

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

**06-1115**

**STATE OF LOUISIANA**

**VERSUS**

**JAKE C. DESOTO**

**PICKETT, J., dissenting.**

For the reasons set forth in the original opinion and set forth herein, I respectfully dissent.

I disagree that the issue before us, as set forth in the majority opinion, is whether the defendant believed he shot at a deer. The issue that had to be determined by the *finder of fact*, the jury, was whether, considering *all the evidence before them*, “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.” La.R.S. 14:12. The issue before *this court* is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Captville*, 448 So.2d 676 (La.1984). As set forth more fully in the original opinion, I find when reviewed under the *Jackson* standard, there is sufficient evidence to affirm the conviction.

As I previously noted the jury could have concluded, based on the evidence which is thoroughly reviewed in the original opinion, that the defendant shot without

clearly identifying his target. Further, the jury could have concluded, based on the defendant's statement, that the defendant actually saw Roy enter the field before firing his gun. Either, when viewing the evidence and circumstances as a whole, would have been a gross deviation below the standard of care expected of a reasonably careful person under like circumstances.

The Supreme Court has recently reminded us in *State v. Ware*, 06-1703, p. 8 (La. 6/29/07), \_\_\_ So.2d \_\_\_, \_\_\_, that

a reviewing court may impinge on the trier of fact's discretion "only to the extent necessary to guarantee the fundamental due process of law." *State v. Mussall*, 523 So.2d 1305, 1311 (La.1988).

In *Ware*, the court of appeal reversed the defendant's conviction of attempted forcible rape. The Supreme Court reinstated the conviction, finding that "the court of appeal erred by substituting its appreciation of the evidence for that of the factfinder" and noted the appellate court "failed to accord due deference to the rational credibility choices made by the jury." *Ware*, \_\_\_ So.2d at \_\_\_.

In the matter before us, the majority has obviously substituted its appreciation of the evidence for that of the factfinder. The majority has "failed to accord due deference to the rational credibility choices made by the jury" which, as the Supreme Court points out in *Ware*, is improper. I note, for example, that the writing judge states as a fact that the defendant did not see Roy enter the field. There was, in fact, testimony from the defendant that could have caused the jury to conclude that the defendant did see Roy enter the field. This court's substitution of its conclusions regarding the evidence for the conclusions of the jury is exactly what the Supreme Court in *Ware* reminds us is prohibited.

In setting aside the conviction, the majority has totally ignored the standard set forth in *Jackson*, 443 U.S. 307, which clearly sets forth that:

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light ***most favorable to the prosecution***, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged.

*State v. Leger*, 05-11, p. 91 (La. 7/10/06), 936 So.2d 108, 170 (emphasis added).