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**Aug 07 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CELIA WINDHAM,

APPELLANT.

APPELLATE CASE NO. 2023-000283

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FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

Respondent contends that “it is not necessary to prove a fiduciary relationship to establish the crime of breach of trust with fraudulent intent.” BOR. 4. Critically, Appellant has never argued that a fiduciary relationship is an element of breach of trust with fraudulent intent. What Appellant has argued below, and now on appeal, is that the State must prove the critical element of the existence of a trust to establish the crime of breach of trust with fraudulent intent. At trial, the State failed to prove a trust existed between Appellant and McCoy. The circuit court should have directed a verdict of acquittal.

Respondent’s primary argument is that breach of trust with fraudulent intent is merely larceny after lawful possession. However, “[o]ne difficulty with assuming that breach of trust is simply larceny by another name minus the requirement of a trespassory taking is that one might overlook the unique element of the newer offense: **the existence of a trust.**” McAninch, Fairey, & Coggiola, The Criminal Law of South Carolina, 360 (6<sup>th</sup> ed. 2013) (emphasis added). Our appellate courts have reversed numerous convictions where the State failed to prove the specific trust that was breached.

In State v. Cody, 180 S.C. 417, 186 S.E.2d 165 (1936), the defendant was charged with breach of trust for fraudulently converting shares of stock when in fact the defendant had, with authorization, sold the stock shares and then converted *the proceeds* from the sale of the stock to his own use. Cody at 417, 186 S.E.2d at 16-167. Our Supreme Court reversed the defendant’s conviction because the evidence at trial only supported a breach of trust regarding the proceeds and not a breach of trust regarding the actual stock shares as was alleged in the indictment. The Court wrote that “[t]he state must prove the **exact trust** which has been breached.” Id. (emphasis added); See also State v. White, 244 S.C. 349, 137 S.E.2d 97 (1964) (holding that the

evidence established that the defendant violated the trust by failing to remit proceeds of the sale of equipment to owner who had left equipment with defendant to sell, did not support a conviction on an indictment alleging that the defendant fraudulently appropriated the equipment to his own use).

In State v. Le Master, 231 S.C. 321, 98 S.E.2d 756 (1957), the complaining witnesses had hired two contractors to construct a building by November 11, 1955. The parties agreed that the owners would make payments to the defendants “by week or as work progresses.” Five payments were made, totaling \$6,500 of the \$8,000 total price. Le Master at 322-323, 98 S.E.2d at 756. A day before the work was to be completed a dispute arose when the owners offered to pay the defendants the remaining \$1,500 to finish the job but the defendants would not accept the payment as the final payment because an additional sum of \$591.59 for changes and additions was also due. The owners refused to pay the additional sum and the defendants left the project unfinished. Id. The owners hired another party to complete the projection for \$1,700 “or approximately \$200 more than the amount owed the appellants according to the prosecutrices’ own testimony.” Id. at 323, 98 S.E.2d at 757.

The prosecutrices had paid defendant’s \$2,000 on October 20, 1955, which the prosecutrices contended was to be used to pay for materials, “and specifically some \$600 owing to one M.D. Martin.” Id. The State alleged the payment was “impressed with a special trust” for payment of the specific bills and that the trust was violated when the bills remained unpaid. The uncontradicted testimony showed that the construction materials used in the project were billed to the defendants, not to the prosecutrices, and there was no evidence that the materials were diverted from the project or converted in any way to the use of the defendants. There was no relationship between the prosecutrices and the materialmen who expected to receive their

compensation from the defendants. The Court further noted that the notations on the checks “to the effect that the owner’s obligations had been met up to the date of the check related to their transactions with appellants and did not mean that the contractors had paid all materialmen in full.” Thus, our Supreme Court found that the State had failed to offer evidence of a trust between the parties and held the lower court erred by not granted a directed verdict. Id. at 324, 98 S.E.2d at 757; See Also State v. Jackson, 338 S.C. 565, 527 S.E.2d 367 (Ct. App. 2000) (Stating a trust is an arrangement whereby property is transferred with intention that it be administered by trustee for another’s benefit and the fraudulent conversion of money delivered by mistake did not give rise to breach of trust because “the person who mistakenly gave the money or property to another never reposed trust or confidence in that person.”).

The modern jurisprudence of this State has repeatedly defined a trust as an arrangement whereby property is transferred with intention that it be administered by the trustee for another's benefit. See State v. Jackson, 338 S.C. 565, 527 S.E.2d 367 (Ct.App.2000), State v. Parris, 363 S.C. 477, 611 S.E.2d 501 (2005), State v. Holcomb, 426 S.C. 557, 827 S.E.2d 367 (2019). What is clear from all of the cases dealing with breach of trust is that the property in the trust cannot be used for the benefit of the trustee but must be used at the direction of the trustor for the benefit of the trustor or another. Even the oft cited Anderson’s South Carolina Requests to Charge reflects the case law as it has developed. It reads,

The elements of the crime of breach of trust with fraudulent intent are:

- (1) there must be a trust;
- (2) there must be a breach of the trust; and
- (3) there must be a fraudulent intent on the part of the defendant.

First, the State must prove the existence of a trust relationship. A **“trust,” for purposes of the offense of breach of trust with fraudulent intent, is an arrangement whereby property is transferred with intention that it be administered by the trustee for another’s benefit.**

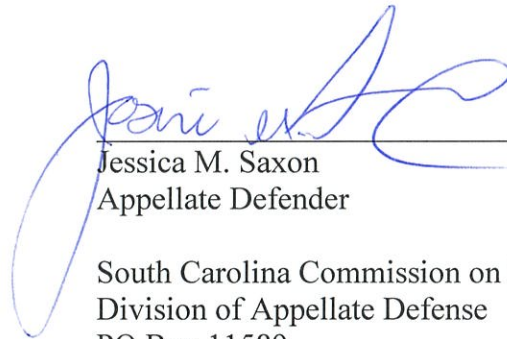
To establish existence of a trust relationship, **the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf.** A trust is an obligation upon a person arising out of a confidence reposed in him to apply and use property faithfully and according to such confidence. It is a holding of property, subject to a duty of using or applying the property according to directions given by the person from whom it is derived.

Breach of Trust with Fraudulent Intent, Anderson, S.C. Requests to Charge - Criminal, § 2-38 (3<sup>rd</sup> ed. 2023) (emphasis added).

The State presented no evidence of a trust between Appellant and McCoy. McCoy lent Appellant his car so that she could accomplish personal business, namely obtaining a loan. McCoy did not instruct Appellant to use the car in a particular way or for a particular purpose. He did not direct Appellant to use the car to his benefit or the benefit of another, he merely allowed her to borrow his car for her own benefit. Even when taking the evidence presented at trial in the light most favorable to the State, there is no evidence of a trust between Appellant and McCoy. This Court should reverse Appellant's conviction and sentence.

**CONCLUSION**

Based on the foregoing argument, along with those arguments set forth in Appellant's Final Brief, Appellant respectfully requests that this Court find the circuit court erred in denying the motion for a directed verdict and reverse Appellant's conviction and sentence for breach of trust with fraudulent intent.



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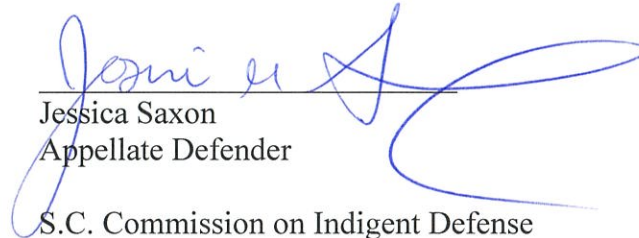
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply 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."

August 7, 2024.



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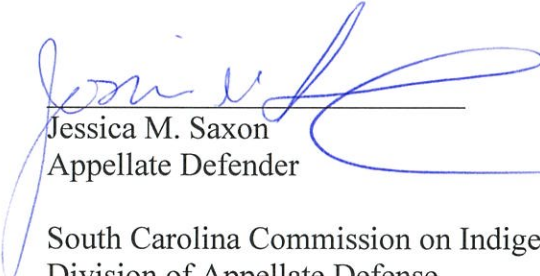
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CERTIFICATE OF SERVICE  
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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 7<sup>th</sup> day of August, 2024.

  
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