STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No: 2015-002315

THE STATE,

Appellant,

vs.

DAVID Z. LEDFORD,

Respondent.

RETURN TO MOTION TO DISMISS APPEAL AND REMAND THE CASE

Appellant, by and through undersigned counsel, making Return to Respondent Ledford's Motion to Dismiss Appeal and Remand, would respectfully show this Court:

I.

Respondent Ledford was indicted in Greenwood County for inflicting great bodily injury upon a child in violation of S.C. Code Ann. § 16-3-95 (2003 & Supp. 2014). The indictment in this case states that Respondent Ledford:

> On or about December 16, 2013, in Greenwood County, **willfully** and unlawfully inflict great bodily injury upon a child, in that said defendant did violently shake and/or hit the victim . . . which acts caused great bodily injury to the child, in violation of the provisions of section 16-3-95 of the South Carolina Code of Laws, 1976, as amended.

(See Indictment attached as Exhibit A to Respondent Ledford's Motion to Dismiss and Remand). The statute referenced in the indictment and prohibiting the conduct, Section 16-3-95, states that "[i]t is unlawful to inflict great bodily injury upon a child." The statute does not contain the word "willfully."

Respondent Ledford proceeded to jury trial before the Honorable Eugene C. Griffith, Jr., and a jury. A jury charge conference was held during trial and after the close of all of the evidence and the trial court's denial of Respondent Ledford's directed verdict motion. At the conclusion of the jury charge conference, the trial court orally ruled it would give Appellant's Request to Charge No. 1, to include the definition of "willfully" but to omit the last sentence of the Request to Charge. Respondent Ledford states that the trial court pointed to the State's use of the word "willful" in the indictment in support of its decision. Appellant's Request to Charge No. 1 states:

> "It is unlawful to inflict great bodily injury upon a child." To violate this statute, the state is required to prove that Zack Ledford acted wilfully. To act wilfully, the state is required to prove that Mr. Ledford knew his act would inflict great bodily injury upon a child. It is not sufficient that the state prove that he acted negligently, grossly negligent or reckless in his action. Such actions are not wilful as alleged in the indictment.

(See Defendant's Request to Charge No. 1 attached to Respondent's Motion to Dismiss and Remand as Exhibit B). The State objected to the jury instruction which was contrary to and added an element to the statute prescribing the offense. The State expressed a desire to appeal the ruling. The trial court agreed to recess the trial and hold the matter in abeyance without releasing the jury to allow the State to appeal its ruling. Respondent Ledford consented to this request.

On November 5, 2015, the State filed and served notice on appeal from the oral ruling. In the notice of appeal, the State indicates that it appeals because "that the trial court's order affects a substantial right and prevents a judgment from which an appeal might be taken."

II.

Respondent Ledford moves this Court to dismiss the State's appeal asserting "the decision of the trial court to charge the jury the definition of willfully as alleged in the State's indictment is the State's acknowledgment that its evidence is insufficient to sustain a conviction." Respondent Ledford contends the State has no right to appeal a mid-trial jury charge ruling which substantially impairs the prosecution despite the fact that the trial court recessed the trial to permit the State to appeal and the State will be left without a remedy for the legal error committed by the trial court if it is not able to appeal before final judgment.

Respondent Ledford also asks this Court to remand the case to the court of general sessions for dismissal of the charge which is, in essence, is his request for this Court to consider the merits of the appeal without a transcript or briefs and to find that remand for dismissal by the court of general sessions is appropriate.

The State submits that Respondent Ledford's arguments have no merit.

III.

To prevail in his request to dismiss the appeal, Appellant must show that the State is prohibited from taking an appeal from the trial court's interlocutory ruling in this case. However, Respondent Ledford arguments are faulty. The ruling is immediately appealable because, without recourse to the appellate court, the State will be precluded from correcting the error in the trial court's ruling and left without a remedy.

The right to appeal is controlled by statute. Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988). In the absence of a statute or rule that permits the immediate appeal of an interlocutory order, only final orders are generally appealable. Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996); Woodward v. Westvaco Corp., 319 S.C. 240, 319 S.E.2d 392 (1995). An order is interlocutory and not final when "there is some further act which must be done by the court prior to a determination of the rights of the parties . . . ." Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). The purpose of this general practice is to prevent piecemeal appeals. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89 (2000). Interlocutory decisions or rulings are generally not immediately appealable because appellate review is available after the final judgment. Id.

However, South Carolina, like most jurisdictions, confers the right to the immediate appeal of an interlocutory order in S.C. Code Ann. 14-3-330 (1976 & Supp. 2014), which outlines appellate jurisdiction and delineates the categories of interlocutory decisions subject to immediate appeal. See also Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision."); State v. Miller, 289 S.C. 426,427, 346 S.E.2d 705, 706 (1986) ("In both state and federal court, the right to appeal is conferred by statute or rule, S.C. Code Ann. § 14-3-330 (1976) . . . ."); Woodward v. Westvaco Corp., 319 S.C. 240, 319 S.E.2d 392 (1995) ("Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330.").

Specifically, S.C. Code Ann. § 14-3-330 (2) confers jurisdiction upon our appellate courts for the correction of errors of law when the order or ruling affects "a substantial right

when such order . . . in effect determines the action and prevents a judgement from which an appeal might be taken . . . ." An order affecting a "substantial right" is defined as one which discontinues an action, **prevents an appeal**, grants or refuses a new trial, or strikes an action or defense. Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993); see also Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89 (2000) (stating that immediate appeals are permitted where a substantial right could not be vindicated on appeal). An immediate appeal of an interlocutory order is permitted when no appellate review is available to correct the trial court's error after the final judgment. Id. (citing Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985)). In South Carolina, an immediate appeal may be taken where the rights of the State would be substantially impaired if the appeal is not heard. When error in the decision or ruling cannot be vindicated on appeal, a substantial right is involved. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000).

In the context of State's appeals in criminal cases and based upon double jeopardy considerations, this language has been construed to prohibit State's appeals after the defendant has been acquittal based upon the insufficiency of the evidence. State v. Holliday, 255 S.C. 142, 177 S.E.2d 541 (1970); State v. McWaters, 246 S.C. 534, 144 S.E.2d 718 (1965); see also State v. Ludlam, 189 S.C. 69, 200 S.E. 361 (1938) ("The ultimate of the decisions . . . is that when in the trial, or examination, the result amounts to a final determination of the case, the State cannot appeal. For instance, if there be a trial and the defendant is acquitted . . . ."); State v. Lynn, 120 S.C. 258, 113 S.C. 74 (1922) (The State has no right to appeal from a judgment of acquittal).

However, the State may appeal orders and rulings that significantly impair the prosecution before final judgment or when the jury's guilty verdict is set aside based upon an

error of law. State v. Thompson, 348 S.C. 152, 348 S.E.2d 152 (Ct.App. 2002) (The State may appeal an order setting aside a jury's guilty verdict when the order is based upon an error of law); Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct.App. 1999) ("Because it so significantly impairs the prosecution of a criminal case, an order which prohibits the State from withdrawing a plea offer is directly appealable by the State under § 14-3-330(2)(a)."); State v. Saunders, 324 S.C. 314, 476 S.E.2d 711 (Ct. App. 1996) (The State may appeal an order quashing an indictment on double jeopardy grounds); State v. McKnight, 287 S.C. 157, 337 S.E.2d 208 (1985) (the State may appeal a pretrial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case); State v. Dasher, 278 S.C. 395, 297 S.E.2d 414 (1982) (The State may appeal an order setting aside a conviction where the order is based upon an error of law. Double jeopardy concerns are not implicated because the judge ruled in the defendant's favor after a verdict of guilty); State v. Holliday, at 142, 177 S.E. at 542-543 ("[T]he State has no right of appeal from a judgment of acquittal in a criminal case . . . unless the verdict of acquittal was procured by the accused through fraud or collusion." "However, since double jeopardy is not involved . . . , we have held that the State may appeal from an order quashing an indictment . . . or from a judgment reversing or setting aside a conviction on purely legal grounds."); State v. Royster, 181 S.C. 269, 186 S.E.2d 921 (1936) (The State may appeal an order that has the effect of applying to any venire of jurors by which the defendant might be tried); State v. Deschamps, 126, S.C. 416, 120 S.E. 491 (1923) (The State may appeal an order setting aside a conviction before sentencing, based upon an error of law.); State v. Johnson, 76 S.C. 39, 56 S.E. 544(1907) (The State may appeal from the circuit court order where the defendant was convicted in city court for violating an ordinance and the circuit court held the ordinance unconstitutional); State v. Long, 66 S.C. 398, 44 S.E. 960 (1902) (stating State may

appeal an order dismissing the prosecution); State v. Bouknight, 55 S.C. 353, 33 S.E. 451 (1899) (stating that the State may appeal from a motion to quash the indictment granted during trial after the trial was suspended for appeal because the order would end the prosecution and the State would be denied appellate review of the order).

The statute referenced in the indictment and prohibiting the conduct, Section 16-3-95, states that "[i]t is unlawful to inflict great bodily injury upon a child" and does not contain the word "willfully." The word "willfully" in the indictment is mere surplusage and the trial court's ruling improperly alters the elements of the offense and heightens the evidence the State must present to the jury as specifically delineated by statute after the State's evidence has been presented. State v. Toliver, 304 S.C. 298, 403 S.E.2d 676 (Ct.App. 1991); State v. Thompson, 305 S.C. 496, n.1, 409 S.E.2d 420 n.1 (Ct.App. 1991). Because the statute is silent as to the mental state, it was only necessary for the State to show, at most, criminal negligence or indifference or, alternatively, strict liability. See State v. Taylor, 323 S.C. 162, 165, 473 S.E.2d 817,818 (Ct. App. 1996); State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). The trial court's ruling in this case is premised upon legal error that heightens the State's burden and materially impairs its ability to proceed when the jury charge adds a non-existent element after all of the State's evidence has been presented. Because jeopardy has attached preventing an appeal after final judgment, no appellate remedy exists to vindicate the substantial right of the State to an proper jury instruction other than to permit an immediate appeal pursuant to S.C. Code Ann. § 14-3-440 (2).

IV.

Respondent Ledford also asks this Court to remand the case to the court of general sessions to dismiss the action. He takes the position that the appeal constitutes a concession by

the State that its evidence is insufficient to support a conviction. He asks this Court to remand for the court of general sessions to dismiss the charge against him. Respondent Ledford contests appellate jurisdiction and that is the only issue properly before this Court at this stage of the appeal. If he is correct, and this Court lacks appellate jurisdiction, then this Court is without authority to rule or comment on anything other than the issue of appealability and appellate jurisdiction. If this Court finds the order is not appealable, the only action it can take is to dismiss the appeal for lack of jurisdiction. If the appeal is properly before the Court, then the appeal will proceed, the transcript will be obtained and the parties will submit briefs for this Court's consideration on the merits. Respondent Ledford's request is without basis.

V.

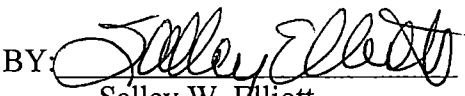
In conclusion, the State submits that the Motion to Dismiss and Remand must be denied; otherwise the State will be left without a means to correct a legal error that substantially impairs the prosecution.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

November 30, 2015

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THE STATE,

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Dismiss Appeal and Remand the Case on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney C. Rause Wise, Esquire, 305 Main Street, Greenwood, South Carolina 29646.

I further certify that all parties required by Rule to be served have been served.

This 30th day of November, 2015.

Angela Bennett

ANGELA BENNETT
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

November 30, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. David Z. Ledford
Appellate Case No: 2015-002315

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return to Motion to Dismiss Appeal and Remand the Case along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: C. Rauch Wise, Esquire
Ms. Trisha Allen