THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Aiken County
R. Knox McMahon, Circuit Court Judge

Opinion No. 2017-UP-025 (S.C. Ct. App. filed Jan. 11, 2017)
Appellate Case No. 2017-000742

THE STATE,

Respondent,

v.

DAVID GLOVER,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals properly hold the trial court did not err in declining to recharge the jury on self-defense because the jury did not request it nor did the trial court's failure to recharge self-defense render the charge as a whole imbalanced or unduly prejudicial to Petitioner?

STATEMENT OF THE CASE

David Glover (Petitioner) was indicted at the September 2014 term of the grand jury for Aiken County for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime. On May 13, 2015, Petitioner proceeded to trial by jury and was found guilty of attempted murder and possession of a firearm during the commission of a violent crime. The Honorable R. Knox McMahon sentenced him to twenty-five years' imprisonment for the attempted murder conviction and five years' imprisonment for the possession of a firearm conviction, to be served concurrently.

Petitioner appealed, and the court of appeals affirmed in an unpublished opinion. *State v. Glover*, Op. No. 2017-UP-025 (S.C. Ct. App. filed Jan. 11, 2017). Petitioner filed a petition for rehearing, which the Court of Appeals denied by order dated February 23, 2017. Petitioner subsequently filed a petition for a writ of certiorari in this Court.

STATEMENT OF FACTS

Petitioner was indicted for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime after attacking his former paramour, Vernell Weaver. (R.11.) At trial, Weaver testified that on the day of the incident she spoke with Petitioner and asked him to come pick her up from George Mackey's house so she could retrieve some clothes from their home.[1] (R.50.) Petitioner agreed and after taking her home to get her things, he dropped her back off at Mackey's house. (R.52.) Once inside, Weaver began making herself something to eat when she heard a banging at the door and saw Petitioner standing at the door. (R.56.) Before she could speak, Petitioner drew a gun and shot her through the neck. (R.56.) Weaver turned, ran into the bedroom, and dialed 911. (R.56.) Although she shut the door, Petitioner came through the wall and the two began to tussle on the bed as Weaver attempted to wrestle the gun away from him. (R.56.) However, Petitioner took the gun back and attempted to shoot Weaver again in the stomach.[2] (R.57.) Weaver was able to get away from him and ran through the living room, grabbing a hammer that was on the floor as she headed out of the house towards the home of Otis and Almetha Green. (R.58–89.)

Almetha Green testified that she was in the kitchen when she heard Weaver yelling about having been shot as she ran towards the house. (R.86.) Weaver eventually reached the porch and sat in a chair, still clutching the hammer. (R.89–90.) Petitioner, who had chased Weaver to the Greens' house, tried to pull the hammer from her hand. (R.90.) Almetha got her husband, Otis Green, who told Petitioner to leave Weaver alone and threatened to call the police. (R.89.) Almetha eventually called the police and Petitioner ran away when he heard the sirens. (R.89.)

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[1] Although it appeared Weaver and Petitioner were not romantically involved at the time, they still shared a home. (R.50.)

[2] Petitioner pulled the trigger; however, the gun did not fire. (R.57)

Otis similarly testified that on the day of the incident he was awakened by Almetha, and he went with her to the porch to find Weaver sitting on the porch with Petitioner standing over her trying to get the hammer out of her hand. (R.100.)

Dr. Bradford Huffman testified as an expert in oral and maxillofacial trauma and treatment. (R.216.) He described how when Weaver was shot, the bullet entered the right side of her neck, passed through the floor of her mouth and her tongue, and exited through the left side of her lip. (R.220.) He further explained that this type of injury was associated with a high level of mortality. (R.223.)

Petitioner testified in his own defense. He testified Weaver called him the morning of the incident about getting something to eat at the church, and they arranged for Petitioner to pick her up. (R.250.) He claimed that on the way, Weaver requested they make a stop to pick up some crack before they returned to their shared home, where Weaver smoked the crack she had acquired. (R.252–253.) After that, Petitioner stated he drove Weaver back to Mackey's house and accompanied her inside where she began to smoke the remainder of her crack. (R.255.) Petitioner claimed that once Weaver consumed all her crack she asked him for money so she could purchase more to smoke; when he responded he did not have any cash, she began to hit him and they began a physical altercation. (R.255–256.) Petitioner maintained the fight escalated and Weaver eventually grabbed a hammer and began swinging it at him and they began to struggle over the hammer, knocking through a wall and the glass front door. (R.257–258.) Petitioner testified he then drew a gun and shot at Weaver twice. (R.259.) He followed her into the bedroom, going through the wall because the door was locked. (R.260.) According to Petitioner, they continued to fight until Weaver left and ran to the neighbors' home. (R.264.)

The defense then rested and the trial court discussed jury charges. Ultimately, the trial court instructed the jury on burglary, attempted murder, ABHAN, first-degree assault and battery, possession of a firearm during the commission of a violent crime, and self-defense. (R.311–320.) After sending the jury to deliberate, Petitioner objected, citing *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *certiorari granted* (S.C. Sup. Ct. Order dated March 28, 2016), because the trial court had charged the jury it must only find a general intent to commit serious bodily harm as opposed to a specific intent to kill. (R.324.) After reviewing the case, the trial court brought the jury back in and recharged it on attempted murder, this time stating that the "State must prove specific intent to commit murder as an element of attempted murder." (R.329.) The jury returned to deliberations. (R.331.)

The jury subsequently submitted the question: "What is the difference between guilty of attempted murder and guilty of [ABHAN]?" (R.331.) The trial court proposed recharging attempted murder and ABHAN, and neither party objected. (R.331.) After the court delivered its recharge and the jury exited, Petitioner requested "the Court to consider re – instructing self-defense as well." (R.336.) The State objected and the court ultimately declined to recharge the jury, citing *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996), for the proposition that a trial court need only answer the questions asked by the jury. (R.337.)

The jury then submitted another question: "Can you give an example of guilty of [ABHAN] without reading the law." (R.337–38.) After bringing the jury back, the trial court clarified it could not provide examples for fear those statements would be interpreted as a comment on the facts. (Tr.400–01.) Instead, the trial court reiterated the language of the statute and reminded the jury it must determine the facts and compare them to the law. (R.339.) Finally, the trial court reminded the jury the State must prove the elements of the offenses

beyond a reasonable doubt. (R.339.) The jury then returned to deliberations and neither party noted any objections. (R.340.)

Ultimately, the jury found Petitioner guilty of attempted murder and possession of a firearm during the commission of a violent crime, and not guilty of burglary. (R.341.) The trial court sentenced him to twenty-five years' imprisonment on the attempted murder charge and five years' imprisonment on the possession charge, to be served concurrently. (R.352.)

Petitioner appealed. Citing the standard of review and relying on settled precedent, the court of appeals affirmed in an unpublished memorandum opinion. *State v. Glover*, Op. No. 2017-UP-025 (S.C. Ct. App. filed Jan. 11, 2017). Petitioner filed a petition for rehearing, which the Court of Appeals denied by order dated February 23, 2017. Petitioner subsequently filed a petition for a writ of certiorari in this Court.

ARGUMENT

The Court of Appeals properly affirmed Petitioner's conviction because the trial court did not err in declining to recharge the jury on self-defense. The jury did not request this charge nor did the trial court's failure to recharge self-defense render the charge as a whole imbalanced or unduly prejudicial to Petitioner.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in not recharging the jury on self-defense. The Court properly affirmed because this contention is unpreserved, inconsistent with settled precedent, and does not demonstrate reversible error.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). "It is well established in South Carolina that '[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.'" *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996) (alteration in original) (citing *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993)).

At the outset, Petitioner acknowledges his argument is unpreserved as he failed to object or request an additional charge on self-defense before or after the trial court's final recharge. (Pet'r's Pet. For Writ of Cert. p.9 fn2.) Although he indicates such an objection would be futile, there is no evidence the trial court would have refused the invitation to include a recharge on self-defense if Petitioner presented his current argument—that charging the jury on the elements of the offenses three times threatened to focus it on the crimes and therefore including a reminder of the elements of self-defense would ameliorate any possible imbalance. The fact that the trial court had previously declined to recharge self-defense is unpersuasive as a basis for ignoring the rules of preservation. Although the trial court specifically asked before the second recharge whether Petitioner objected to him simply recharging attempted murder and ABHAN, it was not

until the jury returned to deliberations that Petitioner suggested the trial court recharge self-defense. Thus, his request was not simply that the trial court charge self-defense along with the offenses, but he asked that the jury be brought back in for the sole purpose of recharging it on a matter on which it had expressed no confusion. Had he timely requested a recharge, it is unclear what the trial court may have ruled and it is unfair to accuse the trial court of error in not *sua sponte* giving a charge that was neither requested by the jury nor Petitioner.

Further, as the Court of Appeals concluded, Petitioner cannot circumvent the precedent standing staunchly against his position. The trial court adhered to well-established law in answering *only* the jury's questions. *See Anderson*, 322 S.C. at 94, 470 S.E.2d at 106 (citing the well-established law that where the jury makes a request, it is sufficient that the court recharge only those matters necessary to answer the jury's question).[3] His sole distinction is that because he requested a recharge on self-defense, his case represents an exception to settled law. However, simply because the trial court deemed a charge on self-defense appropriate based on the evidence presented, it does not follow that Petitioner garners the right to an imbalanced charge in his favor—which is precisely what would result from the court injecting a self-defense charge into its response to the jury. Petitioner mistakes the rationale of existing jurisprudence, assuming the substance of what is being charged should be determinative, where instead the undergirding of our case law is basic logic. The law is no more profound than allowing the trial court to answer only the questions asked of it because inserting another charge in its response,

[3] Petitioner unnecessarily invites the Court to venture beyond settled case law and review jurisprudence from the United States Court of Appeals for the Fifth Circuit. However, that court is in accord with South Carolina in only requiring a trial court to answer the questions asked of it in recharging the jury. *United States v. Ehrlich*, 902 F.2d 327, 330 (5th Cir. 1990) ("A trial court generally may limit a supplemental charge to the specific instruction requested by the jury. As we have said before, there is no error if the trial judge in supplemental instructions charges exactly as he was requested." (internal quotations and citations omitted)).

regardless of the legal substance, would needlessly and unduly emphasize that instruction. While certainly the Petitioner is entitled to a fair charge, he is not entitled to have the trial court highlight his theory of self-defense, particularly where the jury expressed no confusion about that theory.

The simplicity of Petitioner's case is therefore incontrovertible. After the court recharged the jury on the elements of attempted murder at the request of Petitioner, it asked for clarification on attempted murder and ABHAN. The trial court then recharged the elements of those offenses without objection from Petitioner and the jury returned to deliberations. It was not until the jury left the courtroom that Petitioner requested a charge on self-defense, which the trial court properly declined as neither responsive to the question asked, nor appropriate to bring up *sua sponte* while the jury was deliberating. As the case law cited by Petitioner notes, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (internal citations omitted). Here, the final sentiment the trial court offered reiterated the State's burden of proof. Therefore, despite the fact that Petitioner did not object to the trial court's final recharge, it nevertheless tailored its conclusion to benefit Petitioner. Although Petitioner complains, now, that the trial court should have also charged the jury on the presumption of innocence, he cannot complain he was prejudiced by the trial court not reciting every single portion of the charge that favors him—especially when he never objected to this recharge at trial. Furthermore, injecting an unrequested recharge on self-defense into deliberations would undermine the role of the judge as a neutral arbiter of the law. *See State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) ("A fundamental concept of our system of justice is that

every person charged with a crime has an absolute right to a fair and impartial trial. Basic to this concept is the requirement of neutrality on the part of the trial judge, and it is imperative that he exercise a high degree of restraint, caution, and circumspection in making remarks or comments in the presence of the jury."). Accordingly, the court of appeals properly found the trial court did not err in declining to recharge the jury on self-defense in affirming Petitioner's convictions. The petition for certiorari should therefore be denied.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 25, 2017

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within *Return to Petition for a Writ of Certiorari* on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 25th day of April, 2017.

Angela Bennett

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APR 25 2017
SC Court of Appeals

April 25, 2017

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RE: The State v. David Glover
Appellate Case No. 2017-000742

Dear Ms. Baer:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

Ranee Saunders
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RS/ab
Enclosures

cc: Honorable Daniel E. Shearouse
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