STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of General Sessions
The Honorable George McFaddin Jr., Circuit Court Judge

Appellate Case No. 2023-000283

THE STATE,

Respondent,

v.

CELIA ELIZABETH WINDHAM,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the trial court correctly refused to grant a directed verdict on the charge of breach of trust with fraudulent intent where Windham borrowed the victim's car and never returned it.

STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant Celia Windham for breach of trust with fraudulent intent. S.C. Code Ann. §16-13-230 ("A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny."). Windham proceeded to jury trial before the Honorable George McFaddin Jr., Circuit Court Judge, on February 13–17, 2023.

The State presented evidence that the victim, Windham's boyfriend, allowed her to borrow his car so that she could cash a check. She never returned. (Feb13–16 Tr.p.87–101). After repeated phone calls, Windham eventually told the victim she had left the car at a Domino's Pizza. The victim looked for his car but never found it. The car was never recovered. (Feb13–16 Tr.p.121–22).

Windham was convicted as charged and sentenced to one year of incarceration, which was suspended upon the payment of a $100 fine. In this direct appeal, Windham argues the court erred by refusing to direct a verdict of not guilty.

STANDARD OF REVIEW

When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. State v. Holcomb, 426 S.C. 557, 562, 827 S.E.2d 367, 370 (Ct. App. 2019).

ARGUMENT

The trial court correctly refused to grant a directed verdict because Windham obtained property lawfully and fraudulently converted it to her own use.

The State presented evidence that the victim allowed Windham to borrow his car in order to cash a check, and that Windham never returned it. Her conduct meets the definition of breach of trust. This Court should affirm.

A. It is not necessary to prove a fiduciary relationship to establish the crime of breach of trust with fraudulent intent.

Citing State v. Parris, 363 S.C. 477, 611 S.E.2d 501 (2005), Windham argues that in order to prove the crime of breach of trust with fraudulent intent, the State must show the existence of a trust relationship where "the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf." While the Parris court did cite this definition of a trust relationship, the opinion should not be read to require this type of relationship in all breach of trust cases. The trial court used the correct definition of a trust relationship as it relates to the crime of breach of trust with fraudulent intent, which requires only that one be in lawful possession of the property of another and subsequently convert that property to his own use with fraudulent intent.

The trial court used the following definition of breach of trust, which it gathered from the judicial bench book:

> The State must prove beyond a reasonable doubt that personal property was put in the defendant's possession as a trust. A trust is a holding of property subject to a duty of using it or applying it his personal use according to the direction given by the person who put the property in trust. The State must prove beyond a reasonable doubt a breach of trust. There must be a use of the property by the defendant

> for some purpose other than for which it was first put in trust. The State must prove beyond a reasonable doubt that defendant had a fraudulent intent in breaching the trust. The State must prove the property was converted by the defendant with the fraudulent intention of using it as his or her own or of the permanent depriving the owner of the use of the possession of the property.

(Tr.p.141–42). The trial court referenced this Court's opinion in State v. Holcomb, 426 S.C. 557, 827 S.E.2d 367 (Ct. App. 2019), which in turn cited McPhatter v. Leeke, 442 F.Supp. 1252 (D.S.C. 1978) (conducting a thorough analysis of South Carolina precedent defining the offense of breach of trust).

Among the cases cited in McPhatter is State v. McCann, which conducted its own thorough review of case law. The McCann court surveyed the history of the statutory crime of breach of trust and explained it as follows:

> The effect of the decisions from which we have quoted is clearly a holding that breach of trust with fraudulent intention, in this state, is nothing more or less than larceny. It might well be termed 'statutory larceny,' as distinguished from larceny at common law. The main distinction between the two crimes is this: In common-law larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully. . . .
>
> [I]f possession of the property is obtained through artifice, trick, or other fraud, then such possession is not lawfully obtained and the crime is larceny at common law, rather than that of breach of trust, as contemplated by the statute. . . .
>
> Under the decisions from which we have quoted, the crime of breach of trust with fraudulent intention is to be governed by the legal principles applicable to the crime of larceny.

State v. McCann, 167 S.C. 393, 166 S.E. 411, 413 (1932) (emphasis removed). That breach of trust is but another form of larceny is evident from the statute itself, which provides that a "person committing a breach of trust with a fraudulent

intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention **is guilty of larceny**." S.C. Code Ann. § 16-13-230(A) (emphasis added).

The connection to larceny is illustrated by the Gorman case, cited in McCann, where the defendant was convicted of larceny for stealing a horse:

> On Sunday the prisoner applied to Gandy to borrow one of Tidwell's horses, to go a few miles below Granby, as he pretended, to procure hay for his horses; and Gandy lent him the horse, charged to have been stolen, and he went directly off with him to Barnwell district, where he was before known, and was there recognized by the name of William Turnage, and there sold the horse to a Mr. Seigler.

State v. Gorman, 11 S.C.L. (2 Nott & McC.) 90 (1819). Gorman predates the breach of trust statue, but Gorman would be guilty of breach of trust today. There may be a question whether he obtained possession of the horse lawfully or through artifice—a sometimes-blurry distinction—but he likely could have been convicted of either breach of trust or grand larceny depending on the jury's view of the evidence. See McPhatter, 442 F. Supp. at 1255 (explaining "the cases have not held the crimes of larceny and breach of trust with fraudulent intent to be mutually exclusive, there is no requirement that lawful possession be proved to convict of breach of trust. In fact, both offenses merge and constitute the single crime of larceny."). Windham's case is essentially the same as Gorman's.

Another similar fact pattern was presented in State v. Thurston:

> The defendant was a common carrier, owned a boat on the Santee, and undertook to transport cotton from Orangeburg district to Charleston, belonging to various persons. Before reaching Charleston, and while passing down the river, he communicated his intention, (to one of the hands on board,) of converting the cotton to his own use. Afterwards, at

> 'Euchaw Creek' in Charleston district, he consummated his previous intention, by burning a portion of the cotton and disfiguring the marks upon the other bales by patching, and had the cotton shipped on board a steamer to Charleston, and sold and appropriated the sales to his own use.

State v. Thurston, 27 S.C.L. (2 McMul.) 382 (1842).

In these cases, the court reasoned the defendants committed larceny because they had the intent to steal at the time they gained possession of the goods. However, Justice Earle dissented in Thurston, reasoning that a conviction for larceny would not stand where the property was obtained without fraud or deceit: "[I]f a person obtain the goods of another by lawful delivery, without fraud, although he afterwards convert them to his own use, he cannot be guilty of felony." Thurston, 27 S.C.L. at 398. According to Justice Earle, Thurston could not be convicted in Orangeburg County, where he took possession of the goods, but only in Charleston where he converted the goods to his own use.

The first breach of trust statute was enacted in 1866. In State v. Shirer, the supreme court, referencing Thurston, wrote that "the object of our act was simply to enlarge the field of larceny, removing what before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it." State v. Shirer, 20 S.C. 392, 408 (1884). That same year, in State v. Butler, the supreme court defined breach of trust as "the appropriation of the property of another to the use of the accused, with the intent to make it his own, and to destroy the title of the true owner, under circumstances which would make it larceny at common law, except for the fact that he had obtained possession in the first

instance in some legal way." State v. Butler, 21 S.C. 353, 355 (1884). This is the proper meaning of the crime of breach of trust in South Carolina.

Windham cites an isolated portion of the State v. Parris opinion to support her argument that it is necessary to show "the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf." The Parris court cited State v. Jackson, 338 S.C. 565, 567, 527 S.E.2d 367, 368 (Ct. App. 2000), which in turn quoted the Black's Law Dictionary definition of "trust." This is essentially the definition of a fiduciary relationship in the civil law of trusts. See Fiduciary relationship, Black's Law Dictionary (3rd Pocket Edition 2006) (defining "fiduciary relationship" as "a relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship").

The Black's Law definition of a "trust" is not an element of breach of trust under section 16-13-230. That the supreme court believed this definition was helpful to explain its decision in Parris does not mean that it states an essential element of breach of trust in all cases. Parris did not abrogate the court's earlier cases defining the crime of breach of trust with fraudulent intent, which it quoted earlier in the opinion as the definition of breach of trust.

Justice Pleincones directly quoted Shirer and McCann in his dissent in Parris to express his disagreement with the court citing this definition of a "trust" in a criminal case. Justice Pleicones explained:

> I disagree with the majority's interpretation of the language from Shirer, 'received in trust,' as meaning 'received as a trustee.' In my

> opinion, the Shirer Court used the word 'trust' in a lay sense, as in **confidence in the integrity of another person**. The Court was merely explaining the dichotomy between lawful and unlawful acquisitions in the context of larceny. **A friend, an employee, or some other 'trusted' person** might receive property lawfully, but if he thereafter converts the property to his own use with animus furandi, then he is guilty of larceny through breach of trust with fraudulent intent.

State v. Parris, 363 S.C. 477, 484, 611 S.E.2d 501, 504 (2005) (Pleicones, J., dissenting) (emphasis added). Justice Pleicones pointed out that under the definition cited by the majority—that the property must be used "for the benefit of" the transferor—no trust relationship would have existed in Parris because the victims did not believe they were creating a trust relationship. Id. at 485, 611 S.E.2d at 505.

Justice Pleicones was correct that the Black's Law definition is not an element of breach of trust under South Carolina law. This would be inconsistent with Shirer and McCann, which explain that the intent of the statute was to expand the field of larceny, not to create a more restrictive crime requiring the establishment of a formal trust relationship. Butler, 21 S.C. at 354 ("The act on the subject of breach of trust makes the offence larceny in general terms, and we think when it **placed it under the general head of larceny**, it partakes of all the incidents thereto, and is governed by the law applicable to larceny as one of the classes of crime whether statutory or common law."(emphasis added)). The trial court correctly held that a trust—in the context of section 16-13-230—is "a holding of personal property subject to a duty of using it or applying it in his personal use according to direction given by the person who put the property in trust."

(Tr.p.142). That the property must be used in accordance with the directions of the transferor does not mean that it must be used for his "benefit."

This meaning applies equally to a person—such as Windham—acting a bailee, not only those who have entered into a fiduciary relationship. See McCann, 167 S.C. 393, 166 S.E. at 413 ("Breach of trust with fraudulent intention, by that especial designation, is, so far as we are advised, peculiar to this jurisdiction. In other states, the crime, as known to us, is called by different names, such as 'larceny after trust,' '**larceny by a bailee**,' 'larceny by false pretenses,' and very commonly as 'embezzlement.'"(emphasis added)); see also Va. Code Ann. §18.2-117 ("If any person comes into the possession as bailee of any animal, aircraft, vehicle, boat or vessel, and fail to return the same to the bailor, in accordance with the bailment agreement, he shall be deemed guilty of larceny thereof and receive the same punishment, according to the value of the thing stolen, prescribed for the punishment of the larceny of goods and chattels."). This is true even when there is no agreement that the property be used "for the benefit" of the transferor, such as when the property is lent to the bailee as a favor.

As explained in Shirer, a "breach of trust is where personal property of appreciable value and of which larceny may be committed is **put into the possession of another; and when it is so put into his possession it becomes a trust**, and while it so remains, if he conceives the purpose to convert that property to his own use, and does it with intention to deprive the owner of the use of

that property, then that is a breach of trust with a fraudulent intent." Shirer, 20 S.C. at 401 (1884) (emphasis added). The facts of Shirer illustrate this holding:

> Among other things, it appeared that Banks & Smith were in the rice milling business at Orangeburg; that they had an office in which the business was conducted, and the defendant Shirer was employed by them as a general office clerk. Smith had general charge of the outdoor work, and Banks looked after the finances and office work. Shirer and Banks together kept the books of the concern; Shirer had charge of the cash on hand; that there was a safe in the office, with a combination lock, of which no one had knowledge but the partners and Shirer. All could enter the office and the safe; but inside the safe there were two drawers, to which Shirer alone had access. The use of these had been assigned to him for the purpose of keeping at night the cash received during the day. Shirer alone had the key to these drawers; and the allegation was that, on the night of the larceny, he had in this drawer $394, money belonging to the proprietors, Banks & Smith, which said money he, Shirer, in breach of the trust reposed in him, fraudulently appropriated to his own use.

Shirer, 20 S.C. at 401.

Shirer was a bailee. He had no fiduciary duty to spend the money with which he was entrusted in any discretionary way for the benefit of its owners. He was merely a clerk who had access to money in a safe and converted it to his own use. The supreme court upheld his conviction for breach of trust: "We do not see why a clerk, who has received into his possession money of his employer in trust, and having it in his exclusive custody, appropriates it fraudulently to his own use, may not be indicted under the act for larceny by breach of trust, although for the same offense he might be indicted for simple larceny at common law." Shirer, 20 S.C. at 409. See also Butler, 21 S.C. at 355 (breach of trust occurs when one has "the legal custody of the property of another").

This case is distinguishable from State v. Jackson. There, Jackson received a check in the mail by mistake, cashed the check, and refused to return the money. The check was supposed to have been mailed to a car dealership to pay off a lien on an automobile Jackson had traded. State v. Jackson, 338 S.C. 565, 567, 527 S.E.2d 367, 368 (Ct. App. 2000). This Court reversed because there was no trust relationship. However, the bigger issue was that there was no conversion with fraudulent intent. Simply put, Jackson did not steal the money. Rather, the whole situation was simply a "very big mistake." Id. at 571, 527 S.E.2d at 370. While the lienholder may have had a remedy in the civil law, Jackson was not guilty of larceny or breach of trust.

The supreme court's citation to the Black's Law definition of a trust in Parris did not redefine the elements of the crime. Rather, the Parris opinion was a repudiation of the court of appeals opinion reversing Parris's conviction based on fiduciary principles. The court of appeals cited the Restatement of Trusts defining a trust as "a fiduciary relationship ... which arises as a result of a manifestation of an intention to create it." State v. Parris, 353 S.C. 582, 589, 578 S.E.2d 736, 740 (Ct. App. 2003) (emphasis removed), rev'd, 363 S.C. 477, 611 S.E.2d 501 (2005). Citing civil cases, the opinion emphasized there was no fiduciary relationship between the parties. Id. at 592, 578 S.E.2d at 742. The court emphasized "the commercial relationship between a buyer and seller [is] ordinarily not fiduciary." Id. at 593, 578 S.E.2d at 742.

The supreme court reversed because this was a too-restrictive view of the crime of breach of trust. While the court cited Jackson for the definition of a trust as an "arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit," the court removed all references to a fiduciary relationship as a predicate for breach of trust. Most importantly, the court continued to cite the definition given 140 years ago in Shirer, which places breach of trust squarely within the field of larceny. The facts of Parris demonstrate that the supreme court has adopted a very broad interpretation of breach of trust, even if the quotation of the definition of "trust" from Jackson could be viewed as narrowing the meaning of the crime if viewed in isolation.

Windham's view of breach of trust essentially requires the existence and breach of a fiduciary relationship. This is not the meaning of the crime of breach of trust in South Carolina. "[B]reach of trust with fraudulent intention, in this state, is nothing more or less than larceny." McCann, 167 S.C. 393, 166 S.E. at 413. The gravamen of the crime is the act of conversion. The evidence in this case supports a finding that Windham converted the victim's property to her own use after obtaining lawful possession, and thus committed breach of trust with fraudulent intent. The trial court correctly refused to grant a directed verdict on this ground.

B. Even if the State is required to prove the victim's property was transferred to Windham "with the intention that it be administered for [his] benefit," the evidence—viewed in the light most favorable to the State—supports Windham's conviction.

Even if Windham is right that property must be intended to be used "for the benefit of" the transferor, the trial still correctly refused to direct a verdict. A directed verdict should only be granted when there a total failure of the State's evidence viewed in the light most favorable to the State. Likewise, when reviewing a denial of a directed verdict, "an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Holcomb, 426 S.C. 557, 562, 827 S.E.2d 367, 370 (Ct. App. 2019).

The victim testified he allowed Windham to borrow his car so that she could cash a check. He explained: "That way she had her own money and wouldn't have to depend on me." (Tr.p.88). Thus, he gained a benefit—less dependency from Windham. Certainly he entrusted Windham with his car with the understanding that she would bring it back. Viewing this testimony in the light most favorable to the State, a trust relationship existed. 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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