STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEAN ALTON HOLCOMB,

APPELLANT

APPELLATE CASE NO 2016-001927

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to direct a verdict of acquittal for breach of trust when the State failed to prove that a check, written to a business for work to be done pursuant to a contract, constituted a trust relationship?

2. Did the trial judge err in refusing to direct a verdict of acquittal for obtaining money by false pretenses when the State failed to prove that Appellant made a fraudulent representation of an existing or past fact?

3. Did the trial judge err in refusing to grant a mistrial based on the improper remarks made by the prosecution in closing argument?

STATEMENT OF THE CASE

In May of 2013, the Greenville County Grand Jury indicted Appellant Holcomb for breach of trust, indictment #2013-GS-23-5223. (R. p. 494). This indictment was amended in August of 2016. In June of 2015, an indictment for obtaining money by false pretenses was directly presented to the Greenville County Grand Jury and Appellant was additionally indicted for this charge, indictment #2015-GS-23-4600A. (R. p. 497). On September 6, 2016, Appellant proceeded to jury trial on both indictments[1] before the Honorable John C. Hayes, III. Matthew W. Shealy represented Appellant at trial. Russell D. Ghent and Bratton S. Todd prosecuted the case. The jury returned verdicts of guilty on both charges. Judge Hayes sentenced Appellant to two concurrent five year sentences. A timely notice of intent to appeal was served on September 14, 2016. This appeal follows.

[1] No motion was made to require the State to elect between the two charges.

ARGUMENTS

1. The trial judge erred in refusing to direct a verdict of acquittal for breach of trust when the State failed to prove that a check, written to a business for work to be done pursuant to a contract, constituted a trust relationship.

Both the breach of trust charge and the obtaining money by false pretenses charge involved a contract between Carolina Home Renovators and Robert McGinn to install a Green Tree metal roof on the McGinn home in Travelers Rest, South Carolina and make exterior repairs – stain deck and paint door - after a hail storm caused damage. (R. p. 448). The contract was signed by Mr. McGinn and the Appellant on May 25, 2012, and called for a payment of $4,295.03 to start the work and an additional payment of $2,885.96 upon completion for a total cost of $7,180.00. Although not specified in the contract, Mr. McGinn testified that the new metal roof was going to be green. (R. p. 187, lines 4-8). As provided in the contract, on May 29, 2012, Mr. McGinn wrote check #1040 to Carolina Home Renovators in the amount of $4,295.03. (R. p. 449). Mr. McGinn testified that the deck was stained and doors painted but the roof was never installed. (R. p. 166, lines 4-10; p. 171, lines 15-18).

The State introduced in evidence an invoice to Carolina Home Renovators from Green Tree Metals in the amount of $3,179.16. (R. p. 462). The invoice listed Hawaiian blue metal roofing to be delivered to an address in Lyman, South Carolina. The invoice was stamped as paid on May 29, 2012, the same day Mr. McGinn wrote the check to Carolina Home Renovators. The owner of Green Tree Metals testified that Appellant paid the invoice with a Visa card. (R. p. 220, lines 1-13). The State failed to introduce any financial records from Carolina Home Renovators or from Appellant's personal accounts. Susan and Kenneth Clark testified that Appellant installed a Hawaiian blue metal roof on their home in Lyman, South Carolina in June

of 2012. (R. pp. 234-242; 245-247). There were no other invoices billed from Green Tree Metals to Carolina Home Renovators after May 29, 2012. (R. p. 221, lines 9-13).

At the close of the State's case, Appellant moved for a directed verdict of acquittal on both the breach of trust and the obtaining money by false pretenses charges. (R. pp. 418-426). Appellant argued in regard to the breach of trust charge, "And, quite frankly, Judge, you can't have – there simply wasn't a trust because there was nothing in the document that says that four thousand, two hundred and eighty-eight dollars ($4, 288.00), I believe, or whatever the figure was was to go solely to this particular job, to purchase this particular metal." (R. p. 346, lines 24 – p. 347, lines 1-5). Appellant argued that there was no requirement that the money received from Mr. McGinn, pursuant to the contract, be placed in a trust account where the proceeds of that account were to be used only for the McGinn job. (R. p. 347, lines 6-15). Appellant argued that the facts of the present case may form the basis for a civil breach of contract action act case but it was not a criminal case. (R. pp. 348 – 349). The judge denied the motion and stated:

> I will sort of – this is not the traditional breach of trust case we see, quite frankly. Usually that is somebody who works for a company and takes the company till and supposed to take it to the bank and instead of taking it to the bank, takes it home. That's what we usually see in breach of trust cases. The clerk at Hardee's doesn't take the night deposit, they take it home instead. So this is not the traditional case as far as one that I've tried, but I do believe that the evidence is sufficient to get it to the jury.

(R. p. 357, lines 8-17). The trial judge erred in refusing to direct a verdict of acquittal on the breach of trust charge when the State failed to prove that Appellant received money from Mr. McGinn in trust. The State failed to prove the existence of a trust relationship.

In State v. Parris, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005), the South Carolina Supreme Court wrote:

> In State v. Shirer, 20 S.C. 392, 408 (1884), the Court stated, "the object of our [breach of trust] act was simply to enlarge the field of larceny, removing what

> before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it. The question under our act is, whether the party received the property in trust, which he afterwards violated...." Therefore, the State must prove the existence of a trust relationship to sustain a charge of breach of trust with fraudulent intent. See State v. LeMaster, 231 S.C. 321, 98 S.E.2d 756 (1957). Failure to prove the existence of a trust relationship will result in a directed verdict of acquittal for the defendant. Id.

The trial judge erred in refusing to grant a directed verdict of acquittal for the breach of trust charge because the State failed to prove the existence of a trust relationship.

The indictment in the present case alleges:

> That in Greenville County on or about May 25, 2012, the Defendant, Dean Alton Holcomb, did enter into a contract to replace the damaged roof at the home of the victim Robert McGinn, with some additional repairs that included staining a deck and siding and painting the door of said home at ** Beaver Dam Road in Travelers Rest. The contract called for an initial payment by the victim of $4,295.03 and a final payment of $2,885.96 upon completion.
>
> The victim on May 29, 2012 paid $4,295.03 to Defendant Dean Alton Holcomb for the partial payment of the repairs. The Defendant did not ever repair the roof as agreed upon and instead misappropriated the monies paid to him by the victim, in whole or in substantial part for other uses in his business and otherwise acted with unlawful and fraudulent intent in dealings with the victim, Robert McGinn, all of this constituting the crime of breach of trust with fraudulent intent in excess of $2,000 but less than $10,000 in violation of Section §16-13-0230(A),(B)(2) of the South Carolina Code of Laws (1976, as amended).

(Indictment #2013-GS-23-5223, R. p. 495). The indictment fails to allege a trust relationship. Accepting payment, pursuant to the contract in this case, for work to be done does not establish a trust relationship.

In the present case the State failed to prove that Appellant received money in trust. Mr. McGinn paid Appellant to install a roof and make exterior repairs pursuant to a contract. Appellant received the money as a payment, not in trust. Once Appellant received the payment from Mr. McGinn, there was nothing to prevent him from using it for his own benefit. There is nothing in the contract or otherwise in the record to establish that the particular funds Mr.

McGinn paid were to be used exclusively for the McGinn job. There was no breakdown in the contract between materials and labor. Appellant started work pursuant to the contract but failed to complete the work as outlined in the contract. The case presents the classic example of a case that should be decided in civil court as a civil breach of contract action rather than a criminal breach of trust.

The present case is distinguished from Parris where the South Carolina Supreme Court found there was sufficient evidence to present the jury with the issue of whether a trust relationship existed between the buyers of a mobile home and a mobile home dealer. When the buyers paid the dealer, they trusted that he would use that money to their benefit and deliver the mobile home with a clear title. As the dealer did not have a title to the purchased mobile home, he took the buyers' money in trust and had a duty to pay the bank who held the title in order to deliver the mobile home to the buyers with a clear title. Instead, the dealer took the money and used it for his own benefit. In the present case, Appellant accepted payment not money in trust. Appellant had no duty to hold the money in trust and was free to use the money for his own benefit.

In State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000) this Court wrote:

> The State is required to prove every element of a charged offense to obtain a conviction. State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). In reviewing the denial of a motion for directed verdict, the appellate court must view the evidence in the light most favorable to the State. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). However, where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted. See State v. Lee, 294 S.C. 461, 365 S.E.2d 734 (1988).

In Jackson the defendant traded his 1990 Mazda toward the purchase of a 1993 Nissan. The dealership, by mistake, sent the payoff check for the Mazda to the defendant rather than the

Mazda lien holder. The defendant was able to cash the check and when informed of the mistake refused to return the money. Jackson was convicted a breach of trust. This Court reversed finding that Jackson received the money by mistake not in trust. While Appellant in the present case did not receive the money by mistake, he did not receive the money in trust. Appellant received the money as payment. As in Jackson, the facts of the present case do not constitute breach of trust because the State failed to prove a trust relationship. As in Jackson, because the State failed to prove an essential element of the crime charged, the existence of a trust, the conviction must be reversed and the case remanded for the entry of a judgment of acquittal.

2. The trial judge erred in refusing to direct a verdict of acquittal for obtaining money by false pretenses when the State failed to prove that Appellant made a fraudulent representation of an existing or past fact.

Appellant additionally moved for a direct verdict of acquittal for the obtaining money by false pretenses charge. (R. p. 353, line 21 – p. 354, lines 1-18). The trial judge denied the motion stating, "But I'm going to deny the motion for directed verdict. I believe there's sufficient evidence as to obtaining money under false pretenses sufficient to – looking at it in the light most favorable to the State to allow it to go forward to a jury." (R. p. 357, lines 3-7). The trial judge erred in refusing to direct a verdict of acquittal for obtaining money by false pretenses.

In State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372, 372 (Ct. App. 1985) this Court wrote:

> False pretenses is defined in State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980) as follows:
>
> 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 a person to whom it is made to part with something of value. (Emphasis ours.)
>
> A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses. A postdated check is a promise to pay at a future time. State v. Winter, 98 S.C. 294, 82 S.E. 419 (1914).
>
> The indictment in the present case alleges:
>
> That the defendant, Dean Alton Holcomb, did in Greenville County, on or about May 25, 2012, represent to the victim, Robert McGinn, in Greenville County that Defendant, acting in Greenville County through his business, Carolina Home Renovations, would repair the roof of victim's house in Greenville County; in line therewith, Defendant did accept from the victim a written instrument, check #1040, drawn on the Bank of Traveler's Rest on the victim's account with said bank, said check in the amount of $4,295.00, (said amount being greater than $2,000, but less than $10,000). The repairs to victim's roof were never made by Defendant or his business, as Defendant represented.
>
> Defendant made these representations, accepted said payment in line therewith, endorsed and negotiated/cashed said check, all by false pretense and

representations, with the intent to cheat and defraud the victim of the instrument and money obtained by Defendant from the victim.

All this in violation of the laws of South Carolina, and S.C. Code Ann. Section 16-13-240(2) (1976 as amended).

(Indictment #2015-GS-23-4600A, R. p. 498). The indictment fails to allege that Appellant made a fraudulent representation of an existing or past fact. The promise to repair the roof in the future cannot constitute the basis of a prosecution for obtaining money by false pretenses.

The State is required to prove every element of the crime for which an accused is charged. Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). In reviewing the denial of a motion for directed verdict, the appellate court must view the evidence in the light most favorable to the State. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). However, where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted. See State v. Lee, 294 S.C. 461, 365 S.E.2d 734 (1988).

Viewing the evidence in the light most favorable to the State, the State failed to prove that Appellant made a fraudulent representation of an existing or past fact, an element of obtaining money by false pretenses. The purported breach of the contract, without a false representation, could be the subject of a civil breach of contract action but not a criminal action. The trial judge erred in refusing to direct a verdict of acquittal for obtaining money by false pretenses.

3. The trial judge erred in refusing to grant a mistrial based on the improper remarks made by the prosecution in closing argument.

Following the State's closing argument Appellant moved for a mistrial based on improper remarks made by the prosecution. Specifically, counsel for Appellant stated:

> We would move or my client and I move for a mistrial based on the improper arguments made by the solicitor in closing. Throughout his closing Mr. Ghent pointed out how seasoned he was, how long he's been doing this. It's been thirty-seven years and yet he argued both a grand jury, which is clearly improper, one of those things they teach you at first year solicitor school as well as arguing something that was clearly held to be irrelevant, kept out of the testimony at trial. We had a hearing on it. Your Honor refused to allow them to use that particular phrase and yet Mr. Ghent used it anyway.

(R. p. 399, line 25 – p. 400, lines 1-11). Trial counsel specifically objected to the prosecution's use of the term "meth making mama" and argued there was manifest necessity for a mistrial. (R. p. 400, lines 14-18). The trial judge denied the motion for a mistrial. (R. p. 402, line 19 – p. 403, 404, lines 1-5). The trial judge stated, "As to the reference to the grand jury, I believe I actually stopped that if I recall correct. And as to the meth making mama, Mr. Ghent told the jury to disregard that. And I can certainly again tell them to disregard that, but that's sort of a statement in the air. I don't know where that – I don't – that was never in his argument connected to Mr. Holcomb [Appellant]. I don't know that the jury would connect that to Mr. Holcomb or not because he didn't connect it to Mr. Holcomb. (R. p. 402, line 19 – p. 403, lines 1-4).

Earlier in the trial the prosecution asked Mr. McGinn if Appellant posted on YouTube about Mr. McGinn's daughter Megan and whether Appellant had a nickname for her. (R. p. 166, lines 13-18). Appellant objected. (R. p. 166, line 19). The prosecution proffered the testimony from Mr. McGinn that Appellant called the daughter, Megan, the meth making mama. (R. p.

167, lines 14-22). The judge properly sustained the objection and did not allow the testimony before the jury. (R. p. 169, line 17).

During closing argument the prosecutor told the jury, "And as a result they were in the hospital when his daughter went down, finally, Megan, who, again, Megan, the meth making mama - - -" (R. p. 389, lines 3-5). Appellant immediately objected and the judge sustained the objection. (R. p. 389, lines 6-8). The prosecutor apologized and told the jury to disregard. (R. p. 389, lines 11-15). The prosecutor's reference to Megan the meth making mama was improper because it was calculated to arouse the juror's passions or prejudices and was outside of the record. Based on the earlier questioning of Mr. McGinn by the prosecutor, the jury easily could have connected the nickname to Appellant.

In State v. Rudd, 355 S.C. 543, 548–49, 586 S.E.2d 153, 156 (Ct. App. 2003), this Court wrote, "A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. Copeland, 321 S.C. at 324, 468 S.E.2d at 624; State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)." The reference to the nickname, ruled inadmissible by the judge, was improper.

As to the reference to the grand jury, during closing the prosecution told the jury, "This case was not brought on a warrant. This case was brought on an indictment that goes through a grand jury." (R. p. 387, lines 6-7). Appellant immediately objected and the judge sustained the objection. (R. p. 387, lines 12-13). When the trial judge denied the motion for a mistrial based on the improper closing, the trial judge additionally noted jury would know that the case had been presented to the grand jury because the indictments note grand jury presentment and the

jury would have the indictments during deliberations. (R. p. 403, lines 8-18). The trial judge erred.

In State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003), this Court found that the prosecutor's references in closing argument to a preliminary hearing and grand jury presentment were improper. In Rudd this Court wrote:

> Our supreme court has repeatedly condemned closing arguments that lessen the jury's sense of responsibility by referencing preliminary determinations of the facts. See, e.g., State v. Thomas, 287 S.C. 411, 412, 339 S.E.2d 129 (1986) (citing Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); *State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981)). "These statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts...." Thomas, 287 S.C. at 412-13, 339 S.E.2d at 129.

State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003). The comment referencing the grand jury presentment was improper.

Additionally, during closing the prosecutor made numerous references to his experience and the inexperience of counsel for Appellant. At the beginning of the closing the prosecutor told the jury:

> I am very southern. I don't believe in tooting my own horn, but counsel's representation to you regarding this being a civil matter – at the very first he told you he's never tried a civil case. I'm thirty-seven years – I have been practicing for thirty-seven years. Yah, let's get that clear at the start. I have been practicing law for longer than I have been alive, before I started practicing law. [Sic].
>
> I want to tell you a little bit about that because counsel is telling you all this stuff. I'm not going to use ugly words. I was trained several years in the South Carolina Attorney General's Office. I was trained by Bill Traxler and Billy Wilkins over in this office. I handled all kinds of complex litigation.
>
> I must say, it takes a certain degree of expertise to know how to put together a documents case, a white collar crime case. I have prosecuted cases as a special assistant, U.S. attorney. I went with Leatherwood, Walker, Todd & Nann, a major law firm, practiced for fourteen years in both Spartanburg and Greenville.

> What I am telling you is I know a criminal case from a civil case. I will also remind you that in virtually any kind of case that can run parallel, you can sue somebody as well as seek criminal charges.

(R. p. 382, line 16 – p. 383, lines 1-14).

Later during closing the prosecutor told the jury:

> But the reason why I got up and objected so vociferously at the very first was he doesn't know what he's talking about and it was outrageous. He has never tried a civil case. I have tried many in thirty-seven years. I have tried even more criminal cases with major firms. I know how to put together something like this. And, yes, even a case this small is complicated. It takes someone who knows what they're doing, it takes hard work and under the circumstances of this case there were things that had to be factored in. So let me go through and say that Mr. Shealy is young. He's a good young lawyer. He's clever. He's too clever by half. This was fraud.

(R. p. 385, lines 3-14).

The comments the prosecutor made about his experience and knowing a civil case from a criminal case were irrelevant and outside the record. The prejudicial impact of the comments was heightened by the comments the prosecutor made about Appellant's attorney's inexperience. The comments about Appellant's attorney were improper as expressing personal judgment about opposing counsel. It is improper for the solicitor to express before the jury his or her personal judgment about opposing counsel. State v. Lunsford, 318 S.C. 241, 246-47, 456 S.E.2d 918, 922 (Ct.App.1995).

"The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981)." State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

The test of granting a new trial for alleged improper closing argument is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). See also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996)(test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial). State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (Ct. App. 2001) overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003), this Court wrote:

> On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. *Copeland,* 321 S.C. at 324, 468 S.E.2d at 624-25; State v. Johnson, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987). The appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

In the present case the State did not present overwhelming of guilt. Appellant argues in issues one and two that the trial judge erred in refusing to direct verdicts of acquittal based on the State's failure to present evidence of the offenses charged. The judge did not give instructions to cure the improper comments. The improper comments made by the prosecutor prejudiced Appellant to the extent that he was denied a fair trial. The trial judge abused his discretion in refusing to grant the motion for a mistrial based on the improper comments made in closing argument.

CONCLUSION

Based on the arguments made in issues one and two, this Court should reverse the conviction and sentences should be reversed and remand for directed verdicts of acquittal. Based on the argument presented in issue three, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of February, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

February 23, 2018

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT