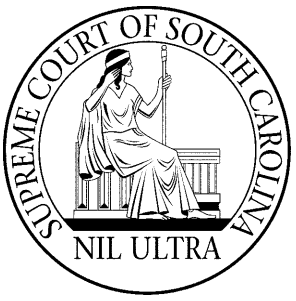

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 17, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Palmer, Appellant,

v.

State of South Carolina, Horry County, and David Weaver, Defendants,

Of which State of South Carolina is the Respondent.

Appellate Case No. 2017-000567

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5641
Heard December 6, 2018 – Filed April 17, 2019

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, and Roger Dale Johnson, of Law Office of Roger Johnson, of Conway, both for Appellant.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith, Jr., and Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, all of Columbia; Lisa Arlene Thomas, of Thompson & Henry, PA, of Conway, for Respondent.

KONDUROS, J.: Robert Palmer appeals the circuit court's dismissal of his complaint under Rule 12(b)(6), SCRCP. He contends the circuit court erred in finding no constitutional or civil remedy exists for a previous wrongful conviction. We affirm.

FACTS/PROCEDURAL HISTORY

Palmer and Julia Gorman—his girlfriend—were caring for Gorman's seventeen-month-old grandson (Victim) while Gorman's daughter traveled across the country. After suffering from ant bites and allergies on July 1, 2008, Victim was prescribed a liquid antihistamine (Xyzal), which has a sedative effect. The prescribed dosage of Xyzal was half a teaspoon per day. Victim was regularly given more than the prescribed dosage, up to 2.5 teaspoons per day—five times the prescribed amount. On July 14, Palmer was alone with Victim while Gorman was at work. Gorman returned home at 4 p.m. that day and observed Victim sleeping and breathing normally. Gorman checked on victim again at 6 p.m. and found him "slack," making "really strange noises," and with saliva at his mouth. Victim was treated at multiple hospitals before finally being removed from life support by his parents on July 16. Doctors that examined Victim before death and during the autopsy found evidence indicating he received hits to the head as well as atypical bruises on various portions of his body.

Palmer and Gorman were tried jointly for the death of Victim. At the conclusion of trial, both were convicted of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct towards a child. On appeal, this court reversed both Palmer's and Gorman's aiding and abetting convictions but affirmed their homicide and unlawful conduct convictions.

On July 29, 2015, the South Carolina Supreme Court affirmed the reversal of both Palmer's and Gorman's aiding and abetting convictions but overturned Palmer's convictions for homicide and unlawful conduct towards a child. *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015). Palmer initiated a civil action against the State, alleging malicious prosecution, false arrest, negligence, and violation of 42 U.S.C. § 1983. Palmer also sought a declaratory judgment, requesting the circuit court declare a remedy existed for wrongful conviction in South Carolina under

both the United States and South Carolina Constitutions. The State moved to dismiss under Rule 12(b)(6), SCRCP. The circuit court granted the State's motion on November 17, 2016, with prejudice. Palmer moved the court to reconsider, which the court denied. This appeal followed.[1]

STANDARD OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRCP,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

LAW/ANALYSIS

I. Consideration of Novel Issue under Rule 12(b)(6), SCRCP

Palmer argues the circuit court erred in dismissing his case because it presented a novel issue of whether the South Carolina or the United States Constitutions require South Carolina to provide a civil monetary remedy for a wrongful conviction. We disagree.

"[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015).

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[1] On November 28, 2017, the State moved to certify this case for immediate review by the South Carolina Supreme Court pursuant to Rule 204(b), SCACR. The supreme court denied the motion on February 1, 2018.

"Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

In this case, neither party disputes Palmer raises a novel issue. However, the issue is solely one of constitutional interpretation. In his brief, Palmer does not argue that any factual issues exist. Therefore, because the issue concerns the interpretation of the law, we find the circuit court did not err in dismissing the case pursuant to Rule 12(b)(6) in spite of it being a novel issue.

II. Takings Clause

Palmer contends the circuit court erred in dismissing his action because the Takings Clauses of the United States Constitution and the South Carolina Constitution provide his right to a remedy for a wrongful conviction in South Carolina. We disagree.

The Takings Clause from the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The takings clause of the South Carolina Constitution states: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3.

"The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states." *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429 n.3, 548 S.E.2d 595, 601 n.3 (2001). "The Fifth Amendment to the United States Constitution provides that 'private property shall not be taken for public use, without just compensation.'" *Id.* (quoting U.S. Const. amend. V). "Because both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action, parties claiming both of these violations must first show that they had a

legitimate property interest." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 437, 661 S.E.2d 73, 79 (2008).

We find the circuit court correctly determined Palmer's argument has no merit. In his appellate brief, Palmer attempts to equate the prohibition against governmental takings of property without just compensation to wrongful imprisonment. However, Palmer fails to cite any statutory or case law to demonstrate he has a legally protected property interest. Furthermore, Palmer concedes no state supreme court throughout the nation has found a civil remedy for wrongful imprisonment exists under the Takings Clause of any state constitution or the United States Constitution. Because Palmer fails to provide any supporting law for his claim, we affirm the circuit court's finding on this issue.

III. South Carolina Constitution

Palmer asserts the circuit court erred in dismissing his action because the South Carolina Constitution protects his right to a remedy for a wrongful conviction by way of an implied right of action for money damages. We disagree.

"The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than as requiring further legislation, for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation." *Beatty v. Wittekamp*, 171 S.C. 326, 332, 172 S.E. 122, 125 (1933) (quoting *Brice v. McDow*, 116 S.C. 329, 331, 108 S.E. 84, 87 (1921)). "A self[-]executing provision is one which supplies the rule or means by which the right given may be enforced or protected, or by which a duty enjoined may be performed." *Id.* (quoting 8 Cyc. 753).

A constitutional provision is self-executing as to a civil remedy when it "provides any rules or procedures by which its declaration of rights is to be enforced, and, in particular, whether it provides citizens with a specific remedy by way of damages for its violation in the absence of legislation granting such a remedy." *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1454 (Ct. App. 1988). A constitutional provision

> must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are

> fixed by the [c]onstitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the [l]egislature for action; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation.

Id. (quoting *Taylor v. Madigan*, 53 Cal. App. 3d 943, 951 (1975)).

> In essence, a self-executing constitutional clause is one that can be judicially enforced without implementing legislation. To ascertain whether a particular clause is self-executing, we consider several factors. This court has stated as follows
>
> > [a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed . . . ." Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist., 16 P.3d 533, 535 (Utah 2000) (alterations by court) (quoting *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)). "[A] constitutional provision that prohibits certain government conduct generally qualifies as a self-executing clause 'at least to the extent that courts may void incongruous legislation.'" *Id.* (quoting *Bott*, 922 P.2d at 738).

The court in *Spackman* recognized "the Utah Constitution does not expressly provide damage remedies for constitutional violations," and thus, "there is no textual constitutional right to damages for one who suffers a constitutional tort." *Id.* at 537. It further noted the legislature had declined to "enact[] any laws authorizing damage claims for constitutional violations in general." *Id.* The court concluded "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law." *Id.* at 538.

Both parties recognize South Carolina has not previously addressed this issue. Our review of cases throughout various jurisdictions shows that states are divided on whether a civil remedy can exist for the violation of a constitutional provision without enabling legislation. We will not create an implied cause of action for wrongful conviction in South Carolina because it is not for this court to create such an action when the legislature has specifically declined to do so.[2] Considering the South Carolina Constitution does not provide for monetary damages for civil rights violations and the legislature has not enacted an enabling statute, we affirm the circuit court on this issue.

IV. Tort Claims Act

Palmer argues the circuit court erred in dismissing his action because the South Carolina Tort Claims Act (SCTCA) cannot override a constitutionally implied right of action. We find this issue to be abandoned.

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is abandoned and the

[2] A bill creating a cause of action for wrongful conviction was introduced in the South Carolina Senate but was not passed. *See* S. 1037, 119th Gen. Assemb., Reg. Sess. (S.C. 2012), to amend Chapter 13, Title 24 of the South Carolina Code to read "Article XXII Compensation for a Wrongful Conviction." The bill passed in the senate but did not pass the house of representatives.

court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Palmer provides a conclusory argument that the SCTCA cannot override an express constitutional provision or implied cause of action under the South Carolina Constitution. However, Palmer failed to cite any law in his brief to support his assertion. For this reason—and pursuant to our discussion in Section III—we affirm the circuit court's decision.

CONCLUSION

Based on the foregoing, the circuit court did not err in dismissing the case under Rule 12(b)(6), SCRCP. First, the circuit court did not err in dismissing this case despite Palmer's raising a novel issue. Additionally, the circuit court did not err in finding Palmer had no remedy under the Takings Clauses of the South Carolina Constitution and the United States Constitution. Moreover, the circuit court did not err in finding the South Carolina Constitution did not provide Palmer a remedy. Finally, Palmer abandoned his argument that the circuit court erred in finding the SCTCA barred his claim. Thus, the circuit court's order is

AFFIRMED.

MCDONALD and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dean Alton Holcomb, Appellant.

Appellate Case No. 2016-001927

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5642
Heard March 14, 2019 – Filed April 17, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General John Benjamin Aplin, all of Columbia; Solicitor Barry Joe Barnette and Assistant Solicitor Russell D. Ghent, both of Spartanburg, for Respondent.

KONDUROS, J.: In this criminal case, Dean Alton Holcomb appeals his convictions for breach of trust and obtaining money by false pretenses, arguing the

trial court erred in (1) failing to direct a verdict of acquittal due to the State's failure to prove a written check constitutes a trust relationship; (2) failing to direct a verdict of acquittal due to the State's failure to prove Holcomb made a fraudulent misrepresentation; and (3) refusing to grant a mistrial based on remarks made by the prosecution. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Robert McGinn, Jr., lived in a house with his family in Greenville County for almost twenty years. A hail storm damaged the home around March or April of 2012. The damage to the house amounted to $7,180.99. McGinn's insurer, State Farm Insurance Company, initially paid $4,295.03. McGinn remained eligible for up to an additional $1,885.96 if the repairs necessitated it.

McGinn entered into a contract with Holcomb, the owner of Carolina Home Renovators, on May 25, 2012, to replace the roof of the house as well as make incidental repairs. McGinn selected a green roof from Green Tree Metals to replace the old one. The contract called for McGinn to initially pay Holcomb $4,295.03 to begin the repairs and $2,885.96 upon completion, for a total cost of $7,180.99. Four days after McGinn and Holcomb signed the contract, McGinn wrote Holcomb a check in the amount of $4,295.03. Two days later, the funds were withdrawn from McGinn's account.

Unbeknownst to McGinn, Holcomb had other clients, Susan Clark and Kenneth Clark (the Clarks), who also contracted with Holcomb to replace their roof. The Clarks suffered a significant delay in their roof being repaired, and it was only completed after constant reminders from Kenneth Clark. On the same day McGinn paid Holcomb, Holcomb finally ordered the roof for the Clarks' home. Holcomb replaced the Clarks' roof in late June 2012.

Holcomb never installed a new roof on McGinn's house. Holcomb completed some minor repairs, including staining the deck and sides of the house and painting the doors and windows. However, McGinn understood the substance of the contract to be for the roof repair. One of Holcomb's employees, Jared Richardson, also understood McGinn hired Holcomb to install a new roof. Holcomb never contacted McGinn to explain why he did not repair the roof.

A grand jury indicted Holcomb for obtaining property or money by false pretenses—greater than $2,000. He was subsequently indicted for breach of trust more than $2,000. At trial, Holcomb moved for directed verdicts on both charges, which the trial court denied. During closing arguments, Holcomb objected to two comments by the solicitor, and the trial court sustained both objections. Holcomb subsequently moved for a mistrial due to the remarks, and the trial court denied the motions. The jury convicted Holcomb of both counts, and the trial court sentenced him concurrently to five years' imprisonment for each count. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

I. Trust Relationship

Holcomb argues the trial court erred in refusing to grant a directed verdict for the breach of trust charge because a written check does not constitute a trust relationship. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." *Id.*

"A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny." S.C. Code Ann. § 16-13-230(A) (2015). "Larceny . . . is defined as the felonious taking and carrying away of the goods of another against the owner's will or without his consent." *State v. Mitchell*, 382 S.C. 1, 5, 675 S.E.2d 435, 437 (2009).

"Breach of trust with fraudulent intention, by that especial designation, is . . . peculiar to this jurisdiction." *State v. McCann*, 167 S.C. 393, 400, 166 S.E. 411, 413 (1932). "In other states, the crime, as known to us, is called by different names, such as 'larceny after trust,' 'larceny by a bailee,' 'larceny by false pretenses,' and very commonly as 'embezzlement.'" *Id.* "All the offenses are regarded as statutory, and one must look to the respective statutes to ascertain a definition of the crime." *Id.*

> A careful reading of the language of [section] 16-13-230 together with the South Carolina decisions reveals that that statute did not establish a new offense with an essential element of lawful possession. Section 16-13-230 merely expanded the definition of common law larceny by eliminating the element of 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.

McPhatter v. Leeke, 442 F. Supp. 1252, 1254 (D.S.C. 1978).

"A trust is an 'arrangement whereby property is transferred with [the] intention that it be administered by trustee for another's benefit.'" *State v. Jackson*, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000) (quoting *Black's Law Dictionary* 1047 (6th ed. 1991)). "Thus, the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf." *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005).

We find the trial court did not err in denying Holcomb's motion for directed verdict. Our supreme court in *Parris* looked at a factual situation comparable as the one in this case. In *Parris*, homebuyers received a loan to purchase a mobile home. 363 S.C. at 480, 611 S.E.2d at 502. They gave the loan checks to the mobile home seller, who then used the checks for his own benefit instead of paying the mobile home supplier on behalf of the homebuyers. *Id.* The supreme court

held a trust relationship existed when the homebuyers intended the money from the checks be used for their benefit. *Id.* at 483-84, 611 S.E.2d at 504.

In this case, McGinn intended for the majority of his payment to go toward a new roof. The first check McGinn wrote, in the amount of $4,295.03, had "partial payment, roof" written on the memo line. McGinn testified the substance of the contract was for the roof to be replaced. McGinn expected Holcomb to use his payment to purchase a new roof and install it. McGinn never received a new roof. Accordingly, we find the State presented sufficient evidence taken in the light most favorable to the State for the trial court to deny a motion for directed verdict. (S*ee Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 ("When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State.")). Therefore, we affirm the trial court's ruling on this issue.

II. Obtaining Money by False Pretenses

Holcomb argues the trial court erred in refusing to grant him a directed verdict for the obtaining money by false pretenses charge because the State failed to provide any statement proved to be false at the time it was made. We agree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Weston*, 376 S.C. at 292, 625 S.E.2d at 648. "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599. "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." *Id.*

"A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty [of obtaining a signature or property by false pretenses.]" S.C. Code Ann. § 16-13-240 (2015). "The supreme court has defined this offense as requiring a fraudulent representation of a *past or existing* fact by one who knows of its falsity, in order to induce the person to whom it is made to part with something valuable." *State v. Dickinson*, 339 S.C. 194, 198, 528 S.E.2d 675, 677 (Ct. App. 2000) (alteration in original). "A promise to do something in

the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses." *State v. McCutcheon*, 284 S.C. 524, 525, 327 S.E.2d 372, 372 (Ct. App. 1985).

The trial court erred in denying the motion for directed verdict for the charge of obtaining money by false pretenses. The cases interpreting this statute make clear that a future promise cannot constitute a false representation. Instead, the representation must be false either at the time or prior to it being made. In this case, the representation was that Holcomb would replace McGinn's roof. At the time the representation was made, Holcomb could have used McGinn's payment to replace his roof. Thus, we find the State did not provide sufficient evidence to show the statement was irrefutably false at the time made. Accordingly, the trial court erred in denying Holcomb's motion for a directed verdict on this charge. Therefore, we reverse the trial court's ruling on this issue.

III. Improper Remarks

Holcomb argues the trial court erred in failing to grant a mistrial based on improper remarks the solicitor made during closing argument. We agree.

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. *State v. Penland*, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial [court]'s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 169 (1986). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief

beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996).

"A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors." *Rudd*, 355 S.C. at 548, 586 S.E.2d at 156. "Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Id.* at 549, 586 S.E.2d at 156.

"Our supreme court has repeatedly condemned closing arguments that lessen the jury's sense of responsibility by referencing preliminary determinations of the facts." *Id.* Statements referring to a grand jury indictment "are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts . . . ." *Id.* (quoting *State v. Thomas*, 287 S.C. 411, 412-13, 339 S.E.2d 129 (1986)).

During trial, in an in camera hearing, the solicitor proffered testimony that Holcomb talked negatively about McGinn's daughter on YouTube. Specifically, Holcomb called McGinn's daughter a "meth making mama." Holcomb objected to the solicitor's line of questioning, and the court sustained the objection. In his closing argument, the solicitor used the phrase "meth making mama" again in reference to McGinn's daughter. Holcomb objected, and the trial court sustained the objection. At the end of closing arguments, Holcomb moved for a mistrial. Although the comment was improper, because McGinn's daughter was not involved in the case and none of the charges against Holcomb related to illegal substances, we find the solicitor's comment was not so unfair to Holcomb as to offend his due process. *See Darden*, 477 U.S. at 169 ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result.").

However, the solicitor also stated during his closing argument "[t]his case was not brought on a warrant. This case was brought on an indictment that goes through a grand jury." Again, Holcomb objected, and the trial court sustained the objection. Holcomb moved for a mistrial on this basis. We find this statement by the solicitor extremely improper and prejudicial to Holcomb because it had the potential to influence the jury by referencing earlier determination made about the merits of the case. Moreover, we do not find the evidence of Holcomb's guilt so overwhelming

as to render the solicitor's improper remark harmless. Therefore, we find the trial court erred in failing to grant a mistrial.[1] Accordingly, we reverse and remand for a new trial on the charge breach of trust.

CONCLUSION

Based on the foregoing, the trial court did not err in failing to direct a verdict of acquittal on the breach of trust charge due to the State's failure to prove a written check constitutes a trust relationship. However, the trial court did err in failing to direct a verdict of acquittal on the obtaining money by false pretenses charge due to the State's failure to prove Holcomb made a fraudulent misrepresentation. Additionally, the trial court erred in refusing to grant a mistrial based on the solicitor's reference to the grand jury during closing argument. Thus, the trial court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and THOMAS, JJ., concur.

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[1] Holcomb also appeals remarks made by the solicitor regarding the solicitor's years of experience and defense counsel's inexperience. However, we find Holcomb's argument is not preserved for appellate review because it was not immediately objected to at trial. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding to preserve a question for review, the objection must be timely made, and usually it must be made at the earliest possible opportunity); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (finding a contemporaneous objection is required to preserve issues for appellate review).