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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2017-002107

The State, Respondent,

vs.

John Ernest Perry, Jr., Appellant.

PETITION FOR REHEARING

On April 21, 2021, this Court reversed the trial court's jury instruction regarding the distinction between intent and motive and remanded for a new trial based on a finding that the "trial court erred in the definition of intent it provided the jury" and because the mention of motive "could have confused the jury." This Court misapprehended or overlooked the language of the charge given and the fact that it was very unlikely to confuse the jury. Additionally, the case law from the Eighth Circuit Court of Appeals relied on by the Court is distinguishable from the current case based on the difference in the language used and this Court overlooked other relevant case law and commentary. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial court did not err in giving the instruction given, and affirm Appellant's conviction and sentence.

Initially, this Court overlooked or misapprehended the closing arguments of counsel and the entire charge provided by the trial court. During closing argument, Appellant's counsel focused on a lack of intent to kill. He specifically noted to the jury that attempted murder

required a specific intent to kill. (R.209). Counsel called any shots fired "unintentional" and explained Appellant "did not shoot to kill or attempt to hurt or anything Officer Dalton, absolutely not." (R.210). He ended his argument again reminding the jury that "Mr. Perry didn't have any intent on shooting or killing officer Taylor . . . ." (R.212). The jury clearly knew intent to kill was the relevant and main consideration for their deliberations.

During his charge to the jury, the trial court repeatedly charged the jury that the State had the burden to prove the charge beyond a reasonable doubt. (See e.g., R.214-215; 223). There is no question that the jury understood who possessed the burden of proof and what that burden entailed. Additionally, the trial court charged the jury with the language directly from the statute regarding attempted murder. While this Court spends significant time discussing the charge that could have been given regarding specific intent and the holding in King from the South Carolina Supreme Court, there was **no** objection to the charge given and **no** request for any additional charge. The jury knew intent to kill was required from both the closing argument and from the jury instruction. Further, and most significantly, they knew the State's burden of proof and nothing in the additional charges provided by the trial court changed that burden of proof.

Additionally, the Court overlooked or misapprehended how the trial court charged the jury regarding intent and motive. The court provided the following charge:

> Intent. The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. **When the intent** to do an act that violates the law **exists motive becomes immaterial.**

(R.232) (emphasis added). The charge provided by the trial court correctly explained the difference between intent and motive. It articulated definitions of each term so the jury would

not be confused and would not treat them as one in the same concept. The trial court then specifically told them that the only time motive becomes irrelevant is **after** they find the requisite intent exists. As a result, the jury had to find the intent to do an act that violates the law (in this case kill another person) existed **before** motive became immaterial. The charge never precluded a finding of intent based on the irrelevancy of motive. To the contrary; it maintained the requirement of intent to kill and said that once that intent to kill is found, then and only then, does motive become immaterial. The charge would not have confused the jury or altered what they were required to find in order to convict of attempted murder.

The charge in this case is vastly different than the case cited by this Court to demonstrate how the charge could be confusing. In United States v. Hammond, 642 F.2d 248 (8th Cir. 1981), the prosecutor's statement that the court found misleading suggested to the jury that "motive had no relevance to the issues in this case." The Court found that the very broad statement by the solicitor could have been believed by the jury to eliminate any consideration of motive, including considering it for a determination of the defendant's intent. This is significantly different than in this case when the charge told them it is only immaterial or should not be considered after the jury already found intent. In other words, the charge in this case specifically allowed the jury to consider motive in determining whether a specific intent to kill existed and told them to stop considering motive only after they found intent. This is a correct and non-confusing statement of the law.

Even the jury instruction considered in Hammond was distinguishable from this case. In it, the court noted: "So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of the state of mind or intent of the defendant." The charge provided in Hammond again began with the presumption motive is immaterial. In the current

case, the presumption for the jury is that motive may be material and only "becomes immaterial" after the jury has concluded a specific intent to kill exists in the case. The jury instruction in this case is very different and much less confusing than the one provided in Hammond. It is also significant to note, that even though the Eighth Circuit Court of Appeals had a more confusing instruction to consider, the Court did not find the instruction constituted reversible error.[1] Other cases support giving a similar jury instruction. See United States v. Irizarry, 341 F.3d 273, 304 (3d Cir. 2003) (finding an instruction similar to the instruction in Hammond differentiating between motive and intent and charging: "If the guilt of the defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be or whether any motive may be shown" was properly given); United States v. Simpson, 950 F.2d 1519, 1525 (10th Cir. 1991) (finding instructions which properly differentiated between motive and intent and indicated motive was immaterial were not reversible error).

Further, the Eighth Circuit Court of Appeals has directly found that motive is immaterial even with regard to a specific intent crime once the intent is found. See United States v. Kabat, 797 F.2d 580, 588–89 (8th Cir.1986) (evidence of motive is irrelevant even with regard to a specific intent crime). Other commentators have agreed:

> Once motive is understood as something altogether distinct from intentions,[2] it is clear that motive is irrelevant to specific intent crimes and inchoate crimes such as criminal attempt. "In criminal attempts, the purpose to effect a particular harm is not a motive; it is part of the plan, it implies intention." As long as the person

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[1] Further, the Modern Federal Jury Instructions include a specific suggested instruction related to motive. See United States v. Riley, 90 F. Supp. 3d 176, 191 (S.D.N.Y. 2015) (citing 1–6 Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal, Instr. 6–18 (2011) ("If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be—or whether any motive be shown, but the presence or absence of motive is a circumstance which [the jury] may consider as bearing on the intent of a defendant.")

[2] A distinction the trial court in this case made clear to the jury.

> intended to commit the crime, it simply does not matter whether that person planned to do so for love or for money.

Michael T. Rosenberg, The Continued Relevance of the Irrelevance-of-Motive Maxim, 57 Duke L.J. 1143, 1169–70 (2008) (quoting in part Jerome Hall, General Principles of Criminal Law 88 (2d ed. 1960)).

In this case, the charges given to the court properly explained the State had the burden to prove beyond a reasonable doubt that Appellant had the intent to kill another person. This, as the Court in King determined, is a specific intent to kill. The trial court's follow-up charge defining intent explained "intent is the mental resolution or determination to do [the forbidden act]." In this case, the forbidden act was to kill another person. So if someone has the mental resolution or determination to kill another, they clearly have the specific intent to kill another person.

As a result, the instruction which was given by the trial court properly differentiated between motive and intent, such that the jury should not have been able to confuse or conflate the concepts. Further, the instruction was a correct statement of the law, did not alter the State's burden of proof, and did not lessen the level of intent required to be proven. Finally, the jury instruction did not have the potential to confuse the jury because it made it abundantly clear that motive only became immaterial **after** the jury already determined intent to kill existed.

Also in this Court's opinion, the Court errs in describing the lesser included offenses. This Court states: "Additionally, because attempted murder and the lesser included offenses are all specific intent crimes, the definition of intent could have been confusing for the jury because only specific intent was applicable here." This is an incorrect statement of the law. The lesser included offenses of attempted murder are not all specific intent crimes. For example, assault and battery of a high and aggravated nature, a statutorily defined lesser included offense, is a general intent crime. See State v. Smith, 430 S.C. 226, 234, 845 S.E.2d 495, 499 (2020)

("ABHAN is a general-intent crime . . . ."). While it may be arguable portions of the statute covering assault and battery in the first degree, second degree, and third degree which allow for an attempt to commit the requisite injury may be specific intent crimes, all other portions of those statutes are clearly general intent crimes. See S.C. Code Ann. § 16-3-600(C-E) (Supp. 2020). Accordingly, the State asks this Court to remove any broad statements which could be improperly interpreted as requiring a specific intent for all of the crimes listed in section 16-3-600, which are lesser included offenses of attempted murder.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court did not commit reversible error in charging the jury regarding motive and its immateriality once the jury determined an intent to kill existed, and affirm Appellant's conviction and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Rehearing on Appellant by having a copy emailed to his counsel of record, Robert M. Dudek, at his primary email address provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 6th day of May, 2021.

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Caroline Collins

From: Caroline Collins
Sent: Thursday, May 6, 2021 1:03 PM
To: rdudek@sccid.sc.gov
Cc: Kellner, Haley; William Blitch
Subject: The State v. John Ernest Perry, Jr. (2017-002107)
Attachments: PERRY John - Petition for Rehearing - 2017-002107 (02563376xD2C78).PDF

Good Afternoon Mr. Dudek,

Attached please find a copy of the Petition for Rehearing in The State v. John Ernest Perry, Jr. (2017-002107). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

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