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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for a Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Mark Hayes, II, Trial Judge
The Honorable Michael G. Nettles, PCR Judge

Appellate Case No. 2018-001188

CHRISTOPHER MIDDLETON. .....Respondent,

v.

STATE OF SOUTH CAROLINA. .....Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the PCR court, by failing to engage in a case-specific prejudice analysis, erred as a matter of law in granting relief on the basis of trial counsel's failure to object to an erroneous jury instruction charging only general intent in an attempted-murder case, because no prejudice existed where the erroneous instruction did not contribute to the jury's verdict, due to overwhelming evidence of a specific intent to kill when Middleton repeatedly told the victim he would kill her and only failed to do so because the attack was interrupted when the victim's friend arrived at the house unexpectedly?

STATEMENT OF THE CASE

Christopher Middleton (hereafter "Middleton") is presently confined in the South Carolina Department of Corrections. During its March 2015 term, the Spartanburg County Grand Jury indicted Middleton for attempted murder and possession of weapon during commission of a violent crime (2015-GS-42-1128). Middleton was represented by E. Joshua Schultz, Esquire (hereafter "Counsel"). Assistant Solicitor Megan Gilmer, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On October 12-14, 2015, the case proceeded to trial before the Honorable J. Mark Hayes, II, and a jury. 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. 414). The jury found Petitioner guilty of the crimes charged. Judge Hayes sentenced Petitioner to thirty years' imprisonment for attempted murder and five years for possession of a weapon, to be served concurrently.

Middleton appealed his conviction, which was perfected by Appellate Defender David Alexander, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Middleton's appeal. The remittitur was issued on May 5, 2017.

Middleton timely filed a PCR application on August 9, 2017, alleging:

1. Ineffective assistance of counsel:
    a. "Failing to object to the trial judge's erroneous jury charge, 'that intent to kill is not an element of attempted murder but there must be general intent to commit serious bodily injury' . . . and that [Middleton] 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."

The State made its return on January 10, 2018. The evidentiary hearing occurred on February 22, 2018, before the Honorable Michael G. Nettles.

The Court granted Middleton's request for post-conviction relief. At the PCR hearing, Judge Nettles stated "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. 515). By written order dated June 8, 2018, Judge Nettles submitted the following reasoning for granting relief:

> The jury charge in the case negated the requirement of any proof of an essential element of the charges against [Middleton]. 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. 530).

The State filed a notice of appeal on June 26, 2018. The petition for writ of certiorari was filed on December 7, 2018. The issue raised on appeal was:

> 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?

Middleton filed his return on January 14, 2019. The South Carolina Supreme Court transferred the case to this Court on January 28, 2019, and this Court granted certiorari, by written order, on November 24, 2020.

STATEMENT OF FACTS

Middleton's wife, Robert Undra Cohen-Middleton (hereafter "Victim"), was lying down in their bedroom, weak from medication and resting for a medical procedure scheduled for the next morning, when Middleton entered and locked the door. (App. 179, 182). Middleton told Victim, "Bitch, I hate you." (App. 182). Middleton, angry with Victim about her desire to get divorce, moved on top of Victim and began stabbing her with a knife. (App. 184-86).

Middleton stabbed Victim five times, including in her left lower stomach, on her left shoulder, the left breast, and on the right hand. (App. 92-93, 156, 185). Middleton told Victim, "I'm gona kill you. I'm already dead. So I might as well kill you." (App. 185). Middleton also kicked Victim in the face, knocking her out of bed. (App. 185). Middleton, sitting on the floor, told Victim, "Tell another lie and I'll stab you in the heart," and "[You] better be glad 'cause I had asked my friend for a gun and I was gona kill all you little mother fuckers." (App. 186-87). Middleton then moved Victim back into the bed and laid beside her as she bled out. (App. 188). Holding the knife to Victim's head, Middleton told her, "If you ain't dead by morning, I'm gona stab you in the head and I'm gona 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. 188).

The next morning Middleton stated, "I told you if you wasn't dead in the morning I was gona stab you in your damn head." (App. 188). Middleton was about to stab Victim when there was a knock on the front door of the house; Victim screamed for her mother, and Middleton immediately left the room. (App. 188).

Victim's friend, Lorena Miller-Bobo, was living with Victim and Middleton at the time. Miller-Bobo left the night before because she heard arguing between Victim and Middleton and

wanted to stay out of the matter. (App. 99-100). The next morning she arrived back at the house, where she knocked on both the front and back doors for several minutes. (App. 109-10). Miller-Bobo then went to the bedroom window, knocked again, and heard Victim moaning. (App. 111). She began knocking on the door again, which Middleton opened. Middleton was holding a silver object in his hand and had blood on his shorts. (App. 111, 116). Miller-Bobo screamed when she saw Middleton, and Middleton took off running into the woods. (App. 116-17, 148). Miller-Bobo entered the bedroom and told Victim that Middleton ran out the backdoor. (App. 188). When Miller-Bobo asked Victim what was wrong, Victim told Miller-Bobo to be quiet, that Middleton would kill her, and then showed her where she was stabbed. (App. 122). Miller-Bobo then called the police. (App. 122).

Meanwhile, that same morning, Victim's mother received a phone call from the hospital where the surgery was set to take place, informing her that Victim failed to appear for surgery. (App. 63). Victim's mother attempted to call Victim, but she did not get an answer. (App. 63). She then called Victim's father and asked him to go to the home to determine why Victim was not at the hospital. (App. 63). Victim's father could not see anything or get anyone in the house to respond to the door, so he told Victim's mother to call the police, which she did. (App. 64). Victim's father and a police officer then entered the bedroom shortly thereafter. (App. 150-51). Miller-Bobo was on scene when the police arrived as well. (App. 155). Victim's father stated that Victim was stabbed, and there was blood everywhere. (App. 150-51).Victim was transported to the hospital by helicopter, where she spent five days in intensive care and received multiple surgeries as a result of her attack. (App. 77, 152, 162, 189).

Officer Wesley Berkley responded to the scene and began an investigation. (App. 158). Officer Berkley retrieved a knife wrapped in a towel from Miller-Bobo, which was later

determined to have Victim's DNA on it. (App. 159, 389). A K-9 track was conducted, and a yellow sweatshirt was located on the ground in the wood line behind the house. (App. 263). There was additional evidence indicating someone had traveled through the woods recently following the incident, consisting of vegetation that was pushed down in that area. (App. 264). The knife was tested by a DNA analyst at SLED, who stated Middleton's DNA was consistent with DNA evidence found on the knife. (App. 343-44). Doctor Jason Johnson, who operated on Victim, testified that if she had not been rushed into surgery, she likely would have died from the injuries, especially when combined with her pre-existing myasthenia gravis condition. (App. 82).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law," *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 at 442, 334 S.E.2d at 814. When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The PCR court, by failing to engage in a case-specific prejudice analysis, erred as a matter of law in granting relief on the basis of trial counsel's failure to object to an erroneous jury instruction charging only general intent in an attempted-murder case, because no prejudice existed where the erroneous instruction did not contribute to the jury's verdict, due to overwhelming evidence of a specific intent to kill when Middleton repeatedly told the victim he would kill her and only failed to do so because the attack was interrupted when the victim's friend arrived at the house unexpectedly.

The PCR court erred in granting Middleton relief because the 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 jury's verdict. Here, 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. 418). Counsel did not object to the instruction.

The State concedes Counsel's failure to challenge the instruction was an error amounting to deficient performance. However, this error was not prejudicial to Middleton, and therefore, this Court should reverse the PCR court's grant of relief.

When analyzing the prejudicial effect of erroneous jury instructions, 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) ("[W]e join our sister circuits in holding that . . . [erroneous jury instructions are] subject to harmless error analysis."). 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). When considering whether an error with respect to a jury instruction was harmless, appellate courts 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). This is determined based on all of the evidence presented to the jury. *State v. Gibson*, 416 S.C 260, 265, 786 S.E.2d 122, 124 (2016); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992).

An appellate court will find an erroneous instruction harmless if it "conclude[s] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. 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).

In this case, the jury instructions were erroneous because the judge stated Middleton

could be found guilty of attempted murder if he showed only a general intent to commit serious bodily injury. However, attempted murder is a specific-intent crime, which requires that "the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact." *Id.* at 56, 810 S.E.2d at 22 (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). "Express malice is the 'deliberate intention unlawfully' to kill a human." *Id.*

In *King*, the South Carolina Supreme Court agreed with this Court and held the trial court's jury instruction *in that specific case* could not be deemed harmless. *King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017). This Court conducted a harmless error analysis regarding 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).

Here, unlike in *King*, the PCR court neglected to conduct a harmless-error analysis at all; instead, it determined that the erroneous jury instructions could never be deemed harmless. Thus, the PCR court wrongfully ruled that an appellate court would be required to find the erroneous jury instruction harmful, based upon *King*, without conducting a harmless-error analysis. This was an error of law. *See State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (An erroneous instruction alone is insufficient to warrant this Court's reversals.").

The State contends that specific intent is readily apparent based upon the facts involved in the case at hand. Middleton specifically stated multiple times that he wanted to kill Victim.

(App. 185-88). Middleton stated he attempted to borrow a gun from a friend so that he could shoot her dead. (App. 186-87). Middleton also waited until Victim was in bed and on medication in preparation for a medical procedure, locked the door behind him, stabbed Victim five times, and kicked her in the face. (App. 179, 182, 184-85). Additionally, seemingly the only reason why Victim was not killed was because there was a knock on the door, and her friends and family showed up looking for her. (App. 188). Further, the attending doctor stated that if she was not rushed into surgery, she likely would have died from the injuries. (App. 394).

These facts are very similar to the one in *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014). In this case, the Court found:

> [T]he evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack. *See* S.C.Code Ann. § 16–3–29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."). Therefore, we hold any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt.

Id. at 319, 755 S.E.2d at 436.

Much like in *Middleton*, Middleton was not prejudiced by the erroneous jury instruction because the only conclusion established by the facts was of a specific intent to kill. Specifically, given the repetitive nature of the deadly assaults with weapons and the fact that the perpetrator in neither case succeeded in their aims only because of an intervening event the perpetrator did not adequately prepare for in attempting to murder the victim, there is no other way to construe the evidence than finding specific intent to kill. Thus, much like in *Middleton*, the Court should find

that the erroneous jury instructions did not contribute to the verdict beyond a reasonable doubt.

Despite Middleton's assertion that specific intent was a "major contention" and a "big debate" at trial, it is unquestionable that Middleton intended kill Victim - he in fact stabbed Victim five times, repeatedly told Victim that he would kill her, and the only reason he did not succeed was because he was interrupted by their roommate and Victim's father. Middleton's conscious object was to kill Victim and the only reason why he did not succeed was because he was unexpectedly interrupted. Even if Middleton now wishes to create a sense of ambiguity around this issue, the facts in this case are clear, and it is unreasonable to argue Middleton did not have a specific intent to kill Victim.

Further, regardless of what the jury instructions consisted of, the jury seemingly was made aware of the difference between general and specific intent before they found Middleton guilty of the crimes charged, given the content of the parties' respective closing statements. Specifically, the State argued in closing:

> We know what happened there and, again, I submit to you the State has given you the tools, what you need to find the defendant guilty of attempted murder in that he had every intent to kill Mrs. Undra on June 19th of 2014, and but for the fact that Loreena Miler-Bobo and Robert Montgomery showed up on June 20th, 2014, that would have happened. These life threatening injuries could have been the end and, ladies and gentlemen, that's that specific intent to kill.

(App. 396-97).

Additionally, the specific intent to kill element was implied in Counsel's closing statement, when he stated the State could not prove attempted murder beyond a reasonable doubt because "if he had wanted to accomplish this, he had the means to do it." (App. 407-08). Further, he stated that "if he wanted to [kill the victim] he could [have done] it. He didn't do it." (App. 404). Though Counsel did not specifically dive into the difference between specific and general intent in his closing statement, what was required to rightfully convict Middleton of attempted

murder remained clear: proof beyond a reasonable doubt that Middleton's conscious aim to murder the victim. The jury, after hearing both arguments, found in favor of the State, seemingly concluding that specific intent to kill was found, regardless of the erroneous jury instructions. Thus, any failure to provide specific intent as an element of the crime in jury instructions is a harmless error that did not contribute to the verdict beyond a reasonable doubt, and Middleton was not prejudiced by counsel's failure to object. Because no prejudice exists, Middleton is not entitled to relief and, this Court should reverse the PCR court's decision granting relief.

CONCLUSION

For the reasons stated above, this court should reverse the PCR Court's findings that Middleton had ineffective assistance of counsel.

Respectfully submitted,

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