STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-001927

THE STATE, ...RESPONDENT

v.

DEAN ALTON HOLCOMB, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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1. Whether the trial court properly denied Appellant's motion for a mistrial on grounds that the prosecutor made improper remarks during closing arguments where: (1) when viewed in the proper context, the closing argument was proper and well within acceptable limits under the doctrine of invited response; and (2) even if some of the remarks were improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair because the proof at trial was overwhelming.

2. Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of obtaining money and signature by false pretenses.

3. Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of breach of trust.

STATEMENT OF THE CASE

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).[1] He 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.[2] 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). Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

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[1] Appellant was originally indicted at the June 2013 term of the grand jury for Breach of Trust with fraudulent intent; however, he was re-indicted by amendment on that charge at the August, 2016 term of the grand jury. At the June, 2015 term of the grand jury he was indicted additionally for Obtaining Property/Money by false pretenses. Delay in the case was due to Appellant's threats against the original investigating officer and assistant solicitor on his case. Another prosecutor was assigned by the Attorney General to prosecute the case and pursued indictments for threats against a court official and obstruction of justice, which were tried subsequently by the assigned prosecutor and are now also pending on appeal. Counsel of record on those appeals filed motion to be relieved from further representation on December 6, 2017. (Motion by Donald L. Smith, Esquire, Attorney for Appellant in Appellate Case No. 2017-001659).

[2] 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.

STATEMENT OF FACTS

Procedural History

There were two pre-trial hearings in this case, one before a judge from the Seventh Judicial Circuit (June 4, 2015, Transcript) and a second one before a judge from the Sixteenth Judicial Circuit (July 29, 2016, Transcript). These required trial counsel to file motions, prepare to argue those motions, and then travel to other counties when General Sessions court was scheduled and the matters were worked into other locally scheduled dockets. Jurisdiction was properly declared as being in those counties by the respective attending judge. Among cross-motions heard, Appellant made a motion for a more definite statement. (R.p.32). Although such a motion is not specifically provided for under the South Carolina Rules of Criminal Procedure, the assistant solicitor agreed to do so prior to trial.

In compliance with this agreement, the State amended the charge of breach of trust with fraudulent intent, Code of Laws of South Carolina Section 16-13-230(A) (Supp. 2012), and thereby provided more specifics of that charge. There were no further objections as to the specifics of the Breach of Trust Charge. (Amended Indictment No. 2013-GS-23-5223).

The State also submitted an indictment to the grand jury for obtaining property/money by false pretense alleging the elements of the contract as understood by the victim, and that "Defendant made these representations, accepted 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). See S.C. Code Ann. § 16-13-240 (2) (Supp. 2012).

In addition, the State amended the previously returned indictment for threatening a court official so as to provide specificity to the charge for threatening the assistant solicitor originally assigned to the case, with reference to the specific Code section, S.C. Code Ann. §16-9-

340(A)(1). It also amended the previously returned indictment, based upon the threatening actions against the sheriff's investigator, to specifically allege obstruction and attempted obstruction of justice with reference to the specific Code section, S.C. Code Ann. § 16-9-340 (A)(2). S*ee also State v. Lyles-Gray,* 328 S.C. 458, 492 S.E. 2d 802 (Ct. App. 1997).

Finally, the State added a separate indictment for the threat against the assistant solicitor for intimidation against her "because of political opinions or the exercise of political rights and privileges guaranteed to ever citizen by the Constitution and laws of the United States or by the Constitution and laws of this State." S.C. Code Ann. § 16-17-560. These amended and additional indictments were all vehicles by which the Solicitor provided the specifics of the assortment of charged offenses, as requested by defense counsel. (R.p.32-p.33). There were no further complaints by defense counsel as to specificity in the charges or any allegations against the Appellant. Over the objection of the State, the threat cases were tried separately.

State's Proof of Guilt as to Both Charges

In the case now before this Court, Appellant was indicted for and convicted of two charges, breach of trust with fraudulent intent and obtaining money under false pretenses. The charges involved Carolina Home Renovators, a business owned and operated by Appellant that was in the process of going "belly up." Robert McGinn [Victim] was the last customer in Appellant's financial game of musical chairs with payments from customers for home repairs after a major hail storm. The proof was more than sufficient to go to the jury as to both charges, it was overwhelming. (See Brief of Respondent, p.30-p.41).

Appellant moved for a directed verdict on both charges at the end of the State's case. He argued the State had failed to make a thorough showing of proof at trial that was sufficient to go to the jury. In reviewing the denial of a directed verdict, a court must view the evidence in a light

most favorable to the State and on review that determination is limited to considering the existence or non-existence of evidence, not its weight. *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272, 276 (2017) (citing *State v. Bennett*, 415 S.C. 232, 235, 781 S.E. 2d 352, 353 (2016)). Contrary to Appellant's assertion, the proof and evidence submitted was overwhelming and factually supported denial of the motion for a directed verdict, and a jury verdict of guilt as to both charges. The true strategy of defense at trial centered not on the sufficiency of the evidence, but on efforts at jury nullification, as demonstrated in Appellant's improper arguments this to the jury in opening and closing arguments. *See United States v. Muse*, 83 F.2nd 672, 677-78 (4th Cir. 1996)("Although a jury is entitled to acquit on any ground, a defendant is not entitled to inform the jury that it can acquit him on grounds other than the facts in evidence, i.e., a jury has the power of nullification but defense counsel is not entitled to urge the jury to exercise this power (footnote omitted).").

Trial

At trial, the State first called Jason Martin, a claims representative for State Farm Insurance Company, employed in their homeowners division. He identified documents from his appraisal of the claim filed by Victim after a hail storm damaged his Greenville County home in March or April of 2012. He testified the total amount of damage sustained was seven thousand, one hundred eighty dollars and ninety-nine cents ($7,180.99), which included exterior damage to the house, damage to the roof, and necessary repairs. The replacement cost for damage to the roof alone was four thousand, two hundred ninety-five dollars and three cents ($4,295.03). (R.p.149, lines 6-18). State Farm initially paid Victim four thousand, two hundred ninety-five dollars and three cents ($4,295.03). Victim remained *eligible for* up to another one thousand, eight hundred eighty-five dollars and ninety-six cents ($1,885.96) in *additional replacement*

costs after the roof work was completed. (R.p.145-p.154). Replacement and repair costs for the mailbox, to stain and finish the siding, the handrail, deck, and beams, to paint the door and repair gutters and window screens was estimated at seven hundred fifty-six dollars and fifty-five cents ($756.55). (R.p.151). Documents of the insurance claim were offered into evidence and entered without objection. (R.p.146; p.436-447).

Next, Victim took the stand. Victim testified he had lived in his home for "pretty close to twenty years" with his wife, step-daughter and grandchildren. (R.p.158). His wife suffered from severe health issues, and at the time of contracting with Appellant as well as during the period of non-performance of the repairs, Victim suffered from illness as well. (R.p.158-p.160). Victim testified that in the spring of 2012 his house was hit by a hail storm. As a result, he reported a claim to his insurer, State Farm. (R.p.160). The insurance company adjusted the claim and wrote him a check for repairs. Victim then entered into a contract with Appellant and his company to replace his roof, along with incidental repairs for other damage to the house. (R.p.161-p.162; p. 448). Victim testified his understanding, as reflected in the insurance claim, was that he was contracting with Appellant to repair the damage to the house, and that the estimate as well as the contract for repairs were primarily for the roof replacement and materials provided via Green Tree Metals, a business located in Hartwell, Georgia, with offices in South Carolina. (R.p.148-p.151; p.161-p.171; p. 436-450). The agreement called for payment by Victim to Appellant and his company in the amount of four thousand, two hundred ninety-five dollars and three cents ($4,295.03) to begin work, and two thousand, eight hundred eighty-five dollars and ninety-six cents ($2, 885.96) upon completion, for a total cost of seven thousand one hundred eighty dollars and ninety-nine cents ($7,180.99). (R.p.162). The contract was signed by Appellant on May 25, 2012, in Victim's presence at the same time Victim signed it. On May 29, 2012, Victim wrote

and gave check #1040 to Appellant in the amount of four thousand two hundred ninety-five dollars and three cents. ($4,295.03). The check was drawn on Victim's personal checking account at the Bank of Travelers Rest. (R.p.162-p.193; p.205-p.210).

Victim made clear the money was being given to Appellant as a first payment to put the roof on his house and to make the other less significant external repairs. (R.p.171). Victim selected Green as the color for his metal roof. He was not aware Kenneth and Susan Clark from the town of Lyman in Greenville County had previously ordered a Green Tree Metal roof from Appellant, and were then becoming persistent in seeking the benefit of their bargain as well. (R.p.248). The Clarks had chosen Hawaiian Blue as the color for their roof. (R.p.235). Victim made clear what color roof he was choosing when he gave Appellant his check. It was Green, not Hawaiian Blue. Victim did not entrust money to Appellant for work on anyone's home but his own, and he did not know the Clarks, nor did he intend for his money to be used to put a roof on their home. (R.p.172). Within two days of the payment to Appellant, the check made to Carolina Home Renovators had cleared Victim's account. It was endorsed by Appellant and Appellant then paid Green Tree Metals for a Hawaiian Blue roof. The blue roof was then put on the home of the Clarks. (R.p.210-p.217; p.458-464).

Appellant never put a new roof on Victim's house. (R.p.164-p.165). Appellant ignored Victim's efforts to contact Appellant about his roof and failed to have his crew do anything more than preliminary work to stain the sides and deck of the house or paint the doors and windows, (R.p.165-p.166). Victim was also a contractor. (R.p.165, lines 17-25). He understood the essential term of the contract with Appellant was to install a new roof. (R.p.165, lines 23-24). Victim testified the amount of work actually done on his house could not have been more than four hundred dollars' worth of work. (R.p.170-p.171).

On cross-examination, Victim acknowledged he knew Appellant was bonded and licensed by the State of South Carolina, and that his license is on file with the State. He also acknowledged he is familiar with the bonding process and its importance, that he looked up Appellant on the Better Business Bureau and found him Double-A rated at the time, that one of Appellant's employees had been dating one of Victim's stepdaughters, and that it was that employee who gave Victim the initial estimate for repairs. (R.p.173-p.177). Cross-examination of Victim further established the job was in fact predominantly about replacing the roof. (R.p.178-p.184).

In short, the cross-examination of Victim cut two ways. It showed Appellant had the appearance of an upstanding successful businessman, as Appellant had claimed was the case. On the other hand, it established Victim had actually researched Appellant and his business and had a basis for believing he was dealing in good faith with someone who held himself out to potential vendees for his services and clients as a reputable businessman. Victim had reason to believe Appellant was in charge of and directing a solvent and reliable company upon which purchasers of his services could rely. However, the State showed this was untrue both at the time of the time the contract was signed and when the first payment was made to Appellant.

One of the two men who actually performed the work on Victim's house was Jared Richardson, Appellant's employee, who was dating one of Victim's stepdaughters. (R.p.184-p.185). Richardson testified he worked for Appellant, lived with Victim's step-daughter, and brought Victim's job to Appellant after conducting an estimate. (R.p.262-p.265). Richardson was employed as a roofer and was not authorized to handle the money, the checking account, or write checks for Carolina Home Renovators. (R.p.263, lines 14-22). He briefly considered doing the job himself because he knew the supplier, but did not because he worked for Appellant.

(R.p.265, lines 4-16). He also testified regarding the contract and that the check from the victim was a partial payment on the roof and as to the supplier. (R.p.265-p.266).

Richardson went over the terms of the engagement agreement as Victim had outlined in his testimony. (R.265-266). He reluctantly affirmed problems were developing regarding timely payment to the workers at the time Appellant contracted with the victim. (R.p.266, lines 15-23). Outside the jury's presence the witness admitted that even with prior law enforcement experience, (R.p.264, lines 10-17), he was afraid of Appellant. (R.p.286, lines 2-17).

The State introduced copies of two checks Richardson testified were payments to him from Appellant. (R.p.489-490). They were written to Richardson in Appellant's handwriting. (R.p.268). One of the checks, was check #2414, dated June 8, 2012, from Carolina Home Renovators for $330.00 and signed by the Appellant, and specified the check was "For Clark". (R.p.267-p.268; p. 489). The other check, was check #2410, dated June 1, 2012, from Carolina Home Renovators for $400 and signed by Appellant. (R.p.490). Appellant gave Richardson this four hundred dollar ($400.00) check. Richardson's endorsement was on the back of each check.

Richardson also recalled installing a Hawaiian Blue roof on another project in June and July of 2012 and identified pictures of the house upon which he installed the blue roof. He testified, again reluctantly but clearly enough to concede, the people at that residence had some problems about "a little delay" with the project getting started. (R.p.269, lines 11-24). He was unresponsive when asked if he knew "whether or not the people who lived there had been pressing [Appellant] for their money." (R.p.270, lines 11-24).

Richardson recalled that Will Byrd was the other employee working on the projects. (R. 270, 271). Richardson testified that Byrd also received checks from Appellant, marked as State's Exhibits 49 and 50. These were entered without objection. Check #2411 was made out to Will

Byrd and dated June 1, 2012 for $490.00 without an explanation of payment in the "memo" line. (R.p.2720, lines 1-17; p. 491). Check #2413 was made out to Will Byrd and dated June 8, 2012, for the "Clark and Saffy repair." (R.p.272, lines 18-25; p. 492). These payments for $500 and $490 were made during early June, 2012. The State proved these checks were made to Appellant's employees to complete work using funds from Victim, although Victim never intended or approved such use.

Next, Investigator John T. "Tim" Martin of the Greenville County Sheriff's Office, who was the original investigating officer on the case, testified on behalf of the State. The testimony of the original investigating officer was considerably abridged due to his having been replaced by Lt. Jeff Kindley of SLED in his investigation of the case, after threats were made against both Martin and Assistant Solicitor Sylvia Harrison by Appellant. (R.p.54-p.76). Martin explained a long standing practice of that office whereby private citizens can come in and meet with officers designated for a shift to handle "walk-ins" and receive assistance in determining whether or not they have probable cause for an arrest warrant. (R.p.289). He testified he met with Victim's step-daughter when she came in and was aware of her prior history of drugs. (R.p.290). He told her he needed to speak with her step-father, Victim. That he needed pictures, contract(s), and insurance information. Martin recalled the report he took was dated January 31, 2013 and the incident date was May 25, 2012. (R.p.291). Martin then identified from his file two pictures of the house and its condition on May 8, 2013, partially stained, with no new roof. (R.p.293). Photographs taken by another officer with the Greenville County Sheriff's Office, in June, 2015 and prior to trial, depicted the victim's house still without a new roof and still with only partial staining and painting. (R.189-p.204; State's Exhibits 8, 9, 10, 11, & 20).

Brian Johnson, the owner of Green Tree Metals, then testified for the State. Through Johnson, the State introduced Exhibits 33, 34, and 35. (R.p.210-p.211). Exhibits 34 and 35 were duplicates of an invoice from the same company. The address of the purchaser of the merchandise from his company matched the address of Appellant and his company. (R.p.214; p. 459-464). State's Exhibit Number 34 was an invoice for Hawaiian blue roofing to be delivered to the Clark's house in Lyman, South Carolina. (R.p.215; p.459-461). Johnson testified the roofing was paid for by a Visa Card, but did not recall whether it was a debit or a credit card. (R.p.220, lines 7-20). He also testified the amount of the invoice for that roofing was $3,203.21, and was dated May 29, 2012. (R.p.212, lines 7-12). Johnson further testified that, at the State's request, he printed a summary of the business he had conducted with Appellant and Carolina Home Renovators, running from December 9, 2011 through May 29, 2012, the last entry being for the invoice on the same day as the victim had written check #1040 to Carolina Home Renovators in the amount of $4,295.03. (R.p.210-p.217).

John Booth of South Carolina Farm Bureau testified Susan and Kenneth Clark were policy holders and that an adjuster for his company estimated total repairs to their home to have been $6,589.70 after suffering hail damage from a storm in April, 2012. The initial check to them was for $4,878.73 after the Clark's filed a claim. (R.p.226-p.229). Booth was a district field claims supervisor who reviewed work from adjustors and also handled claims and deals with contractors and/or policy holders. He testified that a contractor in a homeowner's claim is generally familiar with the concept of a deductible and how it is subtracted from a payable claim. (R.p.230-p.231). He testified the claim involved payment for a roof replacement at the Clark's home. (R.p.231).

Mrs. Clark testified regarding the hail storm damage to the roof of the home she shared with her husband in 2012. (R.p.234, lines 1-19.) The roof chosen was a metal Hawaiian Blue roof. (R.p.235, lines 4-25). She testified a delay in installation was explained by a claim the roof had been delivered in the wrong color. (R.p.236, lines 9-20). The State introduced checks the Clarks paid to Appellant as Exhibits 37 through 40. (R.p.237-p.241). A check stub for a payment from Founders Bank and copies of three checks were offered and admitted into evidence. (R.p.238-p.241). The check stub for a check written by her and paid by Founders was offered and introduced into evidence. (R.p.237-p.239; p.485). Similarly, check #2029, for partial payment for the roofing, $500, signed and deposited by Appellant, was admitted. (R.p.239-p.241; p.486). Check #2008, dated April 24, 2012, for $4,874.73, and endorsed by Appellant, and Check #2035, dated July 9, 2017, for $705.34, and endorsed by Appellant, were also admitted. (R.p.240; p.487-488). Mrs. Clark deferred to her husband's recollection on when the roof was finished, "April, May, June. I think it's June. Wasn't it finished in June... My Husband's the one that does this." (R.p.242, lines 4-9). Mrs. Clark testified her husband is totally blind. She testified they became concerned about the roof not being replaced. (R.p.240-p.242).

Mr. Clark testified he recognized the voice of the prosecutor as someone he had spoken to before. (R.p.245, lines 1-18). He recalled discussing the replacement of his roof with someone who identified himself as Dean Holcomb. He recounted their conversation on his porch after the "bad hail storm to come through in April of 2012" and the agreement they reached for replacement of the roof. He recalled his payments for the replacement, "the last was around first of July, and that was the year of 2012." He thought his last payment was around the first of July,

2012 and the roof was finally repaired "sometime in June because the insurance company had to come out and make a final inspection." (R.p.246-p.248). He testified:

> The agreement was that he was to take what the insurance company paid. And he gave me a coupon and I wrote a check for—it was forty-eight hundred dollars before he ever started anything. And you have those checks... the deposit, the thousand dollars. He said that's what I owed now. And I reminded him of the coupon. And if you'll look at the checks again, it was five hundred dollars plus the five hundred dollar coupon... And I kept the coupon until time to make the deductible payment. And I gave him the coupon and the deductible payment.

(R.p.247, line 16-p.248, line 10). Mr. Clark testified the work was not done promptly, there was a significant delay, he started to become worried about it and he repeatedly attempted to follow up with Appellant until the work was finally done. (R.p.248, lines 11-25).

Captain Myron Shelor of the Gaston County Police Department in North Carolina testified that to his knowledge, Appellant and Ms. Claudia Whitt had maintained a residence at least from April 29, 2013 in Bessemer City, North Carolina. He and Lieutenant Jeff Kindley of SLED executed a search warrant at that residence on August 12, 2014. Neither Appellant nor Ms. Whitt were there, but a computer, related devices and certain documents were seized. (R.p. 314-p.318).

During a proffer outside the jury's presence, Lt. Kindley was shown checks seized from the search, checks pertaining to the victim, Mr. Clark, Mr. Byrd, and Mr. Richardson. (R.p.319-p.328). At the end of the proffer the Court went over those checks and ruled them admissible, "Check 2410 from Carolina Home to Jared Richardson, in. Check 2413, same company to Will Byrd, in. 2414, same company to Richardson, in."

Kindley testified: "Wells Fargo bank statement, May 24—May something, 2012, which has—it's two pages, it appears, and has quite a bit of writing on it regarding McGinn and Jared, invoice, Carolina Homes, can't read the number, but it's the one that has the coupons and money

notation on it, check 2414, again to Jared, check number 2413 to Will Byrd, statement of Dean Alton Holcomb, and on that same sheet of paper check 2411, same company to Mr. Byrd, another Wells Fargo statement on the same sheet of paper, a check 2410 to Mr. Richardson." (R.p.328, lines 10-23). A portion of the documents were marked collectively and identified by Lt. Kindley as those seized from the residence in Bessemer City, North Carolina. (R.p. 328, line 25-p. 337, line 17; State's Exhibit 54).

Among the documents comprising this Exhibit 54 was check #2410, dated June 1, 2012, signed by Appellant. At the bottom, in the memorandum line it read "McGinn." The check was made out to Jared Richardson. The copy of the original check introduced through Richardson as State's Exhibit 48, but the copy of the one seized at Appellant's home in North Carolina and introduced through Lt. Kindley, State's Exhibit 54, had a material difference. The copy introduced as part of State's Exhibit 54 "has McGinn written in the memorandum line." (R.p.330, lines 7-23). On the other hand, another copy of the "same" check, introduced earlier through the former employee, witness and payee Mr. Richardson had been admitted and published to the jury as State's Exhibit 48, without objection. (R.p.268). That check had nothing in the blank as to what it was "for". (R.p.329-p.332). Together these documents showed Appellant had been in the process of his continuing fraud of Victim at the residence searched in 2014, attempting even then to manufacture evidence to cover up the facts of what had actually been the true circumstances regarding the documents.

Next, the State introduced a "voluntary statement" or affidavit purportedly from William Byrd, a fellow employee of Appellant and his company, in the possession of Appellant and apparently generated by Appellant for Mr. Byrd's signature. (R.p.334; State's Exhibit 54). With this document was a copy of check #2411, previously introduced as State's Exhibit 49, made out

to Will Byrd dated June 1, 2012, for $490.00 and without any explanation of payment in the "memo" line. (R.p.272, lines 1-17; p.334, line 21; p.491). Again, there is a material difference in the copies of the checks. The check discovered in the search again has "McGinn" on it after the fact of the actual check having been written, deposited, and processed by the bank. (R.p.334, line 21-p.335, line 6; State's Exhibit 54). Finally, the State offered a copy of a bank statement with handwriting and notes on it that the jury by now could recognize as that of the Appellant. (R.p.335, line 13-p. 337, line 14).

ARGUMENT

I.
[Appellant's Argument III]

The trial court properly denied Appellant's motion for a mistrial on grounds that the prosecutor made improper remarks during closing arguments where: (1) when viewed in the proper context, the closing argument was proper and well within acceptable limits under the doctrine of invited response; and (2) even if some of the remarks were improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair because the proof at trial was overwhelming.

Appellant argues the trial judge erred in refusing to grant a mistrial based on improper remarks made by the prosecution. Specifically he complains about three remarks: (1) an isolated use of the term "meth making mama" in reference to Victim's daughter; (2) an isolated reference to the grand jury; and (3) references to the prosecutor's experience and the comparative inexperience of Appellant's counsel. The State submits the trial judge properly denied the motion for a mistrial based on these remarks because when viewed in the proper context, the closing argument was well within acceptable limits under the doctrine of invited response and because even if some of the remarks were improper, Appellant did not suffer prejudice and his trial was not rendered fundamentally unfair. Only the inadvertent remark about a grand jury was objected to and preserved for appeal. The remark had no prejudicial effect and the Appellant's motion based upon it was properly denied. (R.p.387, lines 6-14; p.399-p.404).

Remarks made in the solicitor's closing argument about his prior experience reflected poor judgment, especially in light of his age and experience. He knows better and should not have taken the bait of a good defense attorney half his age and with a quarter of his experience. But he did. And while this was unwise and more than a little incomprehensible to him, it does happen that sometimes irascibility comes with age, as much if not more than wisdom. However, the argument was within the doctrine of invited response, did not constitute a personal opinion

on the facts, was warranted in light of the attacks on the prosecutor, the officers, Victim and the State's case, and merely commented on admissions Appellant's trial counsel had already made. Furthermore, it did not infect the jury's deliberations with undue prejudice, and any possible error was rendered harmless because the proof of the State's case was overwhelming. When defense counsel in essence encourages jurors to ignore the trial judge's instructions as to the very nature of a criminal case, it cannot be fairly presumed they will just take the law from the trial judge and properly do their duty, without some further corrective action or instruction.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524. 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. *See State v. Weaver*, 361 S.C. 73, 89, 602 S.E.2d 786, 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record.").

"The relevant question is whether the solicitor's comments 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).

Subject to actual fraud or dishonesty, the decision to indict a defendant and on what charge to try a defendant is the domain of the prosecutor. *State v. Langford,* 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012). It is not for the jurors to speculate as to whether a civil, as opposed to criminal, court is appropriate for a case, but rather to follow the instructions of the court in the criminal case before them to determine guilt or innocence.

A jury is bound by and must accept and be governed by the instructions given to them by the court. *See State v. Woomer,* 276 S.C. 258, 267, 277 S.E.2d 696, 701 (1981), *appeal after remand* 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied Woomer v. South Carolina*, 463 U.S. 1229 (1983). A jury must take the law as the trial judge has given it to them and apply it to the facts of the case. *State v. Queen,* 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.").

Relevant Facts

As set forth above, the proof of guilt was overwhelming. There was no error but assuming error arguendo, it was invited by defense counsel after the prosecutor made numerous efforts to prevent defense counsel's improper strategy of nullification. Well before trial of the case the State filed a pretrial motion regarding juror nullification, in anticipation of this possible tactic being pursued by Appellant's trial counsel. The solicitor's argument before the trial judge in the motion hearing could not have been clearer as to his position. The solicitor said: "I don't want this matter characterized in any way shape or form as a civil matter. That is a left-handed

way of seeking juror nullification. The decision was made by law enforcement to go forward with it as a criminal matter. That is not [to be undone by leave to] tell the jury [to] disregard the judge; disregard the prosecution, disregard [the] court. That's improper. Thank you" (R.p.82-p.83). The Appellant's trial counsel responded, "I think it's me saying that these acts weren't criminal; that it just don't—it doesn't rise to a criminal matter and I think I'm allowed to pen [sic] it. That's part of my job is to say you got to find him not guilty." (R.p.83, lines 9-14).

The trial judge denied the State's motion, but qualified his ruling by stating "but I'm gonna be alert if that comes up during a trial and you believe a line has been crossed we'll deal with it then. But I think that's at this point without any research I think that's a legitimate argument that this—my client committed something, did wrong, but it's not a crime." (R.p.83, lines 15-20).

Only in regard to a general recognition that it is appropriate for trial counsel to argue that elements of a crime are unproven, the Assistant Solicitor agreed such language was appropriate and said so stating,"that much I can see. [But] [s]aying you're in the wrong court is basically saying don't pay any attention to the instructions of the judge this is not about a crime." (R.p.83, lines 21-24). The trial judge then stated: "I'm certainly not gonna allow him to argue jury nullification. We've got a belly full of that in this area with people handing out pamphlets. Anyway I'll stay tuned to that." (R.p.84, lines 4-8).

Notwithstanding the State's motion, the Court's cautionary ruling and words, and notice given to Appellant's trial counsel well before trial, the Appellant's trial counsel still ignored these limits and went well beyond mere claims of lack of proof, and in substance and effect sought nullification. Caution was ignored as were the limitations that had been set. It was overlooked by trial counsel that others involved in a criminal case are guaranteed fundamental

fairness, including the victims of crime. S.C. Const. Art. I, § 24 (A)(1) [Victims Bill of Rights]. Appellant's trial counsel did not hesitate to barrel through any boundaries of fair play to Victim and the State in his opening statement when he said, "[a]nd the reason this has drug on so long is because they won't tell Mr. McGinn he's in the wrong." (R.p.141, lines 18-19). The words were absolutely untrue and Appellant's trial counsel well knew it. The assistant solicitor immediately objected, the jury was sent out, and the State moved for a mistrial. The motion was denied. (R.p.141-p.142).

In his motion for mistrial, the assistant solicitor pointed out that Appellant's trial counsel was plainly misrepresenting the circumstances to the jury. As a result of that misrepresentation, which was the jurors' very first impression of the case, jurors had been critically misled, inviting speculation and putting in their minds a completely misleading basis for the delay. As argued by the prosecutor: "[f]or him to stand there and tell the jury this case has taken so long [because the prosecutor won't tell Mr. McGinn he's in the wrong"], it has taken so long because his client threatened a prosecutor and an officer in this circuit. No judge will touch it. No prosecutor will touch it." (R.p.142, lines 13-16).

The assistant solicitor continued: "[h]e was also reported to have made threats against Judge Verdin for revoking his bond. [trial counsel's statement] was a flagrant misrepresentation. And afterwards this juror right here, the gentleman, and this juror right here, the woman with the braided hair, started whispering to each other. I move for a mistrial, your Honor. The State cannot possibly get a fair trial. That is the most outrageous thing I've ever seen a defense attorney do. That was a blatant misrepresentation to the jury." (R.p.142, lines 3-25).[3]

[3] Discovery materials were submitted to the trial judge under seal as to circumstances surrounding other threats made by Appellant while awaiting trial, and which might have put two other detainees at risk if their names were revealed. Rule 5(d)(1), SCRCrimP. They are not being designated by the State for inclusion in the record on appeal but can be transported to this Court under seal if requested.

The prosecutor took the following steps to preserve his position and objection for the record: (1) he made a timely objection; (2) he interrupted no further than necessary, having preserved the issue in his pretrial motion and contemporaneous objection, and allowed counsel to complete his opening statement to the jury; *of special significance* Appellant's counsel chose to leave these objectionable remarks as the last thought for the jury as they began the trial; (3) after the jury was sent out, the assistant solicitor immediately moved for a mistrial due to the likelihood of extreme prejudice from a false claim that a private citizen was in charge of defendant's criminal prosecution rather than the State's prosecutor and an even more blatantly prejudicial claim the State was going forward only because it was unwilling to "tell [the victim] he's in the wrong"; and (4) the state's prosecutor demonstrated more than a mere suggestion, allegation, or the mere appearance of prejudice by immediately pointing out two specific jurors who had begun whispering to each other almost immediately in reaction to the remarks. (R.p.141-p.143). This was unrefuted at the trial level.

At the end of trial, Appellant's trial counsel returned to his argument that the State, SLED, and the assistant solicitor brought in to prosecute the case were all Victim's toadies rather than independent agents attempting to do justice. Specifically, counsel said:

> And as I told you what you've just seen is an excellent example of breach of contract. Unfortunately, for whatever reason, Mr. McGinn didn't choose to go out and hire his own lawyer, serve my client, have him in civil court. And I'll tell you, if I had been my client's attorney in that civil courtroom, I would have told him, yeah, you've breached the contract, you owe him some portion of the money because he clearly owes him some portion of the money."
>
> . . . .
>
> "But ultimately I expect that difference could have been bridged in any kind of civil courtroom. But instead he went into his—gotten *all the machinery*

you've got as his collections agency. And *you saw how many police officers, how many solicitors they got in here all at public expense to chase this money.* Now, *I can't tell you why they've done that, but that's what happened."*

. . . .

"*And so they brought all these other law enforcement officials in here.* And they brought a bunch of documents that a year later, *2014, they go serve a search warrant up in Gaston County* and pull a bunch of documents from his house. *Now remember, he's already been arrested at this point for at least a year. So this thing had been going on for at least a year at this point.*"

. . . .

"Because I understand that right now they're going after a contractor, but *if you don't think that a credit card company is going to get more prosecutions than regular people, then you don't know government. Who pays them? Who pays for their lawyer?*

And remember, Mr. McGinn was not some poor fellow. His jobs are three to four million dollars apiece, eight million in the aggregate. And he was real quick with those numbers. All right.

*So I understand you're thinking, surely it won't happen to regular people. And maybe you're right, but the way the government works, I don't know that I'd want to take that ch*ance."

. . . .

"*Now I believe that my client did absolutely nothing criminal here.* And I'll believe it til I die that you will find my client not guilty of all of these things."

(R.p.369-p.381) (emphasis added).

By way of comparison, the prosecutor did not give a personal opinion on the facts as Appellant's Counsel had done, nor did he strike foul blows nor use improper methods. Instead, he responded with the verbal equivalent of a resume. Being old by appearances and having felt that he, his case, and his colleagues had been professionally attacked while the jury factually misled, he first responded by, unfortunately, citing his own experience to make clear he had done

more work in his career than to spend merely 37 years as an assistant solicitor. (R.p. 382, line 16-p. 384, line 7).

Solicitor's Experience

A. Issue is Not Preserved for Appellate Review

First, in regard to the remarks about the prosecutor's "wealth of experience", the current challenge to those comments is not preserved for appellate review because Appellant did not object at trial. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. *State v. Fleming*, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). In any event, the Assistant Solicitor's remarks were proper as an invited response.

Appellant's opening statement and closing argument injected the extraneous considerations of whether Appellant should have been charged with a crime instead of facing a civil suit from Victim. As a result, the solicitor was fully permitted to comment on his experience as it related to distinguishing between the criminal and civil arenas. *See State v. Ellenberg*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant.") ; see also Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair); *Meggett*, 398 S.C. at 524-25, 728 S.E.2d at 496-97 (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof,

presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense).

B. Solicitor's Argument was an Invited Response

The South Carolina Supreme Court has recognized the doctrine of "invited reply", a rule first outlined more than a half century ago by the United States Supreme Court. *Lawn v. United States*, 355 U.S. 339 (1958). Although actual recognition of the doctrine as such was initially vague and seen first only as a continued application of existing legal principles, the United States Supreme Court recognized the doctrine by name. *Id.* at 359-60 n.15 ("Moreover, petitioners' counsel in his summation to the jury had argued that the Government's case was persecution of petitioners, had been instituted in bad faith at the instance of a group of revenue agents; and was supported 'solely' by the testimony of Roth and Lubben who were admitted perjurers, and counsel in his opening statement had said that the United States Attorney and his assistant in charge of the case 'had been instructed, or in my opinion they never would have done this? These comments clearly invited the reply which petitioner now attacks.")

In conjunction with the invited reply doctrine, the United States Supreme Court in *United States v. Young*, 470 U.S. 1 (1985) recognized the additional protections of the "plain-error doctrine" of Federal Rule 52(b) which "tempers the blow of a rigid application of the contemporaneous-objection requirement. Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection— a practice which we have criticized as 'extravagant protection.'" *Id.* at 15-16, citing *Henderson v. Kibbe*, 431 U.S. 145, 154 n.12 (1977). In this case, the prosecutor's argument did not constitute plain error, and "[was] not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.*

The Court in *Young* commented that appellate review as to plain error requires proper review of the entire record, and that "it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Id.* (citing *Johnson v. United States*, 318 U.S. 189 (1943) (Frankfurter, J. concurring)).

The case of *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974) provides some background a decade before the Supreme Court reached a finalized doctrine in *Young*. In *DeChristoforo,* the defendant was convicted in a Massachusetts state court of first-degree murder and a jury recommended that the death penalty not be imposed. At the close of evidence but before final argument, a codefendant elected to plead guilty to a charge of second-degree murder. There were two claims of error in the prosecutor's closing argument to the jury in *DeChristoforo*. The first involved a claim of expressing a personal opinion as to guilt. The remark was found improper but the court did not determine it rose to the level of a violation of due process. However a second argument went to defendant's motive in electing to stand trial: "They (the respondent and his counsel) said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There was an immediate objection followed by the trial judge's instruction that the remark was improper and should be disregarded, and in his final jury instructions the trial judge reemphasized "that the prosecutor's statement was unsupported" and admonished the jury to ignore it. *DeChristoforo,* 416 U.S. at 63.

The Supreme Judicial Court of Massachusetts held the remark was improper but not so prejudicial as to require a mistrial and held the trial court's instruction adequately protected

DeChristoforo's rights. Respondent petitioned a federal court for Writ of Habeas Corpus, and it was denied; the federal Court of Appeals for the First Circuit, however, reversed and found the comment "potentially so misleading and prejudicial that it deprived [*DeChristoforo*] a constitutionally fair trial." 94 S. Ct. 1871. The United States Supreme Court reversed the First Circuit, per the opinion of Justice Rehnquist. The opinion put federal appellate review into perspective, seen in *DeChristoforo* as too broad a federal appellate intrusion into state court proceedings. *DeChristoforo*, 416 U.S. at 642-44. The Court concluded the First Circuit had pressed its federal powers of judicial review of state trial courts well beyond reasonable limitations.

South Carolina has adopted the federal doctrine of invited reply or invited response. *Ellenberg*, 367 S.C. at 69, 625 S.E.2d at 226. In *Ellenburg*, defense counsel in closing argument at the original trial attempted to undermine the credibility of the State's key witness by making explicit reference to a polygraph examination. This drew a response from the prosecutor in closing. *Id.* The Supreme Court acknowledged on appeal a fact of life in trial proceedings, an urge to game one's opponent, but noted the "mere mention of a polygraph during testimony is not prejudicial where, as here, no results are introduced into evidence." The State's witness, Littleton, was the only witness directly implicating the defendant and changed his story of non-involvement to one of accomplice when confronted with a polygraph. At his PCR hearing, defendant's attorney testified "he mentioned the polygraph during closing to give the jury an 'explanation that would exonerate his client, i.e. Littleton told a 'partial truth to avoid having to take a polygraph, which would have revealed that he committed the robbery himself. Counsel's strategy was a reasonable way to cast doubt on Littleton's testimony implicating respondent." *Ellenberg*, 367 S.C. at 69, 625 S.E.2d at 226.

The Supreme Court reversed the PCR judge's finding that counsel was ineffective: "We find the solicitor's argument was in fair response to counsel's argument regarding the polygraph. Once the defendant opens the door, the Solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant. (*citation omitted*). Since the evidence was that Littleton did not actually take the polygraph, it was arguable that either he told only a partial truth, as counsel argued, or he told the whole truth, implicating respondent as the solicitor argued. Accordingly, the solicitor's argument was not unfair and counsel was not ineffective for failing to object." *Ellenberg*, 367 S.C. at 69, 625 S.E.2d at 226.

In *Tappeiner v. State,* 416 S.C. 239, 243, 785 S.E.2d 471, 473 (2016), the PCR judge ruled failure of defendant's counsel to object to the prosecutor's improper closing remarks did not prejudice the defendant/petitioner. On appeal, our Supreme Court tracked prior analyses of the issue in similar cases by the U.S. Supreme Court, examining the propriety of closing remarks made by a prosecutor to a jury. It noted that appellate courts must determine "'whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 250-52, 785 S.E.2d 476-77 (*citations omitted*). "As a result of this inquiry, courts may occasionally apply the 'invited reply' doctrine, and find that although a solicitor's closing argument was inappropriate, it was responsive to statements or arguments made by the defense, and this did not deny the defendant due process." *Id.* at 251, 785 S.E.2d 477. In *Tappeiner*, the Court found that defense counsel's "closing argument did not invite the solicitor to repeatedly assert the State's witnesses all believed victim's version of events after their 'face to face, eye to eye' interviews with him. Rather, trial counsel's presentation pointed out inconsistencies in the stories, which could do no more than *invite* the solicitor to point out the

contradictory aspects of Victim's story and the other witnesses' testimony.'" *Tappeiner*, 416 S.C. at 251, 785 S.E.2d at 477.

"Meth Making Mama"

In the case now before the Court, and in regard to the isolated use of the term "meth making mama," the assistant solicitor inadvertently and without context referred to a derogatory name affixed to Victim's daughter **by Appellant** (R.p.389, lines 3-15). Appellant's trial counsel immediately objected and the jury was told to disregard the remark. (R.p.388-p.389). There was no context offered to the jury at trial; however, the remark was directed to Appellant's personal attacks on the Victim's daughter via the internet and You Tube, which had been explained in a proffer. (R.p.167, lines 13-25).

Reference to Grand Jury

The isolated reference by the assistant solicitor to "a grand jury" was again a response to Appellant's counsel falsely telling the jury that the State and its agents were in this case essentially acting as a collection agency for Victim and attempting to warn them of the possibilities of what credit card companies could do under similar circumstances. (R.p.369-p.381). The context for the comment was one of distinguishing criminal cases from civil cases, which again was an issue injected into the case by Appellant's counsel and pursued from beginning to end.

No Prejudice

Even if the solicitor's remarks during his closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not

necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one."). Remarks complained of by Appellant were the result of and in response to defense counsel's own admissions that he had no civil law knowledge or experience while defaming the assistant solicitor, the investigators and Victim, essentially as being pawns and bill collectors for Victim. However, as indicated in *Young* hereinabove, counsel *on both sides* share a duty to confine arguments to the jury and their conduct within proper bounds. The State's proof of guilt was overwhelming as to both charges against Appellant, and as to their elements, and assuming error, it was invited and it was harmless.

II.

The trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of obtaining money and signature by false pretenses.

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. 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 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. Appellant's conviction for obtaining money by false pretenses should be affirmed.

III.
[Appellant's Argument I]

The trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of breach of trust.

Appellant argues the trial court erred in denying his motion for a directed verdict on the charge of breach of trust because the State failed to prove he received money from Victim in trust and failed to prove the existence of a trust relationship. He argues 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." Appellant asserts he accepted Victim's money as "payment" and not "money in trust" and that as a result he "was free to use the money for his own benefit." (Brief of Appellant, p.5-p.6). The State disagrees and submits Appellant's arguments are entirely without merit.

Substantial direct and circumstantial evidence was presented from which the jury could find Appellant guilty of each element of breach of trust with fraudulent intent, based on the natural and logical inferences to be drawn from the evidence. Again, as demonstrated from the State's specifics as to proof of guilt at trial and as to the charge of Obtaining Money Under False Pretenses hereinabove, there is no dispute that these pieces of evidence constituted strong evidence of Appellant's guilt of breach of trust. 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 for breach of trust should be affirmed.

Discussion / Analysis

Here, Appellant was indicted for breach of trust. During Appellant's trial, the State presented substantial direct and circumstantial evidence establishing Appellant's guilt for each element of breach of trust. This included testimony from Victim that he trusted Appellant would use the money to Victim's benefit and put a new Green metal roof on his house. 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.

The charge of breach of trust by fraudulent intent is a statutory means of addressing openings in the common law of larceny in which the possession of property has not been obtained by trespass but rather by other means. The statute reads that "[a] person committing a breach of trust with a fraudulent intention or a person who hires or counsels another to commit a breach of trust with fraudulent intention *is guilty of larceny*. S.C. Code Ann. § 16-13-230(A) (emphasis added). The elements are not laid out in the statute. Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without the owner's consent. *State v. Mitchell*, 382 S.C. 1, 5, 675 S.E.2d 435, 437 (2009); *State v. Condrey*, 349 S.C. at 191, 562 S.E.2d at 323.

In his discussion of the statute and its history, Professor McAninch notes that one of the earliest cases construing the statute, *State v. Shirer*, 20 S.C. 392, 408 (1883), was "a classic case of breach of trust, or embezzlement as it is generally known in other jurisdictions." MCANINCH, *supra* at 358. In this discussion, reference is made in particular to *State v. McCann*, 167 S.C.

393, 166 S.E. 411 (1932), an often cited case involving the statute and a conviction for breach of trust. Professor McAninch quotes our Supreme Court's observation in *McCann* that:

> The effect of the decisions from which we have quoted is clearly a holding that breach of trust with fraudulent intention, in this State, is nothing more or less than larceny. It might well be termed 'statutory larceny,' as distinguished from larceny at common law. The main distinction between the two crimes is this: In common law larceny, possession of the property is obtained *unlawfully*, while in breach of trust, the possession is obtained *lawfully*."

Id. It should be noted that the matter of when a fraudulent intent actually develops with respect to the possession of the property is not as specific as might appear from the quoted provision.

Later in the same discussion Professor McAninch notes that someone forming the intent fully to deprive after gaining possession "will be seen to have at best a conditional intent to return the property . . . . There are certainly sound public policy reasons for equating a conditional intent to return property with an intent to permanently deprive." MCANINCH, *supra* at 361. In *McPhatter v. Leeke,* 442 F.Supp. 1252, 1255 (D.S.C.) (1978), a federal district court noted that a review of South Carolina cases under the statute:

> "reveals that [the] statute did not establish a new offense with an essential element of lawful possession. [It] merely expanded the definition of common law larceny by eliminating the element trespassory taking or unlawful possession. Accordingly, after the enactment of the statute it became possible to convict a person of larceny without the necessity of proving unlawful possession. *The statute merely eliminated an element, unlawful possession; it did not create a new element of lawful possession.*"

Leeke, 442 F. Supp. at 1254 (emphasis added).

The evidence established that the Victim gave his check to Appellant with his understanding that the money used would pay for the purchase of a Green roof to be put on his home. The Victim did not know of the Clarks who lived miles away in Inman on the opposite end of Greenville County from Travelers Rest where the victim lived. He testified that he did

not know the Clarks, did not intend to pay for the Clark's Hawaiian Blue metal roof, purchased from the same roofing supply company that was represented to Victim in his contract, Green Tree Metal, immediately on the heels of depositing the Victim's money in the account of Appellant's business. (R.p. 160-166; p.186 -188). Photographs taken of the victim's home showed it was not a mansion but a small and very plain wooden house, and that on June 25, 2015, photographs showed that there was still no Green metal roof on it, as had been paid to obtain those materials and begin work, by check to Appellant. (R.p.191-p.197).

Brian Johnson, owner of Green Tree Metals, testified that he had done business with Appellant's company and had brought a summary of that business he had generated. The summary showed that the Appellant had done business with his company from December 9 2011 until a last entry and order on May 29, 2012. (R.p.210-p.213). Again, this was the day the Victim made his payment to Appellant's company via check #1040 for four thousand, two hundred and ninety-five dollars and three cents ($4, 295.03), partial payment for repairs to his house for hail damage that was to include a new roof. (R.p.161-p.165; p.449-450).

The check had cleared Victim's bank account on May 30 2012. (R.p.209). The order placed by Appellant through his company with Green Tree Metal in his last transaction was for a Hawaiin Blue roof, shipped to 69 Lee Street in Lyman, South Carolina. (R.p.214-p.217). The Clarks lived at that address. Victim never received his roof and his efforts to contact Appellant went unsatisfied. The proof at trial established beyond a reasonable doubt that Victim believed and understood that he was giving his check to Appellant for his own home repairs, entrusted it to him for that purpose, and the Appellant's actions demonstrated he accepted the money knowing Victim's understanding of the agreement and fraudulently used the money thereafter for his own purposes.

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 breach of trust 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 breach of trust. 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 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. Appellant's conviction for breach of trust should be affirmed.

As noted above, the proof of guilt as to both charges was overwhelming. The trial court properly denied Appellant's motion for a directed verdict as to both charges.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the convictions and sentence of the lower court be affirmed.

Respectfully submitted,

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February 22, 2018
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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-001927

THE STATE, ...RESPONDENT

v.

DEAN ALTON HOLCOMB,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Legal Coordinator, hereby certify that I have served the within *Final Brief of Respondent* dated February 22, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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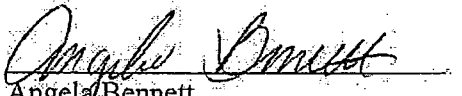
I further certified that all parties required by Rule to be served have been served. This 22nd day of February, 2018.



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