

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
Appellate Case No. 2021-000947

RECEIVED

Aug 16 2023

S.C. SUPREME COURT

The State,

Petitioner,

v.

John Ernest Perry, Jr.,

Respondent.

RETURN TO PETITION FOR REHEARING

On July 26, 2023, this Court properly reversed the Court of Appeals' opinion requiring a new trial based on the jury instruction given by the trial court related to intent and motive. While the State contends the trial court's giving of the jury instruction was not erroneous, any possible error was correctly found harmless by this Court. The Court did not overlook contrary evidence in its determination of harmless error. The Court recognized that the jury instruction could not, beyond a reasonable doubt, have impacted the verdict because the only conclusion the jury could reach was either not guilty or guilty of attempted murder under the facts and circumstances of this case.

Initially, the State notes the challenged jury instruction arose based on a question by the jury indicating a need to define the term intent. The only time the term intent was charged to the jury was in relation to the crime of attempted murder. The jury was charged: "A person with intent to kill attempts to kill another person with malice aforethought, either expressed or

implied, commits the offense of attempted murder.” (App. 230). Further, the only other time the jury heard the term intent related to the malice charge in which the judge explained: “Malice is the wrongful intent to injure another person.” (App.230). This charge also only related to the attempted murder instruction and none of the lesser included offenses. The term “intent” does not occur during any portion of the remaining charge. As a result, the only charge the jury instruction could apply to was the attempted murder instruction, and the instruction explained intent is defined as the “state of mind accompanying an act, especially a forbidden act.” (App. 235). In this particular case, the “forbidden act” can only relate to an intent to kill under the attempted murder charge because it was the only charge which used the term intent. Accordingly, when read as a whole—especially with the instructions on attempted murder and the lesser included offenses—any error in giving the charge could not have impacted the verdict.

Perry seems to also indicate this Court ignored his statement to Agent Wallace that the gun went off and credited the unbiased witness’s testimony over that of Perry’s own statement. The jury did not credit Perry’s statement, so there was no reason for this Court to credit it. His testimony was that the gun accidentally “went off” as he climbed the fence. As a result, if the jury found any credibility to his statement, they could only have acquitted him of all charges because he would not have had any intent—general or specific—to commit any crimes towards the officers.

The only evidence which could have been credited by the jury in reaching its verdict established Respondent’s clear intent to kill Officer Taylor in his attempt to evade capture. Officer Taylor explained the weapon was pointed right at him when fired. Further, and most significant, the neutral, unbiased witness’s testimony from the resident who saw the incident clearly indicated Respondent fired multiple shots “at the officers” and not into the air or by

accident. (App. 107) The only conclusion the jury could logically reach was guilty of attempted murder. See e.g., State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (“[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.”).

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing, reverse the Court of Appeals decision, and affirm Respondent’s conviction and sentence.

Respectfully submitted,

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