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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE, RESPONDENT,

V.

CHRISTIAN J. NOVELLINO, APPELLANT

APPELLATE CASE NO. 2025-002271

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 8

ARGUMENTS

I. The trial court erred in denying Appellant's motion for a new trial on the breach of trust with fraudulent intent charge because there was no evidence that Appellant's initial receipt of the converted money was lawful 9

II. The trial court erred by commenting on the facts during its jury charge 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) 12

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (2021) 8

State v. Brown, 443 S.C. 196, 904 S.E.2d 448 (2024) 14

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) 15

State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). 15

State v. Frasier, 437 S.C. 625, 879 S.E.2d 762 (2022) 8

State v. Gorman, 11 S.C.L. 90 (1819) 10, 11

State v. Holcomb, 426 S.C. 557, 827 S.E.2d 367 (Ct. App. 2019) 11

State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983) 12, 14

State v. McCann, 167 S.C. 393, 166 S.E. 411 (1932) 10, 11, 12

State v. Miller, 441 S.C. 106, 893 S.E.2d 306 (2023) 8

State v. Mitchell, 56 S.C. 524, 35 S.E. 210 (1900) 14

State v. Parris, 363 S.C. 477, 611 S.E.2d 501 (2005). 9, 11

State v. Shirer, 20 S.C. 392 (1884) 10

State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993) 8

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 14, 15

State v. Taylor, 348 S.C. 152, 558 S.E.2d 917 (Ct. App. 2001) 8

State v. Thurston, 27 S.C.L. 382 (Ct. App. 1842) 10, 11

Statutes

S.C. Code Ann. § 16-3-657 15

S.C. Code Ann. § 16-23-230(A) 9

Constitutional Provisions

S.C. Const. art. V, § 21 14

Other Authorities

17 S.C. Jur. § 5, *False Pretenses* (Mar. 2026 update) 10, 11

29A C.J.S. *Embezzlement* § 14 (Dec. 2025 update).. 11, 12

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 230 (1765). 11

Animus furandi, Merriam-Webster Legal Dictionary, https://www.merriam-webster.com/legal/animus%20furandi (last accessed Feb. 26, 2026)...................................... 10

EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 107 (1644)... 10

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying Appellant's motion for new trial on the breach of trust with fraudulent intent charge when there was no evidence that Appellant's initial receipt of the converted money was lawful?

II. Whether the trial court erred by commenting on the facts during its jury charge?

STATEMENT OF THE CASE

At its December 12, 2024 term, the York County grand jury indicted Appellant for breach of trust with fraudulent intent, value $10,000 or more and for obtaining goods under false pretenses. R* (Indictments). The case was tried from November 3-5, 2025, before the Honorable R. Keith Kelly and a jury. Tr. I. 1. Public defenders Devin Neilson and Mark McKinnon represented Appellant; Kevin Brackett and Matthew Hogge represented the state. Tr. I. 1. The jury convicted Appellant as indicted. Tr. II. 242, ll. 2-5. Judge Kelly sentenced Appellant to ten years on both charges, to run consecutively. Tr. II. 256, ll. 1-5.

This appeal follows.

STATEMENT OF FACTS

It is undisputed that Appellant failed to deliver constructed homes to several different customers. The state's theory was that Appellant's actions went beyond breaches of contract and constituted fraud and embezzlement. Appellant's theory was that he was simply a poor businessman, and any legal remedy lied, if at all, through civil litigation.

Appellant was the owner and proprietor of Construction Up, LLC and Pillar Homes, LLC. Tr. I. 120, ll. 3-7. The charges in this case both related to Appellant's failure to construct a home for Johnny Huynh or refund the deposit Huynh made. R.* (Indictments). The state also presented evidence from several other customers who aired similar complaints about Appellant's business practices.

In February 2022, Huynh was looking for a house in the Davidson, North Carolina area. Tr. I. 67, ll. 11-16. He saw a listing on Realtor.com for a new construction located on Shearer Road in Davidson, North Carolina. Tr. I. 67, ll. 17-24. The listed real estate agent was Debra Holloman. Hollman put Huynh in touch with Appellant who was the owner of Construction Up, the company building the house. Tr. I. 68, ll. 11-14.

Appellant and Huynh had several meetings to discuss the possibility of Huynh purchasing the new build. First, Appellant, Holloman, and Huynh met at an incomplete house that Appellant was building in York County, South Carolina, so that Huynh could get an idea of the design and interior. Tr. I. 71, l. 7 – 72, l. 3. Appellant texted Huynh blueprints for the Davidson property. Tr. I. 72, ll. 1-3. On February 14, 2022, Huynh and his realtor, Steven Price, met Appellant and Holloman at the then-empty Davidson lot. Tr. I. 73, ll. 6-12. Huynh testified that Appellant told him that he owned the lots where the houses would be built. Tr. I. 90, ll. 10-15.

The day after their meeting at the Davidson lot, Huynh signed a contract to purchase the

house that Appellant would build. Tr. I. 81, ll. 2-8. The total price of the house was $2.1 million; Huynh paid Appellant a down payment of $150,000. Tr. I. 81, l. 23 – 82, l. 5. After making the down payment, Huynh testified that Appellant became difficult to reach. Tr. I. 85-86. After several months of limited contact between Appellant and Huynh, Huynh asked Appellant for his money back. Tr. I. 87, ll. 19-23. Huynh retained an attorney who informed Huynh that Appellant did not own the property. Tr. I. 88, ll. 2-10. It would later be established that Appellant entered into a contract to purchase the property shortly after his meeting with Huynh, but the purchase fell through. Tr. 139-145. In September, Huynh filed a lawsuit against Appellant; he would ultimately be awarded a judgment against Appellant for $200,000. Tr. I. 96, l. 20 – 97, l. 9. Huynh acknowledged on cross-examination that his contract with Appellant provided, as a condition of the sale, that Huynh would provide Appellant with proof that he was approved for a mortgage, which he did not do. Tr. I. 99, l. 8 – 100, l. 7.

Though both charges arose from Appellant's transaction with Huynh, the state also presented evidence from several other of Appellant's former customers. David Woodley testified that he entered a contract in May 2022 for Appellant to build him a house in York. Tr. I. 120, l. 2; 121, ll. 1-6. He made a downpayment of $480,000. Tr. I. 121, ll. 13-15. Appellant started construction on the house but did not complete it, and Woodley ultimately filed a lawsuit against Appellant in June 2023. Tr. I. 123, l. 5 – 127, l. 11. Vernon Nexsen testified that he signed a contract for Appellant to build him a house and paid Appellant $95,876.15. Tr. I. 138, ll. 16-18; 139, ll. 19-20. His house was also not completed.

Joseph Gorman paid Appellant $110,000. Tr. II. 9, l. 1. This was on the understanding that Appellant would acquire a particular piece of land to build a house on, which Appellant did not do. Tr. II. 10, ll. 8-17. Gorman demanded his money back, which Appellant paid to him. Tr.

II. 11, ll. 1-5. Gorman then entered a second contract with Appellant, this time paying him $120,000. Tr. II. 21, ll. 22-24. Appellant was not responsive to him and again failed to acquire the plot of land Gorman wanted. Tr. II. 27-29. Appellant again wired Gorman's money back to him, this time in installments. Tr. II. 31, ll. 1-4. Jennifer Wallace testified that Appellant took a payment of $84,426 from her and did not finish building her house. Tr. II. 46, l. 18; 47, ll. 8-23. She filed a lawsuit against Appellant at the end of 2022. Tr. II. 49, ll. 9-15.

At the end of the former customers' testimony, the state called Federal Bureau of Investigation forensic accountant Cyndria Swinson who was qualified as an expert in forensic accounting. Tr. 59. She testified that she reviewed records from six bank accounts belonging to Appellant: two for Building Up, LLC, three for Constructing Up, LLC, and one for Pillar Custom Homes d/b/a Constructing Up. Tr. II. 62, ll. 7-11. Swinson testified that Huynh's down payment was credited to Appellant's bank account on February 15, 2022. Tr. II. 66, ll. 5-8. After that credit, the total balance across all six accounts was $273,024.16. Tr. II. 67, ll. 3-7.

Swinson testified that the aim of her testimony was to demonstrate two things: (1) what did Appellant do with the money he received, and (2) where did the money Appellant paid to others come from. Tr. II. 69, ll. 1-11. Using various methods of accounting, Swinson opined that none of the money Appellant received from Huynh was spent on anything related to Huynh's construction project. Tr. II. 71-73; 79, ll. 13-22. She analyzed bank statements from the entirety of Appellant's businesses' existence and testified that the majority of Appellant's customers' contracts were defaulted or terminated. Tr. II. 87-93. She opined that Appellant was committing fraud because of his "pattern" of taking money for one purpose and not using it for that purpose. Tr. II. 95, ll. 17-25. She described Appellant's practices as "robbing Peter to pay Paul." Tr. II. 96, ll. 3-4. Finally, she testified that, over the course of the companies' life spans, Appellant paid

himself $565,398. Tr. II. 99, ll. 19-22. On cross-examination, she admitted it was possible that Appellant used other bank accounts that she was not given to review. Tr. II. 126, ll. 9-24.

After the state rested their case, defense counsel moved for directed verdict. He asserted that the state did not prove Appellant converted any of the customers' money, just that he had commingled the money, and his business faced liquidity problems. Tr. II. 149, ll. 2-8. Further, defense counsel asserted that he was entitled to directed verdict as to the false pretenses count because the state had not proven fraudulent intent at the time Huynh signed his contract. Tr. II. 154, ll. 4-10. The trial court denied the motion. Tr. II. 153, ll. 16-17; 155, ll. 7-19.

During its jury charge, the trial court charged the jury on the elements of obtaining goods by false pretenses. Tr. II. 231. During that charge, the trial court instructed the jury:

> Fraud is an unfair dealing. It is deceitful practices in depriving or endeavoring to deprive another of his known right by means of artful device or plan contrary to the known rules of common honestly. It has been defined as conduct that acts prejudicially as to the rights of another.
>
> *A seller's failure to disclose his lack of legal title can constitute a false pretense.*

Tr. II. 234, ll. 6-13 (emphasis added). Defense counsel objected to the inclusion of the last sentence in the jury charge, which was overruled. Tr. II. 239, ll. 7-16; 240, ll. 11-12. The jury convicted Appellant on both counts. Tr. II. 242, ll. 2-5.

After the verdict, defense counsel moved for a new trial. He argued that obtaining goods by false pretenses and breach of trust with fraudulent intent could not exist at the same time as they are "incongruent with each other." Tr. II. 247, ll. 5-7. Defense counsel asserted that breach of trust required that the initial possession of the money be lawful, and false pretenses required it to be unlawful. Tr. II. 247, ll. 7-13. Therefore, it was not possible for Appellant to be guilty of

both. Tr. II. 247, ll. 13-17. The trial court denied the motion. Tr. II. 247, ll. 22.

STANDARD OF REVIEW

As to the first issue, "the grant or refusal of a new trial is within the sound discretion of the trial judge." *State v. Taylor*, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001). A new trial should be granted "[w]here there is no evidence to support a conviction." *Id.* (*quoting State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993).

As to the second issue, whether a given jury charge constitutes an unconstitutional comment on the facts should be reviewed *de novo* as a question of law. *See State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure questions of law are reviewed de novo); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (extending *Frasier* to voluntariness of a confession); *cf. Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021) (interpretation of a statute is reviewed de novo).

ARGUMENTS

I.

The trial court erred in denying Appellant's motion for a new trial on the breach of trust with fraudulent intent charge because there was no evidence that Appellant's initial receipt of the converted money was lawful.

The evidence surrounding Appellant's initial receipt of Huynh's money can only support the conclusion that Huynh entrusted Appellant with his money only after Appellant misrepresented his ownership of the subject property. Because the evidence can only show that Appellant obtained the money by false pretense, he did not obtain the money lawfully. Therefore, there is no evidence to support the jury's verdict for breach of trust with fraudulent intent. The motion for new trial should have been granted.

"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. § 16-23-230(A). "The elements of breach of trust with fraudulent intent are not set forth in" the statute. *State v. Parris*, 363 S.C. 477, 481, 611 S.E.2d 501, 503 (2005). Rather, breach of trust is "peculiar to this jurisdiction." *Id.* Our Supreme Court has previously stated:

> 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." All the offenses are regarded as statutory, and one must look to the respective statutes to ascertain a definition of the crime. In text-books, law encyclopedias, and digests, references to decisions concerning these offenses are usually found under the title or subject of "embezzlement." The general purpose running through the statutes creating and defining these crimes is, however, the same; to declare as a crime, and usually as one coming within the classification of larceny, acts which were formerly not deemed to

> be larceny at common law, because of the fact that possession of property had been obtained through the consent of the owner.

State v. McCann, 167 S.C. 393, 400, 166 S.E. 411, 414 (1932). A person who has committed the offense of breach of trust with fraudulent intent has committed a form of larceny. *Id.* However, embezzlement[1] is not larceny, because of the *mens rea* distinction at the time the defendant comes into the converted goods' possession. If the stolen property is obtained unlawfully, it is larceny; if the stolen property is obtained lawfully, it is embezzlement. *Id.*; *State v. Shirer*, 20 S.C. 392, 408 (1884) ("The question under our act is whether the party charged received the property in trust, which he *afterwards* violated…." (emphasis added)). Larceny requires taking, that is, that the defendant must obtain the goods *animo furandi*,[2] a mental state that must exist at the time of the taking. *State v. Gorman*, 11 S.C.L. (2 Nott & McC.) 90, 92 (1819); *see also*, 17 S.C. Jur. § 5, *False Pretenses* (Mar. 2026 update) (elements of false pretenses are that the defendant obtains title as a result of a false pretense "which is known by the defendant to be false," and "which is made…with the intent to cheat and defraud."). Larceny requires a "felonious taking;" if the defendant obtains the goods through a "bailment…that is a receipt, and not a taking." EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 107 (1644). By contrast, "if the bailee, pending the trust, carries off the goods without any termination of it…he is only guilty of breach of trust." *State v. Thurston*, 27 S.C.L. (2 McMul.) 382, 386 (Ct. App. 1842).

Therefore, to maintain a prosecution for breach of trust with fraudulent intent, the state must present evidence that the converted property was obtained lawfully. "If possession of the

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[1] Appellant uses "breach of trust with fraudulent intent" and "embezzlement" interchangeably herein because of the Supreme Court's recognition that breach of trust with fraudulent intent is a creature of common law embezzlement. *See id.*

[2] Meaning with "the intent to steal." *Animus furandi*, Merriam-Webster Legal Dictionary, https://www.merriam-webster.com/legal/animus%20furandi (last accessed Feb. 26, 2026).

property is obtained through artifice, trick, or other fraud, then such possession is not lawfully obtained and the crime is *larceny*...rather than that of breach of trust...." *McCann*, 166 S.E. at 413. "A key element of the crime of embezzlement is the element of entrustment of the property to the accused, as a corollary of the accused's *lawful or rightful possession* of the property, entrustment being the initial *lawful* acquisition of the property by the accused." 29A C.J.S. *Embezzlement* § 14 (Dec. 2025 update) (emphasis added). "Failure to prove the existence of a trust relationship will result in a directed verdict...." *Parris*, 363 S.C. at 482, 611 S.E.2d at 503.[3] The distinction is important, because "run[ning] away with the goods committed to [a bailee] to keep" does not constitute common law larceny, "but only a civil breach of trust." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 230 (1765).

Consider two hypotheticals. In the first, Person A convinces Person B to give him a large sum of money, to build a house. In fact, however, Person A has absolutely no intention of ever building the house. In the second hypothetical, Person A did originally intend to build the house, but upon further reflection, decided that Person B's money would be better spent on lavish clothes or other frivolities. In the first hypothetical, Person A committed some sort of fraud. He made a promise that he knew was untrue, and Person B relied upon it to his detriment. 17 S.C. Jur. § 5, *False Pretenses*. In the first hypothetical, Person A formed the *mens rea* necessary to commit fraud at the time he took Person B's money. *Gorman*, 11 S.C.L. (2 Nott & McC.) at 92. However, in the second hypothetical, Person A's taking of Person B's money was innocent. It was not until he, at a later time, converted Person B's money that he committed a different offense: breach of trust with fraudulent intent. *Thurston*, 27 S.C.L. (2 McMul.) at 386. In the two

[3] It must be noted that one case from this Court, *State v. Holcomb*, 426 S.C. 557, 827 S.E.2d 367 (Ct. App. 2019), seems to suggest that lawful possession is *not* an element of breach of trust. *See id.* at 563, 827 S.E.2d at 370. However, that statement is mere *dicta*, and comes from an out-of-context block quote to another case.

hypotheticals, Person A committed two entirely separate offenses. Which offense he committed depended upon the timing of his criminal intent. Because Person A cannot simultaneously have a guilty and innocent mind, he cannot have committed both offenses simultaneously. It is one or the other.

Here, there was evidence in the record that Appellant told Huynh that he owned the lots where he intended to build Huynh's home. This was demonstrably untrue. If Appellant affirmatively represented to Huynh that he owned property that he in fact did not, that is a false pretense. *See State v. Jeffcoat*, 279 S.C. 167, 169, 303 S.E.2d 855, 856 (1983) ("a seller's failure to disclose his lack of legal title can constitute a false pretense."). To be sure, Appellant questioned the veracity of Huynh's testimony, but no evidence was presented to the jury that Appellant did *not* make the statements to Huynh. All the evidence suggested that Appellant obtained Huynh's money through false pretense. *Cf. Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) ("a lesser-included offense may not be charged merely on the theory that the jury may believe some of the evidence and disbelieve other evidence").

Therefore, there was no evidence that Appellant obtained Huynh's money *lawfully*, only that Appellant obtained the money through false pretense. Without evidence that Appellant obtained the money lawfully, a trust relationship cannot have been formed, and the elements of breach of trust with fraudulent intent cannot be satisfied. The state presented no evidence that would tend to prove Appellant was in "lawful or rightful possession" of the property. 29A C.J.S. *Embezzlement* § 14. And because the state only proved that Appellant took possession of Huynh's property through fraud, it did not prove that he committed a crime other than larceny. *McCann*, 166 S.E. at 413.

Therefore, the jury was not presented with evidence sufficient to support its guilty verdict

for breach of trust with fraudulent intent. This Court should reverse.

II.

The trial court erred by commenting on the facts during its jury charge.

The trial court instructed the jury that "a seller's failure to disclose his lack of legal title can constitute a false pretense." Whether Appellant misrepresented his legal title to Huynh was a contested, dispositive fact which was critical to the state's false pretenses charge. The trial court unconstitutionally commented on that fact, and Appellant's conviction should be reversed.

"Judges shall not charge juries in respect to matters of fact but shall declare the law." S.C. Const. art. V, § 21; *see State v. Brown*, 443 S.C. 196, 198-99, 904 S.E.2d 448-449-50 (2024) (collecting cases). The Constitution "forbid[s] the judge, unqualifiedly, from charging the jury in respect to matters of fact, and thus leaving such matters exclusively to the jury, unaided by any suggestions from the judge." *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900). The question this Court must ask is "simply whether the circuit judge erred in giving any advice or suggestion to the jury as to how they might deal with the facts." *Id.* at 214. Article V, Section 21 is a limitation on judicial power itself; the provision "prohibit[s] courts from commenting to the jury on the facts of a case." *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). "Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts." *Id.*

As a matter of law, it is true that "a seller's failure to disclose his lack of legal title can constitute a false pretense." *State v. Jeffcoat*, 279 S.C. 167, 169, 303 S.E.2d 855, 856 (1983). But the Constitution does not provide that judges shall not comment on the facts *unless its comments are legally accurate*; it provides "Judges *shall not* charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21 (emphasis added). It is also correct as a matter of law that "The testimony of a victim [in a criminal sexual conduct trial] need not be

corroborated…." S.C. Code Ann. § 16-3-657. However, charging the jury as much constitutes reversible error. *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. It is also true as a matter of law that jurors may infer a murder defendant acted with malice because he used a deadly weapon, but charging the same to the jury is strictly prohibited. *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). While the trial court's charge here was correct as a matter of law, it "unduly emphasize[d]" the evidence that Appellant told Huynh he owned the property, "and deprive[d] the jury of its prerogative both to draw inferences and to weigh evidence." *State v. Cheeks*, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013).

Here, the trial court instructed the jury regarding the definition of a false pretense and the mental state necessary at the time the false pretense was made. Whether Appellant made a false representation to Huynh was a pure issue of fact that must be decided by the jury. However, by instructing the jury that a seller's failure to disclose lack of legal title – one of the state's chief allegations – qualified as a false pretense, the trial court invaded the jury's province to decide issues of fact. The jury did not need to be told that Appellant's lack of legal title could constitute a false pretense. The state was free to argue this point in closing, but without help from the trial court's improper charge. Just like a jury does not need to be told that malice can be inferred from the use of a deadly weapon or that it can believe a sexual assault victim's testimony without corroboration. *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582; *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. But by instructing the jury as much, the trial court placed significant emphasis on the existence of one single fact, Appellant's lack of title, to the extent that the jury may have believed it was required as a matter of law to find Appellant guilty. That is the exact evil at which the constitutional prohibition on charging matters of facts is aimed. *See, e.g., Cheeks*, 401 S.C. at 328-29, 737 S.E.2d at 484. For these reasons, the trial court's jury charge constituted an

unconstitutional comment on the facts. This Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant's conviction for breach of trust with fraudulent intent should be vacated, and Appellant's conviction for false pretenses should be reversed and remanded for a new trial.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2026.