

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

Appellate Case No. 2017-002384

Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Stephen Trase Fincher.....Appellant.

INITIAL BRIEF OF APPELLANT

RECEIVED

AUG 30 2018

SC Court of Appeals

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STATEMENT OF THE CASE

Stephen Trase Fincher was indicted by the Laurens County Grand Jury of two counts of Burglary 1st degree. Indictment Nos. 2016-GS-30-0757, -0759. He was tried before the Honorable Benjamin H. Culbertson and a jury between March 27 and March 29, 2017. He was tried *in absentia*. Appellant was represented by Lawrence W. Crane. The State was represented by C. Dale Scott, A. Lyon Bixler, III, and James Todd.

Appellant was convicted of one count of Burglary 1st, acquitted of the other Burglary 1st charge, and sentenced to 25 years in prison by way of a sealed sentence.

His sentence was unsealed on May 26, 2017,¹ and this appeal timely follows.

RELEVANT FACTS

Appellant's convictions and sentence arise out of events that allegedly occurred on March 9, 2015. On that date, Appellant allegedly entered 1) a house, wherein Brittany Childress allegedly heard Appellant rifling through drawers in the kitchen, and 2) a detached garage, from which Appellant allegedly absconded with power tools. The jury acquitted Appellant of the burglary of the house. Appellant was not present at his trial.

The State offered the following evidence.

The Childress Residence

¹ Trial counsel filed a Motion to Dismiss Charges or In the Alternative Grant a New Trial on June 1, 2017. Judge Culbertson denied that motion by Order dated November 7, 2017. The notice of appeal was received by the South Carolina Court of Appeals on November 16, 2017.

Brittany Childress testified on behalf of the state. Tr. 79. She was 19 years old at the time of trial. Tr. 79. She woke up the morning of March 9, 2015 because she heard some noises at the front of her house. She testified that it sounded like someone was trying to get in. Tr. 80. She was home alone; it was spring break and her mother was at work. Tr. 81. She heard noises in the kitchen and then called her aunt. She heard what she described as drawers opening and closing, and "some rattling." Tr. 84, l. 23. Then, she called her aunt who lived next door. Tr. 85.

Childress admitted that she never saw anyone in the house. Tr. 87, 90. She did not know whether the doors to house were locked or unlocked. Tr. 90. She did not know whether anything was taken from the house. Tr. 90. She did not recall hearing a door open and close. Tr. 92. She did hear a car leaving her house. Tr. 94.

The State then called Brittany's mother, Annette Childress. Tr. 100. Without objection, she testified that her daughter told her that she heard someone in the house, and that it sounded like they were going through the silverware in the drawers. Tr. 101. After she spoke to her daughter, she called 911. She confirmed that she did not detect anything missing from the home. Tr. 105.

The State then called Annette Childress's sister, Ester Shell. Tr. 106-107. She confirmed that her niece called her, concerned someone was in the house. Tr. 108. She walked outside of her house (she lived next door), and saw a white male coming across her sister's front yard. Tr. 108. She yelled at him and asked him what he was doing. He explained that he was trying to see if the house was for sale. Tr. 109. He then quickly left in his car. Tr. 109. She said the man was parked in the drive way. Tr. 110.

She said the man was in a white car, but she could not identify its make and model. Tr. 110. When she gave a statement to police, she said the man was wearing a light shirt, and was wearing a baseball cap. Tr. 111. She reiterated that she saw the white male in the front of the house. Tr. 118. She also admitted there was nothing in her statement to law enforcement about the white male wearing a hat. Tr. 120.

The State also called Xavier Johnson, Ester Shell's son. Tr. 122. He confirmed that he, his sister, and his mother went next door to see if anyone was in the house after the aunt received a call from Brittany. Tr. 124. He saw the white male get into a white car. Tr. 126. He did not see the direction he came from. Tr. 126. He described the white car as having a spoiler on the back. Tr. 127. He also confirmed that the white male asked about the house's being on sale. Tr. 129.

The State called Indigo Johnson, Xavier's brother and Ester Shell's other son. T. 137. He also said he saw a white male coming around the front of his cousin's house. Tr. 141. He also confirmed that the white male had asked about the house being for sale before he left the property. Tr. 146.

The State called Trooper Jamie Edwards. Tr. 147. At the time of these events, he was a road deputy with the Laurens County Sheriff's Office. Tr. 148. He testified he was dispatched around 10:03 in the morning. He arrived at 10:16am. Tr. 149. He cleared the house by searching it with his gun drawn, and then he took statements from the witnesses. Tr. 151. He relayed information to dispatch regarding the description of the suspect and car. Tr. 151. Law enforcement issued a "BOLO" alert, or "Be On The Lookout." As he was at the house, he heard another call regarding a

break-in on Metric Road. Tr. 154. The description from dispatch matched the description of the person Edwards was investigating. Tr. 154. The second incident location was approximately 10 minutes from the Childress residence. Tr. 159-160.

The Hampton Residence

The trial court then conducted a *Neil v. Biggers*² hearing. Tr. 5. The State called Investigator Chris Martin of the Laurens County Sheriff's Office. Tr. 5-6. He responded to a forced entry on Metric Road. He testified that tools were stolen from that location. Tr. 6. He spoke to Darian Hampton, who he indicated had seen the person who entered the structure. Tr. 7. Ms. Hampton, he said, used her phone to take a picture of the car. She also gave a physical description. Tr. 7. Law enforcement created a photo lineup for her. On March 22, she identified Appellant as the man she saw. Tr. 9.

Darian Hampton testified during the in camera hearing. She was 16 at the time of these events. Tr. 13. She was at home that day because she was sick with the flu. She testified that a man knocked on their front door. She testified that he did not enter the house. Tr. 14. Hampton then called her mom, and her mom called 911. Hampton testified she saw the man make a couple of trips from the garage to his car with power tools and "boxes of stuff." Tr. 15, l. 7. She admitted that the house and garage were detached. Tr. 26. Defense counsel did not call any witnesses for the *Neil v. Biggers* hearing. The judge did not suppress the out-of-court identification.

² 409 U.S. 188 (1972).

Before the jurors, the State then called Darian Hampton to testify. Tr. 29. She told the jury she was home from school that day because she was sick, and she was in bed watching television. Tr. 31. She heard her dog barking and looked out the window. Tr. 32. She saw a white car that she did not recognize. Tr. 33. She saw a man exit the car who was tall, had a scruffy beard, a tattoo on his arm, and reddish hair. Tr. 33. He was wearing a ball cap, normal jeans and a t-shirt. Tr. 33. She could not recall the color of the t-shirt. He knocked on the door. Tr. 34. She heard a beep and knew that he did not enter the house. Tr. 35. She knew that he was in the garage. Tr. 35-36. The garage was detached from the house. Tr. 36. She testified she saw him make 2 or 3 trips from the garage to his car. Tr. 37. She testified to identifying the male in a photo line-up. Tr. 39. She testified, on cross-examination, that he never tried to get into the house. Tr. 45. She also testified that the man had on a navy blue t-shirt. Tr. 47. Hampton testified that no one sleeps in the garage area. Tr. 48.

Teddy Hampton, Darian Hampton's father, also testified. Tr. 49. He informed the jury that he did woodworking in the garage area. Tr. 49-50. On this date, he came home after receiving a call that the house was broken into. He saw the door to the bonus room above the garage was kicked in. Tr. 51. He described that several power tools were stolen. Tr. 52. The garage/ bonus room area is about eight feet from the residence. Tr. 55, 56. Mr. Hampton reiterated that no one sleeps in the bonus room. Tr. 56. He also admitted that he did not place any specialized markings on his tools, nor did he know any of the serial numbers on his tools. Tr. 57.

The State called Investigator David Staton of the Laurens County Sheriff's Office to testify. Tr. 60. At the time of these events, he was a uniform patrol officer. Tr. 60. He was dispatched to Metric Road at 10:17am. He arrived at 10:30am. He spoke with Ms. Hampton who then showed him a picture of the car. She also gave him a physical description. Tr. 62. After he secured the scene, he then radioed in the descriptions. Tr. 64. Shortly thereafter, Lieutenant Haupfer radioed that he spotted a car that met the description. Tr. 64. Haupfer and other officers then stopped the car on Highway 221 and placed Appellant under arrest. Tr. 65.

The State called Deputy Haupfer of the Laurens County Sheriff's Office to testify. Tr. 68. He testified that Appellant complied with his blue lights and pulled off the road when signaled to do so. Tr. 71. According to Haupfer, Appellant admitted he had been at house, but that he went into a building and not the house. Tr. 71. Haupfer testified he found tools in the backseat of the car. Tr. 73. Again, Haupfer testified that Appellant indicated he went into a building and not a house. Tr. 79.

Investigator Chris Martin testified. Tr. 82. He admitted that he was unable to lift any prints from the Metric location. Tr. 88. He did not attempt to take latent prints from the first location. Tr. 92. He did not attempt to conduct any DNA testing. Tr. 92.

The State called Lynn Lancaster, the Laurens County Clerk of Court to testify to Appellant's prior convictions for burglary. Tr. 94. She testified that Appellant pleaded guilty to burglary 2nd degree on April 19, 2005. Tr. 96. He also pleaded guilty to burglary 2nd degree on April 12, 2007. Tr. 98. Appellant also pleaded guilty to burglary 2nd degree on November 18, 2011. Tr. 99.

At the close of the State's case, defense counsel moved for a directed verdict. Tr. 103. The trial court denied the motion. Tr. 104.

Trial counsel asked that the court charge the jury with Burglary 1st degree, Burglary 2nd degree, and Burglary 3rd degree. Initially the judge indicated he would do so. Then, it appears that the Solicitor sent an email to the judge regarding the issue during the lunch break, and the judge changed his ruling. He decided that since the prior burglary convictions were not contested, that he should only charge Burglary 1st degree and Burglary 2nd degree. Trial counsel argued the Solicitor's email was an improper *ex parte* communication. Tr. 114. The judge indicated he did not respond to the email, but that he sent an email on the listserv to other circuit judges to get their advice on the topic. Tr. 115. The trial court ultimately found that the Solicitor's communications did not warrant sanctions.

The defense did not offer any evidence. After closing arguments, the trial court charged the jury with Burglary 1st degree and Burglary 2nd degree. The jury found Appellant guilty of burglary 1st degree with respect to the home on Metric Road, but found Appellant not-guilty of the burglary at the Childress residence. Tr. 165.

ARGUMENTS

- I. **The trial court erred in allowing the trial to proceed in Appellant's absence without a finding that Appellant voluntarily waived his right to be present.**

Prior to the start of the trial, the following exchange occurred:

MR. TODD: Judge, at this point, as far as the bench warrant is concerned, we've got a pretty good warrant-division team that can—

THE COURT: Okay.

MR. TODD: --- lay hands on folks usually, but---

THE COURT: Any reason why we shouldn't issue a bench warrant?

MR. CRANE: I don't think so, judge.

THE COURT: Okay. All right. I'll go ahead and authorized the bench warrant—

MR. TODD: Thank you, Your Honor.

THE COURT: --- to pick him up. Okay? All right. Anything from the state before we bring the jury back in?

Tr. 35, ll. 2-15.

This is the entirety of any discussion regarding the trial going forward without the presence of Appellant. As our appellate courts have acknowledged, the Sixth Amendment to the United States Constitution guarantees the right of an accused to be present at every stage of his trial, but this right may be waived. *State v. Fairey*, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); *State v. Goode*, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989). *See also* Rule 16, SCRCrimP (“Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.”). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence. *State v. Patterson*, 367 S.C. 219, 229, 625

S.E.2d 239, 244 (Ct. App. 2006) (citing *State v. Jackson*, 288 S.C. 94, 95, 341 S.E. 2d 375, 375 (1986)). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend. *Id.* See also *Pitt v. McDougall*, 245 S.C. 98, 138 S.E.2d 840 (1964) (holding that waiver of right to counsel may not be presumed from a silent record); accord *Carnley v. Cochran*, 369 U.S. 506 (1962).

The trial court did not make any findings of fact on the record before the Court indicating that Appellant intelligently, knowingly, and voluntarily waived his right to be present at his trial. His waiver cannot be presumed from a silent record. Respectfully, this Court should remand Appellant's case for a new trial.

- II. The trial court erred in allowing denying Appellant's motion for a directed verdict on the Metric Road intrusion because the garage was not a "dwelling" for purposes of the Burglary 1st degree statute because the garage was detached from the house, and was used as a wood-working workshop for the owner.**

The trial court charged the jury, in pertinent part:

A dwelling is any building or portion of a building in which a person ordinarily sleeps, including all houses, outhouses, buildings, shed, and erections which are within 200 yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance. A building constructed as a dwelling that has never been occupied cannot be considered a dwelling for the purposes of burglary. But a building is a dwelling even if the residents are temporarily absent from the building.

Tr. 154.

Pursuant to *S.C. Code Ann.* §16-11-311(A) (Supp. 2001), a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and the entering if accompanied by an

aggravating circumstance. For purposes of burglary, a “dwelling house” is defined by

S.C. Code Ann. §16-11-10 (1985) as follows:

With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

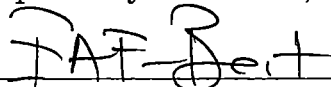
A “dwelling” also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person. *S.C. Code Ann.* 16-11-310 (Supp. 2001). The detached garage in this case did not fall within the ambit of the statute because, although it was physically within 200 feet of the residence, it was used for housing cars and as a workshop. Improperly entering a garage for purposes of absconding with power tools does not implicate the same concerns as one who enters a structure where people actually live and sleep. Entering and stealing from a garage is a much less intrusive and dangerous event, and the law recognizes that fact. The trial court here should have granted defense counsel’s motion for a directed verdict. *See State v. Ferebee*, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979) (noting mere act that a building is suitable for use as a dwelling is insufficient; the building must have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house); *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (declaring a screened porch was a dwelling where the porch was attached to the side of the victim’s house and was used for protection of property). *And see State v. Anderson*, 24 S.C. 109, 1886

WL 2392 (1886) (Though an outbuilding may be only a few yards from a dwelling house, if it has no internal communication between it and the house, is not used for any purpose connect with or contributing to the dwelling house, and is not used by anyone as a place to sleep, it was not appurtenant to the dwelling). *See Foreman v. State*, 546 So. 2d 977 (Ala. Crim. App. 1986) (garage was not part of dwelling for purposes of first-degree burglary statute); *Smalls v. State*, 18 So. 3d 606 (Fla. 1st DCA 2009) (unless a garage is attached to a house or is substantially enclosed along with a house, a defendant who burglarizes the garage is guilty of burglary of a structure, not burglary of a dwelling). Respectfully, this Court should direct a verdict of acquittal for Burglary 1st degree.

CONCLUSION

Respectfully, with regards to Issue I, this Court should remand the case for a new trial. With respect to Issue 2, this Court should enter a judgment of acquittal for Burglary 1st degree.

Respectfully submitted,



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Dated this 29th day of August, 2018.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Benjamin Culbertson, Circuit Court Judge

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State of South Carolina. Respondent.

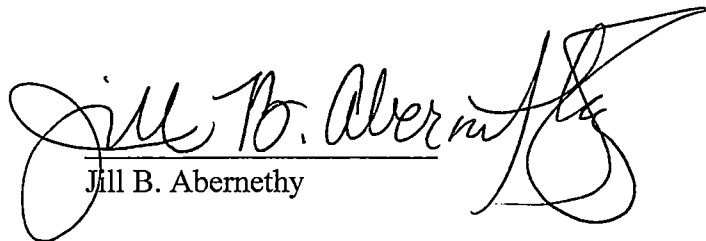
v.

Stephen Trase Fincher. Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellate's Initial Brief and Designation of Matter was served by first class United States mail, postage prepaid, this 29th day of August, 2018, upon the following:

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August 29, 2018

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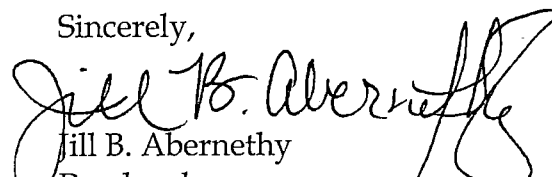
RE: *Stephen Trase Fincher v. State of South Carolina*
2017-002384

Dear Ms. Kitchings,

Please find enclosed for filing, with certificate of service, the original and one copy of the Initial Brief of Appellant. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please feel free to contact me.

Sincerely,


Jill B. Abernethy
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cc: J. Benjamin Aplin, Esq.

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