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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY

Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002384

THE STATE,

Respondent,

v.

STEPHEN TRASE FINCHER,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II.

While Appellant failed to make the arguments advanced on appeal to the trial judge in his directed verdict motion, the trial judge properly denied Appellant's motion for directed verdict where Appellant's act of burglarizing a detached garage met the statutory requirements of burglary in the first degree.

STATEMENT OF THE CASE

Appellant was indicted during the May 2016 term of the Grand Jury for Laurens County for two counts of burglary in the first degree (2016-GS-30-757; 2016-GS-30-759). Appellant was tried *in absentia* from March 27-29, 2017 in Laurens, South Carolina. At the conclusion of trial, Appellant was found guilty of one count of burglary in the first degree and not guilty of the second count of burglary in the first degree. At the conclusion of trial, Judge Culbertson sealed Appellant's sentence. During a May 26, 2017 hearing, after Appellant was apprehended, the Honorable Donald D. Hocker unsealed and published Judge Culbertson's sentence. Judge Culbertson ordered that Appellant be sentenced to imprisonment for a term of twenty-five years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On March 9, 2016, Brittany Childress woke up to the sound of someone trying to break into her home. (R. p. 80) Childress testified that she was home for Spring Break and was home alone while her mother was at work. (R. p. 81) At first, Childress heard knocking on the door. (R. p. 83) Childress then stated the knocking stopped; however, shortly thereafter she heard drawers opening and closing in the kitchen. (R. pp. 83-84) Childress began to panic and called her aunt, who lived next door to her. (R. pp. 84-85) Esther Shell, Brittany's aunt, testified she received a call from Childress where she whispered that someone was in the house with her. (R. p. 109) Shell told her son and daughter to come with her and they began walking towards Childress's home. (R. p. 108) By the time Shell and her children reached the edge of their yard, they saw a while male walking across Childress's yard. (R. p. 109) Shell confronted the man and asked what he was doing there. (R. p. 108) The man replied he was trying to ascertain if the house was for sale. (R. p. 109) Shell testified the man then ran to his car and "took off." (R. p. 109) Shell stated that the man did not want to talk to her. Shell noticed that the man was driving a white car and was wearing a light colored shirt and baseball cap. (R. pp. 110-11) Shell's son, Xavier Johnson, described the car as a white sports-looking car with a spoiler on the back. (R. p. 127) Childress noted she was unable to observe the culprit because she was hiding in her bedroom. (R. p. 87)

Also on the morning on March 9, 2016, Darian Hampton was home sick. (R. pp. 191, 193) Ms. Hampton testified she specifically remembers the date because it was her sixteenth birthday. (R. p. 191) Ms. Hampton stated that she spent the morning in bed watching Netflix. (R. p. 193) While she was in bed, Ms. Hampton heard her dog barking, which normally indicated someone was at the house that should not be there. (R. p. 194) Concerned, Ms. Hampton walked to the window and observed a white Pontiac car she did not recognize. (R. pp. 194-195) Ms. Hampton

observed a man exit the vehicle wearing a baseball cap, a t-shirt, and jeans. (R. p. 196) She described the man as "taller" with reddish hair, a beard, and a tattoo on his arm. (R. p. 195) Ms. Hampton watched the man walk to the front porch and look in the window. (R. p. 196) The man then knocked on the door and looked through the door's peephole. (R. p. 196) Ms. Hampton let her dogs out of her room, which she believed led the man to decide not to enter the home. (R. p. 196) Ms. Hampton saw the man walk to the back of the home, and she subsequently heard the home's alarm system beep, which indicated the man entered the garage. (R. p. 197) She testified the garage served as a workshop and it contained all of her father's power tools. (R. p. 198) Ms. Hampton promptly called 911 and her mother. (R. pp. 198-199). She provided law enforcement with a description of the car as well as the intruder. (R. p. 199) Ms. Hampton observed the individual make several trips form the garage to his car while carrying power tools and boxes of items he was intending to take. (R. p. 199) Law enforcement subsequently arrived and Ms. Hampton provided a statement. (R. p. 200) On March 22, 2016, Investigator Chris Martin of the Laurens County Sheriff's Office showed Ms. Hampton a lineup of individuals and she identified Appellant as the man she observed on her property. (R. pp. 200-201)

Teddy Hampton, Darian's father, testified he used the garage for woodworking a couple of hours a week. (R. pp. 211-212) Mr. Hampton stated the garage was treated as a "bonus" room and that he re-did furniture and worked on knickknacks. (R. pp. 212) Mr. Hampton noted the garage, while detached from the house, was only about eight feet away from the house. (R. p. 217) Mr. Hampton testified he worked at Gen III in Fountain Inn and that he was at work at the time of the robbery. (R. p. 212) After being informed there had been a break in at his house, Mr. Hampton jumped in his truck and headed home. (R. p. 212) Upon arriving home, Mr. Hampton noticed the door to the bonus room above the garage was kicked in. (R. p. 213) Mr. Hampton discovered a

variety of power tools had been stolen from the room, including a Dewalt drill, a Kobalt air tool, a sawzall, and a power grinder. (R. p. 214)

Deputy Robbie Haupfer of the Laurens County Sheriff's Office responded to a burglary call at the Hampton's address. (R. p. 231) While he was en route, the dispatcher advised him that the caller said the culprit's vehicle was leaving the residence. (R. p. 231) Deputy Haupfer then attempted to catch up with the suspect's vehicle. (R. p. 232) Deputy Haupfer eventually caught up with the vehicle, activated his blue lights, and conducted a stop. (R. p. 232) Appellant was driving the vehicle. (R. p. 233) After being Mirandized, Appellant admitted he was at the Hampton residence and went into a building, but he did not go into the house. (R. p. 233) A search of the vehicle revealed a variety of tools in the back seat, including a Skil saw, a Kobalt box, a Dewalt box, and a grinder. (R. p. 235)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENT

I.

Appellant's challenge to his trial in absentia based on the trial judge's alleged failure to make certain factual findings is not preserved for appellate review because Appellant raised no objection to the trial judge failing to make findings on the record before proceeding in his absence, nor did Defense Counsel move for a continuance or offer any sort of objection to the trial continuing in Appellant's absence.

Relevant Facts

Prior to trial, the solicitor stated, "Judge, at this point, as far as the bench warrant is concerned, we've got a pretty good warrant division team that can - - lay hands on folks usually, but - - ." (R. p. 35) The trial judge replied, "Any reason why we shouldn't issue a bench warrant?" (R. p. 35) Defense Counsel simply replied, "I don't think so, Judge." (R. p. 35) When the court started session on March 8, 2017, the trial judge asked, "Do we have a defendant or not?" (R. p. 39) Defense Counsel replied, "No, sir." (R. p. 39) The trial judge then indicated he was going to go ahead and bring the jury in and give the opening charge. (R. p. 39)

Discussion

Appellant asserts the trial judge erred in allowing the trial to proceed in Appellant's absence without a finding that he voluntarily waived his right to be present. Appellant contends that since the trial judge did not make any findings of fact as to whether he intelligently, knowingly, and voluntarily waived his right to be present at his trial and that his waiver cannot be presumed from a silent record. Appellant is correct that the record is silent on the matter, however the record's silence is a direct result of Appellant's failure to raise the issue to the trial judge. Defense Counsel did not move for a continuance based on Appellant's absence, nor did he offer any sort of objection to the trial moving forward in Appellant's absence or request that the trial judge make

findings of fact on the record about whether Appellant voluntarily waived his right to be present. Appellant's argument is therefore not preserved for appellate review.

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 regard to trials in absentia, this Court has instructed:

> In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.

State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (emphasis added).

Because Appellant raised no objection to the trial court's failure to make specific factual findings, nor was a continuance requested, he is precluded from raising such an objection for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."). As this Court instructed in Ravenell, Appellant was required to object at his first opportunity to do so in order to preserve any challenge to his trial in absentia based on the trial court's failure to make factual findings. Where, as here, Appellant failed to do so, the issue should not be considered for the first time on appeal. Cf State v. Wrapp, 421 S.C. 531, 536, 808 S.E.2d 821, 823 (Ct. App. 2017) (finding that issue was preserved despite trial counsel's failure to specifically object to the trial judge's failure to make factual findings because defense counsel moved for a continuance and

objected to the trial proceeding in the defendant's absence). Defense Counsel's failure to offer any sort of objection and/or move for a continuance thus precludes appellate review of the issue. Appellant's conviction and sentence should be affirmed.

II.

While Appellant failed to make the arguments advanced on appeal to the trial judge in his directed verdict motion, the trial judge properly denied Appellant's motion for directed verdict where Appellant's act of burglarizing a detached garage met the statutory requirements of burglary in the first degree.

Relevant Facts

At the conclusion of the State's case-in-chief, Appellant moved for a directed verdict. (R. p. 265) Defense Counsel argued, "Judge, I would move for a directed verdict. Based on the evidence taken in the light most favorable to the State, it does not rise to an issue that should go to the jury. (R. p. 266) The trial judge promptly denied Appellant's directed verdict motion. (R. p. 266)

Discussion

Appellant avers the trial judge erred in denying his motion for a directed verdict because the Hampton's detached garage was not a "dwelling" for purposes of the burglary-first degree statute. Specifically, Appellant argues that, despite the fact the garage was physically within two hundred yards of the house, the garage nevertheless did not fall within the purview of the burglary statute because it was used for housing cars and as a woodworking workshop by Mr. Hampton. Initially, Appellant's argument is not preserved for appellate review because they were not raised to and ruled upon by the trial judge. Further, Appellant's argument lacks merit. Appellant's theft of various power tools from the Hampton's garage falls squarely within the ambit of the burglary-first degree statute because the Hampton's detached garage was within two hundred yards of the

dwelling and appurtenant to the home. Appellant was thus properly convicted of burglary in the first degree.

As a threshold matter, Appellant's argument is not preserved for appellate review. Appellant made only a general directed verdict motion and did not raise any of the arguments now raised on appeal to the trial judge in support of his motion. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). See State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal). Appellant's failure to raise any of the arguments in his brief to the trial judge precludes appellate review of the matter. By depriving the trial court of the opportunity to address this argument at trial, Appellant likewise prevents this Court from addressing it on appeal.

Error preservation concerns notwithstanding, Appellant's argument lacks merit. S.C Code Ann. § 16-11-311(A)(2) provides, "[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 burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." "With respect to the crime[] of burglary . . . 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." S.C. Code Ann. § 16-11-10. See State v. Smalls, 336 S.C. 301, 305, 519 S.E.2d 793, 795 (Ct. App. 1999) (holding the State's proof showed the building actually broken into was a garage located approximately fifty-three feet behind the victim's dwelling satisfies the requirements of S.C. Code Ann. § 16-11-10). Black's Law Dictionary defines "appurtenant" as "annexed to a more important thing." BLACK'S LAW DICTIONARY (10th ed. 2014). South Carolina courts have previously ruled the following structures were "appurtenant" to a dwelling house for burglary purposes: a dog house, State v. Langford, 55 S.C. 322, 33 S.E. 370 (1899), a smokehouse, State v. Branham, 13 S.C. 389 (1880), and a hen house even though it was across a public road from the dwelling house, State v. Johnson, 45 S.C. 483, 23 S.E. 619 (1896). Other jurisdictions have defined "appurtenant" similarly. See Jones v. State, 690 S.W.2d 318, 319 (Tex. App. 1985) (finding an unattached garage structure was appurtenant to the residence, as it was connected with the use and enjoyment of and was secondary or incident to the principle building—the house).

In Appellant's case, Appellant's conduct plainly violated S.C Code Ann. § 16-11-311(A)(2). The State presented overwhelming evidence that Appellant entered a building appurtenant to the Hampton's dwelling, and it was uncontroverted that Appellant possessed the requisite two prior convictions for burglary in order to be charged with burglary in the first degree. Appellant's argument erroneously contends that his conduct could not amount to burglary in the first degree because the garage was not a dwelling and was not used for lodging, but rather as a

garage and woodworking workshop by the owner. This ignores the fact that the statute indicates that all appurtenances within two hundred yards of the dwelling are considered dwellings in the same manner that a house is considered a dwelling. Therefore, a burglary of any of these appurtenances can still constitute burglary in the first degree. By including appurtenant structures in the burglary statute, the legislature clearly sought to enlarge the field within which burglary could be committed. Contrary to Appellant's wishes, there is no requirement in the statute that an appurtenant structure be used for lodging in order to fall within the purview of the burglary statute. On the contrary, South Carolina case law recognizes the opposite. See Padgett v. State, 324 S.C. 22. 29 n. 2, 484 S.E.2d 101, 104 n. 2 (1997) (noting that under S.C. Code Ann. § 16-11-10, "dwelling" is defined as "any building in which a person sleeps or lodges **and all other buildings within two hundred yards of it.**") (emphasis added). The Hampton's detached garage and the bonus room above the garage, which were only eight feet from the main dwelling, were closely affiliated with the Hampton's use and enjoyment of their home. Appellant's burglary of the Hampton's garage where he stole tools from the woodworking shop and was later caught red-handed with those very tools thus constituted burglary in the first degree because Appellant entered a structure which met the statutory definition of a dwelling with the intent to commit a crime in the dwelling. While Appellant's arguments were not raised to the trial judge, the trial judge nevertheless properly denied Appellant's motion for a directed verdict. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 20, 2019

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CERTIFICATE OF COUNSEL

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

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