THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joseph Lamar Brown, Jr., Appellant.

Appellate Case No. 2019-000781

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5942
Heard April 5, 2022 – Filed August 31, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Julianna E. Battenfield, and Assistant Attorney General Caroline Scrantom of Columbia, all for Respondent.

MCDONALD, J.: Joseph "Joe-Joe" Lamar Brown, Jr. appeals his convictions for murder, first-degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime, arguing the circuit court erred in (1) failing to find the retrial of his armed robbery charge violated the bar of double

jeopardy, (2) prohibiting evidence of third-party guilt, and (3) declining to suppress evidence secured by a problematic search warrant. We affirm.

Facts and Procedural History

Shortly before 1:00 p.m. on Friday, December 23, 2016, an intruder entered Johnny Glen Pritchard's (Victim) Lincolnville home, demanded money, and shot and killed him. After shooting Victim in the neck, the perpetrator went through Victim's pockets, took some money, and ran out the front door.

On July 11, 2017, a Charleston County grand jury indicted Brown for murder, first-degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime. Brown pled not guilty, and the Honorable Kristi L. Harrington presided at the four-day jury trial. During their deliberations on June 14, 2018, the jury asked several questions. One of the jury's notes indicated the jury had reached a unanimous verdict of "not guilty" as to the armed robbery indictment but was unable to reach a unanimous decision on the remaining indictments. The circuit court responded with an *Allen* charge.[1] Despite this, the jury remained deadlocked, and the foreperson reported that the jury had "just not been able to come to a unanimous decision on any of the indictments." Thus, the circuit court declared a mistrial.

The State called the case for a second jury trial before the Honorable J.C. Nicholson, Jr. on November 5, 2018. Pretrial, the circuit court heard Brown's motions to dismiss the armed robbery indictment, admit evidence of third-party guilt, and suppress evidence retrieved during the execution of a search warrant. After considering the testimony of witnesses and arguments from the parties, the circuit court denied the motions.[2]

The State called Victim's second cousin Hugh Potter Pritchard (Cousin) as its first witness at trial. Cousin testified he spent the night of December 22, 2016 at Victim's home because he was helping Victim pack his belongings for a move. Cousin was in Victim's kitchen boxing up dishes when an intruder entered the

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

[2] The State called three pretrial witnesses: Detective Barry Goldstein, who led the investigation for the Charleston County Sheriff's Office (CCSO), and eyewitnesses Celest McBride and Merit Williams, who saw a man running in the vicinity of Victim's home on the day of the shooting.

home. Cousin hid under the kitchen table and witnessed the shooting through a doorway. Immediately after the shooter ran out the front door, Cousin exited through the back door, ran across the lawn, and jumped over a fence to reach a neighbor's house and call for help. Cousin and the neighbor, James Eric Jordan,[3] then called 911 together.

CCSO was dispatched to Victim's home at 12:57 p.m. and arrived on scene at 1:03 p.m. Cousin described the perpetrator as a black man of medium height, approximately 5'8" or 5'9", with a small-frame, and hair that "wasn't long." According to Cousin, the perpetrator was dressed in dark clothing, was wearing a face covering, and had on "some kind of hat." Cousin admitted he did not see the intruder going through Victim's pockets, but testified he heard Victim's cash was taken.[4] Cousin explained that while he "didn't know exactly how old [the intruder] was," he thought he was "older than eighteen" and believed he was in his thirties. Cousin was adamant the murder weapon was "a black pistol, automatic handgun," not "a revolver." Officers found some coins and keys on Victim's person and a note on Victim's coffee table indicating Trey Coleman owed Victim $200. Officers also recovered a Speer nine millimeter Luger shell casing from Victim's living room floor.

Celest McBride, who was twenty years old at the time of Brown's second trial, lived with her family approximately one hundred yards from Victim's home. She heard "a boom" around 1:00 p.m. on the day of the shooting. McBride stated she was "being nosey" and "looked outside because [she] thought maybe someone had gotten into a car crash or something had fallen out of someone's vehicle onto the concrete." McBride testified that less than a minute after she heard the boom, she saw a man running from the direction of Victim's home:

> I saw someone running from my right to my left, which was a little odd because people don't go running around in that neighborhood just because. And just in front of

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[3] Jordan is the stepfather of Trey "Red" Lorenzo Coleman, Brown's accomplice. Five months prior to Brown's second trial, Coleman pled guilty to manslaughter, armed robbery, and first-degree burglary; he is now serving a forty-five-year sentence.

[4] Victim withdrew $700 from his bank account a few days before he was killed.

> my house, by a telephone pole, I saw an object fall out of his pocket and—
>
> . . . .
>
> It appeared that he was bending down to pick it up. But he didn't. He continued running. And a little ways down the road from the telephone pole, he'd dropped a large amount of cash and he picked that up.

Once the runner was out of sight, McBride told her father she saw the man drop something by the telephone pole. Her father retrieved the object, an iPhone with a lock screen photo of a man and a woman, and placed it on his porch for safekeeping. McBride explained, "We were being good Samaritans and we wanted the rightful owner to pick it up because there were thieves in the neighborhood." She initially described the runner as a medium-build black man of 5'10" to 6' with dreadlocks, wearing "stone-gray sweatpants" and a dark-colored shirt.[5] At trial, McBride stated an enhanced photograph of Brown—taken from surveillance video—looked "very similar" to the man she saw running in front of her house; however, she agreed with the State that it was possible she mistook the man's hoodie for dreadlocks in giving an earlier description of him.[6] On cross-examination, McBride admitted she could not remember what color shirt the man was wearing.

Merit Williams was driving from Jordan's house to the store when he saw "a young man running from the direction from [Victim's] house." Williams recalled the runner was wearing "[r]ed Converse, black pants, a hoodie with the number 23 on it multicolored, [and a] skull cap."[7] He told law enforcement the runner had

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[5] McBride's father also described the runner to law enforcement as a black man with "longer hair." However, he was unable to describe the runner's clothing.

[6] In a previous hearing, McBride testified she was in cosmetology school. At trial, she agreed dreadlocks are "distinctive."

[7] The number 23, worn by Michael Jordan for the majority of his NBA career, remains popular on sportswear.

dreadlocks, the hoodie was "jet black," and the skull cap had white writing on it.[8] Williams thought the runner was "a young kid, you know, maybe into sports" and saw him drop something and then turn off to the left from East Owens Drive on to Brenda B Lane.[9] Williams identified the man in the video clip—also shown to McBride—as the man he saw running on December 23, 2016.

Martin Perez, who lived at the end of Brenda B Lane, was standing outside his house shortly before 1:00 p.m. on December 23 when he noticed a black car "that arrived very fast, quickly" and parked on the side of his house. The driver got out and started waving at a person and yelling for him to hurry up. Another person ran to the car, he and the driver got in, and the car sped off. Perez recalled the driver wore a red and black cap and a black T-shirt with "white figures, design, [on] it." Perez later approached law enforcement and shared what he saw. He also told the officers about his video surveillance equipment and invited them to review the footage.[10] Perez provided "the master machine that runs his system" to the police for their investigation.[11] Approximately eighteen months after Victim's death, Perez informed law enforcement he recognized the driver because the man frequently visited Perez's neighbor. Perez also knew where the driver lived. He admitted he declined to tell the police he recognized the driver on the day Victim was killed because he "was afraid something would happen to [him]."

Detective Goldstein began his investigation by interviewing Cousin shortly after Victim's death. He then interviewed McBride and her father. Detective Goldstein subsequently took into evidence the iPhone McBride's father retrieved from the ditch by the telephone pole. As the device was passcode protected, law enforcement was initially unable to retrieve its contents; however, Detective Goldstein was able to identify Brown and his girlfriend, Nautica Manigault, as the individuals in the photograph on the iPhone's lock screen.

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[8] Williams described a skull cap as "a cap made of wool or cotton that's used to warm the head and ears."

[9] Brown was eighteen at the time of the murder.

[10] Perez installed the video surveillance system because his home had been burglarized two or three times and he had been shot at in the past.

[11] The enhanced photographs of Brown shown to McBride and Williams were taken from Perez's video surveillance system.

On December 26, 2016, Detective Goldstein interviewed sixteen-year-old Manigault at her grandmother's home, which is less than a mile from the crime scene and in the same apartment complex where Brown lived. Manigault told Detective Goldstein that Brown was called "Joe-Joe" and did not have dreadlocks. Regarding Brown's clothing, Manigault explained Brown only wore Adidas or Converse shoes and "black jeans, all he wears is black."[12] Manigault confirmed she was the female in the lock screen photograph on the iPhone, and noted she had the same photograph on her own device.[13] Manigault admitted that around the time Victim was killed, Brown told her he lost his phone.

Once Manigault identified Brown in connection with the iPhone, Detective Goldstein obtained Brown's records from the Department of Motor Vehicles (DMV) to verify his identity and address. Brown's driver's license identified him as a 5'9" black male weighing 155 pounds. At this point, Detective Goldstein applied for arrest and search warrants.

On January 3, 2017, CCSO took Brown into custody and searched his home, where officers found two boxes of ammunition, one of which contained Speer nine millimeter Luger bullets—the same type and caliber as the shell casing recovered from Victim's living room. When Detective Goldstein interviewed Brown, Brown identified the iPhone as his own and claimed he was near the crime scene looking for it after he lost it in the area. Brown gave Detective Goldstein various descriptions of what he was wearing on the day of the shooting, including "an American flag outfit" and a "black t-shirt with green shorts."

Eventually, Detective Goldstein was able to access the contents of Brown's iPhone. Text messages on the phone reflected a conversation between Brown and "Red" just prior to the shooting. From the contents of these messages, Detective Goldstein suspected Coleman was Red. To verify this, investigators identified a

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[12] Manigault's mother, Tawanna Alston, told Detective Goldstein that on the afternoon of the murder, Brown came to her mother's home "all hysterical and stuff like that, telling yeah, we did it" but never explained what "it" was before he left. She said Brown was dressed in a "[b]lack shirt, black jeans, [and] red Converse" with a white shirt on underneath his black shirt. Additionally, she described his hair that day as "nappy and twists" on the top of his head, "the very top part."

[13] During a May 2, 2017 interview with Detective Goldstein, Coleman also identified Brown's iPhone from the lock screen photograph.

text message in which Red told Brown his Facebook name was "Moneybag Fly." Goldstein obtained search warrants for the subscriber information for the phone number associated with Red and for the Facebook account for Moneybag Fly. After obtaining these records, Goldstein was able to verify that Trey Coleman, Moneybag Fly, and Red were the same person.[14]

In the early morning hours of December 23, Coleman texted Brown asking to borrow his gun. Brown responded that since he "just been about to get robbed," he needed his gun "to stay on point." Around the same time, between 1:00 a.m. and 1:30 a.m., someone used the iPhone to photograph Brown holding a handgun in his right hand.[15] The same photograph shows Brown wearing red Converse shoes with white toes. Another photo on the iPhone depicts Brown wearing a black T-shirt, "the jeans with the holes," and "red-and-white Converse-style shoes."

Shortly before noon on December 23, the following text exchange—as read into the record at Brown's second trial by Chief Investigator Raymond Haupt of the Ninth Circuit Solicitor's Office—occurred:

> Coleman: Where you?
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> Brown: My house.
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> Coleman: [M]an, you got to rob dude today; I'm with him now.
>
> Brown: [P]ull up my hood right now; with—I don't give a—I don't give a f***; I'm going to rob him now.
>
> Brown: [P]ull up with him, blood; for real, for real.
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> [Two missed calls from Brown to Coleman]

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[14] At trial, Coleman confirmed his nickname is Red and that he previously had a Facebook account under the name Moneybag Fly.

[15] The handgun's serial number is visible in these photographs. A trace on the serial number revealed the firearm was a Smith and Wesson M&P9c.

Coleman: [Man], we can't do it like that; then he going to know I set him up.

Brown: [M]an, Bruh, just act like you are pulling up to get one of your peoples and I'm going to rob both of y'all to make it look real; Christmas bumming up; I ain't got shuck for my peoples; I'm going to make it look like I'm robbing both of y'all.

Brown: I'm just going to bum from around the building.

Brown: Where you at; at your house; I'll act like you my homeboy and rob you in the yard; he ain't going to think you set him up then because I came to your yard; I'm telling you, Bruh, it's now or never; what's up; let me eat, Bruh.

Coleman: [N]ot my house; the f***; just wait till you get to his house and I'm going to come in then; and Bruh, don't try and shit me; we split fifty-fifty.

Brown: [Y]eah, [man], you know that; when y'all going—when y'all going be at his house; and you want me to just knock on his door.

Coleman: I'll let you know when we get there; I'm going to be home when you do it; just do it and go to the back of Bell Street or to the circle by Smokey them house; you ball me and I bum—get you from there.

Brown: This a white man or black, and who all in the house?

Coleman: [H]is fat-ass brother and him; the skinny one got the money though; I want you to run his pockets and take his wallet and all; the fat one ain't got nothing; but do whatever to take it; hell, take his pants off him and take his phone too.

Brown: Aye, Balmy.

Coleman: [W]e bumming down Royal Road.

Brown: [S]o you want me to go in there when they both in there?

Coleman: [T]hey packing because he about to move; they some pussies and ain't no gun in the house.

Brown: [W]here y'all at?

[Call from Coleman to Brown at 12:27:54 p.m. that lasts one minute and forty-eight seconds]

Coleman: [H]old on; he out here talking to my peoples in my yard; I'll let you know when he leaves my house.

Brown: [W]here his brother?

Coleman: [I]n his house.

[Call from Coleman to Brown at 12:42:09 p.m. that lasts three minutes and thirty-two seconds]

[Final call from Coleman to Brown at 12:47:00 p.m. that lasts forty-eight seconds]

There is no further activity on Brown's iPhone after these calls.

Michelle Eichenmiller, a firearms examiner for the South Carolina Law Enforcement Division, was qualified without objection as an expert in the area of firearms identification. Following her examination of the bullet recovered at Victim's autopsy, Eichenmiller concluded "[i]t was a .9 millimeter Luger caliber bullet with five grooves, right-hand twist." Eichenmiller identified the cartridge casing recovered from Victim's living room floor as "a Speer manufacturer .9 millimeter Luger caliber cartridge casing" consistent with the bullet removed from the Victim. Additionally, Eichemiller noted the Smith and Wesson handgun identified by the serial number visible in the photograph taken with Brown's iPhone used a teardrop-shaped firing pin, which was consistent with the firing pin marking on the cartridge casing she examined. Eichenmiller opined the "lands and

grooves on the spent projectile" she examined were consistent with having been fired by a Smith and Wesson M&P9c. She further noted the teardrop-shaped firing pin impression on the spent casing eliminated the possibility that another brand fired the projectile and ejected the casing. According to Eichenmiller, the Smith and Wesson M&P9c nine millimeter is the only pistol in the firearms analysis database that matches all of these specific characteristics. On cross-examination, Eichenmiller admitted she did not have the opportunity to examine the murder weapon, and as such could not testify with certainty that the gun in the photograph on Brown's iPhone was the same gun used to shoot Victim.

Trey "Red" Coleman also testified for the State. Coleman pled guilty to setting up the Victim and enlisting Brown to rob him. Coleman admitted he knew Brown owned a gun and identified it as the gun in the photograph from Brown's iPhone. He also confirmed he asked Brown to borrow the gun a few times, including in the early morning hours of December 23, 2016. Coleman knew Victim had recently received some money following a car accident and that Victim had used the funds to buy a mobile home and vehicle. He testified Victim was generous with his time and money and had given or lent money to Coleman in the past. In fact, Victim gave Coleman a ride to the liquor store and Family Dollar on the day he was killed. Approximately ten minutes after Victim and Coleman returned from running errands, Coleman began texting Brown about the robbery plan. He then went to the store to buy cigarettes before returning to Brenda B Lane to pick up Brown. Coleman identified himself and Brown on Perez's surveillance video but claimed he netted no money from the robbery because Brown told him "[h]e didn't get nothing." After Coleman dropped Brown off at home, he returned to his stepfather's house and learned Victim was dead.

After closing arguments, the State requested a jury instruction on attempted armed robbery as a lesser included offense. Ultimately, the jury found Brown guilty of murder, first-degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime. The circuit court sentenced Brown to life imprisonment without the possibility of parole for murder, fifty years' imprisonment for burglary, ten years' imprisonment for attempted armed robbery, and five years' imprisonment on the weapons charge. Following a hearing on Brown's motion to reconsider his sentence, the circuit court amended Brown's life sentence for murder to fifty-two years' imprisonment and ordered the remaining unchanged sentences to run concurrent to the fifty-two years.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). "Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). "The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013).

Law and Analysis

I. Double Jeopardy and the Armed Robbery Charge

Brown argues the circuit court erroneously allowed the retrial of his armed robbery charge in violation of his constitutional protections against double jeopardy. He posits that because the jury in his first trial declared through its note that it had reached a unanimous verdict of "not guilty" on the armed robbery charge, both the United States and South Carolina Constitutions bar his retrial on this indictment. Under the reasoning of *Blueford v. Arkansas*, 566 U.S. 599 (2012), we disagree.

"The Double Jeopardy Clauses of the United States Constitution and the South Carolina Constitution protect citizens from repetitive conclusive prosecutions and multiple punishments for the same offense." *State v. Benton*, 435 S.C. 250, 258, 865 S.E.2d 919, 923 (Ct. App. 2021); *see also* U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage . . . that . . . appl[ies] to the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *Benton*, 435 S.C. at 258–59, 865 S.E.2d at 923 (quoting *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011)).

In *Blueford*, the defendant was charged with capital murder. 566 U.S. at 602. The trial court instructed the jury on capital murder and the lesser-included offenses of

first-degree murder, manslaughter, and negligent homicide. *Id.* Following an *Allen* charge, the jury "deliberated for a half hour more before sending out a second note, stating that it 'cannot agree on any one charge in this case.'" *Id.* at 603. The trial court subsequently summoned the jury, and the foreperson reported the jury was deadlocked. *Id.* When the trial court asked the foreperson to disclose the jury's votes on each offense, the foreperson reported the jury was unanimous in finding the defendant not guilty of capital murder and first-degree murder but was deadlocked on manslaughter and had not voted on negligent homicide. *Id.* at 603–04. Following this exchange, the court gave another *Allen* charge and sent the jurors back to the jury room. *Id.* at 604. When the jury returned half an hour later and the foreperson stated the jury had not reached a verdict, the court declared a mistrial. *Id.*

Prior to his retrial, Blueford moved to dismiss the capital murder and first-degree murder charges on double jeopardy grounds, citing the foreperson's report that the jury had voted unanimously against guilt on these offenses. *Id.* The trial court denied the motion, and the Supreme Court of Arkansas affirmed on interlocutory appeal, concluding "the foreperson's report had no effect on the State's ability to retry Blueford, because the foreperson 'was not making a formal announcement of acquittal' when she disclosed the jury's votes." *Id.* 604–05 (quoting *Blueford v. State*, 370 S.W.3d 496, 501 (2011)). The United States Supreme Court affirmed, explaining, "[t]he fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses." *Id.* at 606. Thus, the Court held:

> The jury in this case did not convict Blueford of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the Double Jeopardy Clause does not stand in the way of a second trial on the same offenses.

Id. at 610.

Despite Brown's argument to the contrary, we find nothing in the record from the first trial—aside from the language of the note as read into the record by the circuit court—to indicate the jury did not continue deliberating or even reconsider its decision regarding Brown's armed robbery charge following the *Allen* charge. Brown submitted affidavits from defense counsel, as well as affidavits from two members of the first jury, as exhibits to his motion to dismiss the armed robbery

indictment prior to his second trial. *But see* Rule 606(b), SCRE ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.").

The circuit court read the *Allen* charge verbatim from the General Sessions Jury Instructions outline provided to circuit court judges. While South Carolina law requires a jury to consider each indictment separately and distinctly, the trial transcript is devoid of information regarding which charges the jury considered following the *Allen* charge. Even though the State, defense counsel, and the circuit court were aware of the note stating the jury had determined Brown was "not guilty" of armed robbery, no action was taken other than the court's supplemental instruction via an *Allen* charge. Both the State and defense counsel indicated they had no objections to the *Allen* charge, and no other discussion followed at that time. *Contra Blueford*, 566 U.S. at 604 (stating defense counsel "asked the court to submit new verdict forms to the jurors, to be completed 'for those counts that they have reached a verdict on,'" following the *Allen* charge); *State v. Bilton*, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930) ("A verdict of a jury should be presented in open court by the jury, properly published, assented to by all the jury, received by the court, and ordered placed [on] record before the final discharge of the jury."). The circuit court in Brown's second trial denied his motion to dismiss the armed robbery indictment because defense counsel failed to raise this issue of the jury's note during the first trial to the first circuit judge; thus, the first circuit judge made no ruling addressing the information in the jury note or otherwise specifically addressing the armed robbery indictment.

We find *Blueford* controlling in Brown's case for two reasons: (1) there was an additional period of deliberation in Brown's first trial after the circuit court received the jury's note indicating the jury had reached a verdict on armed robbery; and (2) following this period of deliberation, the jury foreperson announced, "We, Your Honor, have just not been able to come to a unanimous decision on any of the indictments." While not binding on this court, we are persuaded by the fact that other jurisdictions have declined to apply the bar of double jeopardy in similar

circumstances following an *Allen* charge. *See e.g.*, *State v. Combs*, 900 N.W.2d 473, 482–83 (2017) ("While the jury may have voted or tentatively voted to acquit Combs on three of the counts in its deliberations, it did not reach a verdict. The verdict form was not filled out or signed, the jury did not announce a verdict and was not available to be polled by the parties, nor was any verdict accepted by the district court."); *contra Nickson v. State*, 293 So. 3d 231, 237 (Miss. 2020) ("The foreperson did not simply disclose the jury's votes on each offense. Instead, the foreperson announced that the jury had reached a verdict on two counts and had delivered a verdict in writing and in proper form. The jury was then polled and the trial court determined that the jury's verdict was unanimous. In fact, the trial court referred to the jury's verdict as a 'partial verdict of the jury on Count 1 and 2.'"). Accordingly, we find the circuit court did not err in denying Brown's motion to dismiss the armed robbery indictment.

II. Third-Party Guilt

Brown next argues the circuit court erred in excluding evidence of third-party guilt because Brown identified David Felder as Victim's assailant; Felder matched the descriptions of the assailant as to significant details provided by witnesses; Felder's guilt was inconsistent with Brown's guilt; Felder lived within walking distance of the crime scene and was found in the area within hours of Victim's death; and Felder's jacket tested positive for gunshot residue. We disagree.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the supreme court adopted the following rule regarding third-party guilt:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . "But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to

> the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty."

Id. at 104–05, 16 S.E.2d at 534–535 (quoting 16 C.J., Criminal Law § 1085 (1918) and 20 Am. Jur., Evidence § 265 (1939)).

Decades later, in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), *abrogated by Holmes v. South Carolina*, 547 U.S. 319 (2006), our supreme court attempted to expand *Gregory*. There, the court affirmed the circuit court's exclusion of third-party guilt evidence because of "the strong evidence of appellant's guilt—especially the forensic evidence—and the fact that the forensic experts found that the samples from [the third party] did not match *any* evidence gathered in this case, the proffered evidence about [the third party] did not raise 'a reasonable inference' as to appellant's own innocence." *Id.* at 550, 541 S.E.2d at 544 (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534)). The court further explained that "while the proffered evidence about [the third party] may have established evidence of motive and opportunity for [the third party] to kill the victim, the evidence simply was not inconsistent with appellant's guilt." *Id.*

In *Holmes*, the defendant sought to introduce evidence that a third party had perpetrated the crimes for which he was charged. 547 U.S. at 323. He proffered several witnesses who testified the third party had been in the neighborhood where the crime occurred on the morning it was committed. *Id.* He also presented witnesses who claimed the third party admitted to committing the crimes. *Id.* Relying on *Gregory*, the circuit court refused to admit the evidence of third-party guilt. *Id.* at 323–24. On appeal, our supreme court found no error in the exclusion of petitioner's third-party guilt evidence. *Id.* at 324. Citing both *Gregory* and its later decision in *Gay*, the supreme court affirmed, noting the substantial incriminating evidence presented by the State and concluding the defendant "could not 'overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" *Id.* (quoting *State v. Holmes*, 361 S.C. 333, 343, 605 S.E.2d 19, 24 (2004)). However, the United States Supreme Court reversed, holding the circuit court violated the defendant's right to a "meaningful opportunity to present a complete defense" by excluding evidence of third-party guilt on the ground that the State introduced forensic evidence strongly supporting a guilty verdict. *Id.* at 330–31 (internal quotation omitted).

Here, in his filings seeking to introduce evidence of Felder's third-party guilt, Brown argues no evidence suggests Brown and Felder acted together in the effort to rob Victim and contends Felder's guilt is inconsistent with his own. Brown asserts Felder matched certain aspects of the descriptions witnesses provided to law enforcement. Indeed, officers approached Felder when they canvassed the area in the hours following Victim's death because Felder was wearing red Air Jordan shoes and a red leather jacket with the number "23" on the back. Moreover, Felder's shoulder-length dreadlocks matched the hairstyle described by two witnesses; Brown has never had shoulder-length dreadlocks. Officers located Felder 920 feet from Victim's home, Felder lived nearby, and Felder's jacket had gunshot residue on one sleeve.[16] Thus, Brown—much like the defendant in *State v. Mansfield*, 343 S.C. 66, 85, 538 S.E.2d 257, 267 (Ct. App. 2000)—attempted to show a third party, who matched the physical description of the perpetrator, lived in close proximity to the Victim and was found at home on the day in question.

In *Mansfield*, this court rejected such proximity evidence as casting "a mere 'bare suspicion'" on the third party, finding "[t]he fact that [the third party] generally fit the description of the perpetrator and lived in the apartment complex does not show his guilt, nor is it inconsistent with [the defendant's] guilt. Because the evidence was not inconsistent with [the defendant's] own guilt, the trial court exercised sound discretion in excluding it." *Id.* at 85–86, 538 S.E.2d at 267; *see also Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008) (concluding similar descriptions were not enough to raise a reasonable inference of innocence), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

We find the information offered here to support a theory of third-party guilt is akin to that in *Mansfield*. Law enforcement found Felder within close proximity of

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[16] Law enforcement approached Felder near Victim's home within hours of Victim's death. When Felder's dog became aggressive with Deputy Charles Gaillard, the deputy fired a gunshot into the ground within about one foot of Goldstein. As this occurred, Goldstein and Detective Michael Thompson were handcuffing Felder for transport to CCSO for an interview. A subsequent residue test revealed particles characteristic of gunshot primer residue on the sleeve of Felder's jacket, which the State argues is consistent with Felder being cuffed by Goldstein while in close proximity to Gaillard when he fired his service weapon to scare the approaching dog. Much of this interaction can be seen on bodycam video footage admitted into evidence.

Victim's house shortly after Victim was robbed and killed, learned he lived within walking distance, and noted Felder's physical description matched portions of the perpetrator's description as provided by the witnesses. Based on these facts, officers obtained a search warrant and searched Felder's home. However, because officers found nothing to indicate Felder was responsible for the robbery or the murder, detectives eliminated him as a suspect. Felder certainly behaved suspiciously—he went "back and forth" about whether he attended court on the afternoon of December 23, 2016 (he didn't), and his alibi was "shaky" because the Dorchester County Courthouse was closed on December 23. Felder then claimed he met with his lawyer on the day of the shooting but later indicated his lawyer was out of town for Christmas and they had to reschedule. Finally, Felder claimed that after he left the courthouse, he met with his landlord in Cordesville.

We acknowledge Felder's problematic alibi tales and the various eyewitness descriptions of the perpetrator running from the scene. But unlike the *Holmes* defendant, Brown presented no witnesses suggesting Felder claimed responsibility for the crimes nor otherwise offered evidence of Felder's guilt to the exclusion of Brown. No witness described the perpetrator as dressed in mostly red from head-to-toe (as Felder was) or mentioned a leather jacket like that worn by Felder. Instead, the witnesses consistently described the perpetrator's clothing as dark-colored (gray or black) and indicated the runner had something on his head—dreadlocks, twists, a hoodie, a skullcap, or "some kind of hat." We are not convinced that the facts that Felder had dreadlocks, as initially described by two of the witnesses, and wore a jacket with Michael Jordan's number 23 on the back, as noted by one witness, point to Felder as the guilty party to the exclusion of Brown such that an abuse of discretion has occurred. Critically, when officers showed McBride and Williams photographs of Felder from December 23, both stated he was not the person they saw running from or near Victim's home. Other than "bare suspicion" and the close proximity of his home, there is simply no evidence to suggest Felder was the perpetrator here. As evidence in the record supports the circuit court's denial of Brown's motion to introduce evidence of third-party guilt, we find no abuse of discretion. *See e.g.*, *Cope*, 405 S.C. at 341, 748 S.E.2d at 206 (recognizing under *Gregory* that "evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded" and must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." (alteration in original) (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 532)).

III. Motion to Suppress and the Warrant Affidavit

Brown moved to suppress the bullets recovered from his bedroom, arguing they were seized pursuant to a search warrant flawed by a lack of supporting probable cause. Brown contends Detective Goldstein's warrant affidavit lacked facts sufficient to support a finding of probable cause because the affidavit did not separately particularize, by witness, the descriptions each of the three witnesses gave of the perpetrator. Brown further asserts that because the affidavit gave only a conclusory description of the connection to the recovered iPhone, the phone's contents were insufficient to support issuance of the search warrant. In sum, Brown argues the affidavit in support of the search warrant was disingenuous to the point that the fruits of the warrant must be suppressed in accordance with *Franks v. Delaware*, 438 U.S. 154 (1978). We disagree.

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The *Franks* court explained:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request.

438 U.S. at 154. Our own supreme court has explained that *Franks* addresses more than affirmative false statements by law enforcement:

> [T]he *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit. To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted

> data, still contains sufficient information to establish probable cause.

Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (citation omitted) (footnote omitted). In *State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016), this court discussed *Franks*:

> The defendant has the burden of proving the officer acted with the requisite intent. A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that *its inclusion* in the affidavit would defeat probable cause.
>
> ….
>
> Probable cause is a commonsense, nontechnical conception [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Id. at 627–28, 790 S.E.2d at 444 (alteration in original) (internal citations and quotations omitted).

The probable cause affidavit provided with the search warrant request here reads:

> That on 12/23/16 at approximately 13:00hrs, the victim John Glenn Pritchard W/M/ DOB [redacted] was shot and killed during the commission of an armed robbery, burglary at [redacted] E. Thomas St. Lincolnville S.C. That the subject documented above Joseph Lamar Brown Jr. is believed to be the assailant in this incident [through] the affiant's investigation. At the time of the robbery the defendant was armed with a 9mm firearm. Recovered at the crime scene was one 9mm spent casing within proximity of the deceased inside the residence. The assailant was wearing running pants or some type of trouser, stone washed with a shirt of some type with the

> number 23 on it, and a pair of red sneakers. These descriptions are listed in various statements of witnesses in the area of the homicide who spoke with detectives from the CCSO. A short distance away from the scene of the homicide a witness gave an audio statement that the assailant was dropping cash and his cellphone from his pant pocket onto E. Owens St. Lincolnville, S.C. as he was running away from the residence. The cellphone was taken as evidence by the CCSO, and during the investigation it was determined that the above subject Joseph Lamar Brown Jr. is the owner. The driver's license and other records reflect that the above subject Joseph Lamar Brown Jr. also fits the physical description of the person fleeing the scene, dropping the cellphone as stated above in this affidavit. The affiant believes that the above evidence is at Joseph Lamar Brown Jr.'s listed above, that is also on his SCDL and is in the proximity of the homicide.

Brown contends the affidavit's statement that Brown "fits the physical description of the person fleeing the scene, dropping the cellphone" is false because there was no single description of the perpetrator and the witness descriptions varied widely. He argues the individual descriptions were more vividly contrary to each other than the affidavit conveys and the only commonalities were that the perpetrator was a black male of medium build:

> For example, one witness described the assailant as a "young boy," and another described him as someone in his twenties or thirties. One witness said the person was wearing sweatpants, another witness said he was in all black clothing, and the third witness said he was wearing black jogging pants. Only one witness described the black hoodie with a number 23 on the back and distinctive red shoes. Two witnesses said the person had dreadlocks, and the other witness provided no description about the person's hair at all.

In our view, the evidence does not establish Detective Goldstein knowingly or intentionally made false statements in the warrant affidavit, or made statements in the affidavit with reckless disregard for the truth. Although the witnesses'

descriptions do vary in certain respects, all of the witnesses described the perpetrator as a medium-build, black male, dressed in dark clothing, and between the ages of eighteen and thirty. When shown still photos taken from the surveillance video, the witnesses unequivocally identified Brown.

Even if we accept for argument purposes Brown's premise that Detective Goldstein acted recklessly in omitting from his affidavit some of the contradictory details from the witness descriptions or details related to ownership of the iPhone, we find Brown has failed to demonstrate a *Franks* violation because if the affidavit were to include the referenced omitted details, it would still provide the probable cause necessary for issuance of the warrant. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 397 ("There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause."). The lock screen photograph on the iPhone and Manigault's confirmation that the iPhone belonged to Brown and that Brown told her he ran from Red Coleman's house following the gunshot—facts admittedly omitted from the search warrant affidavit—supported law enforcement's reasonable belief that the iPhone recovered near the crime scene belonged to Brown. Moreover, Perez's video surveillance and Brown's DMV records, as well as the fact that Brown matched descriptions of the perpetrator, provided additional probable cause supporting issuance of the warrant. *See Porch*, 417 S.C. at 627, 790 S.E.2d at 444 ("The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990))). Accordingly, we find the circuit court did not err in denying Brown's motion to suppress the evidence seized from his home and iPhone.

Conclusion

For the foregoing reasons, Brown's convictions are

AFFIRMED.

THOMAS and HEWITT, JJ., concur.