STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From York County
Hon. Paul M. Burch, Circuit Court Judge
Court of Appeals Appellate Case No. 2017-002107

The State, Petitioner,

v.

John Ernest Perry, Jr., Respondent.

Opinion No. 5816 (S.C. Ct. App. re-filed August 4, 2021)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

ATTORNEYS FOR PETITIONER

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on May 6, 2021. The Petition for Rehearing was granted and a substituted opinion was issued August 4, 2021, which did not make substantive changes to the issues being raised in this Petition.

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals erred in finding the trial court committed reversible error in charging the jury with a correct statement of law that "[w]hen the intent to do an act that violates the law exists motive becomes immaterial" as part of his definition of intent as requested by the jury. Even if it was improper to charge the statement, there was no resulting prejudice from the jury instruction.

STATEMENT OF THE CASE

Procedural History

The York County Grand Jury indicted Petitioner for the offense of attempted murder in November 2016. He proceeded to trial before the Honorable Paul M. Burch and a jury on September 18, 2017. On September 21, 2017, the jury found Petitioner guilty as indicted. He was sentenced to life without parole as a repeat offender under section 17-25-45 of the South Carolina Code.

Petitioner timely served and filed a Notice of Appeal. After briefing and oral argument, the Court of Appeals issued an Opinion on April 21, 2021, reversing Petitioner's conviction and remanding for a new trial. The State served and filed a Petition for Rehearing. On August 4, 2021, the Court of Appeals granted the State's Petition in part and issued a substituted Opinion which still reversed Petitioner's conviction and remanded for a new trial.

This Petition for Writ of Certiorari follows.

Factual Background

On June 22, 2016, Officer Dalton Taylor and Officer Shaun Bailey were performing night patrol. They witnessed a vehicle make an improper turn without using a turn signal and initiated a traffic stop. Instead of stopping, the driver of the vehicle jumped out of the car without putting it in park and fled the scene. Officer Bailey secured the vehicle while Officer Taylor pursued the fleeing suspect, who was determined to be Respondent. (T.62; R.26).

Respondent jumped a fence followed by Officer Taylor. As Respondent ran past Officer Taylor, Respondent reached into his waistband and pulled out an object. (T.62-63; R.26-27). Officer Taylor heard the racking of a pistol and then saw Respondent's weapon—a black firearm with elongated silver barrel extension. Respondent fired a shot and then leveled the gun at

Officer Taylor and fired another shot. Officer Taylor had his service weapon drawn and returned fire, striking Respondent. (T.63; R.27). Officer Taylor indicated when Respondent drew his weapon and fired, Respondent was not far from Officer Taylor, roughly five to seven feet, and the area was well lit. (T.63-64; 83; R.27-28; 47). Respondent continued to flee as Officer Taylor took cover. (T.63; R.27).

Officer Taylor indicated Respondent fired in close proximity to him—once not directly at Officer Taylor and once straight at him. Based on his observations, Officer Taylor testified it was not an accidental discharge by Respondent. Officer Taylor explained Respondent tried to shoot him to get away. (T.74; R.74).

An individual residing in an apartment complex near the incident, looked out his window in time to witness the shooting. He indicated a car crashed into the fence at the end of the parking lot, a man ran from the vehicle, and police officers gave chase. The impartial witness testified the man running cleared a fence, doubled back, went down the side of a neighboring house and then fired at the officers. After firing at the officers, the fleeing individual continued running and officers returned fire. (T. 140; R.104). The unbiased witness indicated he had no doubt the man fired at the officers and not in the air multiple times. (T. 141; R.105).

Respondent was later taken into custody at a camper in Fairfield County. (T.167; R.131). The handgun Respondent used to fire at Officer Taylor was also located in the camper. (T.168; R.132).

The case was submitted to the jury after the trial court denied Respondent's motion for a directed verdict and Respondent indicated he would not present a defense. The jury requested several additional instructions after the trial court provided its charge. Additionally, the jury was given an Allen charge and allowed to go home for the night prior to returning the next morning

for further deliberations.[1] The jury found Respondent guilty of attempted murder and, based on prior convictions, the court sentenced Respondent to life without parole.

[1] During final jury deliberations the solicitor and defense had reached a possible plea agreement. However, the State withdrew the plea after discussions with the elected Solicitor and a determination that the State would accept the verdict of the jury. (T.278; R.237).

ARGUMENT

I. The Court of Appeals erred in finding the trial court committed reversible error in charging the jury with a correct statement of law that "[w]hen the intent to do an act that violates the law exists motive becomes immaterial" as part of his definition of intent as requested by the jury. Even if it was improper to charge the statement, there was no resulting prejudice from the jury instruction.

The Court of Appeals erred reversing and remanding Petitioner's conviction and sentence based on its incorrect finding the trial court's jury instruction defining intent constituted an improper jury charge. The jury charge was correct as a matter of law and could not have resulted in confusion for the jury. Further, the jury instruction was not "essentially a general intent instruction" but was a proper instruction on intent in a case which required the jury to find a specific intent to kill existed. This Court should grant the Petition for Writ of Certiorari to find the trial court did not err in giving the instruction.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "'In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 58.

Merits

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

Attempted murder is set forth in section 16-3-29 (2010): "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." Further, this Court recently considered the requisite intent for a charge of attempted murder and concluded that a specific intent to kill was required under the statute. See State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017).

The Court of Appeals spends significant time in the opinion addressing the need for the jury to find a specific intent to kill as discussed in King. Initially, Petitioner never complained about the instructions related to specific intent given and a clear reading of the definition of intent given after the jury's question did not change the required burden of the State to prove a specific intent to kill.

The trial court properly charged the jury on the State's burden of proving Respondent's guilt beyond a reasonable doubt and regarding the underlying offense of attempted murder. The trial court charged the jury, **without any objection**, regarding the crime of attempted murder by reading the statute and stating: "A person who with intent to kill attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." (T.261; R.220). This same statement of the elements of attempted murder was given again **without objection** on a requested recharge. (T.268; R.227). Shortly thereafter, the jury asked the court to define intent and the court offered 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.

(T.273; R.232). Respondent raised his concern with the language that "motive becomes immaterial" in the final sentence of the definition before and after the charge was given. The charge as given, however, was a complete and correct statement of the law, especially when read in conjunction with the elements of attempted murder read twice to the jury.

The charges given to the court properly explained the State had the burden to prove beyond a reasonable doubt that Respondent 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. Unlike the Court of Appeals, this Court should find the jury instruction, when read as a whole

did contain a proper instruction regarding the requisite specific intent to act and did not alter the State's burden to prove a specific intent as opposed to a general intent.

Additionally, the Court of Appeals misapprehends the language of the actual charge given by the trial court in finding it could cause the jury confusion. 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.

As the Court of Appeals noted, motive is not a required element and in this particular case was "not material." As this Court has explained, motive and intent and not synonymous and the trial court's instruction clearly separated the two based on the definition given. See e.g., State v. Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) ("Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or

state of mind is in issue.") (quoting Danny R. Collins, South Carolina Evidence 319 (2d ed. 2000)); see also, State v. Arredondo, 394 P.3d 348, 357 (Wash. 2017) ("Motive and intent are often used interchangeably. They have different meanings. 'Motive' speaks to the 'cause or reason that moves the will,' in other words, what prompted a defendant to take criminal action (e.g., attack a victim). 'Intent' speaks to the 'state of mind with which the act is done,' in other words, what the defendant hopes to accomplish when motivated to take action (e.g., inflict great bodily harm or death).") (internal citations omitted); People v. Hillhouse, 40 P.3d 754, 777 (Cal. 4th 2002) (finding motive and intent are "separate and disparate mental states. The words are not synonyms.").

The trial court's instruction definitely separated the concepts of motive and intent, explaining intent is the state of mind in doing the act, whereas motive is the reason behind doing the act. This is a correct statement of the law. Motive and evidence supporting a motive can assist the jury in determining the intent through circumstantial evidence. However, as our case law makes clear, the motive with which someone operates is not an element the State must prove. See Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512; see also, Hill v. State, 415 S.C. 421, 435, 782 S.E.2d 414, 421 (Ct. App. 2016) (same); State v. Ward, 119 Me. 482, 493, 111 A. 805 (1921) ("[M]otive is only one element in the chain of evidence offered for the purpose of proving the commission of a crime. It is not an essential element. A powerful motive may be found upon all the evidence to be inconsistent with guilt. On the other hand there may be ample proof of guilt without any evidence of motive. It is often impossible to prove motive. **If the other evidence is sufficient, motive becomes immaterial.**") (emphasis added). As this Court found many years ago: "There is no necessity for confounding the terms 'intent' and 'motive.'" State v.

Coleman, 20 S.C. 441, 452 (1884). The Court in Coleman properly recognized that one can establish an intent to act without ever determining the motive behind the act. Id.

While motive was never discussed previously, the mention of the term to the jury should not have resulted in confusion, especially when the term is defined and discussed as a separate concept from intent. The language of the jury instruction, in addition to clearly separating the concepts of motive and intent, required the jury find intent, which it defined as the mental resolution to do a forbidden act—the forbidden act being the killing of another— prior to motive becoming immaterial. In other words, the instruction still required the jury to find a specific intent to kill before it could conclude motive was immaterial. Once the jury found the required element that Respondent acted with a specific intent to kill, Respondent's motive in attempting to kill the officer was immaterial for the jury.

The charge in this case is vastly different than the case cited by the Court of Appeals 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.[2] 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.

[2] 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.")

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,[3] 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 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)).

The instruction 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. The instruction still required a specific intent to kill in order to convict for attempted murder because it required Respondent to have the "mental resolution or determination" to do the forbidden act of killing another person. 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.

Additionally, any error is entirely harmless and Respondent could not show prejudice from the jury instruction. "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. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). In

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

light of the neutral, unbiased witness testimony, which clearly indicated Respondent was firing at the officers and not into the air or by accident, the only conclusion the jury could logically reach was guilty of attempted murder. As a result, the jury charge—even if in error—could not have contributed to the verdict reached by the jury. See e.g., Middleton, at 319, 755 S.E.2d at 436 ("[T]he only conclusion established by the evidence is that Petitioner was guilty of attempted murder."); Arnold v. State, 309 S.C. 157, 170-171, 420 S.E.2d 834, 841 (1992) ("[I]t is clear that the [erroneous jury charge] beyond a reasonable doubt did not contribute to the verdict in this case.").

Accordingly, the State asks this Court to grant the Petition for Writ of Certiorari, hold the Court of Appeals erred in finding the jury charge given was improper, and affirm Respondent's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

September 1, 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From York County
Hon. Paul M. Burch, Circuit Court Judge
Court of Appeals Appellate Case No. 2017-002107

The State, Petitioner,

v.

John Ernest Perry, Jr., Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals by emailing a copy to Respondent's 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 1st day of September, 2021.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

Caroline Collins

From: Caroline Collins
Sent: Wednesday, September 1, 2021 3:30 PM
To: rdudek@sccid.sc.gov
Cc: Kellner, Haley; William Blitch
Subject: The State v. John Ernest Perry, Jr. (Court of Appeals Case No. 2017-002107)
Attachments: PERRY John - Petition for Writ of Certiorari to the Court of Appeals - COA Case No. 2017-002107 (02698201xD2C78).PDF

Good Afternoon Mr. Dudek,

Attached please find a copy of the Petition for Writ of Certiorari to the Court of Appeals in The State v. John Ernest Perry, Jr. (Court of Appeals Case No. 2017-002107). This Petition will be submitted to the South Carolina Supreme Court today via the AIS One Drive System.

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

Thank you!

CAROLINE COLLINS, Administrative Coordinator
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3723 | ccollins@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov