STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

CHRISTOPHER MIDDLETON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2018-001188

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

INDEX

1 *State v. King*, 412 S.C. 403, 406, 772 S.E.2d 189, 190 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017).

PETITIONER'S QUESTION PRESENTED

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?

RESPONDENT'S QUESTION PRESENTED

Whether there was evidence to support the PCR court's finding that counsel was ineffective in respondent's attempted murder trial when he did not object to the erroneous jury charge that a specific intent to kill was not an element of attempted murder but there must only be a general intent to commit serious bodily injury, where counsel was aware that *State v. King*[2] held a specific intent to kill was an element of attempted murder, and that respondent was prejudiced by the incorrect charge on an element of the offense the PCR court recognized was a "major contention" at trial?

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2 *State v. King*, 412 S.C. 403, 406, 772 S.E.2d 189, 190 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017).

STATEMENT OF THE CASE

On March 12, 2015, respondent was indicted by a Spartanburg County Grand Jury for the offenses of attempted murder and possession of a weapon during the commission of a violent crime. App. 437 – 438. Respondent was tried before the Honorable J. Mark Hayes, III, and a jury from October 12 – 14, 2015. App. 5. Joshua Schultz represented respondent and Meghan Gilmer represented the state. App 5.

The court instructed the jury without objection that a specific intent to kill was not an element of attempted murder but there must be a general intent to commit serious bodily injury. App. 418, ll. 11-13. Respondent was convicted and sentenced to imprisonment for concurrent terms of thirty years for attempted murder and five years for possession of a weapon during the commission of a violent crime. App. 491 – 492.

On August 9, 2017, respondent filed an application for post-conviction relief (PCR), alleging ineffective assistance of counsel. App. 458 – 485. The state made its return on January 10, 2018. App. 493 – 500.

The matter proceeded to an evidentiary hearing on February 22, 2018, before the Honorable Michael G. Nettles. App. 501. Respondent was represented by Susannah Ross and the state was represented by Valerie Giovanoli. App. 501.

On the record, Judge Nettles granted respondent relief, finding trial counsel was ineffective for failing to object to the improper jury charge that specific intent to kill was not an element of attempted murder. App. 509, ll. 5-7; App. 514, ll. 1-9; App. 525, ll. 8-11. Judge Nettles issued a written order filed June 8, 2018, which granted respondent relief based upon ineffective assistance of trial counsel. App. 527 – 531.

Petitioner filed a petition for writ of certiorari. Respondent now files this return.

ARGUMENT

There was evidence to support the PCR court's finding that counsel was ineffective in respondent's trial for attempted murder when he did not object to the erroneous jury charge that a specific intent to kill was not an element of attempted murder but there must only be a general intent to commit serious bodily injury, where counsel was aware that *State v. King*[3] held a specific intent to kill was an element of attempted murder. Respondent was prejudiced by the incorrect charge on an element of the offense the PCR court recognized was a "major contention" at trial.

Certiorari should be denied because there was evidence to support the PCR court's finding that counsel was ineffective, since counsel did not object to a jury instruction regarding an essential element of the offense when he knew the instruction was erroneous. There was evidence to support the PCR court's finding that respondent was prejudiced because whether he intended to kill the complainant was, correctly, in the eyes of the PCR court, a "major contention" and a "big debate" at trial. "The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)).

Trial facts

Respondent's trial took place six months after the South Carolina Court of Appeals issued its opinion in *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), which held that it was error to charge the jury that attempted murder is a general intent crime

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[3] *State v. King*, 412 S.C. 403, 406, 772 S.E.2d 189, 190 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017).

since "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder. . ."

Here, the state alleged that respondent had been drinking "a lot" when he confronted his wife in their home after finding out she wanted a divorce and he stabbed her. App. 104, ll. 15-22; App. 185, l. 3 – 186, l. 8. According to the complainant, respondent threatened to kill her, threatened to kill himself, and kept asking if she loved him. App. 186, l. 15 – 187, l. 12. The state alleged that after respondent stabbed the complainant, he stayed with her during the night, with the whole event taking about twelve or thirteen hours. App. 214, l. 20 – 215, l. 12. The complainant claimed respondent told her that if she was "not dead by in the morning," he would kill her. App. 215, ll. 18-21. Respondent eventually fell asleep, and later that morning he opened the door when the complainant's "godsister" came to check on her. App. 189, ll. 9-19. Respondent then ran off "in the woods." App. 97, ll. 19-22; App. 117, ll. 1-11.

The state argued in closing that respondent intended to kill the complainant. "If that is not an intent to kill, after repeatedly stabbing her and leaving her in the bed for 12 hours to bleed out, I don't know what is." App. 385, ll. 3-5. "[T]hat's specific intent to kill." App. 401, l. 2. The solicitor argued, "I think the evidence is very clear in this case that he had every intent to kill [the complainant] on that night." App. 399, ll. 3-5. "[H]e had every intent to kill . . ." App. 400, ll. 22-23.

In his closing argument, respondent's trial counsel did not deny that respondent stabbed the complainant, but he disputed that respondent intended to kill her. "The key thing I want to tell you here today is, if [respondent] wanted to kill, he had ample opportunity to do it." App. 403, ll. 4-6. But, "He didn't do it. He did not attempt to kill." App. 403, l. 21. Trial counsel

argued, "If he wanted to kill her he could of done it. He had the opportunity. He had at least 11 to 12 hours to do it with this knife and he could of done it." App. 403, ll. 14-16.

Unfortunately, the trial court then erroneously instructed the jury, "**A specific intent is—to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury**." App. 418, ll. 11-13 (emphasis added). Trial counsel did not object or otherwise take exception to the incorrect jury charge. App. 422, ll. 18-25.

PCR Hearing

In his PCR application, respondent alleged ineffective assistance of counsel for, *inter alia*, "Failing to object to Trial Judge Honorable J. Mark Hayes, III 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.'" App. 465.

Respondent's PCR counsel Susannah Ross argued that trial counsel was ineffective for failing to object when the court instructed the jury that the state did not need to prove respondent had a specific intent to kill in order for the jury to convict him of attempted murder. App. 505, ll. 7-12. PCR counsel correctly observed that in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), which was published "about four or five months before [respondent's] trial—that exact jury instruction was found to be objectionable and [it was] error to give that instruction." App. 505, ll. 12-16.

The Assistant Attorney General agreed the jury instruction was erroneous, but curiously argued trial counsel provided effective representation because at the time of the trial, the *King* case was "pending on Certiorari before the Supreme Court." App. 506, l. 8 – 507, l. 23. In her view, "[W]e all know that a lot of times the Supreme Court takes Certiorari from the Court of

Appeals to change their decisions, so the state of the law wasn't—although the Court of Appeals opinion was authoritati[ve], the state of the law wasn't final." App. 507, ll. 1-5.

However, the PCR judge correctly observed the "general rule" that trial courts must "abide by the Court of Appeals rulings" unless they are reversed. App. 522, l. 24 – 523, l. 2. "[I]t was final until they change it." App. 524, ll. 13-14.

Respondent's PCR counsel argued the error could not be harmless, and cited this Court's subsequent opinion in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). App. 505, l. 18 – 506, l. 2. PCR counsel Ross said that a harmless error analysis "simply can't apply to this. We don't know what the jury would have done." App. 508, ll. 10-12.

Regardless, the PCR judge engaged in a harmless error analysis and still found counsel was ineffective, observing that there was a "big debate" at trial "between the defense counsel and the solicitor as to whether or not he intended to kill her." App. 516, ll. 22-24. The court continued that this "makes it very important that [the jurors] understand what the law is, because they've got to apply . . . the facts to the law." App. 517, ll. 1-3.

PCR counsel correctly noted that respondent was prejudiced since his counsel argued that he was not guilty because he did not intend to kill the complainant, but then "the Judge stands up and gives the jury an instruction that says the opposite." App. 517, ll. 19-23. PCR counsel asserted that during the twelve-hour time period in which respondent was "sleeping next to a woman after stabbing her, if he—if there was an intent to kill, she would be killed . . ." App. 518, ll. 14-17.

Respondent's trial counsel, Joshua Schultz, acknowledged that he was aware of the *King* decision at the time of trial, but he did not object to the erroneous charge. App. 520, ll. 14-16. This was not a strategic decision. Trial counsel was unaware of the general principle than an

appellate court's holding is good law unless and until it is overruled. When asked why he did not object, trial counsel said, "[T]he decision was on Cert, and so I wasn't sure or not that I should introduce that when arguing for a—arguing for the instructions on my side." App. 520, ll. 19-21.

Q. Why didn't you object to the jury instruction?

A. Because it was on Cert. I wasn't sure if that was proper or not.

App. 521, ll. 5-7.

At the conclusion of the hearing, the PCR court ruled that respondent was entitled to post-conviction relief. App. 525, ll. 8-11.

Order granting relief

In its order granting PCR, the court stated, "The transcript of [respondent's] trial clearly shows the trial judge gave an erroneous jury charge on attempted murder." App. 530. "Although he claimed to have been fully aware of the *King* opinion that found a specific intent to kill was an element of attempted murder, trial counsel failed to submit a compliant proposed instruction. He further failed to object or take exception after the improper jury charge was given." App. 530. "I find this was error and amounted to ineffective assistance of counsel. I further find no strategic basis for allowing the improper jury charge which was clearly prejudicial to his client." App. 530.

The court reasoned that, "The jury charge in this case negated the requirement of any proof of an essential element of the charge against [respondent]. This error substantially undermines confidence in the outcome of the trial." App. 530. "If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidenced by the *King* opinions." App. 530. "Furthermore, to underscore the prejudicial nature of the improper charge, the Supreme Court held that the error cannot be harmless." App. 530.

Discussion

Deficient performance

The South Carolina Court of Appeals issued its decision in *State v. King*, 412 S.C. 403, 406, 772 S.E.2d 189, 190 (Ct. App. 2015), six months prior to respondent's trial. The Court of Appeals held in *King* that "specific intent to commit murder [is] an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime." *King*, 412 S.C. at 411, 772 S.E.2d at 193.

This Court affirmed the decision as modified in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). This Court affirmed that specific intent to kill is an element of attempted murder. *Id.* at 55, 810 S.E.2d at 22. "[W]e agree with the Court of Appeals that the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder. Further we agree that this error cannot be deemed harmless." *Id.* at 63-64, 810 S.E.2d at 27.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-88.

The failure to object to an erroneous jury instruction is deficient performance. *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016). *Accord Bailey v. State*, 392 S.C. 422, 436-37, 709 S.E.2d 671, 678-79 (2011) (counsel's failure to object to judge's erroneous supplemental

jury instructions was deficient performance); *McKnight v. State*, 378 S.C. at 48, 661 S.E.2d at 361-62 (counsel was deficient for failing to object to supplemental jury instruction using general criminal intent charge where "extreme indifference to human life" was level of intent required); *Rivera v. State*, 382 S.C. 606, 610, 677 S.E.2d 596, 598 (2009) (counsel's performance fell below professional norms when he agreed to an erroneous jury instruction by the court); *Pauling v. State*, 350 S.C. 278, 565 S.E.2d 769 (2002) (counsel's failure to object to court's erroneous instruction in response to jury question was deficient performance).

"The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. The Supreme Court "will uphold the findings of the PCR judge when there is any evidence of probative value to support them." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Here, it was uncontested the trial court's instruction was erroneous—counsel's failure to object was deficient performance. Because the PCR court heard that trial counsel had no valid reason for his failure to object to the erroneous jury instruction, there was evidence of probative value to support the judge's finding this amounted to deficient performance.

Prejudice

In its petition for certiorari, the state argues the erroneous jury instruction was harmless, and contends the judge erred by finding such an instruction "could not be deemed harmless." This is a contorted reading of the PCR court's order when viewed in the context of the order as a whole and of the PCR hearing.

During the hearing, the PCR judge stated that after he heard from the witness, he would allow the parties "an opportunity to comment on [the erroneous jury instruction] and **why that**

would render it harmless or not . . ." App. 511, ll. 20-23 (emphasis added). The PCR court observed that there "was a **big debate** between the defense counsel and the solicitor as to whether or not he intended to kill her." App. 516, ll. 23-24 (emphasis added). "[W]hich makes it very important that they understand what the law is . . ." App. 517, ll. 1-2. As seen, both the state and the defense addressed whether respondent intended to kill the complainant numerous times during closing arguments. Defense counsel framed this as the "key" issue in the case. App. 403, ll. 4-6.

Under the second prong of *Strickland*, a PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In determining whether a PCR applicant was prejudiced by trial counsel's deficient performance, the appellate court must decide whether an erroneous jury instruction "contributed to the verdict based on all the evidence presented to the jury." *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). "Error is harmless when it could not reasonably have affected the result of the trial." *King*, 412 S.C. at 416, 772 S.E.2d at 196 (quoting *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)).

The PCR judge explained on the record why he found the deficient performance in this case could not be harmless. The court recognized that "in this case" specific intent was "a **major**

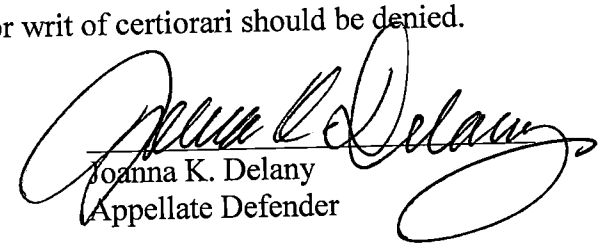
contention" in the trial, so it could not be harmless error to charge general intent. 517, ll. 5-8 (emphasis added). The PCR court recognized the prejudice to respondent where his counsel had argued to the jury that he was not guilty because "he didn't really mean to kill her," but then the trial judge told the jury it did not have to find respondent meant to kill her. App. 517, l. 8-13.

The PCR court recognized that the *King* decision underscored the prejudicial nature of this erroneous charge and made a finding which was supported by probative evidence that counsel's deficient performance prejudiced respondent since, in the PCR court's words, there was a "major contention" and a "big debate" at trial whether respondent intended to kill the complainant.

"Any evidence" of probative value is sufficient to uphold the PCR judge's findings. *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. Certiorari is not warranted here.

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 14th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

CHRISTOPHER MIDDLETON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Christopher Allen Middleton, #213662, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 14th day of January, 2019.

Joanna K. Delany
Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 14th day of January, 2019.

ATTORNEY FOR RESPONDENT

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028.