THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

John Kenneth Massey, Jr., Respondent.

Appellate Case No. 2015-000431

Appeal From York County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5630
Submitted June 1, 2018 – Filed February 27, 2019

AFFIRMED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Megan Harrigan Jameson, of Columbia; and Solicitor Kevin S. Brackett, of York, all for Appellant.

Appellate Defender David Alexander, of Columbia, for Respondent.

MCDONALD, J.: The State challenges the circuit court's pre-trial dismissal of John Kenneth Massey, Jr.'s first-degree burglary indictment, arguing the circuit court lacked authority to quash the indictment because evidence existed to support the charge. We affirm.

Facts and Procedural History

Kristopher Callahan (Victim) used a building on his uncle's property in Rock Hill for storage. Victim lived with his parents next door to the property; his parents' home is approximately forty-five feet away from the storage building.

Massey was arrested following the theft of a four-wheeler from the storage building. The York County grand jury indicted Massey for criminal conspiracy, first-degree burglary, and grand larceny. The first-degree burglary indictment alleged Massey entered "the outbuilding appurtenant to and within 200 yards of the dwelling of [Victim]." However, the grand jury later issued an amended indictment, which simply stated Massey entered "the dwelling of [Victim]."

Massey moved to quash the first-degree burglary indictment, arguing the storage building was not appurtenant to Victim's residence because it was on a separate parcel of land, and it was used for Victim's business, not as a dwelling.

Victim testified the land in the area was "family land," once owned by his grandfather, who gave his parents five acres to build the home in which Victim resides. Victim claimed his mother inherited the surrounding property upon her grandfather's death, but it was never titled in her name because "it's just family land. There's no need to change the land over. So we just left it in the farm name, which is . . . my uncle, Bill."

Although Victim runs a business from the family property, he testified he did not use the storage building for business operations, stating, "I operate a waterproofing and grading company . . . . We meet there at the—at the land in the mornings. And from there we, you know, go off to our jobs." Victim explained that the sign for "Callahan Waterproofing & Construction" listing his business's contact information on the exterior of the storage building was "to just, you know, display [his] name." Although Victim admitted he used the building to "work on stuff" related to his business, he claimed the tools do not leave the storage building when he goes to a job site. Victim further testified he and his father primarily use the storage building for belongings such as four-wheelers, boats, and tools.

The State argued the storage building was appurtenant to the family dwelling because it was within two hundred feet of Victim's residence. Under the State's theory, Uncle Bill's ownership of the land was irrelevant because burglary is a crime against possession and habitation, not ownership.

The circuit court granted Massey's motion to quash the indictment, noting Victim did not own either parcel of land or the storage building bearing the name of his

business. The circuit court explained that although the storage building was in close proximity to Victim's parents' home, it was on a separate piece of property and titled in someone else's name. The court elaborated, "that building is an outbuilding. It's a—looks like a butler building to me. And [] has a sundry of things in it. And I just don't believe it's appurtenant to the residence owned by the victim's parents, factually." Thus, the proper charge was not burglary first, but burglary second.

The State subsequently moved to set aside the quashing of the first-degree burglary indictment; the circuit court denied the State's motion.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Pulley*, 423 S.C. 371, 376-77, 815 S.E.2d 461, 464 (2018) (quoting *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* However, "[q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

Law and Analysis

The State argues the circuit court erred in dismissing the first-degree burglary indictment because it alleged the necessary elements of first-degree burglary and sufficiently apprised Massey of the allegations he would face at trial. Under the State's theory, the Building's "appurtenance to" Victim's residence, satisfied the "dwelling" requirement of the first-degree burglary statute. *See* S.C. Code Ann. § 16-11-311 (2015). We disagree.

"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." S.C. Code Ann. § 16-11-311 (2015).

> 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.

S.C. Code Ann. § 16-11-10 (2015). The Code further defines a "dwelling" as "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 (2015).

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "[A] court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *Id.* (citation omitted). "The text of a statute is considered the best evidence of the legislative intent or will, and the courts are bound to give effect to the expressed intent of the legislature." *State v. Ramsey*, 409 S.C. 206, 209, 762 S.E.2d 15, 17 (2014).

"Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 (citation omitted).

The South Carolina Code does not define "appurtenant" for the purposes of first-degree burglary. Black's Law Dictionary defines appurtenant as "[a]nnexed to a more important thing." *Appurtenant*, Black's Law Dictionary (10th ed. 2014). Annex is defined as "[s]omething that is attached to something else, such as a document to a report or an addition to a building." *Annex*, Black's Law Dictionary (10th ed. 2014).

In discussing the common law offense of burglary, our supreme court has explained:

> It was long ago held in this State that "a house to be parcel of the mansion-house, must be somehow

> connected with or contributory to it, such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a distinct use."

State v. Evans, 18 S.C. 137, 140 (1882) (quoting *State v. Ginns*, 10 S.C.L. (1 Nott & McC.) 583, 585 (1819)).

Initially, we note the State argues for the first time on appeal that the circuit court lacked authority to quash the indictment. When Massey moved to quash the indictment, the State argued it did not matter that Victim's uncle owned the storage building parcel because burglary is a crime of possession, not a crime of ownership. The State did *not* argue that the circuit court lacked authority to quash the indictment. Therefore, we find this argument unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Applying the plain language of section 16-11-10 establishes that the storage building is not a dwelling for the purposes of our first-degree burglary statute. To fall under the first-degree burglary statute, a structure must be within 200 yards of a dwelling *and* appurtenant to it. S.C. Code Ann. § 16-11-10; *see also Evans*, 18 S.C. at 139 (finding a burglary indictment insufficient when it failed to allege a gin house, within the curtilage of a dwelling, was both within 200 yards of the dwelling *and* appurtenant to it). We find a storage building unattached to a residence and located on a separate parcel of land is not "usually considered as a necessary appendage of a dwelling-house." *Evans*, 18 S.C. at 140. The storage building here is separate from Victim's dwelling and "appropriated to another and a distinct use"—as reflected by the commercial signage and Victim's storage of his business tools there. Further, as there was no evidence that the storage building was used as a dwelling or was in any way "annexed to" or "attached to" the home, the circuit court correctly quashed Massey's first-degree burglary indictment.

Conclusion

The decision of the circuit court is

AFFIRMED.[1]

HUFF and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR