THE STATE OF SOUTH CAROLINA
In The Supreme Court

ORIGINAL

CERTIORARI TO THE COURT OF APPEALS

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. 2016-000791

THE STATE, ... PETITIONER,

v.

DAVID ZACKARY LEDFORD, ...RESPONDENT.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err in summarily dismissing the State's appeal before briefing as "not immediately appealable" because it failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous nature of the ruling by the trial judge, and the novel question of law presented by the pursuit of this interlocutory appeal?

STATEMENT OF THE CASE

David Zachary Ledford (Respondent) was indicted by the Greenwood County grand jury for inflicting great bodily injury upon a child in violation of S.C. Code Ann. § 16-3-95 (2003 & Supp. 2015) (App.p.1-p.2). He proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. At a charge conference after the close of all of the evidence, the trial court agreed to give a jury instruction that had been requested by Respondent. Petitioner (the State) objected to the charge and 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 attempt to pursue an appeal of the jury charge ruling. (App.p.488-p.510).

On November 5, 2015, the State filed and served notice on appeal from the oral ruling with the South Carolina Court of Appeals. (App.p.532-p.533). On November 10, 2015, Respondent filed a "Motion to Dismiss Appeal and Remand the Case" as well a Memorandum in support of his motion. (App.p.534-p.543). On November 30, 2015, the State submitted a Return to the Motion to Dismiss with the Court of Appeals (App.p.544-p.553), and on the same day filed a "Motion to Certify Appeal" with this Court. (App.p.559-p.563). On December 7, 2015, Respondent filed a Reply to the State's Return to his motion to dismiss. (App.p.554-p.558).

On February 5, 2016, the Honorable Stephanie P. McDonald filed an Order on behalf of the Court of Appeals 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)." (App.p.564) On February 8, 2016, the State submitted a petition for rehearing and by order filed March 18, 2016, the petition was denied by a three judge panel of the Court of Appeals. (App.p.565-p.570). On March 23, 2016, this Court filed an Order denying the State's motion to certify the appeal as moot. (App.p.571). On April

15, 2016, the State submitted a Petition for a Writ of Certiorari to the Court of Appeals. On May 16, 2015, Respondent submitted a Return to Petition for Writ of Certiorari. On May 25, 2016, the State submitted a Reply to Respondent's Return and by Order dated February 10, 2017, this Court granted the petition and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. This Brief of Petitioner now follows.

STATEMENT OF FACTS

As noted above, Respondent was indicted by the Greenwood County grand jury for inflicting great bodily injury upon a child in violation of S.C. Code Ann. § 16-3-95 (2003 & Supp. 2014). The indictment alleges:

> That David Zachary 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 . . . 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.

(App.p.1-p.2) (emphasis added). The statute referenced in the indictment and prohibiting the conduct, Section 16-3-95 of the South Carolina Code, states: "It is unlawful to inflict great bodily injury upon a child." The statute does not contain the word "willfully."

Respondent proceeded to trial before the Honorable Eugene C. Griffith, Jr., and a jury. A 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. (App.p.488-p.510). At the conclusion of the charge conference and over the State's objection, the trial court orally ruled it would give Appellant's "Request to Charge No. 1," to include the definition of "willfully," but it would omit the last sentence of that request to charge. (App.p.491, line 13-p.492, line 4; p.495, line 22-p.496, line 1). The trial court referenced 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.

(App.p.542). The State objected to the jury instruction which was contrary to and added an element to the statute prescribing the offense. (App.p.492, line 15-p.495, line 21). The State expressed a desire to appeal the ruling because the incorrect charge would impair its ability to proceed with trial. The trial court agreed to recess the trial and hold the matter in abeyance without releasing the jury, to allow the State to attempt to appeal the jury charge ruling. Respondent acknowledged that the filing of a notice of appeal would divest the trial court of jurisdiction to proceed with the trial during the pendency of the appeal. (App.p.496, line 2-p.510, line 25).

On November 5, 2015, the State filed and served notice on appeal from the oral ruling. In the notice of appeal, the State explained it was appealing because "that the trial court's order affects a substantial right and prevents a judgment from which an appeal might be taken." (App.p.20-p.21).

ARGUMENT

The Court of Appeals erred in summarily dismissing the State's appeal before briefing as "not immediately appealable" because it failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous nature of the ruling by the trial judge, and the novel question of law presented by the pursuit of this interlocutory appeal.

In the Court of Appeals, Respondent moved 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." He argued the State has no right to appeal a mid-trial jury charge ruling which substantially impairs the prosecution, despite the fact that the State would 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 also asked the Court of Appeals to remand the case to the court of general sessions for dismissal of the charge which was, in essence, a request for the appellate court to direct a verdict on an issue neither raised to nor ruled upon by the trial court. The State argued both of Respondent's requests were without merit; however, the Court of Appeals disagreed in part and granted Respondent's motion to dismiss the State's appeal as "not immediately appealable." The State contends the summary dismissal by the Court of Appeals was in error and now asks this Court to reverse its decision.

The Court of Appeals should only have dismissed the State's appeal if Respondent was able to show in his motion that the State was statutorily prohibited from taking an appeal from the trial court's ruling in this case. However, Respondent's arguments to the Court of Appeals were faulty and he failed to make the requisite showing. The trial court's ruling is immediately appealable because without recourse to challenge that ruling in the appellate courts, the State will

be precluded from correcting the egregious error in the trial court's interlocutory ruling and will be 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, 317, 368 S.E.2d 456, 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, 23, 471 S.E.2d 163, 164 (1996); Woodward v. Westvaco Corp., 319 S.C. 240, 242, 319 S.E.2d 392, 393 (1995), overruled on other grounds by Sabb v. S.C. State University, 350 S.C. 416, 567 S.E.2d 231 (2002). 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, 780 (1993). The purpose of this general practice is to prevent piecemeal appeals. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 94, 529 S.E.2d 11, 13 (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 some interlocutory orders 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, 319 S.C. at 242, 319 S.E.2d at 393 ("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., 310 S.C. at335, 426 S.E.2d at 780. (emphasis added); see also Breland, 339 S.C. at 93, 529 S.E.2d at 13 (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, 339 S.C. at 93, 529 S.E.2d at 13.

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 acquitted based upon the insufficiency of the evidence. State v. Holliday, 255 S.C. 142, 145, 177 S.E.2d 541, 542 (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.E.2d 74, 75 (1922) (finding the State has no right of 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. Taylor, 348 S.C. 152, 157, 558 S.E.2d 917, 919 (Ct. App. 2001) (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, 681, 511 S.E.2d 396, 399 (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. 167, 168, 337 S.E.2d 208, 209 (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, 400, 297 S.E.2d 414, 417 (1982) (the State may appeal an order setting aside a conviction where the order is based upon an error of law because double jeopardy concerns are not implicated where 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,

492 (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) (the State may appeal an order dismissing the prosecution); State v. Bouknight, 55 S.C. 353, 33 S.E. 451, 452 (1899) (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 which prohibits the relevant 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 to the contrary improperly alters the elements of the offense. That ruling to add "willfully" as an element of the offense effectively altered the level of evidentiary proof the State would be required to present to the jury in support of conviction, **after** the State's evidence has been presented, which improperly proscribed the State's ability to rely on the evidence of the elements as specifically delineated in the statute. See State v. Toliver, 304 S.C. 298, 299, 403 S.E.2d 676, 676-77 (Ct. App. 1991) ("When, as here, an indictment contains matter unnecessary to the description of the offense, the unnecessary matter may be disregarded as surplusage and no proof thereof is required."); State v. Thompson, 305 S.C. 496, n.1, 409 S.E.2d 420 n.1 (Ct. App. 1991) ("Surplusage will not vitiate an indictment which, without regard to the surplusage, is sufficient to charge the offense for which the defendant is being indicted."). Because the statute is silent as to a particular 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 of proof 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 a proper jury instruction, other than to permit an immediate appeal pursuant to S.C. Code Ann. § 14-3-440 (2). Unlike a defendant who can appeal a guilty verdict on grounds of an improper jury charge, the State cannot appeal a jury verdict of "not guilty" on grounds of a improper jury charge, even if the trial court clearly misstated the law.

Respondent also asked the Court of Appeals to remand the case to the court of general sessions to dismiss the action. He took the position that the appeal constitutes a concession by the State that its evidence is insufficient to support a conviction and would warrant dismissal of the charge against him. The Court of Appeals did not address this request when dismissing the State's appeal, thus, it is not an issue before this Court.

In his reply to the State's Petition for a Writ of Certiorari, Respondent continued to pursue this angle by contending:

> The State has represented to the trial court, to the South Carolina Court of Appeals and this Court, that by filing this appeal, the charge to the jury giving 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.

(Return to Petition, p.3). He went on to argue that the erroneous jury charge "hardly prevents the State from winning, unless the State has acknowledged that the evidence does not establish

willfulness" and that because of this acknowledgement, "the State should dismiss the case in the event this appeal is denied." (Return to Petition, p.3). To the extent Respondent continues to advance this same argument in the appeal now before this Court, the State submit he has significantly misconstrued the State's position in this matter as it was argued to the trial court, the Court of Appeals, and this Court.

At trial the solicitor referenced the particular sentence in Respondent's requested charge that: "It is not sufficient that the state prove that he acted negligently, grossly negligent or reckless in his action." He argued such language "would basically direct the jury to find him not guilty." (App.p.493, line 23-p.494, line 7). However, this argument was made in the context of the preceding sentence in the requested charge which did not merely use the word wilfully as unnecessarily included in the indictment, but sought to define that term to require not just that the act itself must be was wilfull, but that the result of the wilfull act was in fact known to the actor. Specifically, Respondent asked the trial judge to insert what was essentially a specific intent requirement by charging that "the state is required to prove that Mr. Ledford knew his act would inflict great bodily injury upon a child." While the solicitor argued the requested charge as a whole was akin to directing a verdict of not guilty, he never argued a not guilty verdict would be the only possible result if the charge was given. Indeed, the State has never conceded to the trial court that a jury verdict of guilty would be an impossibility under the proposed jury charge. (App.p.492-p.495).

Instead, the State has maintained it is pursuing a proper interlocutory appeal because, regardless of the verdict reached after being given the erroneous jury charge, the State would be precluded from pursuing an appeal to challenge what it alleges is the trial court's erroneous ruling. In other words, as specifically argued in the Petition for a Writ of Certiorari:

> 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) (emphasis added); 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).

(Petition p.8-p.9). Thus, the inability to appeal the erroneous jury charge would affect a substantial right and determine the action because there would be no way to vindicate the trial court's ruling on appeal, not because the ruling would make a guilty verdict less likely. For this reason, the State asks this Court to accept and evaluate the State's position as set forth in the Brief of Petitioner, and not as misconstrued by Respondent in his return to the State's Petition for Certiorari. To the extent this Court determines reversal of both the Court of Appeals and the trial court is not warranted as set forth in this Brief, the State submits it should simply remand this matter to the trial court for further proceedings and resumption of the trial. This would be the only proper course of action where the Court of Appeals itself declined to address Respondent's request to remand the case to the court of general sessions to dismiss the action. Ordering dismissal of the underlying charge is not an issue before this Court because it was not ruled upon by the Court of Appeals.

In conclusion, the State respectfully submits that the Court of Appeals erred in granting the motion to dismiss and in summarily dismissing the State's proper interlocutory appeal. If the appeal is not permitted to proceed, the State will be left without a means to correct a legal error

that substantially impairs the prosecution of Respondent's criminal conduct. The Court of Appeals failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous nature of the ruling by the trial judge, and the novel question of law presented by the pursuit of this interlocutory appeal. The trial judge erred in ruling it would give an improper jury charge that added a non-statutory element to the offense, and the Court of Appeals erred in finding this error was not immediately appealable. The State respectfully asks this Court to reverse the decision of the Court of Appeals, reverse the trial court's ruling to give an improper jury charge, and order that the trial proceed with a jury charge that accurately sets forth the elements of the charged offense.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court: (1) reverse the decision of the Court of Appeals, (2) reverse the trial court's ruling to give an improper jury charge, and (3) order that the trial proceed with a jury charge that accurately sets forth the elements of the charged offense.

Respectfully submitted,

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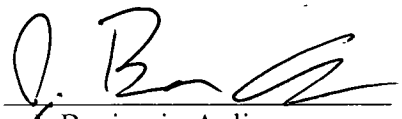
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Brief of Petitioner* dated March 13, 2017, on Respondent by depositing two copies of the brief in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 13th day of March, 2017.

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