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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Court Judge

Order (S.C. Ct. App. filed February 5, 2016)
Appellate Case No: 2015-002315

THE STATE

PETITIONER,

v.

DAVID Z. LEDFORD

RESPONDENT.

APPENDIX
Volume 2 of 2

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1 be moved in. Never had it done before.
2 JUROR: Will we get a few days notice?
3 THE COURT: Oh, yeah. I'm talking a couple of weeks.
4 Because my schedule is very predictable. I'm coming back in
5 two weeks, and then maybe in December for a week, and then
6 January through June I'm here maybe six or eight weeks. So
7 it'll be one of my weeks, because I'm marshalling the case
8 through. Judge Addy got started.
9 JUROR: When will you be back?
10 THE COURT: Two weeks, December, January or something.
11 It's on the computer. You all can look it up.
12 JUROR: Do you have an idea how long it will take for a
13 ruling to come back from Columbia?
14 THE COURT: It could be very quickly. It could be
15 fairly quickly. We might get together in two weeks. But
16 we've only got a half a day, a day more or less to instruct
17 you, let the lawyers do their summaries. So it might be
18 that we say, okay, how about Thursday of the week after
19 next, you know. I'm going to give you some lead time so we
20 can try to get you together.
21 JUROR: So they're trying to do is determine how to be
22 charged?
23 THE JUDGE: No, no, no. My -- I call them charges. My
24 instructions to you are. The law of South Carolina says
25 one, two, three. The lawyers and I have a disagreement on

1 what I ought to say to you. They want that -- in Columbia,
2 Judge Griffith, please instruct them this way, and we
3 believe that would be appropriate.
4 JUROR: So in the meantime --
5 THE COURT: In the meantime -
6 JUROR: But we have a disagreement somewhere to create
7 this, is that correct?
8 THE COURT: The lawyers and I disagree. The lawyers
9 and I disagree.
10 JUROR: I understand. And you just said it's going to
11 be your way whether they like it or not.
12 THE COURT: No, no, no. I'm not going to say which ,
13 lawyers are right and which lawyers are disagreeing with me.
14 It's just the lawyers and I are disagreeing. But when I get
15 back I'm just going to give you the instruction like
16 Columbia says and then I'll be right.
17 JUROR: And you think you're right?
18 THE COURT: Oh, yes. I won't brag about it. Everybody
19 likes to be right. But that's what I mean. The thing is
20 certain things are -- for instance, a jury verdict, once you
21 all deliberate and you all reach a verdict, civil case,
22 criminal case either one, 12 people agree unanimously. You
23 can't get behind that. That's done. A Judge's mistake is
24 the only mistake can be corrected. That's why they got to
25 ask now. Okay? They can correct my mistakes. They can't -

1 - you all don't make mistakes in the eyes of the law. A
2 jury, 12 people reaching a consensus, either way it stands,
3 period. If it was the instructions given to you wrong,
4 evidence admitted improperly, those are the Judge's mistake.
5 Do it again.
6 JUROR: Am I to understand we're not to breath
7 anything about this case until --
8 THE COURT: You all got to keep quiet. You all got to
9 not let anybody ask you. If they do, say, look, I'm told
10 not to say a word. I want you all to take your notes with
11 you. You all keep those. Those are your all's.
12 JUROR: Tear them out of your notebooks.
13 THE COURT: Take them out of the notebooks.
14 (Everyone speaking at once.)
15 THE COURT: The thing is, I don't want anybody to
16 contact you. If they do say, look, I'm told not to
17 communicate with anybody about the case. Those are the
18 instructions. And I told you, what you all need to decide
19 on the case you get from here, not outside.
20 Now, once we reconvene I'm going to ask you did
21 anything happen that we need to know about, and I'll try to
22 correct that. I hope it doesn't happen. But caution
23 anybody about asking you about your service on the jury.
24 Nope, I can't talk about the case. It's not over yet.
25 Leave it at that. You can't talk to each other about it.

1 You can't talk to your pets about it, nobody.
2 JUROR: When we come back how long will we be here?
3 Just the day?
4 THE COURT: For one day. Because, I mean, what's left
5 is the lawyers are arguing, 30 minutes apiece, my
6 instructions are about 30 minutes and you all deliberate.
7 Once you -- if it takes two hours, four hours, whatever
8 amount of time to deliberate and reach a consensus is what
9 you all got left to do. So there'll be no more witnesses.
10 It will be we're going to summarize the case, the other side
11 will summarize the case, and I'll give you the instructions,
12 the charges on the law. But no, the charges that have been
13 brought, that's been cast. You all got what you're going to
14 get. Except my instructions that we're not agreeing on.
15 Any questions? We've got your name, number and
16 whatnot. And while I got you here, if I had to pick a day
17 of the week that's going to be the least inconvenient,
18 because I got court weeks, is Wednesday better, is Monday
19 better for you all? If I gave you that question could you
20 all talk out -- think out loud? Is any day better or worse
21 than the other?
22 JUROR: The worst is Monday.
23 THE COURT: I think a Thursday would be a good day, but
24 -- how's that sound? That way, you know, we get done before
25 the weekend. Off for the weekend.

1 JUROR: We have to have it before Friday.
2 THE COURT: Well, I'm going to push for a Thursday most
3 likely of whatever upcoming week. Once we get an answer and
4 we start trying to reconvene I'm going to say, okay, folks,
5 Thursday of so and so week. I think I can -- I'll promise
6 at least 10 days notice.
7 JUROR: At least two days prior to come.
8 THE COURT: Yeah. I'm not going to call you Wednesday
9 night and say see you first thing in the morning. I will
10 not do that. I promise you. You all need a little warning
11 because I want you all here and everybody ready to go to
12 work. The last day of February will be seven years I've
13 never had this happen. But that's why we do what we do.
14 Any other questions?
15 JUROR: Well, we were told that like once we go back
16 and discuss what we have to discuss, if we had any questions
17 --
18 THE COURT: You put them in writing.
19 JUROR: -- we could write them. Will we still be able
20 to do that when we come back that day?
21 THE COURT: Oh, yeah. Well, see, here's what I tell
22 jurors, and this would be more appropriate. I tell jurors
23 this all the time. I say, look, like the DVDs, they're in
24 evidence. You call can see them. Pictures, you can see
25 them. Testimony, she's got it transcribed on that machine

1 and she's got a voice recording of the testimony. And
2 that's why she was moving this little device here and there
3 tying to pick up the voice. So if you all need to hear so
4 and so's testimony, you know, you all focus in on somebody's
5 testimony, I thought he said so and so, I thought he said so
6 and so else. Let's here it again. You all have that
7 option, too. Once you all start deliberating if you all got
8 questions of law, what's the law mean, I want testimony
9 again, that kind of thing, you call can get that.
10 JUROR: Judge, she's got a question.
11 THE COURT: Yes, ma'am.
12 JUROR: Working at Walmart, I might need a note to
13 state that --
14 THE COURT: The lady right here can hook you up. The
15 Clerk of Court, that's what she does. Not a problem.
16 JUROR: Thank you.
17 JUROR: Your Honor, maybe you just addressed the
18 question and I didn't understand. You said there's possibly
19 10 days, two weeks here, could be longer, could be less.
20 THE COURT: Yeah. I'm going to have to be scheduled to
21 come back, or swap back with Judge Addy, or something along
22 those lines. Be back here in town to finish you all up.
23 JUROR: These people on the stand right here, there's a
24 very good possibility we could forget what some of these
25 people said.

1 THE COURT: She's got it recorded -

2 JUROR: Could we have a transcript of that prior to --

3 THE COURT: I'll talk about that. Normally we can just

4 replay testimony for you that she's recorded, so it'll be

5 live question/answer by the lawyers. That's a very real

6 possibility in this case. Most of the time -- you know, you

7 just heard it yesterday and today, you just go deliberate

8 and you call can deal with it. If we're talking two weeks

9 from now, I wouldn't be surprised if you all don't ask for

10 several portions of testimony to be replayed. I'd be

11 surprised.

12 JUROR: Yeah, me too.

13 THE COURT: And I would encourage it, to listen to it,

14 whatever you need to do, because, I mean, it's an important

15 case. I want you all to be comfortable --

16 JUROR: But, you know, holidays are coming up, too.

17 Thanksgiving is a Thursday. So that eliminates one

18 Thursday. We're not going to come on Thanksgiving.

19 THE COURT: Two weeks around Christmas there won't be

20 court, Thanksgiving. Now -- we'll just do the best we can.

21 Okay?

22 JUROR: So this could take us into next year?

23 THE COURT: It could potentially.

24 JUROR: This is bad.

25 THE COURT: I agree.

1 JUROR: Free to speak freely?

2 THE COURT: Yeah.

3 JUROR: Why in the hell can't you all do this before
4 now?

5 THE COURT: I can't answer that. I can't answer that.
6 I agree with you on --

7 JUROR: This is very -- still speaking freely?

8 THE COURT: Yes, sir.

9 JUROR: This is very imposing upon us people. Very
10 imposing, Your Honor.

11 THE COURT: It is.

12 JUROR: This is pathetic here.

13 THE COURT: I do my best --

14 JUROR: I understand.

15 THE COURT: -- to impose on you as least as possible.
16 But all I can say is I'm sorry it's come up and I'm going to
17 do my best to make certain the trial is conducted fairly,
18 and I apologize for any inconvenience, but I know it is.
19 That's one reason I bring candy for the jurors. I try to
20 take care of them. I try not to start late.

21 JUROR: We thought you needed our address to send us
22 boxes of candy.

23 THE COURT: Not what I figured. Most likely it'll be
24 the Clerk of Court calling you about when to come back in,
25 but --

1 JUROR: So they will call us? Not by mail? Either
2 one?
3 THE COURT: I just think they should call you to speak
4 to you. But if they can't get you on the phone they'll send
5 you a letter, throw an email, either way.
6 Thank you all for your patience.
7 (Whereupon, the jury was released.)
8 MR. WISE: Your Honor, I do not think, and I don't
9 think the State can produce evidence on the record, that
10 would show a manifest necessity for an interlocutory appeal.
11 It certainly didn't substantially impact our ability to
12 present evidence in the Court. It only impacted the jury
13 charge. Using a word that they elected to put in the
14 indictment, they elected to give me notice of a willful
15 violation, and there's been no showing that complies with
16 the statute that it substantially impacts our ability to try
17 this case. Granted it has some impact, but it certainly
18 does not have a substantial impact. And therefore I want
19 the record to -- if they have a basis for saying there's
20 substantial impact I think they should maybe even put it on
21 the record.
22 MR. BROWN: Judge, we believe there's substantial
23 impact based on the language that would have been read per
24 the jury charge would have been contrary to what the State
25 believes the intent of the statute was when it was written.

1 Now, that would impact -- could potentially impact the
2 verdict on this case, and that would impair -- substantially
3 impair the State's case once it got to jury. So I think
4 that substantially impacts our case if the wrong jury charge
5 is sent to the jury.
6 MR. WISE: I think basically a substantial impact
7 basically means they can't win without it. So if they're
8 representing to the Court they can't win without a willful
9 charge, well, that's one representation.
10 THE COURT: Now, also for the record, I made a Court's
11 exhibit of the charge that I completed with Mr. Wise's
12 requested charge with one sentence -- the last sentence
13 struck through. And I'll represent to the lawyers, and for
14 the record, that the printed out version of my instructions
15 very likely I would not have read. And if so instructed, I
16 will not read verbatim. Mr. Wise's requested charge being
17 only three or four sentences, I probably would read that
18 verbatim since it was a specific request. But my charge of
19 18 to 20 pages, I would editorialize a little bit through
20 it. And so, that's not a verbatim representation of what I
21 do. So that's for the record. And it's been made Court's
22 Exhibit Number 1 -- 3. Hopefully we'll see you shortly.
23 MR. WISE: I have a feeling that if it comes back
24 quickly the Court will excuse you to finish this one up.
25 THE COURT: I may see you on a Thursday of some week.

1 MS. WHITE: And, Judge, we've got the Notice of Intent
2 printed. We're just going to make some copies and get it
3 filed.
4 THE COURT: Good enough.
5 (Whereupon, there was a brief pause in the proceedings.
6 MS. WHITE: Just for the record, I'm assuming all the
7 conditions of his bond that he's out on are all still in
8 effect?
9 MR. WISE: Yeah.
10 THE COURT: Sure. I'm not going to take him into
11 custody. He's going to appear. Just remind him he's on
12 bond.
13 (End of requested transcript of record)
14
15
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1 Certificate of Reporter

2 I, the undersigned, Tara T. Scott, CVR, Official Court
3 Reporter for the Eighth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all the
6 proceedings had and evidence introduced in the trial/hearing
7 of the captioned case, relative to appeal, in the Circuit
8 Court for Greenwood County, South Carolina, on the 2nd-5th
9 day of November, 2015.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12 April 7, 2016

13

14

15 Tara T. Scott

16 Circuit Court Reporter

17

18

19

20

21

22

23

24

25

WITNESSES

Jeff Gossett

Greenwood County Sheriff

WARRANT NUMBER

DIRECT INDICTMENT

2015D2400100039

True Bill

[signature]

Foreman of the Grand Jury

Date: 5/8/15

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

May Term, 2015

Indictment # 15GS24-0668

THE STATE

vs.

David Zackery Ledford

INDICTMENT FOR

INFLICTING GREAT BODILY INJURY UPON A CHILD
§ 16-03-0095

CDR: 2766

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

INDICTMENT FOR

INFLICTING GREAT BODILY INJURY UPON A CHILD
§ 16-03-0095

At a Court of General Sessions, convened on the 8th day of May, 2015, the Grand Jurors of Greenwood County present upon their oath:

That David Zackery Ledford, on or about December 16, 2013, in Greenwood County, willfully and unlawfully inflict great bodily injury upon a child; in that the said defendant did violently shake and/or hit the victim, minor [redacted], date of birth: [redacted] 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.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Assistant Solicitor

5E

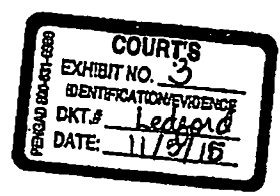
STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENWOOD	)	
THE STATE,	)	**INSTRUCTIONS** **15-GS-24-00668**
DAVID ZACKERY LEDFORD,	)	
Defendant.	)	

1. Preliminary Charges
    a. Preliminary Introduction
    b. Jury: Finder of the Facts/Witness Credibility
    c. Circumstantial/Direct Evidence
    d. Weighing the Evidence
    e. Expert witness testimony
    f. Court: Instructor of the Law
    g. Burden of Proof
    h. Reasonable Doubt
    i. Criminal Intent

2. Specific Law of the Case
    a. Infliction of great bodily injury upon a child
    b. Lesser-Included: Unlawful conduct toward a child

3. Failure of the Defendant to Testify

4. Conclusion



INSTRUCTIONS

MR. MATHIS, AND MEMBERS OF THE JURY, THE STATE OF SOUTH CAROLINA CHARGES THE DEFENDANT, DAVID ZACKERY LEDFORD, WITH ONE COUNT OF INFLICTION OF GREAT BODILY INJURY UPON A CHILD. YOU WILL OF COURSE BEAR IN MIND THAT THE DEFENDANT HAS PLED NOT GUILTY, AND BY THAT PLEA THE DEFENDANT DENIES THE CHARGE ALLEGED IN THE INDICTMENT.

THE DEFENDANT COMES INTO THIS COURT CLOTHED WITH A PRESUMPTION OF INNOCENCE, AND THIS PRESUMPTION OF INNOCENCE CONTINUES THROUGHOUT THE CASE AND ENTITLES THE DEFENDANT TO A VERDICT OF NOT GUILTY UNLESS AND UNTIL IT IS DISPELLED BY EVIDENCE SATISFYING YOU, THE JURY, BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF THE OFFENSE CHARGED, AND THE STATE HAS PROVED EACH AND EVERY ELEMENT OF THE ALLEGED CRIME BEYOND A REASONABLE DOUBT.

THE COURT: INSTRUCTOR OF THE LAW

THE SAME CONSTITUTION AND LAW WHICH MAKES YOU, THE JURY, THE FINDERS OF THE FACTS AND THE EVIDENCE AS I HAVE DISCUSSED WITH YOU, MAKES ME, AS THE JUDGE, THE SOLE AND ONLY INSTRUCTOR OF THE LAW. YOU MUST ACCEPT AS CORRECT

THE LAW WHICH I INSTRUCT AND APPLY TO IT THE EVIDENCE, AS YOU FIND IT, AND REACH A VERDICT.

IF I SHOULD MAKE AN ERROR IN THE LAW AS I INSTRUCT IT TO YOU, THERE IS ANOTHER TIME AND PLACE WHERE THAT ERROR CAN BE CONSIDERED AND, IF NECESSARY, CORRECTED. BUT FOR THE PURPOSE OF THIS CASE TODAY, YOU MUST ACCEPT THE LAW AS I INSTRUCT IT. AND IN THAT REGARD, I TELL YOU THAT NEITHER YOU, NOR I, FOR THAT MATTER, SHOULD BE CONCERNED ABOUT WHAT WE BELIEVE OR THINK THE LAW OUGHT TO BE, BUT ONLY CONCERN YOURSELVES WITH WHAT I INSTRUCT YOU THE LAW TO IN FACT BE.

BURDEN OF PROOF

IN A CRIMINAL PROSECUTION, THE STATE HAS THE BURDEN OF PROOF. THE DEFENSE HAS NO BURDEN AS THE DEFENDANT IS PRESUMED INNOCENT. IN THIS STATE, ACCORDING TO OUR CONSTITUTION, THE PROSECUTION MUST PROVE THEIR CASE TO THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT BEFORE A FINDING OF GUILT MAY OCCUR. IF THE STATE FAILS TO MEET THIS HIGH BURDEN, THE DEFENDANT IS ENTITLED TO A VERDICT OF NOT GUILTY.

JURY: JUDGE OF FACTS AND CREDIBILITY OF WITNESSES

UNDER THE CONSTITUTION AND LAWS OF SOUTH CAROLINA, YOU ARE THE SOLE FINDERS OF THE FACTS IN THIS CASE. I AM NOT ALLOWED TO SUGGEST IN ANY WAY WHAT I MAY THINK ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT.

YOU ALSO ARE THE JUDGES OF THE CREDIBILITY AND BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. IN PASSING UPON THEIR CREDIBILITY YOU MAY TAKE INTO CONSIDERATION MANY THINGS, SUCH AS:

-- WHAT WAS THE MANNER AND APPEARANCE OF THE WITNESS WHO TESTIFIED? WAS HE OR SHE STRAIGHT FORWARD, OR WAS HE OR SHE HESITANT IN ANSWERING?

-- HOW DID THE WITNESS COME TO KNOW THE FACTS THAT HE OR SHE TESTIFIED TO? OR WHAT WAS HIS OR HER ABILITY TO KNOW THESE FACTS?

-- IS THERE SOME REASON A WITNESS WOULD WANT TO GIVE TESTIMONY WHICH WOULD HELP OR HURT ONE SIDE OR THE OTHER? IN OTHER WORDS, WAS THE WITNESS BIASED OR PREJUDICED?

--AND, WAS THE TESTIMONY OF A WITNESS STRENGTHENED OR WEAKENED BY OTHER TESTIMONY OR EVIDENCE?

YOU – THE JURY – MAY BELIEVE AS MUCH OR AS LITTLE OF EACH WITNESS' TESTIMONY AS YOU THINK PROPER. YOU MAY BELIEVE THE TESTIMONY OF A SINGLE WITNESS AGAINST THAT OF MANY WITNESSES, OR JUST THE OPPOSITE.

YOU MAY BELIEVE PART OF A WITNESS'S TESTIMONY AND DISBELIEVE THE REST.

THE FACT THAT TESTIMONY IS NOT CONTROVERTED DOES NOT MEAN YOU MUST ACCEPT IT AS TRUE AND UNDISPUTED. YOU STILL MUST GAUGE THE CREDIBILITY OF THE WITNESS TO DETERMINE THE BELIEVABILITY OR TRUTH OF THE FACTS OFFERED THROUGH THE TESTIMONY.

EXPERT WITNESSES

THE RULES OF EVIDENCE ORDINARILY DO NOT PERMIT WITNESSES TO TESTIFY TO OPINIONS OR CONCLUSIONS. AN EXCEPTION TO THIS RULE EXISTS FOR WITNESSES WE CALL "EXPERT WITNESSES". A WITNESS WHO, BY EDUCATION AND EXPERIENCE, HAS BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION, OR CALLING MAY STATE AN OPINION AS TO RELEVANT AND MATERIAL MATTER, IN WHICH THE WITNESS CLAIMS TO BE AN EXPERT, AND MAY ALSO STATE THE

REASONS FOR THE OPINION.

YOU SHOULD CONSIDER ANY EXPERT OPINION RECEIVED IN EVIDENCE IN THIS CASE AND, LIKE ANY OTHER EVIDENCE, GIVE IT THE WEIGHT YOU THINK IT DESERVES. IF YOU DECIDE THAT THE OPINION OF AN EXPERT WITNESS IS NOT BASED ON SUFFICIENT EDUCATION AND EXPERIENCE, OR IF YOU CONCLUDE THAT THE REASONS GIVEN IN SUPPORT OF THE OPINION ARE NOT SOUND, OR THAT THE OPINION IS OUTWEIGHED BY OTHER EVIDENCE, YOU MAY DISREGARD THE OPINION ENTIRELY.

AN EXPERT WITNESS' TESTIMONY IS TO BE GIVEN NO GREATER WEIGHT THAN THAT OF OTHER WITNESSES SIMPLY BECAUSE THE WITNESS IS AN EXPERT. FURTHER, YOU ARE NOT REQUIRED TO ACCEPT AN EXPERT'S OPINION, EVEN THOUGH IT IS NOT CONTRADICTED.

WEIGHING THE EVIDENCE

AS THE SOLE FACT FINDERS, YOU SHOULD HAVE LISTENED CLOSELY TO THE EVIDENCE PRESENTED. WEIGHING THE EVIDENCE

IS ENTIRELY A MENTAL PROCESS. YOU MUST WEIGH THE EVIDENCE USING YOUR GOOD JUDGMENT AND COMMON SENSE.

DIRECT/CIRCUMSTANTIAL EVIDENCE

THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING A TRIAL – DIRECT AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS. CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE. YOU SHOULD WEIGH ALL THE EVIDENCE IN THE CASE. HOWEVER, TO THE EXTENT THE STATE RELIES UPON CIRCUMSTANTIAL EVIDENCE, ALL OF THE CIRCUMSTANCES MUST BE CONSISTENT WITH EACH OTHER, AND WHEN TAKEN TOGETHER, POINT CONCLUSIVELY TO THE GUILT OF THE ACCUSED BEYOND A REASONABLE DOUBT. IF THESE

CIRCUMSTATNCES MERELY PORTRAY THE DEFNDNAT'S BEHAVIOR AS SUSPICIOUS, THE PROOF HAS FAILED.

AFTER WEIGHING ALL THE EVIDENCE, WHETHER DIRECT EVIDENCE OR CIRCUMSTANTIAL EVIDENCE OR SOME COMBINATION OF THE TWO, IF YOU ARE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY.

REASONABLE DOUBT

WHAT IS A REASONABLE DOUBT? IT IS SIMPLY THIS: A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

REASONABLE DOUBT MAY ARISE FROM EVIDENCE WHICH IS IN THE CASE, OR FROM THE LACK OR ABSENCE OF EVIDENCE IN THE CASE. PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT. IT IS A DOUBT TO WHICH ONE CAN ASSIGN A REASON, IF THE ASSIGNMENT CAN BE DONE REASONABLY, FIRMLY, AND CONVINCINGLY. A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD MAKE A REASONABLE, CONSCIENTIOUS, HONEST, AND SINCERE PERSON HESISTATE TO ACT IN A MATTER IMPORTANT TO

HIS OWN AFFAIRS.

I FURTHER CHARGE YOU THAT A DEFENDANT IS ENTITLED TO EVERY REASONABLE DOUBT THAT MAY ARISE IN THE CASE. WHAT THAT MEANS IS SIMPLY THIS: IF ANY OF YOU, INCLUDING THE ALTERNATE JUROR(S), HAVE HAD A DOUBT ABOUT ANYTHING DURING THIS TRIAL, YOU WOULD BE REQUIRED TO RESOLVE THAT DOUBT IN FAVOR OF THE DEFENDANT.

THE VERY FACT, HOWEVER, THAT THE JURY ENGAGES IN A FULL AND FREE DISCUSSION OF THE ISSUE OF GUILT OR NON-GUILT IN THIS CASE DOES NOT AUTOMATICALLY MEAN THAT REASONABLE DOUBT EXISTS IN THIS CASE. YOU, THE JURY, MUST MAKE THE DETERMINATION OF WHETHER OR NOT REASONABLE DOUBT EXISTS AS TO THE GUILT OF THE DEFENDANT. IF YOU FIND THAT THE STATE HAS NOT MET THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT, THE DEFENDANT IS ENTITLED TO A VERDICT OF NOT GUILTY.

CRIMINAL INTENT

CRIMINAL INTENT IS A NECESSARY ELEMENT OF EACH CRIME WHICH MUST BE PROVEN BY THE STATE BEYONE A REASONABLE DOUBT.

CRIMINAL INTENT IS ALWAYS A MATTER THAT MUST BE DETERMINED BY THE JURY FROM THE CIRCUMSTANCES SURROUNDING THE SITUATION. THERE IS NO WAY TO PROVE INTENT TO A MATHEMATICAL CERTAINTY. THERE IS NO WAY MEDICAL SCIENCE CAN DISSECT A PERSON'S BRAIN AND DETERMINE WHAT HE OR SHE HAD IN MIND, SO THE LAW STATES CRIMINAL INTENT MAY BE INFERRED FROM THE CIRCUMSTANCES SHOW TO HAVE EXISTED, BOTH BEFORE AND AFTER THE FACT. THIS IS HOW YOU, THE JURY, MAKE A DETERMINATION OF WHETHER OR NOT THE ELEMENT REQUIRING THAT AN INTENT WAS PRESENT OR NOT.

CRIMINAL INTENT IS A STATE OF MIND THAT OPERATES JOINTLY WITH AN ACT OR OMISSION IN THE COMMISSION OF A CRIME. CRIMINAL INTENT IS A MENTAL STATE OF CONSCIOUS WRONGDOING SO IT IS UP TO YOU, THE JURY, TO DETERMINE WHAT THE DEFENDANT INTENDED TO DO BASED ON THE CIRCUMSTANCES SHOWN TO HAVE EXISTED. I TELL YOU THAT THE STATE MUST PROVE CRIMINAL INTENT BEYOND A REASONABLE DOUBT JUST AS THE STATE MUST PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT AS I PREVIOUSLY EXPLAINED TO YOU.

IT IS UNLAWFUL TO INFLICT GREAT BODILY INJURY UPON A

CHILD. TO VIOLATE THIS STATUTE, THE STATE IS REQUIRED TO PROVE THAT DAVID ZACKERY 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.

SPECIFIC LAW OF THE CASE

ONE INDICTMENT.

INDICTMENT 15-GS-24-00668

INFLICTING GREAT BODILY INJURY UPON A CHILD

THE DEFENDANT IS CHARGED WITH INFLICTING GREAT BODILY INJURY UPON A CHILD.

OUR CODE OF LAW STATES THAT:

(A) It is unlawful to inflict great bodily injury upon a child. ~~A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.~~

~~(B) It is unlawful for a child's parent or guardian, person with whom the child's parent or guardian is cohabitating, or any other person responsible for a child's welfare as defined in Section 63-7-20 knowingly to allow another person to inflict~~

~~great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than five years.~~

(C) For purposes of this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

~~(D) This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person in loco parentis in a manner which does not cause great bodily injury upon a child.~~

~~(E) This section does not apply to traffic accidents unless the accident was caused by the driver's reckless disregard for the safety of others.~~

THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, DAVID ZACKERY LEDFORD, INFLICTED GREAT BODILY INJURY UPON A CHILD.

LESSER-INCLUDED OFFENSE

UNLAWFUL CONDUCT TOWARD A CHILD

ALSO INCLUDED WITHIN THE OFFENSE OF INFLICTING GREAT BODILY INJURY UPON A CHILD IS THE LESSER OFFENSE OF UNLAWFUL CONDUCT TOWARD A CHILD.

OUR CODE OF LAW STATES THAT:

(A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:

(1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

(2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

~~(3) wilfully abandon the child.~~

THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, DAVID ZACKERY LEDFORD, (1) PLACED THE CHILD AT UNREASONABLE RISK OF HARM AFFECTING THE CHILD'S LIFE, PHYSICAL OR MENTAL HEALTH, OR SAFETY; OR (2) DID OR CAUSED TO BE DONE UNLAWFULLY OR MALICIOUSLY ANY BODILY HARM TO A CHILD SO THAT THE LIFE OR HEALTH OF THE CHILD WAS ENDANGERED OR LIKELY TO BE ENDANGERED.

~~LESSER INCLUDED OFFENSE~~

~~ASSAULT AND BATTERY IN THE FIRST DEGREE~~

~~ALSO INCLUDED WITHIN THE OFFENSE OF INFLICTING GREAT BODILY INJURY UPON A CHILD IS THE LESSER OFFENSE OF ASSAULT~~

~~AND BATTERY IN THE FIRST DEGREE.~~

~~OUR CODE OF LAW STATES THAT:~~

~~(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:~~

~~(a) injures another person, and the act:~~

~~(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or~~

~~(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or~~

~~(b) offers or attempts to injure another person with the present ability to do so, and the act:~~

~~(i) is accomplished by means likely to produce death or great bodily injury; or~~

~~(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.~~

~~THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, DAVID ZACKERY LEDFORD, UNLAWFULLY OFFERED OR ATTEMPTED TO INJURE ANOTHER PERSON WITH THE PRESENT ABILITY TO DO SO, AND THE ACT WAS ACCOMPANIED BY MEANS LIKELY TO PRODUCE DEATH OR GREAT BODILY INJURY.~~

<u>FAILURE OF DEFENDANT TO TESTIFY</u>

I INSTRUCT YOU AND EMPHASIZE THAT THE FACT THE

DEFENDANT DID NOT TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATION AND IN YOUR CONSIDERATION ON THE QUESTION OF THE GUILT OR THE INNOCENCE OF THE DEFENDANT. IT MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER. A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THE ASSERTION OF THIS RIGHT MUST NOT BE CONSIDERED BY YOU IN YOUR DELIBERATIONS. I REPEAT, UNDER YOUR OATH, YOU ARE TO DRAW NO CONCLUSION WHATSOEVER FROM THE FACT THAT THE DEFENDANT IN THIS CASE DID NOT TESTIFY. THE FACT THAT THIS DEFENDANT DID NOT TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM. THE BURDEN OF PROOF, AS I HAVE STATED TO YOU, IS ON THE STATE. THE DEFENDANT IS NOT REQUIRED TO PROVE HIS [HER] INNOCENCE. THE BURDEN OF PROOF REMAINS ON THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT.

<u>CONCLUSION</u>

MR. MATHIS, MEMBERS OF THE JURY, AS YOU RETIRE TO BEGIN DELIBERATIONS, I WISH TO EXPRESS THE HOPE THAT EACH OF YOU WILL BE MINDFUL OF THE IMPORTANCE OF YOUR RESPONSIBILITY. YOU ARE NOT CALLED UPON TO SERVE AS JURORS VERY OFTEN.

YOU AND I ARE ACTING FOR THE COMMUNITY AND THAT IS WHY WE MUST SEE TO IT THAT THE TRIAL IS FAIR AND THE VERDICT IS JUST.

IT IS MY RESPONSIBILITY AS THE JUDGE IN THIS CASE TO SEE THAT EVERY PERSON TRIED HERE RECEIVES FAIR AND IMPARTIAL JUSTICE. I AM NOT TRYING TO TELL YOU HOW YOU SHOULD DECIDE THIS CASE. AS I HAVE ALREADY TOLD YOU, THAT UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA YOU, THE JURY, ARE THE SOLE JUDGE OF ALL QUESTIONS OF FACT. IT WOULD BE HIGHLY IMPROPER FOR ME TO INFLUENCE YOU IN THE PERFORMANCE OF THAT DUTY. ADDITIONALLY, I AM NOT TRYING TO TELL YOU WHAT YOUR VERDICT SHOULD BE, BUT AS THE PRESIDING OFFICER OF THIS COURT, I AM VITALLY CONVINCED WHATEVER VERDICT YOU FIND WILL BE THE RESULT OF YOUR GOING INTO THAT JURY ROOM AND CONFINING YOUR CONSIDERATION TO THE EVIDENCE AND THE LAW THAT YOU HAVE HEARD IN THIS COURTROOM, WEIGHING IT FAIRLY AND IMPARTIALLY, I AM CONVINCED AND HAVE EVERY CONFIDENCE YOU WILL.

Defendant's Request to Charge № 1

"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 indictm~~ent.

Staples v. U.S., 511 U.S. 600 (1994); *Morissette v. United States*, 342 U.S. 246 (1952)

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Indictment No. 2014-GS-24-0696

State of South Carolina, ...Appellant,

v.

David Z. Ledford, ...Respondent.

FILED GENERAL SESSIONS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2015 NOV -5 PM 2:37

NOTICE OF APPEAL

The State of South Carolina appeals the ruling of the Honorable Eugene C. Griffith, Jr., with respect to certain jury instructions, pronounced orally on November 5, 2015. This notice of appeal is filed pursuant to S.C. Code Ann. § 14-3-330(2)(a) because the trial judge's order affects a substantial right and prevents a judgment from which an appeal might be taken.

November 5, 2015

ELIZABETH P. WHITE
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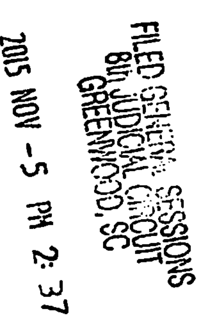
STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Indictment No. 2014-GS-24-0696



State of South Carolina, ... Appellant,

v.

David Z. Ledford, ... Respondent.

PROOF OF SERVICE

I, Elizabeth P. White, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esq.
305 Main Street
Greenwood, South Carolina 29646

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

11/5, 2015

ELIZABETH P. WHITE
Assistant Solicitor
Eighth Circuit Solicitor's Office
8th Circuit Solicitor's Office
PO Box 516
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ewhite@greenwoodsc.gov

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Indictment № 2014-GS-24-0696

State of South Carolina .... Appellant,

v.

David Z. Ledford, ... Respondent.

Motion to Dismiss Appeal and Remand the Case

David Z. Ledford, the Respondent above named, hereby moves the Court to dismiss the Appeal filed by the State of South Carolina and to dismiss the underlying charge based upon the following:

1. The decision by the trial judge to charge the jury the definition of "willfully" as alleged in the indictment is not "an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action" as required by S. C. Code § 14-3-330.

2. The State has represented to the trial court and to the South Carolina Court of Appeals by filing this appeal, that charging the jury the definition of "willfully" as alleged in the

indictment "determines the action" as required by S. C. Code § 14-3-330. By so doing, the State has acknowledged that the evidence in this case is insufficient to sustain a conviction for a willful violation of S. C. Code § 16-3-95 and therefore, in the event the appeal is dismissed, this Court should remand the matter to the trial court to determine if the admission of the State requires that the underlying criminal charge be dismissed with prejudice.

November 10, 2015

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Attorney for David Z. Ledford

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Indictment № 2014-GS-24-0696

State of South Carolina .... Appellant,

v.

David Z. Ledford, ... Respondent.

Memorandum in Support of Motion to Dismiss Appeal and Remand the Case

Facts

The State of South Carolina indicted David Zackery Ledford for "willfully and unlawfully inflicting great bodily injury upon a child; in that the said defendant did violently shake and/or hit the victim, minor date of birth: , 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. After over three days of testimony, the trial judge stated in a charging conference that he would charge the definition of "willfully" as proposed by defense counsel, with the exception that he would not

charge the last sentence of the proposed charge. See, Defendant's request to charge № 1 attached as Exhibit B.[1] At that time the State represented to the trial judge that they would appeal based upon S. C. Code § 14-3-330. By doing so, the State, as an officer of the Court, represented to the trial court that the evidence was not strong enough to support a willful violation of the statute and therefore the charge "in effect determines the action" as required by S.C. Code § 14-3-330.

Defense counsel noted that the State elected to use a willful mens rea requirement in the indictment. The State contended that as the statute did not have a mens rea the court should impose the least mens rea of criminal negligence. The trial court, noting both that the statute did not have a mens rea and one was required, and that the State had indicted the Defendant with the men rea of "willfully" agreed to charge a definition of "willful." The State never proposed a definition of willful.

The State then officially filed a Notice of Appeal. The Jury was not dismissed, but informed by the trial court that the trial would resume at a later date when the Court of Appeals ruled. The trial is officially in recess.

Motion to Dismiss the Appeal

The trial judge properly charged the definition of willful

The trial judge in this matter has not suppressed any evidence that is the subject of this appeal. All he has done is tell the State they must prove what they alleged in the indictment. While the charge as to mens rea may make proving the case more difficult for the State, the charge hardly prevents the State from winning, unless the State has acknowledged that the

[1] The trial judge who heard the testimony thought the charge was appropriate. The dismissal of this appeal should not need a transcript of the trial testimony to resolve the issue.

evidence does not establish willfulness in which case the State should dismiss the case in the event this appeal is denied.

Under S. C. Code § 17–19–90 Mr. Ledford would have been required to file a motion to quash the indictment if he believed the indictment to be vague or the statute to be over broad. By including the mens rea of "willfully" in the indictment, the State corrected any ambiguity in the statute as to the required mens rea and therefore a motion to quash the indictment would not be successful. The State apparently had no problem telling the grand jury they were going to prove Mr. Ledford acted willfully. The South Carolina Supreme Court has held "The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) As such this indictment notified Mr. Ledford that the State intended to prove he willfully inflicted great bodily injury on the minor child. The State did not notify him they intended to prove he acted knowingly or he was negligent, grossly negligent or reckless in inflicting such injury.

The court in *Gentry* further stated the indictment must make sure " the offense is stated with sufficient certainty and particularity to enable . . . the defendant to know what he is called upon to answer . . . ." *Id.* at 93, 102, 610 S.E.2d at 500. The State told Mr. Ledford he was called upon to answer an allegation that he willfully inflicted great bodily injury upon the child. Mr. Ledford took the State at its word.

At the trial conference Mr. Ledford and the trial court both agreed with the wording of the indictment. Only the State at that point disagreed with the wording of the indictment it had prepared and had presented to the grand jury. If the indictment as a notice document is to have any meaning, it cannot mean the state can tell Mr. Ledford one thing at the

start of the trial and then renege on what they said at the end.

A ruling by the trial judge on a jury charge is not appealable by the state

In the only case counsel for Mr. Ledford has been able to find, the Vermont Supreme Court has held an interlocutory appeal is not proper in a dispute over jury charges. *State v. Premo,* 168 Vt. 600, 719 A.2d 398 (1998). Counsel has found no case in South Carolina which permits an interlocutory appeal that did not involve the suppression of evidence that was critical to the prosecution of the case. Counsel has also not found any reported case in South Carolina that permits an interlocutory appeal after the jury is sworn. While granted the State will not be able to review in error on this charge on appeal, the same is true for any objection the State may have to any proposed jury charge. While the State argued below, and apparently will on this appeal, that the proposed jury charge defining willfulness, determines the action, the State could make a similar argument in virtually any interlocutory appeal involving a jury charge. Unless this Court desires to micro-manage trials by permitting the State to appeal rulings on jury charges, this Court should summarily dismiss this appeal and remand the case back to the trial court.

The Court should remand the case to the trial court with instructions to dismiss the case.

To comply with S.C. Code § 14-3-330, the State is required to establish that the ruling of the trial judge in this case "in effect determines the action." Simply put, the State is required to establish that the ruling of the trial judge below prevents the State from winning this case. By filing this appeal, and with the comments made below, the state has admitted it cannot prevail if the State is required to prove Mr. Ledford acted willfully. The comments below and the requirements of S.C. Code § 14-3-330 constitute an admission of a party opponent under S.

C. Rules of Evidence 801 (2). Mr. Ledford request that this Court dismiss the appeal and remand the matter to the trial court to determine if this admission by the State necessitates the dismissal of the case against Mr. Ledford.

For the foregoing reasons, David Zackery Ledford requests that this Court dismiss this appeal and remand the matter back to the trial court to determine if the admissions of the State in filing this appeal require the trial court to dismiss the case because of the admission of a party opponent pursuant to Rule 801(2) of the South Carolina Rules of Evidence.

November 10, 2015

C. Rauch Wise
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S. C. Bar № 06188

Attorney for David Zackery Ledford

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

INDICTMENT FOR

INFLICTING GREAT BODILY INJURY UPON A CHILD
§ 16-03-0095

At a Court of General Sessions, convened on the 8th day of May, 2015, the Grand Jurors of Greenwood County present upon their oath:

That David Zackery Ledford, on or about December 16, 2013, in Greenwood County, willfully and unlawfully inflict great bodily injury upon a child; in that the said defendant did violently shake and/or hit the victim, minor [redacted] date of birth: August 28, 2013, 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.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Assistant Solicitor

Exhibit A

Defendant's Request to Charge № 1

"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.

Staples v. U.S., 511 U.S. 600 (1994); *Morissette v. United States*, 342 U.S. 246 (1952)

Exhibit B

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Indictment № 2014-GS-24-0696

State of South Carolina .... Appellant,

v.

David Z. Ledford, ... Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on November 10, 2015, she did deposit in the United States Mail with proper postage affixed thereto a copy of the corrected Motion to Dismiss Appeal and Remand the Case and corrected Memorandum in Support of Motion to Dismiss Appeal in the above case addressed to Elizabeth White, Solicitor's Office, P.O. Box 516, Greenwood, SC 29648.

SWORN to and Subscribed

Sandy Traynham

before me this 10 day

of November, 2015.

Mary Ann Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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: [signature]
Salley W. Elliott
S.C. Bar No. 1871

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ATTORNEYS FOR RESPONDENT

November 30, 2015

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.

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
Administrative Assistant

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Indictment № 2014-GS-24-0696
SC Court of Appeals No. 2015-002315

State of South Carolina . . . . Appellant,

v.

David Z. Ledford, ... Respondent.

Reply to Return to Dismiss Appeal and Remand the Case

The Respondent disagrees with the statement of facts in which the State contends that "Respondent Ledford consented to this request." [To suspend the trial during the appeal.] Return to Motion to Dismiss at 2. All the attorney for Mr. Ledford did was state that if a Notice of Intent to Appeal was filed, then the lower court loses jurisdiction to hear the case. *See,* South Carolina Appellate Court Rules, Rule 205 (Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . ."). The attorney for the Respondent did not consent to stop the trial immediately before closing argument. In fact, the attorney for the

appellate insisted that the jury that had been selected not be dismissed.

The Appellant incorrectly argues that "the State may appeal orders and rulings that significantly impair the prosecution before final judgment or when the guilty verdict is set aside based upon an error of law." Return to Motion to Dismiss at 5. South Carolina Code of Laws § 14-3-330 requires more than that the prosecution be significantly impaired. The section says "An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . . ." The substantial right is such that the ruling by the lower court has the effect of terminating the action. While requiring the State to prove willfulness in this case makes the burden more difficult, it does not have the effect of terminating the action unless the State is admitting that based upon the facts, the State is unable to prove Mr. Ledford acted wilfully.

In *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987), the final decision of the *McKnight* case cited in the State's memorandum, the ruling by the trial judge in a pre-trial motion did have the effect of ending the State's case as all the evidence seized from the mobile home was ordered suppressed. Also, the order being appealed was a pre-trial order. No case cited by the appellant involved an appeal by the state after a jury is sworn. They all involved rulings that ended the case either through a quashing of an indictment, the pre-trial suppression of evidence, the quashing of an indictment, the granting of a new trial on an incorrect legal ground after a conviction or a declaration that an ordinance is unconstitutional.

The State has argued that the word "wilfully" is mere surplusage. But the State fails to acknowledge that the indictment with no mens rea is unconstitutional and would have

been subject to a motion to quash. *See, Morissette v. United States,* 342 U.S. 246, 248-249 (1952)("If any state has deviated [from a men rea requirement], the exception has neither been called to our attention nor disclosed by our research.") The State by including the word wilfully included a mens rea that made the statute and the indictment constitutional. The indictment was not subject to attack on its face.

The State appears to argue that the requirement that they prove Mr. Ledford acted wilfully caught them by surprise. As they contend, "the jury charge adds a non-existent element after all the State's evidence has been presented." Return to Motion to Dismiss at 7. The State ignores the fact that the State elected to put the mens rea of wilful in the indictment before any testimony was taken. This was the theory they presented to the grand jury. The State could, but did not, move to delete the term "wilful" prior to the start of the trial. Mr. Ledford had the right to rely upon the indictment as presented to the grand jury.

The Respondent has not suggested that this Court dismiss this case without a review of the transcript of the testimony. The Respondent has suggested that this Court remand the case to the trial court to consider a directed verdict motion based upon the fact that the State has represented to this Court, and the trial court below, that they are unable to prove a wilful violation of the statute as alleged in the indictment.

CONCLUSION

For the foregoing reason, this Court should dismiss the appeal of the State on the ground that the issue involved in not appealable and remand the case to the trial court to consider a directed verdict motion based upon the representation of the State they cannot prove the crime as alleged in the indictment.

December 7, 2015

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Rauchwise@gmail.com
Attorney for Respondent

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Indictment No. 2014-GS-24-0696
SC Court of Appeals No. 2015-002315

State of South Carolina . . . . Appellant,

v.

David Z. Ledford, ... Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on December 7, 2015, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Reply to Return to Dismiss Appeal in the above case addressed to Elizabeth White, Solicitor's Office, P.O. Box 516, Greenwood, SC 29648, J. Benjamin Aplin, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and Court Administration, 1015 Sumter St., Ste. 200, Columbia, SC 29201.

SWORN to and Subscribed

Sandy Traynham

before me this 7 day

of December, 2015.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
11/22/30

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

THE STATE,

Appellant,

vs.

DAVID Z. LEDFORD,

Respondent.

MOTION TO CERTIFY APPEAL

Appellant, State of South Carolina, through its undersigned counsel, would respectfully show unto this Court as follows:

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). Respondent Ledford proceeded to jury trial before the Honorable Eugene C. Griffith, Jr., and a jury. A jury charge conference was held 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." 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 without releasing the jury to allow the State to appeal its ruling.

The State filed and served notice on appeal from the oral ruling on November 5, 2015. 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." The appeal is presently pending before the South Carolina Court of Appeals.

II.

Respondent Ledford filed a motion asking the Court of Appeals 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. (See attached Motion to Dismiss and Remand the Case).

Respondent Ledford also asks the Court of Appeals to remand the case to the court of general sessions for dismissal of the charge which is, in essence, is his request for the Court of Appeals 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 submitted a Return to the Motion to Dismiss asserting that 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. The State noted that the trial court, with Respondent Ledford's consent, recessed the trial and held the matter in abeyance without releasing the jury to allow the State to appeal its jury charge ruling. It

is the State's position that, 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). (See attached Return to Motion to Dismiss Appeal and Remand the Case).

III.

Because the appeal presents a legal principle of major importance regarding appealability and because time is of the essence in view of recess of the trial, this Court is best suited to consider the appeal in order to expedite the appellate process.

V.

In addition to expediting the appellate process by certifying this case to the South Carolina Supreme Court, the State asks the Court consider the appeal in an expedited manner after the transcript is received by the parties. Respondent Ledford will not be prejudiced by having this appeal certified to the South Carolina Supreme Court and considered on an expedited basis.

WHEREFORE, the State respectfully requests, pursuant to Rule 204, SCACR, the above case be certified to the South Carolina Supreme Court for consideration in an expedited manner.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: [signature]
Salley W. Elliott
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ATTORNEYS FOR APPELLANT

November 30, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

Appellant,

vs.

DAVID Z. LEDFORD,

Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Motion to Certify Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney C. Rauch 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
Administrative Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
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The South Carolina Court of Appeals

The State, Appellant,

FEB - 8 2016

v.

ATTORNEY GENERALS OFFICE

David Zackary Ledford, Respondent.

Appellate Case No. 2015-002315

ORDER

The State has served and filed a notice of appeal "with respect to certain jury instructions," arguing the circuit court intends to charge willfulness, which is not an element in the statute addressing the indicted offense. Because the ruling is not immediately appealable under section 14-3-330 of the South Carolina Code (1976 & Supp. 2015), we grant Respondent's motion to dismiss the State's appeal. The remittitur will be sent as provided in Rule 221 of the South Carolina Appellate Court Rules.

Stephanie P. McDonald
FOR THE COURT

Columbia, South Carolina

cc:
Elizabeth Phillips White, Esquire
Alan McCrory Wilson, Esquire
Clarence Rauch Wise, Esquire
John Benjamin Aplin, Esquire

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No: 2015-002315

THE STATE,

Appellant,

v.

DAVID Z. LEDFORD,

Respondent.

PETITION FOR REHEARING

On February 5, 2016, this Court filed an Order granting Respondent's motion to dismiss the State's appeal in the above captioned case: "Because the ruling is not immediately appealable under section 14-3-330 of the South Carolina Code (1976 & Supp. 2015)." Appellant (the State), by and through undersigned counsel, now respectfully petitions this Court for rehearing pursuant to Rules 221(a) & 221(c), SCACR. The State hereby seeks rehearing and reinstatement of its appeal on the grounds that: (1) the action of the Court on Respondent's motion has the effect of dismissing or finally deciding the State's appeal and (2) the Court may have overlooked the existence of a November 30, 2015, "Motion to Certify Appeal" which is currently pending before the South Carolina Supreme Court. The State would respectfully show unto the Court as follows:

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.

(Attached as Exhibit A to Respondent Ledford's Motion to Dismiss and Remand). The statute referenced in the indictment, 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 Respondent'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. Respondent'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.

(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.

On November 5, 2015, the State filed and served notice on appeal from the oral ruling with this Court. 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.

On November 10, 2015, Respondent Ledford served and filed a "Motion to Dismiss Appeal and Remand the Case" as well as a memorandum in support of his motion. He moved 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."

III.

On November 30, 2015, the State served and filed a "Return to Motion to Dismiss Appeal and Remand the Case." The State argued that even if the Court found the trial court's decision is not appealable, the only action it could take is to dismiss the appeal for lack of jurisdiction and that it could not remand to the trial court for dismissal of the charge.

IV.

Also on November 30, 2015, the State filed, pursuant to Rule 204, SCARC, a "Motion to Certify Appeal" in the South Carolina Supreme Court. The motion was served on Respondent and a copy was provided to this Court. Upon information and belief that motion has not yet been addressed and is still pending in the Supreme Court.

WHEREFORE, based on the foregoing procedural history and the arguments raised in the Motion to Certify Appeal, the State respectfully requests that this Court grant this petition for rehearing and issue an order reinstating the State's appeal, at least until such time as the Supreme Court rules on the motion to certify.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:______________________
J. Benjamin Aplin
S.C. Bar No. 8729

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ATTORNEYS FOR RESPONDET

February 8, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith, Jr., Presiding Judge

Appellate Case No: 2015-002315

THE STATE,

Appellant,

vs.

DAVID Z. LEDFORD,

Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petition for Rehearing on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, C. Rauch 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 8th day of February, 2016.

ANGELA BENNETT
Administrative Assistant

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The South Carolina Court of Appeals

RECEIVED
MAR 2 1 2016
ATTORNEY GENERALS OFFICE

The State, Appellant,

v.

David Zackary Ledford, Respondent.

Appellate Case No. 2015-002315

ORDER

This appeal was dismissed on February 5, 2016, because the circuit court's ruling regarding certain jury instructions is not immediately appealable. The State has now filed a petition to rehear the dismissal of this appeal. After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_________________________ J.

_________________________ J.

_________________________ A.J.

Columbia, South Carolina

cc:
Elizabeth Phillips White, Esquire
Alan McCrory Wilson, Esquire
Clarence Rauch Wise, Esquire
John Benjamin Aplin, Esquire

The Supreme Court of South Carolina

The State, Appellant,

RECEIVED
MAR 24 2016
ATTORNEY GENERALS OFFICE

v.

David Zackary Ledford, Respondent.

Appellate Case No. 2015-002441

ORDER

The State filed a motion to certify this appeal pursuant to Rule 204(b), SCACR. However, the Court of Appeals has dismissed the appeal and denied the State's petition for rehearing. Accordingly, the motion to certify is denied as moot.

______________________ C.J.
FOR THE COURT

Columbia, South Carolina

March 23, 2016

cc:
The Honorable Jenny Abbott Kitchings
Clarence Rauch Wise, Esquire
Elizabeth Phillips White, Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire