

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001188

State of South Carolina, Petitioner,

v.

Christopher Allen Middleton, Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court err in granting relief, when it ruled that an improper jury instruction for attempted murder could not be deemed harmless error?

STATEMENT OF THE CASE

In March 2015, the Spartanburg County Grand Jury indicted Christopher A. Middleton (“Respondent”) for attempted murder and possession of a weapon during the commission of a violent crime. (App. p. 444). On June 19, 2014, Respondent stabbed his wife (“Victim”) repeatedly with a knife upon learning Victim has taken steps to divorce Respondent. (App. p. 47). Respondent was represented by E. Joshua Schultz, Esquire (“Counsel”). (App. p. 493). Assistant Solicitor Megan Gilmer of the Seventh Circuit Solicitor’s Office represented the State. (App. p. 493). On October 12-14, 2015, Respondent proceeded to trial before the Honorable J. Mark Hayes, II., in Spartanburg County, South Carolina. (App. p. 5).

Respondent did not present any witnesses on his behalf. (App. p. 4). During the jury instruction, Judge Hayes stated “[a] specific intent - - to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.” (App. p. 414). The jury found Respondent guilty as charged. (App. p. 420). Judge Hayes sentenced Respondent to imprisonment for thirty years for attempted murder and five years for possession of a weapon during the commission of a violent crime, to be served concurrently. (App. p. 430).

Respondent appealed his conviction. (App. p. 471). Appellate Defender David Alexander filed a brief on behalf of Respondent pursuant to Anders v. California, 386 U.S. 738 (1967). (App. p. 471). The South Carolina Court of Appeals dismissed Respondent’s appeal. (App. p. 455). The Remittitur was issued on May 5, 2017. (App. p. 457).

Respondent filed an application for post-conviction relief on August 9, 2017. (App. p. 458).

In his application, Respondent alleged the following:

1. Ineffective Assistance of Counsel
 - a. “Failing to object to trial judge’s erroneous jury charge, ‘that intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury...and that [Respondent] was prejudiced by Trial Counsel

in failing to object to the trial judge's charge to the jury that a specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury."¹

(App. p. 494).

Petitioner filed its Return on January 10, 2018. (App. p. 493). On February 22, 2018, an evidentiary hearing was convened before the Honorable Michael G. Nettles in Spartanburg County, South Carolina. (App. p. 501). Respondent was represented by his appointed counsel Susannah C. Ross (App. 501). Petitioner was represented by Assistant Attorney General Valerie G. Giovanoli of the South Carolina Attorney General's Office. (App. p. 501). Counsel testified on behalf of Respondent. (App. p. 519).

Judge Nettles, at the conclusion of the hearing, granted post-conviction relief to Respondent. (App. p. 525). During the hearing, Judge Nettles opined on the harmlessness of an erroneous jury instruction for attempted murder, stating "but I think the Supreme Court said that it can't be harmless error, that it's dispositive that you have to charge a specific intent to kill." (App. p. 515). By written order on June 8, 2018, Judge Nettles submitted the following reasoning for his grant of relief:

The jury charge in this case negated the requirement of any proof of an essential element of the charges against [Respondent]. This error substantially undermines confidence in the outcome of trial. If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidence by the *King* opinions. Furthermore, to underscore the prejudicial nature of the improper charge, the Supreme Court held that the error cannot be harmless. *State v. King*, App. Case No. 2015-001278, Opinion No. 27744, Page 14 (2017).

(App. p. 530).

¹ At the evidentiary hearing, Respondent waived presentment on all remaining allegations. (App. p. 511).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Because erroneous jury instructions are subject to a harmless error analysis and the trial court's jury instruction on attempted murder did not contribute to the verdict based on all the evidence presented to the jury, the PCR court erred in granting relief.

The PCR court erred in granting relief for Counsel's failure to object to the attempted murder jury instruction was prejudicial to Respondent. The PCR court incorrectly applied the holding of this Court in King, by determining that an improper jury instruction on attempted murder could never be deemed harmless. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). However, erroneous jury instructions are subject to a harmless error analysis and based on all of the evidence presented to the jury, the erroneous attempted murder instruction did not contribute to the jury's guilty verdict. Based upon the significant evidence of Respondent's specific intent to kill Victim presented during trial, the erroneous jury instruction was harmless.

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the applicant such that

“there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The trial court’s jury instruction incorrectly stated “A specific intent to kill - - is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.” (App. p. 418, line 11). Counsel did not object to the instruction. At the PCR hearing, Petitioner conceded Counsel’s failure to challenge the instruction was an error. (App. p. 515, line 19). However, this error was not prejudicial to Respondent.

The PCR court erred when it ruled the trial court’s erroneous jury instruction could not be deemed harmless, under King. (App. p. 530). The Supreme Court has “often applied harmless-error analysis to cases involving improper instructions.” Neder v. United States, 527 U.S. 1, 9 (1999); see United States v. Brown, 202 F.3d 691, 699 (4th Cir. 2000). When considering whether an error with respect to a jury instruction was harmless, we must “determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.” State v. Kerr, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). Whether or not the error was harmless is a fact-intensive inquiry. State v. Jeffries, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) (“We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.”) (citations omitted). Errors, including erroneous jury instructions, are subject to harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (quoting Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008)).

In King, this Court agreed with the South Carolina Court of Appeals when it held the trial court’s jury instruction could not be deemed harmless. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017). The Court of Appeals conducted a harmless error analysis for the erroneous jury instruction, and held “Officer Butler's inadmissible testimony as to the number of shots King fired

affected the jury's verdict on attempted murder, and we cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt.” State v. King, 412 S.C. 403, 417, 772 S.E.2d 189, 198 (Ct. App. 2015).

In the present case, the PCR court ruled the erroneous jury instruction in Respondent’s trial could not be deemed harmless, because the erroneous jury instruction in King was deemed harmful. The PCR court neglected to determine the effect of Counsel’s error on the outcome of Respondent’s trial, because it determined the erroneous jury instruction could never be deemed harmless. The PCR court did not consider the fact that an appellate court would be required to conduct a harmless error analysis based upon the specific facts of Respondent’s case. Instead, the PCR court wrongfully rules that an appellate court would be required to find the erroneous jury instruction harmful, based upon King.

This Court has provided the standard for analyzing prejudicial effect of erroneous jury instructions. In determining whether Petitioner was prejudiced by trial counsel’s deficient performance, this Court must decide the erroneous malice instruction contributed to the verdict based on all of the evidence presented to the jury. State v. Gibson, 416 S.C. 260, 265, 786 S.E.2d 124 (2016); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992).

There was considerable evidence of Respondent’s specific intent to kill Victim presented during trial. Victim testified as to the night of her attack by Respondent. (App. p. 181). Respondent told Victim “bitch, I hate you.” (App. p. 182). Victim was in bed, weak from medication and resting for a medical procedure scheduled for the next morning. (App. p. 179). Respondent entered the bedroom and locked the door. (App. p. 182). Respondent confronted Victim about her desire to seek a divorce. (App. p. 184). Respondent walked over the bed, moved on top of Victim, and began stabbing her with a knife. (App. p. 184). Victim attempted to fight him off, but Respondent

hit Victim in the face and knocked her off the bed. (App. 184). Respondent told Victim “you gonna get a divorce but you aint gona sign no damn papers.” (App. p. 184). Victim was stabbed five times and cut on her hand. (App. p. 185). Respondent told Victim “I’m gona kill you. I’m already dead. So I might as well kill you.” (App. p. 185). Respondent kicked Victim in the face. (App. p. 185). Respondent sat on the floor and told Victim “tell another lie and I’ll stab you in your heart.” (App. p. 186). Respondent told Victim “you better be glad cause I had asked my friend for a gun and I was gona kill all you little mother fuckers.” (App. p. 187).

Victim described the clothing Respondent was wearing during the incident, including bloody shorts that he never changed out of. (App. p. 188). Respondent moved Victim into the bed and laid beside her as she bleeding out. (App. p. 188). Holding the knife to Victim’s head, telling her “if you ain’t dead by morning, I’m gona stab you in your head and I’m gonna watch watch you take your last breath and I’m gona leave out of here a free man cause ain’t nobody gona know who did this to you and won’t nobody know where I am cause I’ll be gone.” (App. p. 188). The next morning, Respondent told Victim “I told you if you wasn’t dead in the morning I was gona stab you in your damn head”. (App. p. 188). Respondent attempted to stab Victim when someone knocked on the door, causing Victim to scream for her mother. (App. p. 188). Respondent left the room immediately upon hearing the knocking. (App. p. 188). Victim heard her friend, Bobo-Miller, scream and was worried Respondent had attacked her friend. (App. p. 188). The friend entered the bedroom and found Victim, where she informed Victim that Respondent had run out the backdoor. (App. p. 188). Victim’s father and a police officer entered the bedroom shortly after, finding Victim and her wounds. (App. p. 189). Victim was in intensive care for five days and received multiple surgeries as a result of her attack. (App. p. 189).

Photos of Victim's injuries were admitted at trial. (App. p. 195). Bobo-Miller testified that she knocked on Respondent's back door to try and locate Victim. (App. p. 110). Respondent answered the backdoor, wearing bloody shorts. (App. p. 115). Bobo-Miller testified that Respondent was holding a silver item in his hand with blood on it, what she described as a knife or screwdriver. (App. p. 115). Bobo-Miller testified that when she screamed upon seeing Respondent, he ran into the woods. (App. p. 116). Victim's father testified that shortly after he was told Respondent ran into the woods, the police arrived. (App. p. 148). Officer Wesley Berkley testified he arrived on scene and spoke with Victim's father. (App. p. 154). Officer Berkley testified that Victim was in her home suffering from multiple stab wounds. (App. p. 158). Officer Berkley testified that he retrieved a knife wrapped in a towel, admitted at trial as the knife used to stab Victim. (App. p. 388). Victim's DNA was found on this knife. (App. p. 395). Doctor Johnson, who operated on Victim, testified that had she not been rushed into surgery, there's a good chance she would have died from her injuries. (App. p. 394).

The evidence presented at trial was used by the jury to convict Respondent of attempted murder. There was an abundance of evidence the jury could have relied upon to find Respondent guilty of attempted murder, but also that he had the specific intent to kill Victim. Based upon the evidence presented at trial, the erroneous jury instruction was harmless. Respondent was not prejudiced by the trial court's jury instruction, as there is not a reasonable probability that the result of the trial would have been different if the trial court instructed the jury correctly.

Furthermore, the PCR court erred in finding "the jury charge in this case negated the requirement of any proof of an essential element of the charge against [Respondent]." (App. p. 530). The PCR court found "this error substantially undermines the confidence in the outcome of trial." (App. p. 530). Specific intent to kill is an essential element of attempted murder. State v.

King, 422 S.C. 47, 810 S.E.2d 18 (2017). Erroneous jury instruction that omits element of offense is subject to harmless-error analysis. Neder, 527 U.S.1, 10 (1999). The court will find an erroneous instruction harmless if we “conclude beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.” Id. at 17 (1999). In cases where the defendant has contested the omitted element, we ask “whether the record contains evidence that could rationally lead to a contrary finding with respect to that omitted element. If not, then the error was harmless.” United State v. Ramos-Cruz, 667 F.3d 487, 496 (4th Cir. 2012).

Although the jury instruction omitted an element of attempted murder, the evidence in Respondent’s trial could not rationally lead to a contrary finding. The guilty verdict is supported by the overwhelming evidence of Respondent’s specific intent to kill Victim and of his guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and permit Petitioner to more fully brief the issues herein.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER

December 7, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001188

Christopher Middleton, Respondent,

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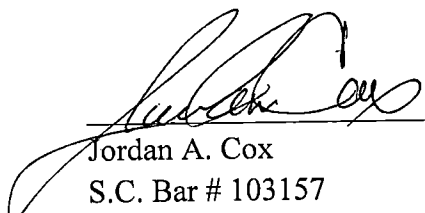
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Joanna Katherine Delany
S.C. Commission on Indigent Defense
Office of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 7th day of December, 2018.



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December 7, 2018

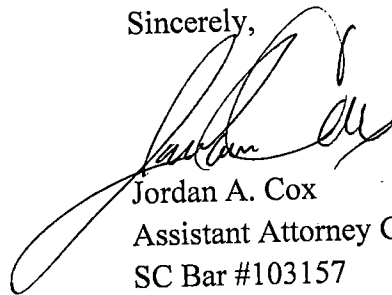
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
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Re: Christopher Middleton, #213662 v. State of South Carolina
Appellate Case No. 2018-001188
Lower Court Case No. 2017-CP-42-2751

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** and **Appendix** in the above-captioned case.

Sincerely,



Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/ck
Enclosures

cc: Joanna K. Delany, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)