (App'x p. 743; p. 809).

Ultimately, at the conclusion of the interview, Roberts was arrested for multiple offenses in connection to the incident, including murder. (App'x pp. 753-754; p. 780). Subsequent to that, Roberts was indicted for murder, first-degree burglary, multiple counts of attempted murder, and attempted armed robbery, and he elected to proceed forward to trial. (App'x p. 20; pp. 1058-1067).

Amongst the substantial evidence that was presented during that trial, Trenton—who had earlier identified Roberts as one of the perpetrators from a lineup—identified Roberts in the courtroom as the person who rushed into his home with a gun and attacked him on the night of the incident, and Troy—who also spotted Roberts in a lineup prior to trial—confirmed he, too, saw Roberts inside his home fighting with Trenton that night. (App'x pp. 332-333; pp. 348-351;

---

[11] Duckett was hiding in a closet with Roberts's cell phone when officers entered in the apartment in search of Nelson. (App'x pp. 405-407; p. 730). Notably, Roberts's cell phone was taken into custody at that time, and the incriminating text messages Nelson was exchanging with his co-conspirators were still contained on it when it was later examined. (App'x pp. 483-484; p. 733; pp. 751-752).

[12] Later on during trial, Duckett identified himself as a good friend of Roberts's. (App'x p. 401).

p. 353; pp. 448-449; pp. 459-460). Likewise, Nelson, James, and the third of Roberts's accomplices—Deshawn McClary—all testified as part of the State's case, recounted the details of what occurred on the night of the incident, and identified Roberts as one of the key perpetrators.[13] (App'x pp. 485-511; pp. 515-557; pp. 661-686). In addition to that, both James and McClary expressly stated they saw Roberts firing a gun outside during incident when he was near someone on the ground.[14] (App'x p. 496; p. 507; p. 677; p. 684). Furthermore, Duckett, who did not participate in the incident but was present when it was planned at Roberts's apartment, recounted the details of his knowledge of how the robbery scheme was hatched, and he confirmed Roberts was one of its planners. (App'x pp. 408-412).

After all the testimony and evidence was presented, the trial judge discussed his intended jury instructions with defense counsel and the solicitor. (App'x p. 811; p. 817; pp. 822-835). During that discussion, the trial judge initially indicated he intended to instruct the jury on attempted murder by generally instructing on the meaning of attempt. (App'x pp. 830-831). However, the solicitor responded to that suggestion by pointing out the "suggested jury instructions" indicated a specific intent was not an element of attempted murder.[15] (App'x p. 831). In response, defense counsel did not object to the portion of the suggested instruction

---

[13] James and McClary had both been tracked down and arrested in connection to the incident within days of Roberts's and Nelson's arrests. (App'x pp. 499-500; p. 681; p. 754; p. 807).

[14] Notably, as part of his testimony, James indicated Roberts threatened him shortly before he was called as a witness in an effort to get him not to testify. (App'x pp. 505-506). Similarly, Nelson testified Roberts had earlier told him they would get away with it if they did not talk to anyone. (App'x pp. 553-554).

[15] In South Carolina, circuit court judges have historically been provided with a bench book containing suggested jury instructions for use during trial. See, e.g., McKnight v. State, 378 S.C. 33, 47, 661 S.E.2d 354, 361 (2008) ("The court continued with the general intent charge on criminal intent from the Circuit Court Bench Book."); State v. Singleton, 438 S.C. 629, 634, 885 S.E.2d 415, 417 (Ct. App. 2023) ("[T]he trial court declined to give the instruction after it determined the instruction was not in the South Carolina bench book.").

referenced by the solicitor regarding intent and, instead, only asked for a portion of it concerning the character of the instrument used to be excised. (App'x p. 831). At that point, the trial judge appeared to agree to use the suggested instruction identified by the solicitor and to remove the language defense counsel had asked to be eliminated. (App'x pp. 831-832).

Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law.[16] (App'x pp. 838-914). As part of those jury instructions, the trial judge discussed the elements of attempted murder and, in doing so, indicated a specific intent *was* a required component of an attempt. (App'x pp. 907-908). In addition to that, the trial judge thoroughly instructed the jury on the other principles of law applicable to Roberts's case, including on the elements of Roberts's other three indicted offenses. (App'x pp. 907-908).

After finishing those jury instructions, the trial judge asked counsel whether there were any objections to what had been presented, and the solicitor swiftly noted the trial judge's attempted murder instruction as presented would require a finding of a specific intent to kill contrary to their earlier discussions. (App'x p. 914). In response to that, the trial judge—without objection from defense counsel—presented a supplemental jury instruction on attempted murder to the jury, expressly instructed a specific intent to kill was *not* an element of attempted murder, and noted a general intent to commit serious bodily injury would be sufficient to satisfy the elements of that offense. (App'x pp. 917-918).

Notably, at the time that supplemental instruction was given, the *statutory* offense of attempted murder—which was enacted through the Omnibus Crime Reduction and Sentencing

[16] Consistent with the earlier discussion that had occurred, the solicitor stated during the State's closing argument a specific intent to kill was not an element of attempted murder. (App'x pp. 844-845).

Reform Act of 2010 that simultaneously abolished our state's previously-existing common law assault and battery offenses—had only existed in South Carolina for a little less than four years. See Act No. 273, 2010 S.C. Acts & Joint Resolutions (creating a number of new statutory offenses, including attempted murder, while also abolishing the common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault); see also State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. *In place of these offenses*, the Act codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600." (emphasis added)). And, significantly, by that point, the precise meaning of the statutory language involved had still *not* yet been addressed or interpreted by any South Carolina appellate courts in regard to what intent was necessary to prove the newly-created offense. See State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015) (holding—for the first time in *2015*—"the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder"), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

Following the presentation of the trial judge's supplemental jury instruction, Roberts's case was submitted to the jury. (App'x p. 920). Just over an hour later, the jury unanimously convicted Roberts of *all* the indicted offenses, including attempted murder *and* murder. (App'x pp. 921-922). The trial judge then sentenced Roberts to concurrent thirty-year terms of imprisonment for his two attempted murder convictions, and those sentences were ordered to run concurrently to Roberts's lengthier—and day-for-day—forty-five-year sentence for murder, his

accompanying forty-five-year sentence for first-degree burglary, and his twenty-year sentence for attempted armed robbery. (App'x p. 937).

Subsequently, Roberts unsuccessfully appealed his convictions. (App'x p. 1044). And, while that appeal was still pending, this Court issued its decision in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), that held—a little over a year *after* Roberts's trial and for the first time—statutory attempted murder required proof of a specific intent to kill. See King, 412 S.C. at 411, 772 S.E.2d at 193.

Following his unsuccessful appeal, Roberts filed a PCR application. (App'x pp. 939-944). While that application remained pending, the Supreme Court issued its own decision in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and, through that divided decision, a majority of the Supreme Court concluded statutory attempted murder did, in fact, require proof of a specific intent to kill. See State v. King, 422 S.C. 47, 63-64, 810 S.E.2d 18, 26-27 (2017) ("We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which include a 'specific intent to kill' as an element."). Unsurprisingly, after that decision was issued, Roberts—through PCR counsel—then submitted an amendment to his application and now—for the first time—alleged defense counsel was constitutionally ineffective for failing to object to the trial judge's "incorrect" attempted murder jury instruction. (App'x p. 961; pp. 966-967; pp. 1023-1024).

During the ensuing evidentiary hearing on the matter, defense counsel testified about his representation of Roberts.[17] (App'x p. 998). As part of that testimony, defense counsel indicated he believed—at the time of Roberts's trial—statutory attempted murder was just like

[17] Roberts also personally testified during the evidentiary hearing, but he offered no testimony relevant to his claim concerning defense counsel's failure to raise an objection to the attempted murder jury instruction. (App'x pp. 970-996).

common law assault and battery with intent to kill, which would have meant it was a general intent crime as opposed to a specific intent crime. (App'x p. 1002). However, based on the knowledge he had since acquired, defense counsel confirmed he would now "jump through the roof" if a trial judge attempted to present a general intent jury instruction in an attempted murder case. (App'x p. 1002).

Ultimately, upon considering the matter, the PCR judge rejected all Roberts's claims, including his claim defense counsel had been ineffective for failing to object to the attempted murder jury instructions, and ruled Roberts was not entitled to any relief. (App'x pp. 1056-1057). In so ruling, the PCR judge recognized Roberts's trial occurred before even the first King decision was issued. (App'x p. 1054). The PCR judge further recognized the Supreme Court's King decision from 2017 was a divided one and Justice Kittredge had indicated he believed statutory attempted murder was a general intent crime. (App'x pp. 1054-1055). Based on that, the PCR judge concluded reasonable minds could disagree at the time of Roberts's trial about whether attempted murder was a general intent crime and, therefore, defense counsel did not perform deficiently by failing to object to the trial judge's jury instructions on attempted murder. (App'x p. 1056). Likewise, the PCR judge concluded Roberts was not prejudiced by any purported deficiency because the evidence presented during trial overwhelmingly established the shooting occurred during the course of a violent home invasion. (App'x p. 1056).

Applicable Law

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and

indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland, 466 U.S. at 685 ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does *not* mean perfect representation. See Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate

assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate *the distorting effects of hindsight*," and will "evaluate the conduct from counsel's perspective at the time" in light of the *then-existing circumstances*. Strickland, 466 U.S. at 689 (emphasis added). To establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see Dunn v. Reeves, 594 U.S. 731, 739 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the

record does not reveal that counsel took an approach *that no competent lawyer would have chosen*." (emphasis added and citation, internal quotations, and brackets in original omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

Analysis

On appeal, Roberts contends the PCR judge erred by failing to find defense counsel was constitutionally ineffective and by declining to grant him relief. As support for that contention, Roberts—while relying heavily on the "intent to kill" language from the attempted murder statute itself coupled with dicta from our Supreme Court's decision in State v. Sutton, 340 S.C. 393, 397-398, 532 S.E.2d 283, 285-286 (2000), which stated attempted murder in a common law sense would require proof of a specific intent to kill before declining to recognize that particular common law offense *existed at all* in South Carolina—maintains defense counsel should have known the newly-created statutory offense of attempted murder was a specific intent crime and, thus, was deficient for failing to object to the trial judge's jury instruction indicating a conviction for attempted murder only required a finding of general intent. See King, 422 S.C. at 55-56, 810

S.E.2d at 22 (instructing the "intent to kill" language from the attempted murder statute "does *not* identify what level of intent is required" and agreeing the statement from Sutton about attempted murder's requisite mental state constituted dicta (emphasis added)). Tellingly though, Roberts acknowledges—as he necessarily must—the appellate decisions in King, which first determined statutory attempted murder required proof of a specific intent to kill in our state, were only issued "*later*" and after his trial had already concluded. (Pet. Br. p. 11) (emphasis added). Nevertheless, Roberts seeks to avoid the significance of the post-trial timing of the King decisions by suggesting their outcome could have been and should have been anticipated in advance by anyone with the ability to simply "read English." (Pet. Br. p. 12).

To the contrary and just as the PCR judge found, defense counsel was not deficient and did not act in a manner *no* competent attorney would have acted in by failing to raise an objection to the trial judge's jury instructions on the intent necessary to prove statutory attempted murder. That is true because, at the time of Roberts's trial, the issue of statutory attempted murder's required intent remained an *unsettled* and novel question of law upon which reasonable minds could disagree. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)); Black v. United States, 373 F.3d 1140, 1144 (11th Cir. 2004) ("If the legal principle at issue is unsettled, . . . counsel will not have rendered deficient performance for an error in judgment."); cf. State v. Williams, 427 S.C. 148, 154, 829 S.E.2d 702, 705 (2019) ("To be fair to counsel, at the time of [Williams's] trial, we had not yet handed down our decision in King, in which a *majority* of this Court held attempted murder was a specific-intent crime." (emphasis added)).

Indeed, in King itself, Justice Kittredge—who unquestionably was and is quite capable of reading English—was equipped with the exact same statutory language, case law, and dicta available to defense counsel at the time of Roberts's trial *along with* this Court's 2015 King decision, and, after analyzing the matter, he determined statutory attempted murder was *not*—and was not intended to be—a specific intent crime. See King, 422 S.C. at 73, 810 S.E.2d at 32 (Kittredge, J., concurring in result) ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime? I would therefore conclude that a specific intent to kill is not an element of the offense of attempted murder found in section 16-3-29, notwithstanding that the phrase 'with intent to kill' is included in the statute."); see also State v. Foust, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51 (1996) (recognizing common law assault and battery with intent to kill required proof of both an *intent to kill* and malice but concluding that requirement did not mean proof of a *specific* intent to kill was necessary). Meanwhile, one justice concurred only in the result of King without further comment, and the other three justices involved in the decision concluded both the statute defining attempted murder required proof of a specific intent to kill *and* it contained language "arguably inconsistent with a specific-intent crime." King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5.

Critically, since the only thing our Supreme Court's justices could definitively agree upon about the newly-enacted attempted murder statute was that its language concerning intent was ambiguous and inconsistent, defense counsel was not—and, when applying the correct non-hindsight-based analysis, could not have been—deficient for failing to recognize at the time of Roberts's trial the ambiguous statute setting out the new offense of attempted murder was intended to establish a specific intent crime. Strickland, 466 U.S. at 689; see Kornahrens v.

Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate *a new rule of law*." (emphasis added)); Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); cf. Black, 373 F.3d at 1146 (concluding counsel did not perform deficiently by "failing to predict what was not yet a certain holding"); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("The PCR court found trial counsel was ineffective for failing to object to the trial court's instruction, even though Daniels had not yet been decided, because if trial counsel had made an objection, the issue would have been preserved for appellate review. . . . We disagree and hold that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction *when no case law existed rendering the instruction improper per se*. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. As trial counsel's performance was not deficient, we reverse the PCR court's grant of relief on this ground." (emphasis added)); State v. Bennett, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013) (instructing "we have repeatedly declined to find counsel ineffective for failing to take a specific action on an unsettled issue" and concluding the fact the law was unsettled on a particular point—the applicability of a statute of limitations—at the time of Bennett's trial disposed of his ineffective-assistance-of-counsel claim). Likewise, defense counsel—by failing to object after interpreting the attempted murder statute in precisely the same manner as Justice Kittredge ultimately did—certainly did not pursue a course of action no competent attorney would have chosen as would have been necessary for a finding of deficiency. Reeves, 594 U.S. at 739.

Accordingly, since defense counsel's failure to object to a jury instruction that was only declared to be improper through *later* appellate decisions—including a *divided* one from our Supreme Court—issued well *after* Roberts's trial had already concluded did not constitute deficient performance, the PCR judge correctly determined Roberts failed to meet his burden of establishing defense counsel was constitutionally ineffective, and her ruling was fully consistent with the proper guiding standard for evaluating ineffective-assistance-of-counsel claims.[18] See Strickland, 466 U.S. at 689 (rejecting hindsight-based evaluation of defense counsel's performance at trial); see also Thornes v. State, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."); cf. Honeycutt v. Mahoney, 698 F.2d 213, 217 (4th Cir. 1983) ("[W]hile Winship indeed provided the touchstone for the eventual decisions in Mullaney and Hankerson, and while Winship alone would have supported a challenge to the

[18] Because defense counsel's performance was not and could not have been deficient under the circumstances involved, it is unnecessary to consider or address the issue of prejudice in Roberts's case. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); cf. Walker v. Jones, 10 F.3d 1569, 1573 (11th Cir. 1994) ("Because Alabama courts had rejected similar claims and the Supreme Court had not yet decided Cage, trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt. Trial counsel's failure to object to the instruction was, therefore, reasonable. Because trial counsel acted reasonably, his representation in this regard was not deficient, and *we need not address whether the alleged failure caused Walker prejudice*." (emphasis added)). Beyond that, even assuming defense counsel's performance was somehow deficient *and* prejudice was somehow established under the circumstances involved, it is important to note relief would only be warranted in regard to Roberts's attempted murder convictions since there was and is no likelihood whatsoever—reasonable or otherwise—the trial judge's jury instructions on attempted murder's requisite intent could have impacted the outcome of the proceedings in regard to Roberts's convictions for the separate and distinct offenses of murder, first-degree burglary, and attempted armed robbery. See United States v. Morrison, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."); cf. Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) ("Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense.").

presumptions of malice and unlawfulness, an attorney such as the one which represented Honeycutt can hardly be labeled ineffective for his failure to perceive such an argument."); Gilmore, 314 S.C. at 457, 445 S.E.2d at 456 ("Trial counsel . . . could not be ineffective for failing to request a jury instruction which would not be applicable to the offenses charged for at least another year."). The PCR judge's order denying Roberts's application for post-conviction relief should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

December 12, 2024

RECEIVED
Dec 12 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to the Court of Common Pleas
Appeal from Richland County
Honorable Grace Gilchrist Knie, Circuit Court Judge
Appellate Case No. 2022-000652

MAURICE ROBERTS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Brief of Respondent on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Joanna K. Delany, Esquire
S.C. Commission on Indigent Defense
Office of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify all parties required by Rule to be served have been served.
This 12th day of December, 2024.

MARK R. FARTHING
Senior Assistant Deputy Attorney General
Office of the Attorney General