

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

06-1115

STATE OF LOUISIANA

VERSUS

JAKE C. DESOTO

COOKS, J., concurs.

I concur in the majority opinion's result and write separately to specifically note the decedent in this case was not wearing any identifiable "hunting orange" clothing. The record is simply devoid of any evidence tending to show or even suggest that Defendant knew he was shooting at his friend or anything other than a deer. The State "hangs its hat" on the belief that Defendant may have been on his cell phone shortly before he fired the fatal shot and, thus, may have been distracted because he was conversing with his girlfriend. This apparently is the sum total of the State's evidence which it relies upon in asserting that it proved beyond a reasonable doubt that Defendant was guilty of criminal negligence. Even accepting this evidence as true and viewing it in the light most favorable to the prosecution, as required by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *rehearing denied*, 444 U.S. 890, 100 S.Ct. 195 (1979), it does not prove the essential elements of criminal negligence. La.R.S. 14:12 defines criminal negligence as follows:

Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

The record did not indicate that Defendant consumed any alcoholic beverages or engaged in any horseplay. Moreover, the record established Defendant believed his friend was on the deer stand. The only opposition presented by the State to this

unrefuted testimony are the State's inferences on what may have "possibly" happened. The State, in arguing that Defendant's conduct amounted to a gross deviation below the standard of care expected from a reasonable hunter in similar circumstances, noted that it was getting dark and that a hunter clearly should not fire his gun when he is not absolutely sure what is in his sight. The fact that Defendant violated a rule of hunting does not necessarily equate to criminal negligence. The State's position that a hunter must always be certain what he sees in his sight before shooting would mean we could never have a hunting "accident," but simply *de facto* acts of criminal negligence. To the relief of many, including our esteemed vice president, this is not the intent of the statute. As Chief Judge Thibodeaux explains in the majority opinion, we have always attempted to discern the belief or intent of the Defendant at the time of the shooting. In this case, the State offered no evidence to indicate this Defendant believed or had reason to believe that his friend was the target.

I also express concern with the recusal issue that was originally presented on appeal. However, I decline to address this issue as I have joined in the majority opinion's reversal of Defendant's conviction.