STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2013-002017

THE STATE,

Respondent,

vs.

THOMAS RAYNES MARETT,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

Any issue with the trial judge's failure to give a jury charge instructing a post-dated check constitutes a promise to pay at a future date and cannot support an obtaining property by false pretenses conviction was not properly preserved for appellate review where defense counsel did not request such a charge at an appropriate time during trial, never obtained a ruling from the trial judge in regard to such a charge, affirmatively stated the trial judge's proposed jury instructions were fine before they were given, and directly indicated she had no objection to the jury instructions after they were presented to the jury. However, even assuming the issue somehow had been preserved for appellate review, the trial judge committed no error in failing to give the post-dated check jury charge Appellant now desires because the jury instructions that were given correctly and completely advised the jury of the South Carolina law applicable to Appellant's case while adequately covering the substance of Appellant's desired charge in a legally-correct manner.

STATEMENT OF THE CASE

In February of 2013, Appellant Thomas Raynes Marett was indicted by the Spartanburg County Grand Jury for one count of obtaining property by false pretenses. On September 10, 2013, a jury trial was commenced in the Spartanburg County Court of General Sessions with the Honorable R. Keith Kelly, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a five-year term of imprisonment suspended upon the service of a six-month term of imprisonment and a five-year term of probation. Additionally, the trial judge ordered Appellant to pay restitution in the amount of $2,321.40 and stipulated Appellant's probationary term would terminate upon the payment of the ordered restitution. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

In July of 2011, Appellant Thomas Raynes Marett contacted Refrigeration Services, Incorporated ("R.S.I.") to receive assistance with his residence's malfunctioning heating and air conditioning system. (R. p. 71). On the morning of July 14, 2011, an R.S.I. technician was dispatched to Appellant's home in Spartanburg, South Carolina. (R. pp. 71-72). After inspecting Appellant's system, the technician determined Appellant was in need of a new heat pump. (R. pp. 71-72). Appellant then agreed to purchase a new heat pump from R.S.I. with payment due upon installation, and a heat pump was installed at his home.[1] (R. p. 50; pp. 69-70; p. 72; p. 79). Thereafter, Appellant presented a signed check for $2,321.40 dated August 14, 2011, and purported to be drawn on a Bank of America checking account to an R.S.I. representative as payment for the installation of the heat pump. (R. pp. 56-58; p. 63; p. 187).

Subsequently, on July 18, 2011, an employee of R.S.I. delivered Appellant's check to the bank for deposit. (R. p. 59). However, the check could not be deposited because Appellant's checking account with Bank of America was closed, and the check was returned to R.S.I. without payment. (R. pp. 57-59). An R.S.I. representative then turned the check over to the worthless check unit of the Seventh Circuit Solicitor's Office. (R. p. 86). After receiving Appellant's check, Sheila Henderson, the program director for the worthless check unit, began the process of trying to collect the funds Appellant owed to R.S.I. (R. p. 86; p. 88). As part of the process, Henderson mailed two letters to Appellant's address in Spartanburg and post office box on July 27, 2011, one letter through certified mail to the Moore, South Carolina, address listed on Appellant's

[1] Notably, the terms of the R.S.I. work order Appellant signed in regard to the installation of the heat pump expressly stated the total amount owed to R.S.I. was due upon receipt of the goods and services. (R. p. 185).

check on August 9, 2011, and one final letter to the Moore address on August 29, 2011 that included a copy of an affidavit requesting a warrant for his arrest. (R. pp. 89-92; p. 95; pp. 189-193). Additionally, Henderson attempted to reach Appellant by telephone but received no answer. (R. p. 104). Despite Henderson's attempts to afford Appellant an opportunity to pay for the heat pump he received from R.S.I., Henderson received no response from Appellant in regard to the letters she mailed to him, and the letter sent through certified mail was returned as undeliverable. (R. pp. 92-93; p. 100). Appellant was then arrested and indicted for one count of obtaining property by false pretenses, and he proceeded to trial.[2] (R. p. 3; pp. 194-195).

At the outset of trial, defense counsel moved to dismiss the indictment. (R. p. 6). In support of that motion, defense counsel asserted Appellant presented a post-dated check to R.S.I. after the company installed a heat pump at his home. (R. p. 7). Because the check was post-dated, defense counsel argued it was a future promise to pay, the fraudulent check statute did not apply to Appellant's conduct, and Appellant's conduct could not constitute the offense of obtaining property by false pretenses in light of the appellate decision in State v. McCutcheon, 284 S.C. 524, 327 S.E.2d 372 (Ct. App. 1985). (R. pp. 8-9). Additionally, defense counsel contended Appellant was entitled to civil damages in light of the negligence allegedly committed by R.S.I. and the bank in regard to his check. (R. p. 11). Furthermore, defense counsel asserted the jury had to be instructed Appellant must be acquitted if the check he presented was a post-dated check. (R. p. 11).

[2] Specifically, the indictment alleged: "That Thomas Marett did in Spartanburg County on or about July 14, 2011, by false pretense or representation and with the intent of cheating and defrauding the victim, Refrigeration Services, obtain a signature of a person to a written instrument or did obtain from a person a chattel, money, valuable security, or other property (real or personal) valued at more than $2,000 but less than $10,000, in violation of § 16-13-240(2), *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended." (R. pp. 194-195).

In response, the solicitor noted Appellant knowingly presented a check drawn on a closed checking account in order to obtain the installation of the heat pump despite the fact the check could not be cashed in light of the closed status of the account. (R. pp. 12-13). The solicitor further noted Appellant had previously pled guilty to charges related to the presentation of worthless checks drawn on the same closed account in 2010. (R. p. 13). Because the check presented to R.S.I. was drawn on a closed account, the solicitor argued Appellant's check was not a future promise to pay as defense counsel contended and, instead, established he never actually intended to pay for the installation of the heat pump at the time the check was presented. (R. p. 13). Furthermore, the solicitor asserted the victims would never have agreed to accept Appellant's check if they were aware it was post-dated and drawn on a closed account. (R. pp. 14-15).

Following the solicitor's contentions, defense counsel argued the victims were not required to agree to accept a post-dated check in order for post-dated checks to be immune from criminal prosecution. (R. pp. 16-17). Additionally, defense counsel argued Appellant was willing to permit the victims to take back the heat pump if they wished to do so. (R. p. 17). The trial judge then noted to defense counsel a check drawn on a closed account could never be a promise to pay and is not a check because it could never be cashed. (R. p. 19). In response, defense counsel asserted Appellant's check was a promise to pay within thirty days while contending Appellant possibly might have brought the victims cash, a certified check, or a valid check within that time period if the victims had waited for thirty days. (R. p. 21). The solicitor then countered numerous attempts had been made to get Appellant to pay before he was arrested and Appellant had still not paid during the nearly two-year period that had elapsed since the heat pump was installed at his home. (R. pp. 23-24).

After considering the arguments of counsel, the trial judge denied defense counsel's motion to dismiss the charge. (R. p. 25). In denying the motion, the trial judge specifically found Appellant's purported check was not an actual check since it was drawn on a closed checking account and, instead, was a piece of paper constituting a false representation of a check. (R. pp. 25-26). Because Appellant's purported check did not constitute an actual check, the trial judge found it could not be considered a post-dated check and did not warrant the dismissal of the charge. (R. p. 26; p. 28). Subsequently, defense counsel renewed the motion to dismiss the charge, and the trial judge reaffirmed his denial of the motion. (R. pp. 39-40). Defense counsel then sought clarification over whether she could argue to the jury Appellant's check was a post-dated check. (R. p. 40). The trial judge ruled she could not since it was not a check but could argue it was a post-dated writing and potentially a promissory note. (R. p. 40).

Thereafter, during trial, several employees from R.S.I. testified about the company and its transaction with Appellant. (R. pp. 48-49; pp. 69-70). Specifically, Kim Ballenger, the human resources and accounts manager at R.S.I., testified the company required payment in the form of cash, check, or credit card, upon the completion of service and also allowed for approved financing through a lending institution. (R. pp. 49-51). Regarding the transaction with Appellant, she indicated Appellant presented what was purported to be a check to the company after a heat pump was installed at his home but the check was returned without payment because it was drawn on a closed account. (R. pp. 57-59; p. 67). She further stated her company would not have accepted any payments from Appellant other than check, cash, credit card, or approved financing and would not have accepted the purported check if they had known it was a misrepresentation of a check. (R. p. 59; p. 68). Additionally, Greg Ballenger, the

president of R.S.I., confirmed his company only accepted cash, checks, credit cards, or third-party financing upon the completion of a job and did not conduct in-house financing. (R. p. 72; p. 79). He further stated his employees knew payment in full was due upon the completion of service and installation and his company had never been paid by Appellant for the heat pump installed at his home. (R. p. 79; p. 81). Furthermore, in addition to the Ballengers' testimony, Henderson testified Appellant was afforded multiple opportunities to pay the amount he owed to R.S.I. before he was arrested but her attempts to obtain payment from him were unsuccessful. (R. pp. 89-95). She also indicated she spoke with the person who actually received the check from Appellant during her investigation and the person informed her he did not reach any agreement with Appellant to hold the check and was not aware the purported check was not dated for the date of the transaction. (R. p. 99).

Subsequently, the solicitor rested the State's case, and defense counsel moved for a directed verdict on Appellant's behalf, arguing the State allegedly failed to meet its burden of proof due to the facts no one from the bank testified Appellant's checking account was closed and no one who was directly involved in the transaction with Appellant testified about how Appellant was supposed to pay for the goods delivered and the services performed. (R. pp. 105-107). In response, the solicitor noted a copy of Appellant's check was admitted into evidence and reflected Appellant's account with the bank was closed. (R. p. 107). Furthermore, the solicitor noted the witnesses from R.S.I. explained payment was due at the time their work was completed and Appellant provided them with an invalid check drawn on a closed checking account as payment. (R. pp. 107-108). After considering the arguments of counsel, the trial judge denied the motion. (R. p. 108).

Following the trial judge's ruling, defense counsel called Boyce Bush, the department head for the Spartanburg Building Inspectors Department, to testify in Appellant's defense. (R. p. 111). During his testimony, Boyce indicated a mechanical permit was required for a new heat pump to be installed, but he confirmed a permit was not issued in connection to Appellant's address in July of 2011. (R. pp. 111-113). Boyce further noted the normal permit fee could be doubled as a consequence of failing to obtain a permit, and he indicated a repeated failure to comply with the permitting requirements could lead to the loss of a license. (R. p. 121).

Thereafter, defense counsel called Michael Atkins, the owner of At Your Service Heating and Air, to the witness stand. (R. p. 124). Atkins testified his competing heating and air conditioning services company was contacted by Appellant in April of 2013 to inspect Appellant's heat pump due to a reported noise with the pump and a high utility bill. (R. pp. 124-125). Atkins indicated a technician from his company then inspected the heat pump, determined the unit was running properly, and concluded the unit would be expected to continue running properly for several more years. (R. p. 125; p. 128). However, Atkins personally opined the heat pump was too small for Appellant's house while candidly acknowledging he did not do any of the necessary calculations in arriving at that conclusion. (R. p. 126). Additionally, Atkins confirmed his company charged Appellant for the service call and indicated Appellant claimed to have paid for a larger unit than the one installed at his home. (R. p. 126; p. 129).

Subsequently, the defense rested its case, and defense counsel again moved for a directed verdict. (R. pp. 136-137). In support of the motion, defense counsel argued a directed verdict was warranted because the State had failed to establish whether Appellant had a checking account with the bank, when Appellant's checking account had

been opened or closed, and if the bank had been mistaken in regard to Appellant's check. (R. pp. 136-137). Once again, the trial judge denied the motion. (R. pp. 137-138). Defense counsel then again moved for the case to be dismissed, and the trial judge again denied that motion. (R. p. 138). Thereafter, the trial judge and the parties had an off-the-record discussion in regard to the jury instructions before defense counsel confirmed on the record to the trial judge his proposed jury instructions were "fine." (R. p. 138). The parties then presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 139-162). During his jury instructions, the trial judge explained a promise to do something in the future could not constitute a basis for an obtaining property by false pretenses prosecution and it was up to the jurors to determine if the evidentiary exhibit Appellant presented to R.S.I. constituted a future promise to pay. (R. p. 161). After the trial judge finished instructing the jury on the law, defense counsel specifically stated she did not have any objections to the jury instructions as given. (R. pp. 162-163).

Shortly thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 164). The trial judge then ordered Appellant to pay restitution to his victims and sentenced him to a five-year term of imprisonment suspended upon the service of a six-month term of imprisonment and a five-year term of probation. (R. p. 171). The trial judge further ruled the probationary term could be terminated by payment of restitution to the victims. (R. p. 171).

ARGUMENT

I.

The trial judge properly denied Appellant's pre-trial motion to dismiss his obtaining property by false pretenses indictment because the indictment was facially valid and provided Appellant with proper notice in regard to charged offense. Likewise, the trial judge properly denied Appellant's directed verdict motion because the evidence and testimony presented during trial established Appellant's guilt for all of the elements of obtaining property by false pretenses, including that Appellant obtained the victims' property by presenting them with a false representation of a check with the intent to defraud them of their property.

Appellant contends the trial judge committed reversible error by denying his pre-trial motion to dismiss his obtaining property by false pretenses indictment and by denying his motion for a directed verdict. In support of those contentions, Appellant maintains the indictment should have been dismissed and the directed verdict motion should have been granted because there was allegedly no evidence establishing his guilt for the indicted offense in light of the fact the purported check he presented to the victims as payment for their property was post-dated and, thus, constituted a future promise to pay. Contrary to Appellant's contentions, the trial judge properly denied Appellant's pre-trial motion to dismiss the indictment because there was no defect with the indictment itself. Appellant's pre-trial challenge to the indictment related to the sufficiency of the evidence alone, which had not yet been presented prior to the commencement of the trial, and, therefore, did not warrant the dismissal of the facially-valid indictment. Furthermore, the trial judge properly denied Appellant's directed verdict motion because the evidence and testimony presented during trial established every element of obtaining property by false pretenses by showing Appellant obtained a heat pump from the victims by agreeing to pay for it upon installation and then presenting them with a purported

check drawn on a closed checking account. As a result, Appellant's case was properly submitted to the jury. Appellant's conviction should be affirmed.

A. Propriety of the Trial Judge's Denial of the Motion to Dismiss the Indictment

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). An indictment is a "notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The primary purpose of an indictment is " 'to put the defendant on notice of what he is called upon to answer, *i.e.*, to appraise him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted and italics in original).

An indictment is sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of

the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). "[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999).

If a defendant wishes to challenge the sufficiency or validity of an indictment, the defendant must move to quash or dismiss the indictment prior to the jury being sworn. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). Such a motion challenging the sufficiency or validity of the indictment raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007). Importantly though, such a motion **cannot** be used to challenge the sufficiency of the State's evidence, which is an issue properly addressed through a motion for a directed verdict raised during trial after the State has had an opportunity to present its case. See State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993); see also State v. Green, 350 S.C. 580, 585, 567 S.E.2d 505, 508 (Ct. App. 2002) ("A motion for directed verdict . . . contests the *sufficiency* of the State's *properly admitted* evidence." (italics in original)); see generally Gibson v. United States, 244 F.2d 32, 34

(4th Cir. 1957) (holding a pre-trial challenge to an indictment can only be made in respect to the validity of the indictment itself and not in respect to whether the facts of the case support the allegations in the indictment, which is an issue to be raised during trial).

When a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and to be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. If an indictment satisfies those conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.").

In the case sub judice, the trial judge properly denied Appellant's pre-trial motion to dismiss or quash the indictment because the indictment was facially valid and provided proper notice to Appellant in regard to the charged offense. Critically, the indictment clearly identified Appellant's alleged crime as obtaining property by false pretenses and reflected the specific statutory code section Appellant was alleged to have violated. Moreover, the body of the indictment stated the location where the crime was alleged to

have occurred, the date on which the crime was alleged to have occurred, the identity of the victims of the crime, and the elements of the offense for which Appellant was charged phrased in a manner consistent with the language of the relevant statute. Under those circumstances, the indictment was legally sufficient to provide Appellant with all the notice he was entitled to under the law, and there was no proper ground warranting the dismissal of the facially-valid indictment. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) ("[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." (italics in original)); see also State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) ("An indictment is ordinarily sufficient if it is in the language of the statute.").

In arguing on appeal the trial judge erred in refusing to dismiss the indictment, Appellant contends – just as he contended during trial – the indictment should have been dismissed because the evidence allegedly established he had no fraudulent intent in light of the fact he post-dated his check. Critically though, such an argument relates to the sufficiency of the evidence and **not** to the sufficiency of the indictment itself. As a result, that argument is irrelevant to the sufficiency of the indictment and – even assuming it was somehow correct – would not have entitled Appellant to a dismissal of the facially-valid indictment issued in his case. See Garrett, 305 S.C. at 206, 406 S.E.2d at 912 ("Garrett has not claimed, either in the circuit court or in this Court, that the indictment in question is not sufficient on its face. His exception seems to be based on a misunderstanding of the function of a motion to quash. The exception is wholly without

merit."); see also State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (holding a motion to quash the indictment raised on the ground the victims identified in the indictment did not actually own the property stolen was properly denied because the indictment was facially valid and because the motion – if treated as a motion for a directed verdict since it went to the sufficiency of the evidence – was out of order and premature). For those reasons, the trial judge properly denied Appellant's motion to dismiss or quash the indictment. Appellant's conviction should be affirmed.

B. Propriety of the Trial Judge's Denial of the Directed Verdict Motion

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the

accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

The offense of obtaining property by false pretenses occurs when a person by false pretense or representation either obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other real or personal property with the intent to defraud a person of that property. See S.C. Code Ann. § 16-13-240 ("A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty [of the offense of obtaining signature or property by false pretenses.]"). Thus, the statutory elements necessary for commission of the offense are: (1) obtaining a person's signature or property; (2) by false pretense or representation; (3) with the intent to defraud. Id.

" 'A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.' " State v. Haines, 23 S.C. 170, 173 (1885). Notably, "a mere promise to do something in the future, as for example, to pay for goods at a future time, even if false, is not such a pretense as would come with the terms of the [obtaining property by false pretenses] statute." Id. However, "the combination of a false promise

with the false representation of an existing or past fact will not take the case out of the statute[.]" Id.

In the case at bar, Appellant – as shown by the evidence presented during trial – obtained a heat pump from the victims. In doing so, Appellant expressly agreed to pay the victims in full for the heat pump after it was installed, and he personally signed a work order memorializing the terms of that agreement in order to induce the victims to install the heat pump at his home. Then, after obtaining the heat pump from the victims, Appellant presented a document that was falsely represented to be a check, which was one of the forms of payment the victims accepted, to them as the payment he owed them for the heat pump. However, the document was **not** an actual check because Appellant did not have an account with the bank upon which the check was purported to be drawn, and the victims did not receive the agreed-upon payment for the heat pump from Appellant despite the fact he had obtained the heat pump from them.[3] See Haynes v. Bank of Hartsville, 152 S.C. 135, 138-139, 149 S.E. 330, 331 (1929) ("A check is an order upon the bank to pay the amount of the check due on deposit account of the drawer[.]"). Thereafter, in the ensuing days, months, and years, Appellant did **not** ever pay the victims for the heat pump even though efforts were made to obtain payment from him both before and after the date listed on the purported check had been reached and passed. See S.C. Code Ann. § 34-11-70 ("When a check, a draft, or other written order is not paid by the drawee because the maker or drawer did not have an account with or sufficient funds on deposit with the bank . . . and the maker or drawer does not pay the amount due on it, together with a service charge of thirty dollars, within ten days after

[3] During trial, defense counsel conceded the purported check presented as payment to the victims was not an actual legal check. (R. pp. 19-21). Instead of describing it as a check, defense counsel analogized Appellant's purported check to "a scribbly piece of paper" reflecting a promise to pay some amount in the future. (R. p. 20).

written notice has been sent by certified mail to the address printed on the check . . ., then it constitutes prima facie evidence of fraudulent intent against the maker. . . . A certificate by the payee that the notice has been sent as required by this section is presumptive proof that the requirements as to notice have been met, regardless of the fact that the notice actually might not have been received by the addressee.").

Based on the evidence and testimony establishing those facts, the jurors could fairly and logically find Appellant obtained the victims' heat pump by falsely promising to pay for it upon its installation and then presenting them with a false representation of a check drawn on a closed checking account with the intent to defraud them of that property without ever actually paying for it. Cf. State v. Love, 275 S.C. 55, 63, 271 S.E.2d 110, 113 (1980) ("There is contained in these promises the implied representations or pretense that he could do the things promised. This pretense of authority or ability constituted a representation or pretense of fact . . . and supports the charge of obtaining goods under false pretenses. . . . By falsely pretending that he was in a position to aid Dennis in evading prosecution and the penalties for driving under the influence, and by obtaining his money for that purpose, appellant was guilty of obtaining the money by false pretenses." (citation omitted)). Under those circumstances, the evidence and testimony presented during trial established Appellant's guilt for all of the elements of the offense of obtaining property by false pretenses, and the trial judge properly denied Appellant's directed verdict motion and submitted the case to the jury. See Nix, 288 S.C. at 496, 343 S.E.2d at 629 ("**[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment**, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." (emphasis added)).

In arguing to the contrary, Appellant contends there was no evidence of fraudulent intent on his part or of a fraudulent representation of a past or existing fact because the purported check he presented to the victims was post-dated and, thus, constituted a future promise to pay instead of a false representation of actual payment to the victims. (App. Br. pp. 7-8). However, as the Supreme Court explained in State v. Winter, 98 S.C. 294, 298, 82 S.E. 419, 420 (1914), a post-dated check "would only mean a promise on the part of the drawer to do a future act and have funds in the bank at the future time stated in the check" **if** the "check was dated ahead, and it was expressly stated at the time it was passed that the drawer had no funds in the bank[.]"[4] Significantly, the testimony presented during Appellant's trial did **not** establish Appellant drew the victims' attention to the fact the purported check was post-dated or expressly stated to them he did not have an open account with the bank upon which the purported check was drawn.[5] Instead, the testimony established the exact opposite was true with Henderson testifying the R.S.I. employee who received the purported check from Appellant directly informed her he did **not** reach an agreement with Appellant for payment to be made in the future and was not even aware the purported check was post-dated. See generally State v. Hammond, 498 N.W.2d 126, 129 (1993) (recognizing the fact a check was post-dated serves as a defense to a fraudulent check charge only when the payee **knowingly** received the post-dated check). As a result, Appellant's presentation of what was

[4] Notably, in State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372, 372 (Ct. App. 1985), which is the case primarily relied upon by Appellant during trial and on appeal, this Court cited to the Supreme Court's decision in Winter to support its conclusion a post-dated check is a promise to pay at a future time.

[5] Tellingly, Appellant has not even attempted to contend on appeal there was evidence establishing the victims knew of the post-dated nature of his purported check or agreed to accept it with the knowledge it was post-dated. Instead, Appellant maintains "the record is devoid of any evidence regarding an agreement in reference to the post-dated check and future payment[.]" (App. Br. p. 8). However, testimony was presented during trial clearly establishing the person who received the purported check from Appellant was not aware it was post-dated and had not agreed to accept a future promise of payment in exchange for the heat pump. (R. p. 99).

purported to be a check but was actually "a scribbly piece of paper" drawn on a closed checking account to the victims as the payment he agreed to give them upon the completion of the installation of the heat pump constituted a false pretense or representation with the intent to defraud them of their property.[6] See State v. Dickinson, 339 S.C. 194, 201, 528 S.E.2d 675, 678 (Ct. App. 2000) ("Because the state's evidence showed that Dickinson violated the statute's express terms by making false representations as to his address and uttering a check which he had grossly insufficient funds to cover, thereby gaining actual possession of a new truck from Dealer, the trial judge properly submitted the case to the jury."). Accordingly, as the evidence and testimony presented during trial established Appellant's guilt for every element of obtaining property by false pretenses, and the trial judge properly denied Appellant's directed verdict motion.[7] Appellant's conviction should be affirmed.

[6] Significantly, the victims expressly testified they only accepted checks, cash, credit cards, and approved financing as forms of payment and, therefore, Appellant would **not** have been able to obtain the heat pump from them unless he provided them with what at least appeared to be one of those accepted forms of payment. (R. pp. 49-51; p. 72; p. 79).

[7] Critically, if Appellant's contentions in his case were correct, it would mean an individual with an empty or closed checking account could obtain goods from another with the fraudulent intention to never pay for those goods by merely deceptively using a post-dated representation of a check as payment for the goods without any risk of being held criminally liable for his fraudulent actions. See State v. Stone, 95 S.C. 390, 394, 79 S.E. 108, 109 (1913) ("[I]f [a previous appellate] decision must be construed as holding that a false representation of the soundness of a horse, made with knowledge of the fact that the horse was unsound, with intent to cheat and defraud [was not a crime], then it will not be longer regarded as authority for that proposition; such a doctrine would tend to encourage fraud and swindling, and is against the canons of morality."). Such a result would be entirely incompatible with the underlying purpose behind the obtaining property by false pretenses statute and must be rejected.

II.

Any issue with the trial judge's failure to give a jury charge instructing a post-dated check constitutes a promise to pay at a future date and cannot support an obtaining property by false pretenses conviction was not properly preserved for appellate review where defense counsel did not request such a charge at an appropriate time during trial, never obtained a ruling from the trial judge in regard to such a charge, affirmatively stated the trial judge's proposed jury instructions were fine before they were given, and directly indicated she had no objection to the jury instructions after they were presented to the jury. However, even assuming the issue somehow had been preserved for appellate review, the trial judge committed no error in failing to give the post-dated check jury charge Appellant now desires because the jury instructions that were given correctly and completely advised the jury of the South Carolina law applicable to Appellant's case while adequately covering the substance of Appellant's desired charge in a legally-correct manner.

Appellant contends the trial judge erred by failing to instruct the jury a post-dated check is a promise to pay in the future and cannot support a conviction for obtaining property by false pretenses. In support of that contention, Appellant maintains he requested such a charge prior to trial but the trial judge erroneously failed to give it. Initially, any issue with the trial judge's failure to give such a charge was not preserved for appellate review because defense counsel did not request such a charge at an appropriate time pursuant to the South Carolina Rules of Criminal Procedure, did not object to the jury instructions after they were given, and did not obtain a ruling from the trial judge in regard to the desired charge. Moreover, defense counsel waived any issue with such a charge by specifically indicating to the trial judge his proposed jury instructions were "fine" and then confirming she had no objection to those instructions after they were given. However, even assuming the issue somehow had been preserved for appellate review, the trial judge's jury instructions do not warrant the reversal of Appellant's conviction because they constituted a correct and complete statement of the South Carolina law applicable to Appellant's case and adequately covered the substance

of Appellant's desired charge without misstating the law in regard to post-dated checks. Appellant's conviction should be affirmed.

A. Issue Preservation

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000); see also State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

In addition to the general requirements of South Carolina's issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regard to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in

order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). The rule in South Carolina "is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In Appellant's case, any issue with the trial judge's failure to give a jury charge instructing a post-dated check "is a promise to commit a future act and does not qualify as a check submitted under false pretenses" was not properly preserved for appellate review. (App. Br. p. 9). Appellant failed to preserve the issue because he never requested such a charge at an appropriate time during trial, never objected to the trial judge's jury instructions as given, and never obtained a ruling from the trial judge in regard to such a charge. See State v. Hall, 253 S.C. 294, 295, 170 S.E.2d 379, 380 (1969) ("The defendant did not raise the objections to the instructions at the trial although full opportunity was afforded to do so . . . . The failure of the defendant to object or request

additional instructions, when opportunity was afforded, constituted a waiver of any right to complain on appeal of errors in the charge."). Instead, during a pre-trial discussion of Appellant's motion to dismiss the indictment, defense counsel simply stated "it is error not to let the . . . jury know that . . . if they find it is a post-dated check, then, the client is not guilty of the charge" before conceding such an issue "obviously would became a later issue in the case if it did make it to the jury[.]" (R. p. 11). Critically, those remarks did not constitute a proper and timely request for a jury instruction pursuant to the South Carolina Rules of Criminal Procedure, and, even if they somehow could be construed as a proper request, were not ruled upon by the trial judge. See Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."). As a result, Appellant's appellate issue with the trial judge's failure to give the post-dated check jury instruction he now desires was not properly preserved for appellate review and cannot appropriately be addressed on appeal. See State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal.").

However, even assuming the issue somehow had been properly preserved for appellate review through defense counsel's pre-trial remarks, any issue with the desired post-dated check jury instruction **still** could not appropriately be raised or addressed on appeal because defense counsel expressly waived the issue during trial. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised

objection can be waived). Critically, following an off-the-record discussion with the trial judge in regard to the jury instructions he intended to present to the jury, defense counsel explicitly stated on the record the trial judge's proposed instructions were "fine." See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). Then, after the trial judge presented those "fine" instructions to the jury, defense counsel confirmed her acceptance of the instructions given by specifically stating she had no objections to the jury charge. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). Accordingly, in light of the facts defense counsel advised the trial judge his jury instructions were fine before they were given and directly

affirmed she had no objections to them after they were given, any issue defense counsel may have had in regard to the trial judge's jury instructions was expressly waived, and Appellant is precluded from now raising such an issue on appeal. Cf. Pauling, 322 S.C. at 100, 470 S.E.2d at 109 ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."). Appellant's conviction should be affirmed.

B. Propriety of the Trial Judge's Jury Instructions

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). Importantly, the law to be charged in each case is determined from the evidence presented at trial. State v. Turbeville, 275 S.C. 534, 536, 273 S.E.2d 764, 765 (1981).

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664,

594 S.E.2d 462, 474 (2004). "A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

In the case sub judice, the trial judge's jury instructions correctly and completely conveyed the applicable law to the jury. Specifically, the trial judge instructed the jurors on the elements of the offense of obtaining property by false pretenses, explained criminal intent was a necessary element of the crime, indicated a promise to do something in the future could not support an obtaining property by false pretenses conviction, and advised it was the jurors' responsibility to determine if the purported check Appellant presented to the victims constituted a promise to pay in the future. (R. pp. 160-161). Because the trial judge fully and completely instructed the jury on the correct South Carolina law that was applicable to Appellant's case based on the evidence presented during his trial, the trial judge's jury instructions in Appellant's case were not improper. See State v. Rayfield, 357 S.C. 497, 505, 593 S.E.2d 486, 490 (Ct. App. 2004) ("The trial court is required to charge the correct law of South Carolina."); see also Rye, 375 S.C. at 123, 651 S.E.2d at 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Accordingly, the jury instructions given in Appellant's case do not warrant the reversal of Appellant's conviction. See Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 (instructing there is no reversible error when the jury instructions given "afford the proper test for determining the issues").

In seeking to have his conviction overturned on appeal, Appellant contends the trial judge committed reversible error by failing to instruct the jury a post-dated check is the same as a promise to pay at a future date and cannot support a conviction for obtaining property by false pretenses. Significantly though, the trial judge's jury instructions were not erroneous or improper because the substance of Appellant's desired charge was adequately covered by the trial judge's instructions to the jurors indicating Appellant could not be convicted if the purported check he gave to the victims constituted a promise to pay in the future. See State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."); see generally Foust, 325 S.C. at 16, 479 S.E.2d at 52 (holding the jury charge as given was not erroneous where it was substantially correct and properly explained the requisite intent necessary for conviction). Moreover, Appellant's desired instruction would not have been proper because it does not contain a complete explanation of the law regarding post-dated checks. Critically, if the jury had simply been instructed a post-dated check invariably represented a promise to commit a future act and could not support a conviction for obtaining property by false pretenses, such an instruction would **not** have been a complete and correct statement of the law in South Carolina since a post-dated check only constitutes a future promise to pay if the check is post-dated **and** the post-dated nature of the check is expressly stated at the time it is presented to the person receiving it. See Winter, 98 S.C. at 298, 82 S.E. at 420 ("If check was dated ahead, **and it was expressly stated at the time it was passed that the drawer had no funds in the bank**, such check would only mean a promise on the part of the drawer to do a future act and have funds in the bank at the future time stated in the check, and this would be no more

than an obligation to pay in the future, and the check would only be an evidence of debt." (emphasis added)). For those reasons, the trial judge could not have committed reversible error by failing to instruct the jury on a legal principle adequately and correctly covered by the jury charge as given and which would have constituted an incorrect or incomplete statement of the law in South Carolina. See State v. Marin, 404 S.C. 615, 620, 745 S.E.2d 148, 151 (Ct. App. 2013) ("[T]here is no error of law in refusing to give a specific request to charge where (1) the charge requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly."). Therefore, notwithstanding any issue preservation concerns and even assuming Appellant had requested the jury instruction he now desires on appeal, the trial judge committed no error in instructing the jury on the applicable law in Appellant's case. Appellant's conviction should be affirmed.

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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October 7, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2013-002017

THE STATE,

Respondent,

vs.

THOMAS RAYNES MARETT,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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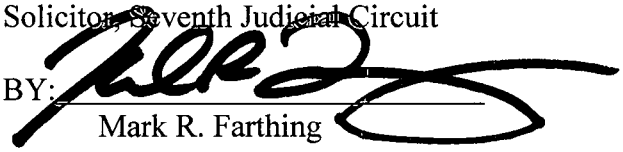
BY: 
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PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Final Brief of Respondent and on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 7th day of October, 2014.

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