RECEIVED
Apr 28 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

FRANK MUNS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001358

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred when it found counsel provided effective representation in Petitioner's trial for attempted murder, where the jury was not instructed that specific intent to kill was an element of attempted murder, and where the PCR court found the jury was properly instructed on intent, since attempted murder required proof of specific intent to kill 7

Introduction 7

Deficiency 8

Prejudice 11

CONCLUSION 13

ISSUE PRESENTED

Whether the PCR court erred when it found counsel provided effective representation in Petitioner's trial for attempted murder, where the jury was not instructed that specific intent to kill was an element of attempted murder, and where the PCR court found the jury was properly instructed on intent, since attempted murder required proof of specific intent to kill?

STATEMENT

On October 3, 2013, an Aiken County Grand Jury indicted Frank Muns, Petitioner, for attempted murder and possession of a firearm during the commission of a violent crime. App. 481 – 484. Petitioner was tried before the Honorable Doyet Early and a jury, from February 4 – 5, 2014. Petitioner was represented by Michael Routzong. Virginia Sheftall and Jeffrey Slocumb, Jr. prosecuted the case. App. 1.

Petitioner and his ex-wife Kimberly Turner (Complainant) had been married and divorced three times. App. 109, ll. 19-22. Petitioner was in his forties, employed, and had several children with Complainant. App. 160, ll. 4-19. At the time of the alleged offense, Petitioner and Complainant were residing on the same property in an effort to reconcile. App. 95, ll. 1-10. Nevertheless, Complainant was married to another man, Tony Turner, at the time. The night before the incident, Complainant spent the night at a hotel with Turner. App. 95, ll. 11-24.

On April 6, 2013, Complainant drove home in the morning. App. 97, l. 16 – 98, l. 22. It was undisputed that she was in her car outside the home when she was shot with a bullet discharged by Petitioner's gun, which left the bullet lodged near her ribs. App. 101, l. 18 – 103, l. 5; App. 117, l. 20 – 118, l. 22; App. 167, l. 13 – 168, l. 20. It was also undisputed that when Complainant arrived at the property, a cable was up across the driveway. App. 161, l. 15 – 162, l. 16; App. 100, ll. 7-21. The cable had been installed previously so that it could be strung across the driveway at times "to keep other people out" of the property. App. 100, ll. 18-20. How Complainant came to be shot was contested.

Petitioner testified in his defense at trial, and he explained that he was standing next to his truck when Complainant drove up. Petitioner said Complainant saw him and went on past the driveway and turned into the property on a go-kart path to come in a back way. Petitioner

became concerned Complainant's route would cause her to drive over and damage a septic tank. App. 161, l. 10 – 166, l. 3. Complainant rolled her window down and the two began arguing; Petitioner repeatedly told Complainant to stop her car, but she did not. Complainant rolled her window back up. Petitioner had his back against his truck and became afraid Complainant "was going to smush me between the two vehicles." App. 165, l. 19 – 167, l. 16.

"She keeps putting it in forward and reverse maybe three or four times. And I'm telling her to stop and I hit the window a couple times and she still won't stop." App. 167, ll. 17-20. "I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop." App. 168, ll. 3-5. "I hit it again and the gun discharged." App. 168, ll. 8-9. However, at the time, Petitioner did not realize Complainant had been shot. App. 178, ll. 17-19. Petitioner said he was not trying to kill Complainant. App. 168, ll. 21-22.

In contrast, Complainant said she had been getting threatening text messages from Petitioner and was confronted by Petitioner jumping out of his truck with a pistol when she pulled onto the property. App. 100, l. 12 – 101, l. 22. According to Complainant, the two began arguing and Petitioner tried to hit her through the open car window, so she rolled the window up. App. 101, l. 22 – 102, l. 14. Complainant alleged Petitioner said he was going to kill her and tried to break the window out. App. 105, l. 22 – 106, l. 2. Complainant claimed Petitioner pointed the gun at her and smirked, so she closed her eyes, heard a gunshot, and was shot. However, Complainant did not immediately realize she had been shot. App.103, ll. 2-5.

Complainant alleged that when she opened her eyes, Petitioner was pointing the gun at her again, so she drove off towards her trailer where she briefly stopped, blew the horn, and yelled for someone to call for help. App. 102, l. 14 – 103, l. 16. Complainant's daughter came out and Complainant told her to call the police. App. 103, ll. 17-20. Complainant claimed

Petitioner kept yelling and coming after her. App. 107, ll. 11-12. Complainant drove to a friend's house nearby and asked someone to call 911. App. 104, l. 20 – 105, l 7.

Eleven-year-old Minor testified and said she heard a gunshot, went outside, and saw Complainant pull up. Complainant said, "he shot me, he shot me, call the police." Minor saw Petitioner running to the bus with a gun.[1] App. 146, ll. 1-14. Minor did not call 911 from her own house because the phone was missing. App. 147, l. 22 – 148, l. 11. The next morning, Minor saw the missing phone inside Petitioner's truck. App. 153, ll. 9-23.

In charging the jury on attempted murder, the court instructed that:

> [W]e're dealing with the charge of attempted murder. Our law defines the word attempt as an effort to accomplish a crime which does not succeed. **An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended**. The State must show more than mere preparation and intent; there must be some overt act committed in the effort to commit the crime. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and circumstances from which you may naturally infer intent. So in this case, the defendant is charged with attempted murder.
>
> In order to prove the offense of attempted murder, the State must prove beyond a reasonable doubt that the defendant attempted to kill another person with malice aforethought, that malice aforethought being either expressed or implied. Pretty simple. **The State must prove beyond a reasonable doubt that the defendant attempted—and I defined attempt to you already—to kill another person with malice aforethought, and that malice must be either expressed or implied** . . .
>
> So, to prove the offense of attempted murder, the State must prove to you, beyond a reasonable doubt, that the defendant attempted to kill another person with malice aforethought, that malice aforethought being either expressed or implied.

App. 228, l. 25 – 231, l. 6 (emphasis added). There was no objection to the charge and defense counsel did not request the jury be charged that attempted murder requires a specific intent to

---

[1] There were several homes and a bus on the property. App. 111, l. 16 – 114, l. 25.

kill. App. 235, ll. 14-19. Petitioner was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of fifteen years for attempted murder and five years for the weapons charge. App. 485 – 486; App. 242, ll. 1-9.

The Court of Appeals affirmed Petitioner's convictions. App. 322 – 327. After exhausting his direct appeal remedies, Petitioner filed an application for post-conviction relief (PCR) on April 2, 2018. App. 361 – 390. The State made its return and partial motion to dismiss on July 9, 2018. App. 391 – 400. On January 22, 2019, Petitioner filed an amended PCR application, which included his claim that trial counsel was ineffective for failing to object to the trial court's instruction on the intent for attempted murder. The amended application alleged that, "The language of the statute makes clear that a conviction of attempted murder requires the State to prove beyond a reasonable doubt that the defendant had the specific intent to kill the victim. The trial judge gave an intent instruction, but that instruction did not include a requirement that the jury find beyond a reasonable doubt that [Petitioner] specifically intended to kill the victim." App. 401 – 404.

On January 22, 2020, a hearing was held on the matter before the Honorable Courtney Clyburn Pope. Arthur Aiken represented Petitioner. Janell Gregory represented the State. App. 405. At that PCR hearing, trial counsel testified he believed the trial judge correctly charged the jury that "'an attempt includes a specific intent to do a particular criminal act, along with an act falling short of the act intended.' So he charged specific intent." App. 444, l. 13 – 445, l. 12.

In summation, PCR counsel argued that the trial court's jury instructions gave "no clear statement that there must be a specific intent to kill." App. 452, ll. 19-25. PCR counsel noted that although the case was tried prior to *King*,[2] the attempted murder statute itself required the intent

---

[2] *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

to kill. "[S]pecific intent to kill is . . . brought forth by that language in the statute itself." App. 453, l. 20 – 454, l. 6. "[T]hat charge was not given to the jury. There was [no] objection. And, of course, that issue was never raised on appeal." App. 454, ll. 13-18.

The State responded that it did not believe that "*State v. King* changes anything," and that the jury was properly instructed on specific intent. App. 454, l. 23 – 455, l. 19. The State also argued that even if "*State v. King* "change[d] anything, which I don't believe it does . . . defense counsel can't be held to be clairvoyant." App. 455, ll. 6-8.

On October 25, 2021, the PCR court issued an order of dismissal. App. 460 – 480. The order of dismissal stated that the trial court charged the jury that, "An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended . . ." App. 478. "The trial court later refers to that definition in defining the State's burden to prove Applicant's intent to kill another with malice aforethought." App. 479. "This Court finds that the trial court's instruction on attempted murder was proper and instructed the jury that attempt requires the state to prove specific intent." App. 479.

"This Court finds Applicant has failed to show any deficiency on behalf of Counsel for failing to object to the trial court's instruction. Furthermore, this Court finds applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency." App. 479. The order of dismissal also noted that *State v. King*, *supra*, was decided after Petitioner's trial and that attorneys are not required to anticipate changes in the law. App. 478, n. 3.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred when it found counsel provided effective representation in Petitioner's trial for attempted murder, where the jury was not instructed that specific intent to kill was an element of attempted murder, and where the PCR court found the jury was properly instructed on intent, since attempted murder required proof of specific intent to kill.

Introduction

The PCR court's finding that counsel provided effective representation was predicated on a misunderstanding of the law. The State argued and the PCR court found that the jury was properly instructed on specific intent. App. 479; App. 454, l. 23 – 455, l. 5. However, the jury was not instructed on specific intent to kill; it was merely instructed on the specific intent necessary for a generic attempt crime since it was charged on "a specific intent to do a particular criminal act." App. 229, ll. 4-5. Therefore, the jury was not given a clear instruction on specific intent to kill.

The State argued that the jury was correctly charged because *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), did not "change[] anything." App. 454, l. 23 – 455, l. 19. The State was correct that *King* did not change the law, the attempted murder statute's enactment changed the law. *King* merely clarified what the statute mandated. At the time of Petitioner's trial, specific intent to kill was an element of attempted murder. *King* later confirmed this. Defense counsel did not request the jury be charged on specific intent to kill or otherwise object to the trial court's insufficient charge on intent. Counsel's performance was deficient since attempted murder requires specific intent to kill.

Deficiency

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 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687.

"Attempted murder was codified as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished several common law assault and battery offenses including assault and battery with intent to kill, also known as ABWIK. *See* Act No. 273, 2010 S.C. Acts 1947-49." *State v. Taylor*, 434 S.C. 365, 369, 862 S.E.2d 924, 927 (Ct. App. 2021). "It replaced these with new, codified offenses including the crime of attempted murder." *Id*. In *State v. King*, 422 S.C. at 56, 810 S.E.2d at 22, this Court considered whether the offense of attempted murder is a specific intent crime and explained that "a specific intent to kill is an element of attempted murder." "[T]he General Assembly created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either expressed or implied' to require a higher level of *mens rea* for attempted murder than that of murder." *Id.*, 422 S.C. at 61, 810 S.E.2d at 25. "While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed." *Id.*, at 56, 810 S.E.2d at 22.

Counsel should have requested a charge on specific intent to kill. App. 453, l. 20 – 454, l. 6. "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." S.C. Code Ann. § 16-3-

29. The PCR court here noted that counsel is not required to anticipate changes in the law. App. 478 (citing *Thornes v. State*, 310 S.C. 306, 310-11, 426 S.E.2d 764, 765-66 (1993)). However, *King* was not a change in the law. *King* merely confirmed that the statute requires proof of specific intent to kill. *King*, 422 S.C. at 56, 810 S.E.2d at 22. Defense counsel was therefore not required to anticipate a change in the law.

In *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000), this Court "distinguished the common law offense of attempted murder from the common law offense of ABWIK by concluding that attempted murder requires a specific intent to kill, while ABWIK does not require a specific intent." *King*, 422 S.C. at 59, 810 S.E.2d at 24. "Attempted murder would require the specific intent to kill and conduct towards that end." *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285. "[T]he underlying basis for the Court's statement regarding attempted murder has never really been challenged." *King*, 422 S.C. at 60, 810 S.E.2d at 24. Notably, *Sutton*, which explained that the crime of attempted murder would require specific intent to kill, was published fourteen years before Petitioner's trial. As this Court explained in *King*, the appellate decisions of this state, when read as a whole, reflect that specific intent is an element of attempted murder. *King*, 422 S.C. at 57, 810 S.E.2d at 23.

The law itself should have put counsel on notice to request that the jury be charged on specific intent to kill. The existence of *Sutton* at the time of Petitioner's trial was a further fact that should have put counsel on notice that attempted murder requires specific intent to kill. So should the appellate decisions of this state, when read as a whole. Counsel's performance was deficient. *Strickland*, 466 U.S. at 687-88; S.C. Code Ann. § 16-3-29; *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285; *King*, 422 S.C. at 57, 810 S.E.2d at 23.

Even at the PCR hearing in 2020, counsel still misunderstood the law, maintaining that he believed the trial judge had properly charged the jury on attempted murder. App. 444, l. 13 – 445, l. 20. As seen, the trial court did not instruct the jury that attempted murder requires a specific intent to kill. Instead, the trial court instructed that as to attempt crimes: "An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended." App. 229, ll. 3-5. The "specific intent to do a particular criminal act" is not the same as the specific intent to kill. Counsel misunderstood the law and he failed to object to the instructions given as incomplete and he failed to request an instruction that specific intent to kill was an element of attempted murder. This was deficient performance. *See Bailey v. State*, 392 S.C. 422, 436, 709 S.E.2d 671, 678–79 (2011) (counsel's failure to object to erroneous jury instructions and his acquiescence in the judge's erroneous interpretation did not constitute a valid trial strategy); *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997) (trial counsel's failure to challenge first-degree burglary indictment did not constitute valid trial strategy since counsel did not recognize distinction between a barn and a dwelling for the purposes of first-degree burglary).

As seen, the State argued that the jury was properly instructed on intent. App. 454, l. 23 – 455, l. 19. The PCR court agreed with the State's position and stated in the order of dismissal that, "This Court finds that the trial court's instruction on attempted murder was proper and instructed the jury that attempt requires the State to prove specific intent." App. 479. However, the only mental states the jury was instructed on were malice (repeatedly) and a specific intent to "do a particular criminal act" (once). App. 228, l. 25 – 231, l. 6. It was not instructed on specific intent to kill.

Therefore, the instructions on intent were incomplete, since they did not explain that the jury had to find Petitioner acted with malice **and** with the specific intent to kill in order to convict. The PCR court's finding that the jury was properly instructed was an error of law. Its finding that trial counsel was not deficient was based on that error. This Court "will reverse if the PCR court's ruling is controlled by an error of law." *Pantovich v. State*, 427 S.C. 555, 561, 832 S.E.2d 596, 599 (2019) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

Prejudice

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "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 evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation." *Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (quoting *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (internal quotations omitted). "A charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *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, 464 (Ct. App. 2003)). "The substance of the law is what must be charged to the jury, not any particular charge." *Id.*

Intent was a critical issue in Petitioner's trial. It was undisputed that Complainant was shot and that she was hit with a bullet from Petitioner's gun. However, Complainant claimed Petitioner said he was going to kill her before shooting her. App. 103, l. 2 – 106, l. 2. In contrast, Petitioner testified he was merely trying to break out the car window with the gun when it fired. App. 168, ll. 3-9. Whether Petitioner intentionally tried to kill Complainant by shooting at her was thus the ultimate question of fact for the jury. An instruction that attempted murder includes a specific intent to kill was necessary to impart the correct law to be applied to this factual determination.

The instructions given in this case focused on malice and repeatedly emphasized that malice could be implied, only once mentioning a specific intent to "do a particular criminal act" and never using the phrase "specific intent to kill." Applying the instructions as given, it was unclear the jury had to find Petitioner possessed a specific intent to kill. The charge as a whole failed to correctly define the offense as requiring a specific intent to kill and failed to adequately cover the law; Petitioner was prejudiced. *Gibbs*, 403 S.C. at 495, 744 S.E.2d at 176; *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464; *Strickland*, 466 U.S. at 695.

Finally, Petitioner was convicted of attempted murder and of possession of a weapon during the commission of a violent crime. App. 485 – 486. Since the conviction for the weapons charge was dependent upon a finding of guilt for attempted murder, counsel's deficient performance requires a new trial on both offenses. *See* S.C. Code Ann. § 16-23-490(A) (providing that a person in possession of a firearm during the commission of a violent crime as defined in Section 16-1-60 must be imprisoned five years, in addition to the punishment provided for the principal crime) and S.C. Code Ann. § 16-1-60 (providing that under South Carolina law, a violent crime includes attempted murder).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2022.

RECEIVED

Apr 28 2022

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 28th day of April, 2022.