

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 11 2023

S.C. SUPREME COURT

Appeal from York County

Honorable Paul M. Burch, Circuit Court Judge

Opinion No. 28167

THE STATE,

RESPONDENT,

V.

JOHN ERNEST PERRY,

PETITIONER.

APPELLATE CASE NO. 2021-000947

AMENDED PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, John Perry timely petitioned for rehearing on August 9, 2023. This amended petitions only clarifies that Perry’s statement that his gun “went off” accidentally came before the jury through the testimony of Agent Wallace. The petition for rehearing is based on the fact that this Court may have overlooked the fact that in its harmless error analysis it stated: “Importantly, a disinterested eyewitness corroborated Officer Taylor’s testimony that Perry fired directly at him, as opposed to up in the air.” See State v. John Ernest Perry, Jr., Op. 28167 (Filed July 26, 2023), Howard’s Advance Sheet # 26 at 19. This Court has stated that the determination of the credibility of the witnesses is properly left to the jury, and it

is improper on appeal for the appellate court to usurp that function. See State v. Perez, 423 S.C. 491, 499, 816 S.E.2d 550, 554-55 (2018)(credibility of witness or his interest in the result should be left for the jury); State v. Prater, 26 S.C. 198, 26 S.C. 613, 2 S.E. 108, 112 (1887)(it would be invading the province of the jury to make a credibility determination regarding an accomplice's testimony on appeal). Yet this Court respectfully did so in this case by finding the purportedly "disinterested" witness was credible in his testimony, and Perry's contrary statement of what occurred was not credible.

Further, in finding the erroneous jury instruction harmless, this Court wrote: "[W]e cannot say beyond a reasonable doubt that the jury found only general intent to commit a crime [rather than the specific intent necessary for attempted murder]." Opinion at 19. To find the jury instruction error harmless this Court, respectfully, should have been able to conclude that it found beyond a reasonable doubt that the jury *could not have found* only general intent to commit the crime. "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. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578-79 (2019) *citing* 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 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. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 579 (2019) quoting State v. Kerr, 330 S.C. at 145, 498 S.E.2d at 218. See, also, State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct.App. 2014); State v. Otts, 424 S.C. 150, 817 S.E.2d 450 (Ct. App. 2018)(when considering whether an error with

respect to a jury instruction was harmless, an appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict).

This Court found the trial court's instruction to the jury, in response to the jury's question at an undisputedly critical time during its deliberations that "[w]hen the intent to do an act that violates the law exists motive becomes immaterial" was an "incorrect declaration of the law." Opinion at 16. This Court also noted "despite having confusing definitions, motive and intent are distinct legal concepts. There is no necessity for confounding the terms 'intent' and 'motive.'" Opinion at 16.

Thus, the trial court gave an incorrect jury charge on the application of intent and motive where the terms "intent" and "motive" have inherently confusing definitions. Yet the very purpose of "[a] jury instruction is `to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)" State Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). See, also, State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). This is another reason the erroneous jury instruction in this case should not have been found harmless.

The defense here was that Perry's gun discharged accidentally or recklessly. The state maintained that Perry was shooting at the officer directly. Specific intent to kill is an element of the crime of attempted murder. See State v. King, 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017).

This Court noted in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), that "the State's and Burdette's theories of the case conflicted, Burdette claimed to have fatally shot the victim accidentally. *Id.* at 493, 832 S.E.2d at 577." Opinion at 19. Burdette gave several

inconsistent statements and the state maintained Burdette murdered the victim. *Id.* at 493, 832 S.E.2d at 577.

Here, the state’s theory was that Perry shot directly at the officer with the intent to kill him, and that he was therefore guilty of attempted murder. This was dramatically different than Perry’s defense that his gun went off accidentally or as a result of recklessness or negligence. Yet, this Court concluded “unlike in Burdette, we conclude that the trial court’s [jury instruction] error was harmless.” Opinion at 19. This Court may have overlooked the fact that does not seem to be a logical conclusion given that the state in Burdette and in this case claimed the shooting was intentional while the defendant maintained it was an accident.

This Court, respectfully, was judging and weighing the credibility of different witnesses on appeal which it has stated that it will not do. In addition, there were two diametrically different cases presented to the jury by the state and the defense in this case as in Burdette yet this Court granted a new trial for Burdette and found the jury instruction error harmless in this case. Finally, this Court’s conclusion that “we cannot say beyond a reasonable doubt that the jury found only general intent to commit a crime” has the harmless error standard reversed in great deference to the state, and unfairly against Perry. Rehearing should respectfully be granted.

Respectfully submitted,



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This 11th day of August, 2023.