

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)

COURT OF GENERAL SESSIONS
EIGHTH JUDICIAL CIRCUIT
INDICTMENT NO. 2016-GS-30-757

State of South Carolina

vs.

Stephen Trase Fincher,
Defendant.

RECEIVED

NOV 16 2017

SC Court of Appeals

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS CHARGES
OR IN THE ALTERNATIVE
GRANT A NEW TRIAL

Before the court is the defendant's Motion to Dismiss Charges or In The Alternative Grant a New Trial.¹ The defendant argues that he is entitled to a dismissal of charges or a new trial because of the State's *ex parte* communication with the court.

Prior to charging the jury with the law in this case, the court met with the parties to discuss proposed charges. The defendant was indicted for first degree burglary and, in addition to charging the law for first degree burglary, the defendant requested that the jury be charged with the law for the lesser included offenses of second degree burglary and third degree burglary. The State opposed charging the jury with the lesser included offenses. The court informed the parties that it would charge the jury with the law for first, second and third degree burglaries. The court then recessed for lunch.

¹ Pursuant to Rule 29(a), SCRCrimP, this motion is decided on briefs without oral arguments.

During the lunch recess, the State emailed the undersigned judge with case law supporting its opposition to charging the lesser included offenses. The State copied this email to the defense attorney's email address. However, the defense attorney did not return to his office during the lunch recess to check his emails.² After reviewing the case law submitted by the State in its email to the undersigned, the court changed its prior decision and charged the jury only with the law for first degree burglary. The defendant was found guilty of first degree burglary.

Even though defense counsel did not read the State's email submitted to the court, he was given the opportunity after the jury was charged with the law in this case and prior to jury deliberations to raise objections to the proposed charges. Further, defense counsel has not shown any prejudice to the defendant or error in limiting the jury charge only to first degree burglary. Even if the State's email to the Court is considered an *ex parte* communication, it does not warrant a dismissal of the charges or a new trial absent a showing of prejudice to the defendant as a result of the communication. See *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993); *A&I, Inc. v. Gore*, 366 S.C. 233, 621 S.E.2d 383 (S.C.App.,2005). Therefore, the defendant's motion should be denied.


NOW, THEREFORE, it is hereby

² The trial of this case was in Laurens. Defense counsel's office is in Greenville.

ORDERED, that the defendant's Motion to Dismiss Charges or In The
Alternative Grant a New Trial be, and the same is DENIED.

AND IT IS SO ORDERED.

November 7, 2017



Benjamin H. Culbertson
Presiding Judge