

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Jul 16 2020**

APPEAL FROM RICHLAND COUNTY

**SC Court of Appeals**

Court of General Sessions  
The Honorable Deandrea G. Benjamin, Circuit Court Judge

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Appellate Case No. 2019-000910

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THE STATE,

Respondent,

v.

CURNEZ ELLERBEE,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

A person commits tax evasion if he “wilfully attempts in any manner to evade or defeat a tax.” In its jury charge, the trial court correctly defined the mental state of willfulness as “a voluntary, intentional violation of a known legal duty” and instructed the jury that tax evasion requires that a defendant took an “affirmative act” and “performed some conduct, the likely effect which would be to mislead or conceal.” Was the charge erroneous and prejudicial?

## STATEMENT OF THE CASE

A Richland County grand jury indicted Curnez Ellerbee for five counts of Tax Evasion pursuant to S.C. Code § 12-54-44(B)(1) and five counts of Failure to File Tax Returns pursuant to S.C. Code § 12-54-44(B)(3). Ellerbee proceeded to jury trial on February 11–12, 2019, before the Honorable Deandrea G. Benjamin. After the State rested, the prosecutor dismissed the counts for Failure to File Tax Returns. Ellerbee was convicted of one count of Tax Evasion and given a probationary sentence. In this direct appeal, Ellerbee alleges the trial court gave erroneous jury instructions regarding the elements of Tax Evasion.

## STANDARD OF REVIEW

The appellate court will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion. State v. Miller, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). In reviewing jury charges for error, the appellate court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. Reversal is not warranted where the charge given is substantially correct and adequately covers the applicable law. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). An appellate court will not reverse on the basis of an erroneous jury charge if it did not contribute to the verdict rendered. State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994).

## ARGUMENT

**The trial court correctly charged the jury that Tax Evasion requires proof of an affirmative act.**

Ellerbee alleges the trial court abused its discretion because it thoroughly defined the concepts of criminal intent and the mental state of willfulness for the jury. He claims the court “confused the issue of whether the jury must find [he] willfully committed an affirmative act. . . or whether it need merely find he willfully failed to act . . . .” Brief of Appellant at 10. Ellerbee’s claim fails because the jury instructions were correct and made clear that Tax Evasion requires an affirmative act of evasion. Given the court’s clear instructions about the affirmative act requirement, the facts of the case, and the parties’ arguments centering on the necessity of proving an affirmative act, there was no danger that the jury believed it could convict based on inaction. This Court should affirm.

S.C. Code Ann. § 12-54-44(B)(1) makes it unlawful to “wilfully attempt[] in any manner to evade or defeat a tax . . . .” The language of §44(B)(1) mirrors the language of the federal income tax evasion statute, 26 U.S.C. §7201. The elements of federal tax evasion are: 1) willfulness; 2) the existence of a tax deficiency; and 3) an affirmative act constituting an evasion or attempted evasion of the tax. Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Sertich, 879 F.3d 558, 565 (5th Cir. 2018). Like South Carolina law, federal law criminalizes as a misdemeanor the willful failure to pay or file a tax return as required by law. S.C. Code Ann. § 12-54-44(B)(3); 26 U.S.C. § 7203. Accordingly, while both crimes

include an element of willfulness, felony Tax Evasion requires an affirmative act, whereas Failure to File Tax Returns is accomplished through willful inaction.

The prosecutor in this case agreed that South Carolina's Tax Evasion statute mirrors the federal statute, and thus requires an affirmative act. The trial court charged the jury accordingly:

To prove attempt, **the government must show that the Defendant engaged in an affirmative act.** In order to meet the burden of proof for the crime of willfully attempting to evade or defeat a tax as charged in the indictment, the Government must prove the following three essential elements beyond a reasonable doubt. One, that income tax was due and owing from the Defendant. Two, that the Defendant attempted to evade or defeat the tax. Three, in attempting to evade or defeat the tax, the Defendant acted willfully. To satisfy the first element requiring that income tax was due and owing from the Defendant, the Government must prove beyond a reasonable doubt that the Defendant had some income tax due for the year of each indictment. However, the Government is not required to prove the precise amount of tax alleged in the indictment, nor the precise amount of tax owed. To establish the second element of tax evasion, **the State must prove that the Defendant engaged in an affirmative act.** An affirmative willful attempt at tax evasion may be inferred from concealments of assets, covering up sources of income, or making any substantial misstatement of fact in an effort to evade or avoid paying the necessary tax. **To satisfy this element, the Government must prove beyond a reasonable doubt that the Defendant took a single affirmative act, that is, that the Defendant performed some conduct, the likely effect which would be to mislead or conceal. This element requires more than passive neglect of a statutory duty.** To establish the third element of tax evasion, the Government must prove willfulness. To find the Defendant guilty of violating Section 12-54-44(B)(1), you must not only find that he did the acts complained of and of which he stands charged, but you must also find that the acts were done willfully by him. The word willfully means a voluntary, intentional violation of a known legal duty. In other words, an act or a failure to act is willfully done if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done. That is to say, the purpose either to disobey or to disregard the law. Act is done knowingly if it is

done purposefully and deliberately and not because of a mistake or accident or negligence or any other innocent reason.

Tr.p.346–48 (emphasis added). The trial court also gave a standard criminal intent charge:

In order to establish criminal liability, criminal intent is required. Criminal intent must be proven by the State beyond 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 the person had in mind, so the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element . . . requiring intent was present. It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. Criminal intent can arise from action or failure to act.

(Tr.p.345–36). The court agreed to omit any reference to the mental states of negligence and recklessness. (Tr.p.270).

Ellerbee's complaint centers around the court's decision to define criminal intent and willfulness. He does not allege the court incorrectly defined willfulness or gave an erroneous explanation of criminal intent. Instead, he argues the court should not have explained that criminal intent and willfulness can exist in cases where a person fails to act. His argument should be rejected because: 1) the charge was a correct statement of law; 2) willfulness is an element of Tax Evasion and a trial court should always fully and correctly define each element of an offense, and; 3) there was no danger that the jury believed passive inaction could form the basis of Tax Evasion.

First, the charge is a correct statement of law. In fact, the complained-of portion of trial court’s willfulness definition appears verbatim in the two cases cited by Ellerbee in his presentation to the trial court. (Tr.p.276, lines 18–19). See State v Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006); State v. Garrard, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). The Garrard court also cited Black’s Law Dictionary definition, the current edition of which defines “willfulness” as “[t]he quality, state, or condition of acting purposely or by design; deliberateness . . . . [t]he voluntary, intentional violation or disregard of a known legal duty.” WILLFULNESS, Black's Law Dictionary (11th ed. 2019). This is the essence of the trial court’s charge, especially when viewed in its entirety: “[t]he word willfully means a voluntary, intentional violation of a known legal duty. In other words, an act or a failure to act is willfully done if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done. That is to say, the purpose either to disobey or to disregard the law.” (Tr.p.348). Indeed, Ellerbee does not contend that the trial court gave an incorrect definition.

Likewise, the court’s charge on intent was a correct statement of law. In response to Ellerbee’s objection to the standard general charge on mental states, which includes a discussion of the various mens rea of negligence and recklessness, the court omitted those portions of the charge. However, the court opted to keep the portion which explains that criminal intent is necessary in all criminal cases, and that criminal intent can be manifest by action or failure to act. Again, Ellerbee does

not contend that this was an incorrect statement of law. Accordingly, the charge was not erroneous. State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”)

Second, it was necessary and proper for the court to define willfulness because it formed one of three essential elements of Tax Evasion. Mental state is not a minor aspect of a criminal case; it is an essential ingredient of a crime. It is important for the jury to have a full, accurate understanding of the mental state required in any case. Failure to adequately define the mens rea of a crime may be grounds for reversal. State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994).

Even if there could be certain circumstances where a court’s definition of an element creates a substantial risk of confusion, this is not such a case. Contrary to Ellerbee’s claims, the trial court made it exceedingly clear that an affirmative act is required to prove Tax Evasion, as illustrated by the emphasized portions of the court’s charge quoted above. The jurors must have easily grasped that willfulness, a mental state in which a person acts voluntarily and intentionally, is simply an element of Tax Evasion. See State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) (explaining a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law); State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009) (“If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.”). Furthermore, both parties’ closing arguments

emphasized repeatedly that the State was required to show the existence of an affirmative act. (Tr.p.324, line 10; p.325, lines 2–3; p.327–28; p.332). Defense counsel even pointed out that “one thing [the prosecutor and I] absolutely agree on is that there has to be an affirmative act.” (Tr.p.327, line 8–10). There was no danger that the jury believed Tax Evasion could be proved by passive inaction. Accordingly, it was not error for the court to fully explain the required mens rea for the charged crime.

The charge was a correct statement of law. Willfulness is an element of tax evasion, and the proper subject of a full and accurate explanation. When read as a whole, along with the evidence and arguments of counsel, the charge was correct and there was no danger the jury was confused. This Court should affirm.

## CONCLUSION

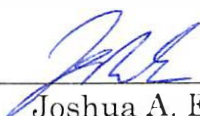
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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APPEAL FROM RICHLAND COUNTY  
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THE STATE,

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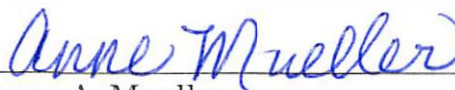
CURNEZ ELLERBEE,

Appellant.

**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and by subsequently depositing one copy of the same in the United States mail, postage prepaid, addressed to Joanna K. Delany, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.  
This 16<sup>th</sup> day of July, 2020.

  
\_\_\_\_\_  
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**Subject:** FW: State v. Curnez Ellerbee, Appellate Case No. 2019-000910  
**Date:** Thursday, July 16, 2020 9:27:00 AM  
**Attachments:** [Ellerbee Curnez - Initial Brief Of Respondent and Designation Of Matter \(02327537xD2C78\).PDF](#)  
[Ellerbee Curnez - IBOR Cover letter to J. Delany \(02327531xD2C78\).PDF](#)

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The previous email sent contained an unsigned Proof of Service on the IBOR/DOM. We are re-serving both the corrected brief which now includes a signed proof of service as well as the cover letter previously sent.

Please let us know if you have any questions.

Please acknowledge receipt of this email and the attachments by return email.

Thank you.

*Anne*

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**From:** Anne Mueller  
**Sent:** Thursday, July 16, 2020 9:00 AM  
**To:** [jdelany@sccid.sc.gov](mailto:jdelany@sccid.sc.gov)  
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**Subject:** State v. Curnez Ellerbee, Appellate Case No. 2019-000910

Dear Ms. Delany,

Attached is a copy of the State's cover letter and the Initial Brief of Respondent and Designation of Matter in the above reference matter. The Initial Brief and Designation will be filed with the Court of Appeals later today.

Please confirm receipt of this email and the attachments by return email.

Thank you.

Sincerely,

Anne Mueller

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