THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Opinion No. 5642 (S.C. Ct. App. filed April 17, 2019)

RECEIVED
APR 29 2019
SC Court of Appeals

Appellate Case No. 2016-001927

THE STATE, ...RESPONDENT

v.

DEAN ALTON HOLCOMB, ...APPELLANT.

PETITION FOR REHEARING

On April 17, 2019, this Court issued a published opinion that affirmed in part, reversed in part, and remanded Appellant Dean Alton Holcomb's convictions for breach of trust and obtaining money by false pretenses. *State v. Holcomb*, Op. No. 5642 (S.C. Ct. App. filed April 17, 2019). Respondent (the State) makes no further challenge to the Court's rulings in regard to the propriety of the solicitor's closing argument or the trial court's refusal to grant a directed verdict for the breach of trust charge. It respectfully, however, petitions the Court for rehearing pursuant to Rule 221(a), SCACR, in regard to the Court's conclusion that the circuit court erred

in refusing to grant Appellant a directed verdict for the obtaining money by false pretenses charge.

The State seeks rehearing on the grounds that this Court may have mis-apprehended, overlooked, or failed to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the State failed to produce evidence of the offense charged because it "failed to provide any statement proved to be false at the time it was made." The trial court, which was properly concerned with the existence or nonexistence of evidence and not its weight, considered the evidence in the light most favorable to the State and determined the State produced sufficient evidence of the offense charged to send the case to the jury. Under the standard of review and giving appropriate consideration to the evidence and all reasonable inferences in the light most favorable to the State, there was ample circumstantial evidence in the record to support the conclusion that Appellant made a representation that was false either at the time or prior to it being made. Consequently, the trial court's determination on this issue should have been affirmed.

For these reasons, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue a modified opinion: (1) affirming the trial court's refusal to grant Appellant a directed verdict for obtaining money by false pretenses; and (2) reversing and remanding for a new trial on BOTH the charge of breach of trust and the charge of obtaining money by false pretenses.

Statement of the Case

Appellant Dean Alton Holcomb (Appellant) was indicted at the June 2015 term of the grand jury of Greenville County for obtaining property or money by false pretenses – greater than $2,000 (Indictment No. 2015-GS-23-4600A). He was subsequently indicted at the August 2016 term for breach of trust – more than $2,000 (Amended Indictment No. 2013-GS-23-5223). Appellant was represented by Matthew W. Shealy, Esquire, of the Seventh Circuit Public Defender's Office. Respondent (the State) was represented by Assistant Solicitors Russell D. Ghent and Bratton S. Todd of the Seventh Circuit Solicitor's Office.[1] On September 6-8, 2016, Appellant proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable John C. Hayes, III, to a concurrent term of five years' imprisonment on each conviction. (R.p.494-501; R.p.429-p.430). He timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the three issue raised by Appellant on appeal. On April 17, 2019, this Court issued a published opinion that affirmed in part, reversed in part, and remanded for a new trial solely on the charge of breach of trust. *State v. Holcomb*, Op. No. 5642 (S.C. Ct. App. filed April 17, 2019). This Petition for rehearing follows.

Argument

In its published opinion, this Court affirmed in part, reversed in part, and remanded for a new trial solely on the charge of breach of trust. *State v. Holcomb*, Op. No. 5642 (S.C. Ct. App. filed April 17, 2019). For the reasons noted above and argued in more detail below, the State respectfully requests that this Court grant this petition for rehearing solely in regard to the

[1] Both Appellant and the State were represented at trial by officials from the Seventh Judicial Circuit rather than the Thirteenth Judicial Circuit, where the charges arose, because officials from the Thirteenth Judicial Circuit disqualified themselves from further participation due to threats made by Appellant.

Court's conclusion that the trial court erred in refusing to grant him a directed verdict for the obtaining money by false pretenses charge. The State specifically requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue a modified opinion: (1) affirming the trial court's refusal to grant Appellant a directed verdict for obtaining money by false pretenses; and (2) reversing and remanding for a new trial on BOTH the charge of breach of trust and the charge of obtaining money by false pretenses.

In its published opinion, this Court identified longstanding precedent in South Carolina whereby our supreme court had defined "obtaining signature or property by false pretenses" as requiring a fraudulent representation of a past or existing fact by one who knows its falsity, in order to induce the person to whom it is made to part with something valuable. *See State v. Dickinson*, 339 S.C. 194, 528 S.E.2d 675 (Ct. App. 2000) (referencing the definition from the supreme court). It further noted that a promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.[2] *State v. McCutcheon*, 284 S.C. 524, 327 S.E.2d 372 (Ct. App. 1985). The Court found: (1) the representation was that Appellant would replace Victim's roof and (2) at the time the representation was made, Appellant could have used Victim's payment to replace his roof. It concluded "the State did not provide sufficient evidence to show the statement *was irrefutably false at the time made*" and therefore the trial court erred in denying Appellant's motion for a directed verdict. (emphasis

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[2] Although the State acknowledges the existence and binding nature of this precedent, it notes that the limitation to only past or existing facts rather than encompassing *future promises the actor has no intention of fulfilling* is an artificial distinction that appears nowhere in the relevant statute. An individual, such as Appellant, who is bent on mischief could certainly make a false representation of future performance *knowing of its falsity at the time the representation is made* in order to induce a person to whom it is made to part with something valuable. The criminal nature of the act comes from the intent to cheat and defraud a person of their chattel, money, valuable security, or other property. The fact that the promise is made to do something in the future may make it much more difficult to prove the intent of the actor beyond a reasonable doubt; however, it should not preclude the jury from making that determination where there is ample circumstantial evidence that the actor *never intended to fulfill the future promise*. This act satisfies the plain, unambiguous terms of section 16-13-240 of the South Carolina Code, and the State submits it warrants our supreme court revisiting the propriety of the limitation this Court recognized in *Dickinson* and *McCutcheon*.

added). The State respectfully submits that requiring proof, at the directed verdict stage, the statement was "irrefutably false at the time made" improperly ventures into weighing the evidence rather than viewing it and all reasonable inferences in the light most favorable to the State. Here, the evidence at trial established Appellant had neither the means nor the intent to do what he claimed he would do. This constituted a pretense of authority or present ability to perform that was a fraud. *State v. Love*, 275 S.C. 55, 63, 271 S.E.2d 110, 114 (1980). The jury was perfectly capable of evaluating the evidence and making a determination, beyond a reasonable doubt, as to whether Appellant's representation was irrefutably false at the time is was made. The trial court properly allowed it to do so and its refusal to grant a directed verdict should have been affirmed.

Appellant's prior representations and advertisements concerning his business prior to and at the time he entered into the contract with Victim constituted a false representation that he could do certain things, a pretense of ability and implied representation that constituted a misrepresentation of present facts—a false and fraudulent pretense. This was a present use of a false pretense or representation to obtain the victim's signature to a contract and then to a check, money and chattels with the intent to cheat and defraud the victim. Thus,

Appellant argues the trial court erred in denying his motion for a directed verdict on the charge of obtaining money by false pretenses because, when viewed in the light most favorable to the State, the State failed to prove he made a fraudulent representation of an existing or past fact, which is an element of the offense. He further argues the purported breach of contract, without a false representation, could be the subject of a civil breach of contract action but not a criminal action. (Brief of Appellant, p.9). The State disagrees and submits Appellant's arguments are without merit.

Substantial direct and circumstantial evidence was presented from which the jury could find Appellant guilty of each element of obtaining money or signature by false pretenses, based on the natural and logical inferences to be drawn from the evidence. There was no dispute that Appellant took the victim's money under an agreement to make repairs to his house, most significantly to his roof. There is no question the money was not used for the victim's roof which was never repaired and the State proved the money was used for a roof and payments to employees on another job, a job as to which Appellant was also receiving complaints from a homeowner who had made payments but received no roof. These pieces of evidence constituted strong evidence of Appellant's guilt of obtaining money or signature by false pretenses, because they establish the strong likelihood Appellant never intended to make repairs to Victim's roof. Accordingly, viewing the evidence in a light most favorable to the State and focusing on the existence of evidence rather than its weight, the trial judge correctly denied the directed verdict motion and submitted the case to the jury to allow for proper resolution of any factual disputes created by the evidence and testimony. Appellant's conviction should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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 any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648; *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (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 or if the ruling is based on an error of law. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); *State v. Dantonio*, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless 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).

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Condrey*, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *See State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); *see also State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Discussion / Analysis

Here, Appellant was indicted for obtaining property/money by false pretenses. During Appellant's trial, the State presented substantial circumstantial evidence establishing Appellant's guilt for each element of obtaining money by false pretenses. This evidence created factual questions regarding Appellant's guilt that could only be properly resolved by the jury. Based on the existence of the evidence in this case along with the logical inferences of guilt to be drawn from that evidence, the trial court properly denied Appellant's directed verdict motion.

Appellant's argument begins with *State v. McCutcheon*, a South Carolina Court of Appeals case that cites *State v. Love*, 275 S.C. 55, 271 S.E. 2d 110, cert. denied, 449 U.S. 901 (1980). Appellant attempts to rely on two of the most adverse precedents to support his argument. However, in the end, the cases support the State's position. The Indictment alleged more than a mere agreement between the parties for future services. It included more than mere language of primarily replacing a roof. The indictment contained allegations that Appellant:

> [D]id 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 the 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 the Defendant or his business, as Defendant had represented.
>
> Defendant made these representations, accepted said payment in line therewith, endorsed and negotiated/cashed said check, all by false pretenses and representations, with the intent to cheat and defraud the victim of the instrument and money obtained by Defendant from the victim.

(Indictment No. 2015-GS-23-4600A). The check was accepted on May 29, 2012 and deposited that same day.

The statute under which Appellant was indicted provides that "[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... or other property , real or personal, with intent to defraud a person of that property is guilty of obtaining money under false pretenses." S.C. Code Ann. § 16-13-240. Professor William McAninch offers a model and support for the State's approach to the indicting and prosecuting on both breach of trust as well as obtaining money by false pretenses. He notes: "This statute demonstrates once more the tendency of this jurisdiction to provide overlap between the three primary property offenses [breach of trust, larceny, obtaining money by false pretenses] in order to preclude a technical avenue of escape from a case of obvious theft." WILLIAM SHEPARD MCANINCH, W. GASTON FAIREY & LESLEY M. COGGIOLA, THE CRIMINAL LAW OF SOUTH CAROLINA 366 (6th ed. 2013). Furthermore, he notes: "While it might be argued that any false promise about future conduct falsely misrepresents the promisor's present state of mind, the traditional rule has been that such a promise will not support a conviction of false pretenses. . . . The modern trend [however] is toward allowing convictions based on promises." *Id.* at 367-68.

However, the circumstances of Appellant's having conducted a "mini" Ponzi fraud to keep his company afloat, to the detriment of the victim, left Appellant at the time of the offense in a *present* violation of the false pretenses statute as well as the law of breach of trust. The Appellant during the course of a continuing fraud obtained the signature of Victim "by false pretense or representation...of a person to a written instrument.... with intent to cheat and defraud that person." S.C. Code Ann. Sec. 16-13-240 (2). Under the statute and case law as they now stand, the charge was properly submitted to the jury and Appellant was properly found guilty.

The State proved overwhelming that on May 29, 2012, Appellant obtained a check for $4,295 from Victim and deposited it in his business account which he controlled. He did this after he had obtained Victim's signature as well as to a contract for his services on May 25. In the course of obtaining and depositing this check he had already made representations about his own ability to perform on their agreement. Appellant had misled Victim and continued doing so knowing and intending that Victim's money would not be applied to repairing Victim's roof. Also in the course of obtaining and depositing the check Appellant obtained at least a claim to an inchoate material man's/chattel lien and mechanic's/chattel lien on Victim's house. (Rp.347, line 24-p.348, line 5). Appellant also obtained at least a present claim of rights to enforce a contract with the victim. Finally, he obtained an immediate and an unlawful means to finance and complete a job in Inman, South Carolina, a job on which he owed money to his employees to complete, and on which he needed to purchase materials.

Victim's testimony was that he signed the contract with Appellant in each other's presence. (R.p.162-p.163). The check was for partial payment. (R.p.160-p.161; p.164, lines 1-20). One of Appellant's employees testified as to an advertising flier that was used to publicize their business in the area. (R.p.282, line 5-p.284, line 15; State's Exhibit 51). Victim looked up Appellant and his company on the Better Business Bureau and found he had a Double-A Rating at that time. (R.p.175, lines 17-25). One of Appellant's employees dated one of Victim's daughters. In short, Appellant held himself and his company out as a reputable, reliable, and competent business entity with whom the victim was somewhat familiar and could rely in entering into an agreement to have repairs performed on his home.

In line with these circumstances, the indictment specifically alleged Appellant falsely represented he could do those things agreed upon in the contract signed on May 25, 2012.

Appellant obtained Victim's signature on two written instruments, one for his money on May 29, 2012 and the other for a right to claim that he had a contract for services with Appellant on May 25, 2012. The proof at trial established Appellant had neither the means nor the intent to do what he claimed he would do. This constituted a pretense of authority or present ability to perform that was a fraud. *State v. Love*, 275 S.C. 55, 63, 271 S.E.2d 110, 114 (1980) ("The essence of appellant's challenge is that there was no allegation or proof of a representation of a past or existing fact, but rather the representations were in the nature of a promise which is not a false pretense. We disagree. Appellant is charged in this case with falsely representing that he could do certain things... There is contained in these promises the implied representation or pretense that he could do the things he promised. This pretense of authority or ability constituted a representation or pretense of fact, (cite omitted); and supports the charge of obtaining goods under false pretenses.").

Appellant's reliance on *State v. McCutcheon*, 284 S.C. 524, 327 S.E. 2d 372 (Ct. App. 1985), is misplaced. *McCutcheon* involved an indictment for two undisputedly postdated checks as a basis for the charge. The Court of Appeals noted that precedent had already addressed and resolved that issue. *McCutcheon,* at p. 372; citing *State v. Winter,* 98 S.C. 294, 82 S.E. 419 (1914). By comparison, here Appellant's prior representations and advertisements concerning his business prior to and at the time he entered into the contract with Victim constituted a false representation that he could do certain things, a pretense of ability and implied representation that constituted a misrepresentation of present facts—a false and fraudulent pretense. This was a present use of a false pretense or representation to obtain the victim's signature to a contract and then to a check, money and chattels with the intent to cheat and defraud the victim. The motion for a directed verdict was properly denied.

In conclusion, viewing all of the evidence presented in a light most favorable to the State as required, and considering only its existence and not its weight, the evidence established Appellant's guilt for obtaining money by false pretense or representation and required the trial judge to submit the case to the jury. Based on the logical and reasonable inferences to be drawn from this evidence, the jury could convict Appellant of each element of obtaining money by false pretenses. Furthermore, the questions as to whether the evidence presented supported an inference of guilt and what weight should be assigned to that evidence rested solely with the jury as the fact-finder. Therefore, the trial judge properly denied Appellant's directed verdict motion on the obtaining money by false pretenses charge and submitted the case to the jurors to allow them to resolve any of the factual disputes raised by the evidence and the inferences to be drawn from it. For all of the reasons argued here and in the Final Brief of Respondent, the trial court's determination should have been affirmed.

Conclusion

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue a modified opinion: (1) affirming the trial court's refusal to grant Appellant a directed verdict for obtaining money by false pretenses; and (2) reversing and remanding for a new trial on BOTH the charge of breach of trust and the charge of obtaining money by false pretenses.

Respectfully submitted,

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Columbia, South Carolina
April 29, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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THE STATE, ... RESPONDENT

v.

DEAN ALTON HOLCOMB, ... APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Petition for Rehearing*, dated April 29, 2019, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to each of his attorneys of record:

Katherine H. Hudgins, Esquire
Appellate Defender
S.C. Commission on Indigent Defense
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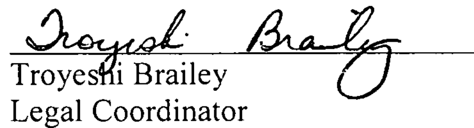
I further certified that all parties required by Rule to be served have been served. This 29th day of April, 2019.



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April 29, 2019

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Appellate Case No. 2016-001927

Dear Ms. Hudgins:

I am enclosing one (1) copy of the Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/tb
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Advocacy Division

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