STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

PETITION FOR REHEARING

On February 27, 2019, this Court issued a published opinion affirming the circuit court judge's pre-trial dismissal of a facially-valid indictment for first-degree burglary based on the purported insufficiency of the evidence the State intended to introduce during trial. State v. Massey, Op. No. 5630 (Ct. App. filed Feb. 27, 2019) (Shearouse Adv. Sh. No. 9 at 103). In affirming the circuit court judge's pre-trial dismissal of the indictment, this Court held the State's argument that the circuit court judge lacked authority to quash the facially-valid indictment pre-trial was "argue[d] for the first time on appeal" and "[t]herefore, . . . unpreserved." This Court further held, "[a]pplying the plain language of section 16-11-10 established the storage building was not a dwelling for the purposed of our first degree burglary statue" and, based on that finding, determined the circuit court judge correctly quashed Massey's first-degree burglary indictment. Pursuant to Rule 221(a), SCACR, and contemporaneously with the filing of a motion

to depublish, Appellant, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked several key arguments before this Court. First, this Court misapprehended and overlooked the State's argument before the circuit court judge that he did not have the authority to quash the facially-valid indictment based on a lack of evidentiary support presented pre-trial, as this argument was made to and ruled upon by the circuit court judge as opposed to being argued for the first time on appeal as this Court's opinion holds. Second, this Court misapprehended and overlooked that the circuit court judge did not have the authority to quash the facially-valid indictment pre-trial based on a lack of evidentiary support. Third, this Court misapprehended and overlooked the evidence presented establishing the building in question, which was located less than fifty feet from the victim's home and used exclusively for the storage of personal items, met the statutory requirements for a first-degree burglary charge.

This Court misapprehended and overlooked the State's argument before the circuit court judge that he did not have the authority to quash the facially-valid indictment pre-trial based on sufficiency of evidence grounds.

In seeking rehearing, the State initially submits this Court's finding that the State did not present its argument that the circuit court judge lacked authority to quash the facially-valid indictment pre-trial is not supported by the record. The State did indeed present this argument to the circuit court judge and the circuit court judge expressly ruled on the merits of this argument. (R. 1-2). Specifically, in its post-trial motion, the State argued,

> A motion to quash is appropriate when there exist "defects apparent on the face" of an indictment. S.C. Code Ann. § 17-19-90. Such a motion cannot be used to challenge the sufficiency of the State's evidence, which is an issue properly addressed through a motion for a directed verdict. See State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of an indictment, not the

> sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

(R. 1). Furthermore, beyond presenting the argument, the circuit court judge ruled upon merits of the argument in his written "Order Denying State's Post-Trial Motion," finding,

> The State moved on February 5, 2015, to set aside this Court's order quashing indictment number 2014-GS-46-00781 for burglary in the first degree, arguing that Defense's motion to quash and the Court's granting of the motion constituted an error of law as a motion to quash cannot be used to challenge the sufficiency of the State's evidence. The State also incorporated in its motion all of its previous pre-trial arguments made on the record. The Court holds the State's arguments to be without merit. [. . .]

(R. 3). Accordingly, the matter was, in fact, raised to and ruled upon by the circuit court judge.

The rules of preservation serve three important functions, allowing the trial court an opportunity to rule on the issue after full and complete argument, enabling the trial court to prevent or cure any potential errors, and providing a record for meaningful appellate review. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (finding South Carolina's preservation and objection requirements enable judges to make reasoned decisions by fully developing issues and allow "potential errors to be prevented or cured."); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (explaining the key purpose of South Carolina's issue preservation requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.").

Under the unique circumstances of this case, the underlying purposes of the South Carolina issue preservation requirements were met in Massey's case when the State raised its argument regarding the lack of authority for the circuit court judge to quash the indictment pre-trial based on the sufficiency of the evidence. The circuit court judge was presented a full

argument on the issue and took the opportunity to rule on the merits of the issue. Further, because the motion and ruling occurred pre-trial, the circuit court judge could still cure any error committed by his prior ruling by considering and ruling on the State's motion. Finally, this Court has a clear platform on which to review the actions of the circuit court judge and its ruling on all motions before it. Therefore, this Court should have addressed the merits of the State's argument regarding the circuit court judge's lack of authority to quash the indictment on sufficiency of the evidence grounds just as the circuit court judge did.

This Court misapprehended and overlooked that the circuit court judge did not have the authority to quash the facially-valid indictment pre-trial based on sufficiency of the evidence grounds.

In seeking rehearing, the State respectfully submits this Court erred in refusing to address the merits of whether the circuit court judge lacked authority to quash the facially-valid indictment pre-trial based on a lack of evidentiary support.

In the present case, Massey was indicted by the York County Grand Jury for first-degree burglary. The first-degree burglary indictment issued by the grand jury identified Massey's offense as a violation of S.C. Code Ann. § 16-11-311 based on his action of "willfully and unlawfully enter[ing] the outbuilding appurtenant to and within 200 yards of the dwelling . . . located at . . . Parris Road in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein . . . during the nighttime hours . . ." (R. 60-67). On April 17, 2014, the York County Grand Jury issued an amended indictment against Massey for first-degree burglary, slightly modifying the language of the original indictment to include that Massey "willfully and unlawfully enter[ed] the dwelling . . . when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house establishment." (R. 64-65).

Pursuant to S.C Code Ann. § 16-11-311(A)(3), "[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 or remaining occurs in the nighttime." "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 (emphasis added).

Massey, as alleged in the first-degree burglary indictment, entered the victim's garage within two hundred yards of his dwelling house during the nighttime hours with the intent to commit larceny. (R. 60-67). Significantly, the indictment contained the necessary elements of the offense of first-degree burglary and sufficiently apprised Respondent of what allegations he was facing. See State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (explaining an indictment is sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction"); State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet."); see also S.C. Code Ann. § 17-19-20 ("Every indictment

shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Under these circumstances, the indictment issued by the grand jury was facially valid and sufficient, and the circuit court judge had no authority to dismiss the indictment prior to trial. See United States v. Mills, 995 F.2d 480, 487 (4th Cir. 1993) ("The longstanding rule of law that courts may not 'look behind' grand jury indictments if 'returned by a legally constituted and unbiased grand jury . . .' is the touchstone for any inquiry into the legality of indictments.") (quoting Costello v. United States, 350 U.S. 359, 363 (1956)); State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("[A] trial court generally has **no power** to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court." (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

Massey himself appeared to concede that this was a facially valid indictment to the circuit court, arguing the first degree burglary indictment was "correctly in line with the statute but . . . [was] faulty with regards to the facts of this case. . . . And therefore, burglary-first would not be an appropriate charge for this case." (R. 35-36). Accordingly, because the first-degree burglary indictment was facially-valid, the circuit court had no authority to quash the indictment.

Despite the fact the indictment was facially valid and sufficient, the circuit court judge in Massey's case agreed with defense counsel's argument, granted Massey's motion, and dismissed the first-degree burglary indictment issued by the grand jury. Critically, that ruling constituted reversible error. The circuit court judge had **no** authority whatsoever to dismiss the facially-valid indictment issued by the grand jury in light of the fact a pre-trial challenge to an indictment cannot be used to challenge the sufficiency of the State's evidence. See Needs, 333 S.C. at 146, 508 S.E.2d at 863 (explaining a trial judge ordinarily has no power to dismiss a properly drawn indictment prior to trial absent some statutory authority permitting the trial judge to do so); State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (holding a motion to quash the indictment raised on the ground the victims identified in the indictment did not actually own the property stolen was properly denied because the indictment was facially valid and because the motion—if treated as a motion for a directed verdict since it went to the sufficiency of the evidence—was out of order and premature); see also United States v. Guerrier, 669 F.3d 1, 3-4 (1st Cir. 2011) ("[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations[.] . . . [I]n the ordinary course of events, a technically sufficient indictment handed down by a duly empaneled grand jury 'is enough to call for trial of the charge on the merits.' " (citations omitted)); United States v. Redcorn, 528 F.3d 727, 733 (10th Cir. 2008) ("[A] challenge to the indictment is not a vehicle for testing the government's evidence."); Gibson v. United States, 244 F.2d 32, 34 (4th Cir. 1957) (holding a pre-trial challenge to an indictment can only be made in respect to the validity of the indictment itself and not in respect to whether the facts of the case support the allegations in the indictment, which is an issue to be raised during trial). As a result, the State respectfully submits this Court should reach the merits of this issue and determined the circuit court judge

erred in dismissing the facially-valid indictment pre-trial based on evidentiary concerns when he had no authority to do so.

This Court misapprehended and overlooked the evidence presented establishing the burglarized building met the statutory requirements for first-degree burglary charge to be warranted.

Notwithstanding any issue preservation concerns, the State respectfully submits in seeking rehearing that this Court erred by affirming the judge's lawless ruling on the sufficiency of the evidence on the merits and appears to have erroneously applied an "any evidence" to support the ruling standard of review rather than viewing the evidence in the light most favorable to the non-moving party as required.

Pre-trial, Massey moved to quash the first-degree burglary indictment based on the ground that the facts of the case did not comport with the requirements of S.C. Code Ann. § 16-11-311. (R. 33-36). Specifically, Massey argued the building subject to the burglary was a place of business instead of a dwelling, was not appurtenant to the dwelling, and was owned by someone other than the victim listed on the indictment. (R. 33-36). Massey argued the first-degree burglary indictment was facially-valid but should be quashed based on the sufficiency of the evidence. (R. 35-36).

In response, the State proffered the testimony of Kristopher Callahan, the victim listed in the indictment. (R. 36). Callahan testified he lives at the Paris Road home with his parents and a family friend. (R. 39). He testified the garage subject to the indictment is "roughly 45/48 feet" from his house. (R. 39). He explained the land the home is on was originally owned by his grandfather along with the adjacent property on which the garage sits. (R. 39-40). He testified his grandfather parceled off five-acres of land when his parents got married to build a home, which is where the Paris Road home is located. (R. 39-40). He testified the land on which the garage

sits was deeded to his uncle, William Russell, Sr., after his grandfather died, but the property is owned and used jointly by the family. (R. 40). Callahan testified he **exclusively uses the garage for personal storage** of various items, including his four-wheelers, boats, tools, appliances, and beds. (R. 37-38). He testified he owns a small waterproofing and grading company and the employees meet at the land where the garage sits in the mornings, but stressed that the garage is for personal use—not business. (R. 37-38, 40-42). He testified the business sign on the garage was made when he sponsored his family friend in a rodeo, and after the rodeo, he hung the sign on the garage to "display his name." (R. 38-39, 42). He testified the sign is not visible from the road and the public does not enter onto the land to conduct business. (R. 38-39).

Following Callahan's proffered testimony, the State argued the garage was appurtenant to and within the required two hundred yards of Callahan's residence, thereby satisfying the "dwelling" requirement pursuant to S.C. Code Ann. § 16-11-311 and § 16-11-10. (R. 43-45). Additionally, the State argued that "burglary is a crime against possession and cohabitation, not a crime against ownership[,]" and therefore, it is irrelevant that the parcel of land on which the garage sits is owned by someone other than Callahan. (R. 45-46). In reply, Massey reiterated his previous arguments, asserting the garage was used for business purposes and was not appurtenant to Callahan's residence. (R. 46-47).

Because the circuit court judge was asked to quash the indictment based on the sufficiency of the evidence, the motion was akin to a motion for a directed verdict. The correct standard that must be applied to sufficiency of the evidence challenges was viewing the evidence in the light most favorable to the non-moving party—the State. See State v. Bennett, 415 S.C. 232, 236–37, 781 S.E.2d 352, 354 (2016) ("[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the

jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' "). This is the same standard this Court necessarily apply on appellate review. See State v. Pearson, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (citing State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460) (noting that when reviewing a circuit court judge's ruling on the sufficiency of the evidence on appellate review, an appellate court must the evidence and all reasonable inferences in the light most favorable to the State).

Here, the circuit court judge committed reversible legal error by improperly dismissing the first-degree burglary indictment because the evidence in Massey's case when considered in the might most favorable to the State supported an indictment for first-degree burglary. Based on the direct evidence presented to the circuit court judge, it is clear Massey entered a garage used exclusively by Callahan for personal storage within fifty feet of Callahan's residence during nighttime hours with the intent to commit larceny, thereby satisfying the requirements of S.C. Code Ann. § 16-11-311. The circuit court judge's ruling is based on several clear errors of law. Initially, the circuit court judge's finding Callahan's lack of ownership of the parcel of land on which the garage sits warrants dismissal of the first-degree burglary indictment is clearly erroneous. See State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011) (holding South Carolina burglary laws protect an interest separate and apart from ownership: the right to be safe and secure in one's home). It is of no importance that Callahan was not the titled owner of the property or that the garage parcel was deeded to a separate owner from the dwelling, as the only evidence before the circuit court judge established Callahan was in possession of the garage and the home. Adopting the clearly erroneous approach of the circuit court judge would lead to an

absurd result where residences and their adjoining buildings could be burglarized without significant consequence, so long as the possessor was not the titled owner.

Additionally, the circuit court judge's findings that the garage was not used for "sleeping" and that he "just [didn't] believe it's appurtenant to the residence," and therefore, not a dwelling, is also legally erroneous. (R. 51). Callahan's testimony established the garage was less than fifty feet from the home where he and three others permanently resided. Furthermore, a review of the aerial photograph of the two parcels of land with the red demarcation line, introduced as Defendant's Ex. No. 3, shows that the only ingress to the garage from the two adjoining roads is from the driveway of Callahan's dwelling. Moreover, the direct evidence before the circuit court judge established that the garage was solely used by Callahan to store his personal property. Cf. State v. Stone, 350 S.C. 442, 446, 567 S.E.2d 244, 246 (2002) ("The porch leads into and out of the laundry room and is used primarily to store wood and paint cans. . . . We find the screened porch is appurtenant, and is used for the protection of Griffith's property (paint and in finding otherwise. wood) so as to come within the definition of a dwelling."). Based on our Court's previous rulings, the garage was "appurtenant to" the dwelling home as required pursuant to S.C. Code Ann. § 16-11-10. See State v. Langford, 55 S.C. 322, 33 S.E. 370 (1899) (holding a dog house was appurtenant to a dwelling); Branham, 13 S.C. 389 (1880) (holding a smokehouse was appurtenant to a dwelling); State v. Johnson, 45 S.C. 483, 23 S.E. 619 (1896) (holding a hen house was appurtenant even though it was across a public road from the dwelling house).

Therefore, the "dwelling" element of S.C. Code Ann. § 16-11-311 was satisfied and the circuit court judge reversibly erred in dismissing the facially-valid indictment pre-trial where the

evidence presented, viewed in the light most-favorable to the State as required, clearly established the building met the statutory requirements for first-degree burglary.

Conclusion

In conclusion, for the foregoing reasons combined with the all the reasons raised in the Final Brief of Appellant, the State respectfully urges this Court to grant rehearing pursuant to Rule 221, SCACR, give the State an opportunity to be heard through oral argument in this unique case, reconsider its decision, and ultimately reverse the ruling of the circuit court judge, reinstate the indictment, and remand the case for trial.

Respectfully submitted,

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March 14, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

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vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Appellant's Petition for Rehearing on Respondent by depositing two copies of the same in the interagency mailbox addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of March, 2019.

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March 14, 2019

The Honorable Jenny A. Kitchings
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RE: State v. John Kenneth Massey, Jr. – Appellate Case No. 2015-000431

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Appellant's Petition for Rehearing, along with proof of service, for filing in the above-referenced criminal appeal.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
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MHJ/
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division