STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURNEZ ELLERBEE,

APPELLANT

APPELLATE CASE NO. 2019-000910

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in Appellant's trial for tax evasion where it charged the jury that criminal intent and willfulness can arise from an omission or failure to act, where tax evasion requires proof of a willful affirmative act, since the instructions were unnecessary, confusing and prejudicial given the facts of this case?

STATEMENT OF THE CASE

During the November term of 2018, a Richland County Grand Jury indicted Appellant for tax evasion. R. 414 – R. 415. Appellant was tried before the Honorable DeAndrea D. Benjamin and a jury, from February 11 – 12, 2019. R. 1. Appellant was represented by Jonathan Comish, Catherine Mubarak, and Alice Phillips. R. 1. The State was represented by Allen Myrick, Jr., and Nicole Wooten. R. 1.

Appellant was tried for five counts of tax evasion and five counts of failure to file tax returns. R. 36, l. 1 – 42, l. 10. However, prior to the charges being submitted to the jury, the prosecutor dismissed by nolle prosequi the five indictments for failing to file taxes. R., 261, l. 23 – 262, l. 1; R. 314, ll. 14-17. The jury found Appellant not guilty of four counts of tax evasion but found him guilty of the remaining count of tax evasion. R. 363, l. 11 – 364, l. 3.

Appellant was sentenced to three years imprisonment, but the sentence was suspended upon five years of probation, and three thousand dollars in restitution was ordered. R. 371, l. 25 – 372, l. 6; R. 416.

On March 11, 2019, the parties reconvened for a hearing on Appellant's motion for a new trial. R. 375; R. 377, 3, ll. 2-4. On May 22, 2019, the court issued an order in which it denied the motion. R. 408.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

"In reviewing jury charges for error, this [c]ourt 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). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

ARGUMENT

The trial court erred in Appellant's trial for tax evasion where it charged the jury that criminal intent and willfulness can arise from an omission or failure to act, where tax evasion requires proof of a willful affirmative act, since the instructions were unnecessary, confusing and prejudicial given the facts of this case.

The instructions that willfulness and intent may be proven by showing a failure to act were erroneous because they confused the issue of whether the jury must find Appellant willfully committed an affirmative act or whether it need merely find he willfully failed to act. The instructions were unnecessary and prejudicial because failure to act was not an element of the crime, and because the prosecutor dismissed Appellant's indictments for failure to file taxes prior to the case's submission to the jury. Instead, the prosecutor elected to go forward only on the indictments for tax evasion, a crime which requires proof of an affirmative act willfully done.

Relevant facts

Appellant was an employee of Verizon who was alleged to have failed to file a state income tax return and failed to pay state income taxes for a five-year period, from 2008 – 2012. R. 196, l. 6 – 197, l. 5. The State also alleged Appellant wrongfully claimed he was exempt from withholding taxes for three of those years, and wrongfully claimed only a de minimis withholding amount for two of those years. R. 196, ll. 19-23; R. 140, l. 19 – 144, l. 23; R. 160, l. 15 – 163, l. 19; R. 169, ll. 7-21; R. 215, l. 16 – 216, l. 7.

Appellant was indicted and tried for five counts of failing to file taxes and five counts of tax evasion. R. 36, l. 1 – 42, l. 10. During opening statements, defense counsel conceded that Appellant was guilty of failure to file his tax returns but maintained he was not guilty of tax evasion. R. 97, ll. 20-22. Nevertheless, after the State and the defense rested, the prosecutor chose

to dismiss the five counts of failing to file taxes by nolle prosequi before they could be submitted to the jury. R. 314, ll. 14-23.

The State offered testimony by Andy Blackwell and Marshall Smith, agents with the South Carolina Department of Revenue (SCDOR), that Appellant was investigated because SCDOR was aware that some employees at Verizon were not having withholding taken from their pay. R. 195, l. 4 – 196, l. 10; R. 209, ll. 13-15. The agents claimed that upon investigation, SCDOR found Appellant had no withholding for the years 2008 – 2010; only one hundred and fifty dollars ($150) in withholding for 2011; and two hundred and twenty-seven dollars ($227) for 2012. R. 215, l. 9 – 216, l. 8.

Mr. Smith, who was qualified as an expert in state and federal taxation, testified that withholding is required of employees by law. R. 215, ll. 16-19. Mr. Smith explained that withholding is an advance payment on tax liability. R. 215, ll. 17-18. According to Mr. Smith, when a person claims he is exempt, no withholding is taken. R. 223, ll. 3-8. Mr. Smith also testified that in order to rightfully claim he is exempt, a person must have had no tax liability the prior year, and the person must reasonably expect to have no tax liability for the current year. R. 220, l. 20 – 221, l. 2.

On cross-examination, Mr. Smith acknowledged that the State did not send Appellant any notices of tax deficiencies as required by statute.[1] R. 228, ll. 2-16.

Stacey Young, a human resources manager at Verizon, testified that it is the Verizon employee who enters withholding information via Verizon's "About You" internet site. R. 130, ll. 16-17; R. 140, l. 19 – 141, l. 10. Ms. Young claimed Appellant's electronic W-4 forms showed

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[1] At defense counsel's request, the court ultimately instructed the jury on S.C. Code Ann. § 12-58-70, regarding the requirements for tax deficiency notices and tax due notices. R. 349, ll. 8-13.

that Appellant had no withholding taken from his pay from 2008 – 2010 and had only de minimis withholding taken in 2011 and 2012. R. 131, ll. 8-15; R. 132, ll. 2-11; R. 134, l. 16 – 139, l. 16; R. 141, l. 1 – 143, l. 13. According to Ms. Young, to claim one is exempt from withholding, the Verizon employee must click on a box that says "exemption," and a popup appears that states the employee certifies he is due a refund from last year and he has no tax liability for the current year. R. 144, ll. 17-23; R. 160, l. 15 – 161, l. 4; R. 163, ll. 5-19; R. 169, ll. 9-21. However, the State did not establish that Young knew Appellant or had any knowledge about Appellant's input on the forms specifically, just about the input process generally. R. 140, ll. 11-13,

A charge conference was held, and the prosecutor agreed that an affirmative act is an element of tax evasion. R. 271, ll. 14-15; R. 272, ll. 18-20. While not entirely clear from the record, it appears likely that the court's charge on the elements of tax evasion came from the State's proposed charges. R. 259, ll. 5-15; R. 263, ll. 11-17. Nevertheless, when the court asked the parties whether they had any objection to the court's proposed charge on the elements of tax evasion (which included an affirmative act), the prosecutor voiced no objection. R. 271, ll. 14-15; R. 272, ll. 18-20.

However, the prosecutor said that since willfulness was not defined in S.C. Code Ann. § 12-54-44, the State wanted a charge on willfulness. R. 253, l. 3 – 255, l. 14. Although the prosecutor had earlier admitted the state and federal tax evasion statutes were "doggone close to being verbatim," he nevertheless asked the court charge willfulness as it was defined in two South Carolina cases that do not deal with tax evasion. R. 244, l. 23 - 245, l. 4. The prosecutor cited *United States v. Pomponio*, 429 U.S. 10 (1976) (per curiam), a case that involved violations of the federal tax laws, for the proposition that the jury should be charged on willfulness, but curiously he did not ask the court to give the willfulness charge that was approved by the United States

Supreme Court in *Pomponio*: "willfulness in this context simply means a voluntary, intentional violation of a known legal duty." *Id.* at 12. R. 254, l. 19 – 255, l. 14.

Instead, the prosecutor asked the court to charge on willfulness as it was explained in *State v. Garrard*, 390 S.C. 146, 150, 700 S.E.2d 269, 272 (Ct. App. 2010); and *State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (internal quotations omitted), that: "A willful act is defined as one done voluntarily and intentionally 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, with bad purpose either to disobey or disregard the law." (emphasis added). Neither of those cases dealt with the revenue laws.

Strangely, in the middle of the charge conference, the prosecutor announced his intention to dismiss the five indictments for failing to file taxes, half of the charges for which Appellant was on trial. R. 261, l. 17 – 262, l. 4. The prosecutor said he had "no improper motive" and had merely indicted Appellant for failure to file taxes because he was unsure whether the tax evasion charges "were going to make it through the directed verdict stage." R. 292, ll. 14-21. Thereafter, the trial proceeded only on the five counts of tax evasion.

After the charge conference resumed, defense counsel objected to the State's request to charge that "criminal intent can arise from action or a failure to act." R. 269, ll. 1-6. Defense counsel argued, "the standard that the State has to meet is actually higher than he did or did not act, it is that he intended the consequences of the **act**." R. 269, ll. 7-10 (emphasis added). Defense counsel argued that including language about failure to act within the definition of criminal intent rendered the instructions "confusing and contradictory." R. 269, ll. 10-13. "[W]e have confusing and contradictory language here, so I just ask that all be removed." R. 269, ll. 11-13.

However, the court said it would "leave in criminal intent can arise from action or failure to act" since that was "an accurate statement of law." R. 270, ll. 2-11.

Later, the parties revisited the issue of jury charges, and defense counsel again made objections to the jury being charged on failure to act. "[C]ase law requires affirmative acts for this allegation [tax evasion]." R. 307, ll. 14-15. Defense counsel had handed the court copies of *Sansone v. United States*, 380 U.S. 343 (1965), and *Spies v. United States*, 317 U.S. 492, 499 (1943), and cited to them for the holding that "the felony [tax evasion] is a willful **commission** where the misdemeanors [failing to file taxes] can be a willful **omission**." R. 307, l. 18 – 309, l. 10 (emphasis added). "[W]e don't want the language that says specific intent to fail to do something the law requires be done." R. 312, ll. 17-19.

The court noted the defense's objection for the record and ordered the jury charges be made a Court Exhibit, and the charges were made Court's Exhibit #5. R. 313, ll. 11-23; R. 387.

The court charged the jury on intent as follows:

> 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 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.**

R. 398 – R. 399; R. 345, l. 21 – 346, l. 18. (emphasis added). The court then charged the jury on the elements of tax evasion as follows:

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 has 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 concealment of assets, covering up sources of income, or from 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 of 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 find not only 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 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, with a purpose either to disobey or disregard the law. An 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. In short, the Government must prove beyond a reasonable doubt that the Defendant specifically intended to defeat or evade the payment of income tax that the Defendant knew it was his duty to pay.

> Whether or not the Defendant acted knowingly and willfully is a question of fact to be determined by you based on all the evidence in this case. You may consider the Defendant's general . . . educational background and experience when determining his ability to form a willful intent.

R. 400 – R. 403; R. 346, l. 22 – 349, l. 7.

After the jury was charged, defense counsel renewed his objections to the charges. R. 359, l. 11 – 361, l. 10. Defense counsel again cited *Sansone v. United States*, 380 U.S. 343 (1965), and argued the charge confused an omission with a commission. R. 360, l. 6 – 361, l. 8.

The jury deliberated for an hour and a half. R. 359, ll. 2-3; R. 362 ll. 16-19. It found Appellant not guilty as to four counts of tax evasion (years 2008 – 2011), but found him guilty as to the remaining count of tax evasion (year 2012). R. 414 – R. 415; R. 363, l. 11 – 364, l. 3.

Discussion

The court's instructions on willfulness and intent were erroneous here because the instructions confused the issue of whether the jury must find Appellant willfully committed an affirmative act (entered incorrect exemption information on his electronic W-4 forms) or whether it need merely find he willfully failed to act (failed to timely file his tax returns). The instructions were confusing since the court instructed that the jury must find Appellant willfully committed an affirmative act and yet also instructed that intent and willfulness could be shown by either action or inaction. As will be discussed *infra*, Appellant's mere failure to file taxes could not permissibly supply the element of willfulness. In a tax evasion case, it is an affirmative act which must be willful. The erroneous instructions were particularly harmful here, since defense counsel had earlier conceded Appellant was guilty of failing to file his taxes, when those charges were still pending.

Undersigned counsel has been unable to find any published appellate opinions of this state which address the elements of S.C. Code Ann. § 12-54-44(B)(1), the statute criminalizing the evasion of state taxes. However, the State agreed that South Carolina's statute includes the element of an affirmative act. R. 271, ll. 14-15; R. 272, ll. 18-20. S.C. Code Ann. § 12-54-44(B)(1), the statute criminalizing the evasion of state taxes, provides:

> **A person who wilfully attempts in any manner to evade or defeat a tax** or property assessment imposed by a title administered by the department or the payment of that tax or property assessment, in addition to other penalties provided by law, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both, together with the cost of prosecution.

(emphasis added.) Similarly, the statute criminalizing the evasion of federal taxes, 26 U.S.C.A. § 7201, provides:

> **Any person who willfully attempts in any manner to evade or defeat any tax** imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(emphasis added).

The United States Supreme Court has held that a conviction under the federal statute requires proof of a tax owed, an affirmative act constituting evasion, and willfulness. "As has been held by this Court, the elements of § 7201 are will-fulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax . . ." *Sansone v. United States,* 380 U.S. 343, 351 (1965) (internal citations omitted).

In *Spies v. United States*, 372 U.S. 492, 494-95 (1943), the accused was tried for tax evasion, and conceded he failed to file a tax return but argued the failure was not willful, while the government contended his willful failure to file a return and pay the taxes owed constituted tax

evasion.[2] Spies' counsel requested the trial court charge the jury that an affirmative act was necessary to constitute attempted tax evasion but the trial court refused, and instead charged that "it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well." *Id.* at 494.

The Supreme Court reversed and explained that in employing the term "attempt," an "affirmative action" is implied. *Id.* at 499. The Supreme Court held, "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors." *Id.* The Court explained that tax evasion requires proof of "**a willful and positive attempt to evade tax** in any manner or to defeat it by any means . . ." *Id.* (emphasis added).

> By way of illustration, and not by way of limitation, we would think **affirmative willful attempt** may be inferred from **conduct** such as keeping a double set of books, making false entries of alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Id. (emphasis added).

South Carolina's General Assembly employed language that is virtually identical to the federal tax evasion statute in our state tax evasion statute: "A person who wilfully attempts in any manner to evade or defeat a tax . . . shall . . . be guilty of a felony . . ." S.C. Code Ann. § 12-54-44(B)(1). The same reasoning applies here as in *Spies*—it is attempt, an affirmative act, that must have been done willfully. Here, the State agreed that an affirmative act was an element of tax

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[2] In *Spies*, the United States Supreme Court interpreted § 7201's predecessor statute, § 145(b) of the Revenue Act of 1936. *Spies*, 317 U.S. at 492.

evasion. Appellant was entitled to an instruction that made it clear that an act—a commission—was required to prove willfulness, not a mere inaction or omission.

The United States Supreme Court has further examined willfulness as it relates to action or omission in the tax laws by contrasting felony tax evasion with misdemeanor failure to file taxes. While 26 U.S.C.A. § 7201 criminalizes federal tax evasion, another federal statute, 26 U.S.C.A. § 7203, criminalizes the willful failure to file a tax return. The United States Supreme Court has compared the two offenses and explained that unlike the offense of failing to pay taxes, the offense of tax evasion requires willful action rather than mere willful omission. "[T]he difference between a mere willful failure to pay a tax (or perform other enumerated actions) when due under § 7203 and a willful attempt to evade or defeat taxes under § 7201 is that the latter felony involves 'some willful commission in addition to the willful omissions that make up the list of misdemeanors.'" *Sansone v. United States*, 380 U.S. 343, 351 (1965) (quoting *Spies*, 317 U.S. at 499).

Willfulness with respect to tax crimes has simply been defined as a knowledge requirement, or the "intentional violation of a known legal duty." *United States v. Pomponio,* 429 U.S. 10, 12 (1976) (per curiam). "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." *United States v. Bishop*, 412 U.S. 346, 360 (1973).

The United States Supreme Court has explained, "'[W]illfully' possesses the same meaning . . ." in the federal tax evasion statute as it does in the federal statute criminalizing the failure to file a tax return. *United States v. Bishop*, 412 U.S. at 356. However, **in a tax evasion case, "[s]atisfaction of the willfulness requirement is closely connected with the affirmative act element**." *United States v. Romano*, 938 F.2d 1569, 1572 (2d Cir. 1991) (emphasis added).

"The actor's mental state is described both by the requirement that acts be done 'willfully' and by the designation of certain express elements of the offenses." *United States v. Bishop*, 412 U.S. at 359 (emphasis added). "In § 7201, for example, the Court has held that, by requiring an attempt to evade, 'Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors.'" *Id.* (quoting *Spies*, 317 U.S. at 499).

United States Supreme Court dicta assists in further explaining the intertwined relationship between the affirmative act requirement and the willfulness requirement. *See, e.g., Kawashima v. Holder*, 565 U.S. 478, 487 (2012) (§ 7201 criminalizes "a willful, affirmative attempt to evade a tax"); *Ingram v. United States*, 360 U.S. 672, 681-82 (1959) (Harlan, J., concurring in part and dissenting in part) (quoting *Spies v. United States*, 317 U.S. at 499) (explaining that there are "[t]wo essential elements of [tax evasion], first, knowledge that the taxes are due, and, second, a 'willful and positive attempt to evade tax in any manner or to defeat it by any means'").

The prosecutor asked the court charge willfulness as it was defined in *State v. Garrard*, 390 S.C. 146, 150, 700 S.E.2d 269, 272 (Ct. App. 2010); and *State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (internal quotations omitted): "A willful act is defined as one done voluntarily and intentionally 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, with bad purpose either to disobey or disregard the law." However, neither case was a tax evasion case: *Sowell* was a criminal contempt case and *Garrard* involved an accusation the defendant violated one of his sex-offender conditions for community supervision. *Sowell*, 370 S.C. at 338, 635 S.E.2d at 84; *Garrard*, 390 S.C. at 148, 700 S.E.2d at 271. As seen, tax evasion requires a willful affirmative act, not a willful omission.

What the trial court's instructions misconstrued here was that willfulness must be considered as applied in context—as applied to the additional misconduct necessary to raise a charge of failure to file a return to a charge of tax evasion, which is an affirmative act. *United States v. Bishop*, 412 U.S. at 359. Here, the trial court's charges on willfulness and intent in the context of an omission were confusing. They were also unnecessary, since failure to act is not an element of the offense.

"If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury." *Id.* "[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Dunsil v. E. M. Jones Chevrolet Co.*, 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977).

"The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) (citing *State v. Hewitt,* 205 S.C. 207, 31 S.E.2d 257 (1944)). Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury. *State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946).

It is unclear why the prosecution requested the jury be charged on failure to act, since it was not an element of the offense. Defense counsel correctly argued the jury instructions on failure to act were confusing and misplaced in this (now) trial on tax evasion charges. Defense counsel's admission that Appellant was guilty of failing to file his tax returns in opening statement, followed by the prosecution's decision to dismiss the five counts of failing to file taxes after the parties

rested was an unusual procedural scenario that unfolded before the jury. The court's instructions under these circumstances, that the requirements of criminal intent and willfulness may be satisfied by a finding of the mere failure to act, when considered in conjunction with its instruction that an affirmative act was required, were confusing.

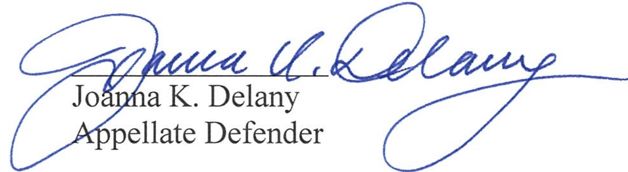
This error was not harmless, particularly where the jury heard defense counsel concede Appellant was guilty of an omission—failure to file taxes. This was not a slam-dunk case for the prosecution. The prosecutor stated he was unsure whether the tax evasion indictments would even survive a directed verdict motion. R. 292, ll. 14-21. The State relied upon the testimony of Stacey Young to establish an affirmative act. However, the State did not establish that Young knew Appellant or had any knowledge about Appellant's input on the forms specifically, just that she knew about the input process generally. R. 140, ll. 11-13. It was also uncontested that the State did not comply with its legal obligation to send Appellant tax deficiency notices. R. 228, ll. 11-16. Finally, the jury deliberated for an hour and a half and ultimately acquitted Appellant of four out of the five counts. R. 359, ll. 2-3; R. 362, ll. 16-19; R. 363, l. 11 – 364, l. 3.

The State was required to prove Appellant willfully attempted to evade taxes. The United States Supreme Court has explained that as to the almost identical federal statute, a willful attempt to evade taxes means a willful act, not a willful omission. Therefore, it was error for the court to instruct that willfulness and intent could be predicated upon an omission. *Spies*, 317 U.S. at 499; *Sansone*, 380 U.S. at 351; *Bishop*, 412 U.S. at 359. Under these circumstances, the charge was confusing, unnecessary and prejudicial. *Blurton*, 352 S.C. at 208, 573 S.E.2d at 804.

This Court should reverse.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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Appellate Defender

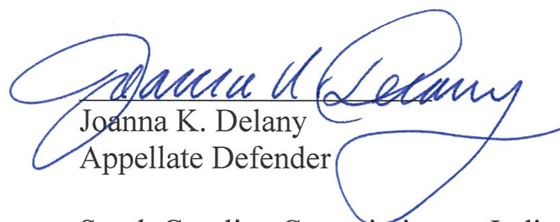
ATTORNEY FOR APPELLANT

This 3rd day of September, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 3, 2020.



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