

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Nicholson, Jr., Circuit Court Judge

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Jun 16 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOSEPH LAMAR BROWN, JR.

APPELLANT

APPELLATE CASE NO. 2019-000781

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to dismiss the charge of armed robbery against Appellant based upon a violation of his constitutional protections against double jeopardy where the first jury declared it had reached a unanimous verdict of not guilty on the charge?

II. Did the trial judge err by prohibiting evidence of third party guilt where Appellant identified a specific person as the assailant, the person matched significant details of the assailant provided by witnesses, the person's guilt was inconsistent with Appellant's guilt, the person lived within walking distance of the shooting scene and was found in the area of the shooting within hours of the shooting, and the person's jacket tested positive for gunshot residue?

III. Did the trial judge err by failing to suppress evidence secured by a search warrant where (1) the affidavit contained false statements, including that that Appellant "fits the physical description of the person fleeing the scene" when there was no single description and the descriptions available varied wildly, and (2) the affidavit provided merely conclusory statements regarding ownership of a cell phone found near the scene, and exclusion of these statements from the affidavit resulted in a lack of probable cause?

STATEMENT OF THE CASE

On July 11, 2017, a Charleston County grand jury indicted Appellant for murder (2017-GS-10-4077), burglary in the first degree (2017-GS-10-4081), armed robbery (2017-GS-10-4083), and possession of a weapon during the commission of a violent offense (2017-GS-10-4079). R. 1154-1155; R. 1158-1159; R. 1161-1162; R. 1164-1165.

The state called Appellant to trial on June 11-14, 2018, before the Honorable Kristi Harrington and a jury. R. 567. The jury began deliberating at 12:18 p.m. on June 14, 2018. R. 1118. While deliberating, the jury had numerous questions. R. 1118-1119. One of the notes indicated the jury had reached a unanimous verdict of not guilty on armed robbery, but the jury was unable to reach unanimous verdicts on the other indictments. Supp. R. 1. In response, Judge Harrington instructed the jury pursuant to Allen v. United States, 164 U.S. 492 (1896). Supp. R. 1; R. 1119-1121. Nevertheless, the jury was unable to reach a unanimous verdict on the remaining charges, and Judge Harrington declared a mistrial. Supp. R. 1; R. 1122-1123.

The state, represented by D. Bruce Durant and Jason Heggelke, called the case for a second trial on November 5, 2018. R. 1. Teresa L. Norris and Taylor L. Seman represented Appellant. R. 1. In light of the first jury finding Appellant not guilty of armed robbery, the state recognized the weakness of its case as it pertained to the armed robbery charge. R. 202, l. 23 – R. 203, l. 9. Due to this weakness, the state requested a jury instruction on attempted armed robbery. R. 202, l. 23 – R. 203, l. 9. Ultimately, the second jury found Appellant guilty of murder, first degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime. R. 533, ll. 2-22.

During the sentencing proceeding, Judge Nicholson questioned Appellant extensively regarding whether he accepted responsibility for the offenses. R. 541, ll. 7-8; R. 541, ll. 14-15.

Thereafter, Judge Nicholson sentenced Appellant to life imprisonment without the possibility of parole for murder, fifty years imprisonment for burglary, ten years for attempted robbery, and five years for the weapon. R. 543, l. 24 – R. 544, l. 19; R. 1156-1157; R. 1160; R. 1163; R. 1166.

Appellant filed a motion to reconsider his sentence. R. 1149. Judge Nicholson convened a hearing on the motion on May 8, 2019. R. 545. Durant represented the state, and Norris represented Appellant R. 545. Again, Judge Nicholson focused on whether Appellant accepted responsibility for the crimes. R. 549, ll. 6-8; R. 549, ll. 11-13. Despite defense counsel reminding Judge Nicholson of Appellant’s right review of his convictions and that any acceptance of responsibility would nullify the review, Judge Nicholson still questioned whether Appellant was entitled to a lesser sentence if he had not accepted responsibility for the offenses. R. 549, ll. 18-21. Picking up on the judge’s line of thinking, the solicitor argued Appellant was not entitled to a lesser sentence because he never showed “an ounce of remorse ... [and] never even accepted responsibility.” R. 555, ll. 3-5. When defense counsel objected to the state’s argument regarding Appellant’s failure to show remorse, Judge Nicholson claimed he was not considering whether Appellant was remorseful. R. 558, ll. 11-20; R. 561, ll. 17-18. On May 10, 2019, Judge Nicholson issued an order reconsidering Appellant’s sentences. R. 1151. He amended Appellant’s sentence for murder from life imprisonment to fifty-two years. R. 1151; R.1157. Appellant’s remaining sentences were unchanged. R. 1151.

On May 10, 2019, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in failing to dismiss the charge of armed robbery against Appellant based upon a violation of his constitutional protections against double jeopardy where the first jury declared it had reached a unanimous verdict of not guilty on the charge.

Standard of review

“In criminal cases, an appellate court sits to review errors of law only and is bound by the trial court’s factual findings unless they are clearly erroneous.” State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011). The reviewing court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge’s ruling is supported by any evidence.” Id. at 611-612, 707 S.E.2d at 801. See also State v. Robinson, 360 S.C. 187, 191, 600 S.E.2d 100, 102 (Ct. App. 2004) (remarking “[i]n criminal cases, the appellate court sits to review errors of law only”).

Relevant facts

When the state called Appellant’s case to trial on November 5, 2018, defense counsel moved to dismiss the armed robbery charge based upon double jeopardy. R. 11, ll. 2-16; Supp. R. 1. Counsel explained that “[d]uring the week of June 11, 2018, the state tried [Appellant].” Supp. R. 1; see also R. 11, ll. 2-4. At that time, “[t]he jury hung on the charges of possession of a firearm during a violent crime, burglary (first degree), and murder, but did reach a unanimous verdict of not guilty on the charge of armed robbery.” Supp. R. 1; see also R. 11, ll. 2-7. Defense counsel explained more fully that during its deliberations, “the jury returned five notes and the testimony of Hugh Potter Pritchard was replayed at the request of the jury.” Supp. R. 1. Most importantly, “[o]ne of those notes indicated that the jury had reached a unanimous verdict of not guilty on armed robbery, but was unable to reach unanimous agreement on the other indictments.” Supp.

R. 1. Subsequently, Judge Harrington instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). Supp. R. 1; R. 567. Even after receiving the supplemental instruction, the jury was unable to reach a verdict. Supp. R. 1; R. 567. Judge Harrington declared a mistrial. Supp. R. 1; R. 567.

Additionally, after the first trial, defense counsel obtained affidavits from two jurors indicating the jury unanimously decided Appellant was not guilty of the armed robbery charge and never revisited discussion of that offense again during their deliberations. R. 12, ll. 8-11; Supp. R. 1. In fact, the foreperson had signed the form indicating the jury's verdict of not guilty on the armed robbery charge prior to the jury continuing its deliberations on the remaining charges. Supp. R. 1.

Judge Nicholson questioned whether anyone made a motion to accept the verdict when the jury revealed it reached a unanimous verdict of not guilty as to the armed robbery charge, and defense counsel candidly admitted she did not. R. 11, ll. 13-23. The judge found the jurors "thought they reached a decision," but the decision was "never ... documented by anyone." R. 14, ll. 23-25. Judge Nicholson found the jury's unanimous not-guilty verdict as to armed robbery "was brought to [the state's] attention, the defense counsel's attention, and the Court's attention ... by note." R. 18, ll. 11-14. Judge Nicholson asserted that "the time to have raised this was when the Foreman or Forelady, or whoever, announced that they had reached that verdict." R. 14, ll. 16-19. According to the judge, it was incumbent upon "[e]ither [defense counsel] or the state or the judge, or someone, ... to say I accept that verdict." R. 14, ll. 19-20.

Judge Nicholson denied Appellant's motion to dismiss. R. 93, l. 22 – R. 94, l. 5. He denied the motion because "no one raised that issue at the prior trial, ... [and] the time to have raised that issue was at the trial." R. 93, ll. 23-25. The judge reiterated that the jury's verdict on armed

robbery was not “raised by the Court or the solicitor or the defense counsel” and “was never accepted by the Court, documented by the Court.” R. 94, ll. 1-3.

Discussion

Both the United States Constitution and the South Carolina Constitution protect individuals from being twice placed in jeopardy by the state. “No person shall be ... subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend V.¹ “No person shall be subject for the same offense to be twice put in jeopardy of life or liberty.” S.C. Const. Art. 1, § 12. The Double Jeopardy Clause embodies two vitally important interests. Yeager v. United States, 557 U.S. 110, 117 (2009). The first is the “deeply ingrained” principle that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” Id. at 117-18 (quoting Green v. United States, 355 U.S. 184, 187-188 (1957)). The second interest is the preservation of “the finality of judgments.” Id. at 118 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).

“It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner’s consent, or upon some ground of legal necessity or the verdict, if rendered be set aside according to law.” Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); see also State v. Baum, 355 S.C. 209, 214, 485 S.E.2d 419, 421 (2003). The guarantee against double jeopardy offers three separate constitutional protections: (1)

¹ The Fifth Amendment is made applicable to the states through the Fourteenth Amendment’s Due Process clause. Benton v. Maryland, 395 U.S. 784 (1969).

protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003); see also State v. Easler, 327 U.S. 121, 130 (1997) (citing Brown v. Ohio, 432 U.S. 161 (1977) (holding “The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense”). Further, under the law of double jeopardy, a person may not be prosecuted for the same offense after an improvidently granted mistrial. State v. Coleman, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005). The bar on re-trials after acquittal is “[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence.” United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

“[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant’s jeopardy, and even when not followed by any judgment is a bar to a subsequent prosecution for the same offense.” Green v. United States, 355 U.S. 184, 188 (1957) (internal quotation omitted). Essentially, “[f]or a jury note regarding the jury’s inability to reach a verdict to bar a subsequent prosecution after a mistrial, there must be some indication that the jury had finally resolved to acquit the defendant.” Traylor v. State, 567 S.W.3d 741, 744 (Tex. Crim. App. 2018). “[F]orm is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution.” Sanabria v. United States, 437 U.S. 54, 66 (1978). “[W]hat constitutes an ‘acquittal’ is not to be controlled by the form of the judge’s action.” United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). The court “must determine whether the ruling of the judge [or jury], whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” Id.

Appellant readily admits that typically a jury's verdict must be presented in open court and received by the court. "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." State v. Bilton, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930). However, in this case, the jury sent a note to the trial judge explaining they were unanimous in their decision to acquit Appellant of the armed robbery charge. The note expressed the jury's finality with regard to the armed robbery indictment. Further, the affidavits presented by Appellant in his motion to bar his re-trial explained the jury did not revisit the armed robbery charge after being instructed by the judge to continue its deliberations. Supp. R. 1.

Finally, and most importantly, the supplemental instruction given by Judge Harrington showed the jury did not reconsider its verdict on armed robbery. When giving the supplemental charge, Judge Harrington told the jurors that they "ha[d] been unable to agree on a verdict in this case." R. 1119. She explained that she had told them earlier that their verdict "must be unanimous." R. 1119. She instructed the jury "to make every reasonable effort to reach a unanimous verdict." R. 567. Thus, the jury was told to resume deliberating on the charges for which they were unable to reach unanimity. The jury was not instructed to deliberate further on the charge for which they had reach unanimity – the armed robbery charge. Therefore, the jury's verdict of not guilty on the armed robbery offense was its final determination on that charge.

At Appellant's second trial, the state relied upon the easily distinguishable case of Blueford v. Arkansas, 566 U.S. 599 (2012), in requesting the judge not bar the state from requiring Appellant to run the gauntlet twice on the charge of armed robbery. R. 18, ll. 15-21. The State of Arkansas charged Blueford with capital murder. Blueford v. Arkansas, 566 U.S. 599, 602 (2012). The jury was instructed to consider capital murder, first-degree murder, manslaughter, and negligent

homicide. Id. The judge instructed the jurors to consider first-degree murder if they had a reasonable doubt about Blueford's guilt on the capital murder charge. Id. Similarly, the judge instructed the jury to consider manslaughter if it had a reasonable doubt as to the first-degree murder charge. Id. Finally, the jury was told to consider negligent homicide if it had a reasonable doubt of Blueford's guilt of manslaughter. Id.

When the jury revealed that it was deadlocked, the judge inquired as to the votes on each offense. Id. at 603. The jury unanimously voted against capital murder and murder in the first degree, but was hung on manslaughter. Id. at 604. The jury had not considered negligent homicide yet. Id. The judge instructed the jury to continue deliberating. Id. Additionally, the judge denied Blueford's request for new verdict forms to be submitted to the jury on those counts for which they had reached verdicts. Id. Ultimately, the jury was unable to reach a verdict, and the judge declared a mistrial. Id. When the state subsequently sought to retry Blueford, he moved to dismiss the capital murder and first-degree murder charges on double jeopardy grounds based upon the foreperson's report that the jurors had voted unanimously against guilt on those offenses. Id.

The United States Supreme Court held "[t]he foreperson's report was not a final resolution of anything." Id. at 606. "When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded." Id. According to the Court, "[t]he fact that deliberations continued after the report deprive[d] that report of the finality necessary to constitute an acquittal on the murder offenses." Id.

Further, the Court was unconvinced by Blueford's argument that the jury instructions, which told the jurors not to consider a lesser offense unless it had a reasonable doubt as to the greater offense, meant the jurors had not revisited the greater offenses during the extended deliberations. Id. at 606-607. The Court reasoned that "nothing in the instructions prohibited the

jury from reconsidering” its prior votes. Id. at 607. “The jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one.” Id. Due to the possibility that the jurors could revisit their votes on the greater offenses, “the foreperson’s report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered.” Id. at 608.

Appellant’s case is easily distinguished from Blueford. The Blueford jurors were considering only one indictment. While the jurors were instructed to consider lesser-included offenses, the jurors were only concerned with the facts and circumstances surrounding the one indictment for capital murder. Therefore, when the Blueford jurors were instructed to resume deliberations, inevitably, the jurors were re-considering the facts and circumstances surrounding the one indictment for capital murder, including whether Blueford’s conduct constituted capital murder, first-degree murder, manslaughter, or negligent homicide. Here, Appellant’s first jury – just as his second jury – was not consider a single indictment. Instead, the state called Appellant to trial on four separate and distinct indictments, which the judge, and South Carolina law, require the jury to consider separately and distinctly. Unlike in Blueford where the jury was considering the same conduct for the single indictment, Appellant’s jury was considering a variety of sets of facts and circumstances applicable to separate and distinct indictments. See State v. Robinson, 360 S.C. 187, 191, 600 S.E.2d 100, 102 (Ct. App. 2004) (explaining that the jury returned a not guilty verdict on the charge of possession of a firearm during the commission of a crime, but was not unanimous on two other charges resulting in a mistrial only as to those two other charges).

The trial judge erred in failing to bar Appellant’s re-trial on the armed robbery indictment where the first jury acquitted him of the offense. The trial judge placed form above substance

when he required that defense counsel request that the verdict be accepted. He was aware that trial counsel admitted she failed to raise any issue about the acquittal during the first trial, and that any collateral attack on counsel's conduct would be forthcoming. Yet, the judge continued to require that counsel have moved to accept the verdict or the judge to have accepted the verdict in order for the double jeopardy principles to apply. This was error. Appellant respectfully requests this Court reverse the trial judge, vacate his conviction for attempted armed robbery, and hold that any trial on the armed robbery indictment be barred by double jeopardy.

II. The trial judge erred by prohibiting evidence of third party guilt where Appellant identified a specific person as the assailant, the person matched significant details of the assailant provided by witnesses, the person's guilt was inconsistent with Appellant's guilt, the person lived within walking distance of the shooting scene and was found in the area of the shooting within hours of the shooting, and the person's jacket tested positive for gunshot residue.

Standard of review

“The admissibility of evidence is within the sound discretion of the trial judge.” State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). “Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant.” Id. “On appeal, [the reviewing court is] limited to determining whether the trial court abused its discretion.” Id. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” Id. at 315, 652 S.E.2d at 415.

Relevant facts

During the pre-trial hearing, several witnesses testified regarding their observations on the day of Pritchard's death. Barry Goldstein, the case agent, informed the judge of the descriptions he received from the various witnesses on the scene. R. 24, ll. 18-20. Hugh Potter Pritchard was present in the home when the shooting occurred. R. 26, ll. 2-5. He told the police the assailant was a black male who stood between five eight and five ten. R. 26, ll. 9-10. The shooter was wearing all black clothing and weighed about 170 pounds. R. 26, ll. 10-11. Pritchard was unable to make out any facial features because the shooter's face was covered. R. 26, l. 11.

Celest McBride, lived a short distance from the deceased. R. 26, l. 20 – R. 27, l. 1; R. 53, ll. 20-23. She told the police that she saw an individual running down the street away from the deceased's home around the time of the shooting. R. 27, ll. 7-11; R. 54, ll. 16-18. She saw the individual drop a large amount of money and his cell phone. R. 27, ll. 11-14; R. 55, ll. 2-12. The individual picked up the cash, but he left the cell phone. R. 27, ll. 17-20; R. 55, ll. 13-17. Celest told the police the man whom she saw running was "a black male" wearing "stone-gray sweatpants." R. 28, ll. 17-18; R. 55, ll. 21-25. The man had dreads, was of a medium build, and stood between five ten and six foot. R. 28, l. 18; R. 55, ll. 23-25. According to Celest, the man was not running fast – it was a "fast jog." R. 58, ll. 10-12.

The police also spoke to Merit Williams who lived near the deceased. R. 29, ll. 1-7. Shortly after the shooting, Williams was driving down the road when he saw someone running and dropping items as well. R. 29, ll. 4-18; R. 62, ll. 16-21; R. 64, ll. 8-13. He described the person as "a young black male, dark skin, black hoodie with the number 23 on the back of it." R. 29, ll. 19-21; R. 62, l. 22 – R. 63, l. 3. The number 23 was multicolored. R. 29, ll. 22-25; R. 63, ll. 7-12. According to Williams, the man wore black warm-up pants and red Converse sneakers. R. 30, ll. 8-9; R. 63, ll. 1-6. Additionally, Williams said the man had shoulder length dreads. R. 30, ll. 15-16; R. 66, ll. 3-6. Contrary to Celest's description, Williams asserted the man "was trying to get out of Dodge quick in a hurry." R. 64, ll. 11-13. Williams believed "the guy was running for exercise." R. 66, ll. 14-16.

While canvassing the area between three and four o'clock in the afternoon, Goldstein "saw an individual that had dreads, wearing a red-and-black jacket with a 23 on the back." R. 31, ll. 5-8; R. 35, ll. 8-16. In fact, his dreadlocks were shoulder length. R. 46, ll. 14-15. The individual – David Felder – was within walking distance of Pritchard's home. R. 46, ll. 3-8; R. 47, ll. 3-7. The

man's jacket was "a leather-type jacket" that was predominantly red. R. 31, ll. 13-16. He was wearing red pants and red shoes. R. 31, ll. 20-23. Additionally, Felder had a red cap in his hand. R. 33, ll. 11-13. See also Court's Exhibits #5, 6, 7, 8. Felder caught Goldstein's attention because "he fit Mr. Williams' description." R. 46, ll. 16-19.

However, Goldstein claimed Felder had an alibi. R. 32, ll. 6-10. Felder told the police that at the time of the shooting, he "had to meet his attorney up at the Dorchester County courthouse." R. 34, ll. 15-19; R. 35, ll. 4-7. His meeting was at 1 p.m. on December 23, 2016. R. 34, ll. 22-24; R. 48, l. 25 – R. 49, l. 1. According to Goldstein, Felder's alibi was confirmed by two women, one of whom was Felder's girlfriend. R. 34, l. 25 – R. 35, l. 3. Felder claimed that when he arrived at the courthouse, his attorney was not there. R. 36, ll. 3-5. Felder "rescheduled, and then went to Cordesville." R. 36, ll. 6-8; R. 50, ll. 10-12. The police later learned there was no court on December 23, 2016, in Dorchester. R. 49, ll. 2-17.

Based upon the information available to the police – finding Felder within close proximity to the shooting scene shortly after the murder and his physical description matching portions of the description provided by the witnesses – the police obtained a search warrant to search his house. R. 47, l. 23 – R. 48, l. 3. In other words, the police were able to establish probable cause that Felder's residence contained evidence of Pritchard's shooting death. R. 47, l. 23 – R. 48, l. 12. Additionally, the jacket Felder was wearing – the one with the distinct 23 on the back – tested positive for gunshot residue. R. 49, ll. 21-23.

Defense counsel argued for the admission of evidence linking Felder to the shooting. R. 68, ll. 2-5; Second Supp. R. 239. As counsel explained, the evidence against Felder was inconsistent with Appellant's guilt and raised a reasonable presumption of Appellant's innocence. R. 68, ll. 11-13; Second Supp. R. 239. As defense counsel explained, Felder fit Williams'

description of the person he saw running from the shooting scene and portions of the description offered by Celest. R. 68, l. 24 – R. 69, l. 5; Second Supp. R. 239. In fact, the police were convinced that Felder met the description provided by Williams – at least, in large part. R. 69, ll. 3-4; R. Second Supp. R. 239. The police detained Felder, transported him to the police station and interrogated him, and seized his clothing based upon the significant evidence against him. R. 69, ll. 6-11; Second Supp. R. 239. Without question, Felder “match[ed]” “certain portions” of the descriptions provided by the witnesses. R. 70, ll. 15-20. Importantly, Felder had shoulder length dreadlocks, unlike Appellant. R. 73, ll. 5-8; R. 75, ll. 7-17; see also R. 46, l. 25 – R. 47, l. 2; R. 72, ll. 21-23; R. 77, ll. 10-17. Not only did Felder live near Pritchard, but he was found by the police a short distance away from Pritchard’s home within hours of the shooting. R. 73, ll. 15-18.

The state argued there was “no evidence in th[e] case pointing out David Felder as the guilty party.” R. 76, ll. 22-24. Later, the solicitor qualified his statement: “[T]here’s no evidence whatsoever pointing to him as being responsible for this crime, other than the fact that he had dreads and he wore Michael Jordan’s number. Period.” R. 77, ll. 22-23. When the judge inquired about Felder having dreadlocks just as a witnesses described, the solicitor responded that “probably a third of the black community” had dreadlocks. R. 77, ll. 1-4. Similarly, when the judge questioned the solicitor about the distinctive number 23 on the jacket, he maintained that the number was “Michael Jordan’s number” “that another third of them have.” R. 77, ll. 6-9. According to the state, the defense was required “to show such a fact, a train of facts or circumstances tending to clearly point out Mr. Felder as the guilty party.” R. 78, l. 25 – R. 79, l. 2.

Judge Nicholson concluded the evidence against Felder was “a mere suspicion.” R. 69, ll. 22-24. He noted that Felder had an alibi, which the police “checked.” R. 73, ll. 20-22. He was

unmoved by the fact that one of the women who claimed to be Felder's alibi was his girlfriend. Likewise, he was unmoved by the fact that Felder told the police that he went to the courthouse in Dorchester to meet with his lawyer on December 23 – a day that courthouse was closed. In fact, Felder actually claimed that he had a court appearance that day. R. 74, ll. 13-22; Second Supp. R. 239. Instead, Judge Nicholson seemed persuaded simply because the police did not charge Felder. R. 73, ll. 24-25.

Ultimately, the judge granted the state's motion to suppress any evidence concerning third party guilt as to Felder. R. 92, ll. 7-9. He found "[a]t best," the evidence raised "a mere suspicion that he had dreadlocks and some residue on his sleeves." R. 92, ll. 9-11. He remarked that the witnesses described the assailant's clothing as "dark," but that Felder was mostly wearing red. R. 92, ll. 12-21. In the judge's estimation, when the witnesses claimed the assailant was in a hoodie that meant he was wearing "some type of cloth or sweatshirt." R. 92, ll. 14-16. Goldstein said Felder was wearing a leather jacket. R. 92, ll. 16-17. He determined the only similarity was the "colored 23." R. 92, ll. 20-21. Thus, he concluded the significant evidence against Felder "raise[d] a mere suspicion ... that the fellow possibly had committed the crime." R. 92, ll. 22-25.

Defense counsel submitted the trial transcript from Appellant's first trial to show how counsel would have used the evidence of third party guilt, which had not been excluded then. R. 94, ll. 9-21; R. 567. Counsel proffered body camera video from an officer who went to Felder's home. R. 297, ll. 7-11; Court's Exhibit #11. Additionally, counsel proffered photographs showing Felder, which demonstrated that his physical description, including his clothing, largely matched what the witnesses described. R. 297, l. 24 – R. 298, l. 1; Court's Exhibits #5, 6, 7, 8, 9. Had counsel been permitted to do so, counsel would have questioned law enforcement regarding their suspicions of and interactions with Felder. R. 298, ll. 1-18; R. 1127. Counsel would have

questioned the law enforcement witnesses extensively regarding their evidence against Felder that resulting in his detention and interrogation. R. 299, ll. 10-13.

Counsel explained her questions to law enforcement would have mirrored those she presented during the first trial concerning Felder. R. 300, l. 8 – R. 301, l. 10; R. 567. However, counsel would have questioned one of the officers about a shooting that occurred when Felder was detained, which counsel had not done during the first trial. R. 300, ll. 16-20. Finally, counsel would have (1) introduced screenshots from the body cam of one of the officers showing Felder’s arrest and (2) called a gunshot residue expert to explain the gunshot residue that was found on Felder’s clothing. R. 302, l. 17 – R. 303, l. 4; Court’s Exhibit #13.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986) (holding the Sixth Amendment “constitutionalizes” the right to present a defense in a criminal trial). “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina’s Constitution provides similarly: “Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....” S.C.

Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 (“Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...”).

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). ““The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.”” Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). ““The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.”” Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States Supreme Court declared “[t]his right is a fundamental element of due process of law.”” Id.

South Carolina’s third party guilt evidence rule provides that

The evidence offered by an 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. ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts and 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.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941).

The South Carolina Supreme Court determined Bruce Miller was entitled to post-conviction relief where trial counsel failed to present evidence of third-party guilt. Miller v. State, 379 S.C. 108,

665 S.E.2d 596 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Bruce Miller’s defense was third-party guilt. Id. at 114, 665 S.E.2d at 599. He claimed his nephew, Derrick Miller, was the culprit. Id. at 116, 665 S.E.2d at 600. The state presented Stephanie Pauling, Bruce’s girlfriend as a witness to establish that Bruce had access to a car – her car – that fit the description of the car used by the assailant. Id. at 111, 665 S.E.2d at 597. Pauling also claimed that Bruce owned a handgun and that he was wearing a gold medallion on the day of the robbery, as these facts were helpful to the state’s case by corroborating the description given by the complaining witness. Id.

On cross-examination, Pauling admitted that she and Derrick had been charged with three armed robberies in the same area. Id. at 112, 665 S.E.2d at 597-598. She also described Derrick, and this description was very similar to the one given by the complaining witness of the armed robbery. Id. at 112, 665 S.E.2d at 598. Although Pauling testified during a proffer that her car was used during each of the three robberies for which she and Derrick were charged as well as the one for which Bruce was charged, trial counsel did not elicit this testimony from Pauling in front of the jury. Id. at 112-113, 665 S.E.2d at 598.

The Court held that “[b]ased on the proffer of Pauling’s testimony and the transcript from the PCR hearing, it [was] clear that trial counsel could have established Derrick Miller’s third party guilt by showing that Pauling’s vehicle was used as the ‘get away’ car in each of the robberies and that a similar handgun was used.” Id. at 116, 665 S.E.2d at 600. The Court recognized that “[a]lthough trial counsel, through Pauling’s testimony was able to establish a physical description of Derrick Miller, this was not sufficient to adequately establish a defense of third-party guilt.” Id. The complaining witness’s description of the robber was “akin to Derrick Miller’s physical features rather

than Bruce Miller's," but the similar descriptions was not enough to raise a reasonable inference of Bruce's innocence. Id.

Judge Nicholson erred when he precluded Appellant's introduction of evidence of third-party guilt. The proffered evidence – that Felder was the one who shot Pritchard and ran from the scene – was inconsistent with Appellant's guilt. According to the only eyewitness to the shooting, there was only one shooter. Additionally, each of the witnesses who described someone running from the scene only described one person. Thus, the first part of the Gregory test was satisfied by the evidence presented.

Contrary to Judge Nicholson's finding, the proffered evidence did more than cast a bare suspicion on Felder. In fact, the police were convinced that the evidence was more substantial than a bare suspicion. When the police obtained a search warrant for Felder's residence, the police represented to the magistrate that they had sufficient evidence to establish probable cause that evidence of Pritchard's murder would be found in Felder's residence. Specifically, the police told the magistrate that "a witness" told the police "that a black male suspect was seen running from the incident location wearing red sneakers and had the number 23, on his clothing." Second Supp. R. 1. Further, "[t]he witness also advised that the suspect ran in the direction" of a street where Felder lived. Second Supp. R. 1. The affidavit claimed the case agent "observed a person matching the description a short time" after the murder. Second Supp. R. 1. In short, the following facts were sufficient to establish probable cause to search Felder's home for evidence of Pritchard's murder: Felder's appearance matched the description provided by a witness, his home was within walking distance of the murder scene, and he was found in the area within hours of the murder.

When the magistrate signed the search warrant, the magistrate agreed with the police that sufficient evidence existed to establish probable cause that evidence of Pritchard's murder would be

found in Felder's residence. The subsequent argument by the solicitor at trial that the evidence against Felder merely established a suspicion was incredulous and disingenuous, at best.

Indeed, the evidence against Felder showed a connection to the murder. As the police determined, Felder matched most of Williams' description of the perpetrator. Of all the witnesses, Williams provided the most specific description, and Felder satisfied almost all of the important criteria relayed by Williams. Just a few hours after the shooting, Felder was wearing the jacket with the distinctive 23 on the back. He was even wearing red shoes as Williams said. Felder also had shoulder-length dreadlocks as described by Williams and Celest. Felder's alleged alibi was implausible due to the date. There was no court on December 23. Felder equivocated between claiming he had a court appearance and claiming he was meeting with his lawyer. Further, his alleged alibi was confirmed by his girlfriend and a friend, both of whom had motives to lie in light of their relationships with Felder. Critically, Felder's jacket tested positive for gunshot residue. Thus, evidence of Felder's guilt established a sufficient connection to the murder to pass this portion of the Gregory test.

Judge Nicholson erred in failing to permit evidence of Felder's guilt during Appellant's trial. Not only was the evidence of Felder's guilt inconsistent with Appellant's guilt, but the evidence established a connection between Felder and the murder. When the police established probable cause to search Felder's home, the police used Felder's description matching the description provided by a witness, his location to the murder scene shortly after the murder, and his home being within walking distance of the murder scene. The evidence against Felder only strengthened subsequently. Felder's alleged alibi grew less reliable and more incredulous as the police learned there was no court on December 23. Finally, and most damning, Felder's jacket – the one with the distinctive number 23 on the back – tested positive for gunshot residue.

III. The trial judge erred by failing to suppress evidence secured by a search warrant where (1) the affidavit contained false statements, including that that Appellant “fits the physical description of the person fleeing the scene” when there was no single description and the descriptions available varied wildly, and (2) the affidavit provided merely conclusory statements regarding ownership of a cell phone found near the scene, and exclusion of these statements from the affidavit resulted in a lack of probable cause.

Standard of review

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citation omitted). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id. (citation omitted). “When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.” Id. The appellate court will reverse only when there is clear error. Id. (citation omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge’s decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

Relevant facts

Prior to trial, defense counsel moved to suppress evidence found in Appellant’s home pursuant to a flawed search warrant. R. 81, ll. 14-16; Second Supp. R. 1. Specifically, defense counsel argued the search warrant affidavit contained deliberately false statements or false statements made with reckless disregard for the truth. Second Supp. R. 1. First, the affidavit presented to the magistrate indicated that Appellant fit the description of the suspect as provided

by the witnesses. R. 82, ll. 12-16; R. 82, l. 23 – R. 83, l. 1. However, the witnesses gave wildly varying descriptions of the assailant. R. 39, ll. 5-7; R. 82, ll. 17-18. There was not a single description of the assailant; instead, there were many descriptions that varied tremendously. R. 83, ll. 1-4. Specifically, the search warrant affidavit informed the magistrate “[t]he 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.” Second Supp. R. 1. Further, the affidavit claimed “[t]hese descriptions are listed in various statements of witnesses in the area of the homicide.” Second Supp. R. 1. After recounting a witness’s statement that “the assailant was dropping cash and his cell phone from his pant pocket ... as he was running away from the residence,” the affidavit asserted that Appellant “fit[] the physical description of the person fleeing the scene, dropping the cell phone.” Second Supp. R. 1.

Additionally, the search warrant affidavit contained only a conclusory statement regarding the cell phone recovered near the deceased’s home. Specifically, the affidavit said “[t]he 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.” Second Supp. R.1. The affidavit contained “no information” to explain the source of the affiant’s claim that the phone belonged to Appellant. R. 83, ll. 5-9; R. 84, ll. 20-24; Second Supp. R. 1. When the police obtained the search warrant, they had not obtained access to the contents of the phone. R. 84, ll. 12-14.

On January 3, 2017, the police executed the search warrant and recovered two boxes of .9 millimeter ammunition. R. 237, l. 3 – R. 245, l. 24; Second Supp. R. 1. One of the boxes contained four .9 millimeter Speer Luger bullets, which were the same type of shell casing found at the crime scene. R. 237, l. 3 – R. 245, l. 24; Second Supp. R. 1.

As previously discussed in Issue II, supra, during the pre-trial hearing, several witnesses testified regarding their observations on the day of Pritchard's death. Goldstein provided an overview of the information the police obtained, including descriptions of the assailant from the various witnesses on the scene. R. 24, ll. 18-20. Hugh Potter Pritchard, who was present in the home when the shooting occurred, told the police the assailant was a black male who stood between five eight and five ten, weighed about 170 pounds, and was wearing all black clothing. R. 26, ll. 2-5; R. 26, ll. 9-11. According to Pritchard, the man wore a mask over his face and a hat over his head. R. 26, l. 11; R. 40, ll. 18-20. Pritchard was certain the shooter "wasn't a teenager," and he estimated the man was in his late twenties or thirties. R. 40, ll. 14-17.

From her window, Celest she saw an individual running down the street away from the deceased's home shortly after the shooting. R. 27, ll. 7-11. According to Celest, the individual dropped cash money and a cell phone. R. 27, ll. 11-14. The individual picked up the cash, but he left the cell phone. R. 27, ll. 17-20. The man was "a black male," – medium-dark complexion – wearing "stone-gray pants," and had shoulder length dreads. R. 28, ll. 17-18; R. 42, ll. 12-15. He was of a medium build, and stood between five ten and six foot. R. 28, l. 18; R. 41, ll. 22-25.

Williams saw "a young black male, dark skin, black hoodie with the number 23 on the back of it." R. 29, ll. 19-21. The number 23 was multicolored. R. 29, ll. 22-25. The man also wore black warm-up pants and red Converse sneakers. R. 30, ll. 8-9. Critically, Williams said the man had dreads. R. 30, ll. 15-16. Further, Williams told the police the man was wearing a skully cap with white writing on it. R. 43, ll. 9-11.

Defense counsel argued the police failed to disclose to the magistrate that the multiple descriptions of the assailant were vastly different, and that Appellant "matched" the descriptions only in the simplest of ways – he was a black male of medium build. R. 84, l. 25 – R.85, l. 10; R.

87, ll. 18-23. Importantly, Appellant did not match the portions of the descriptions that were consistent – long dreads. R. 85, ll. 6-10. As counsel argued, to say Appellant matched the description provided by any of the witnesses was a false statement. R. 86, ll. 17-21. Further, law enforcement failed to inform the magistrate that the police stopped someone else – Felder – near the crime scene within hours of the shooting based upon Felder matching significant portions of a specific description provided by a witness. R. 88, ll. 7-11. Finally, the affidavit contained a conclusory statement that the phone belonged to Appellant, but failed to inform the magistrate of the evidence that allegedly support such a conclusion. R. 83, ll. 5-25; R. 84, ll. 20-24; R. 91, ll. 4-8.

As predicted, the state argued the police “had basically three descriptions of a black male of medium build.” R. 88, ll. 22-23. In the solicitor’s view, “all [the affiant] was saying in that affidavit is when they got the DMV information for [Appellant]; he was a black male of medium build.” R. 88, ll. 23-25; R. 89, ll. 2-6. According to the solicitor, “that’s what [the affiant] was trying to state in the affidavit.” R. 89, l. 1.

Finally, the solicitor argued that the affiant’s sworn statement that Appellant matched the descriptions provided by witnesses was not what established probable cause for the search. R. 89, ll. 7-12. Instead, the only portions of the affidavit necessary to establish probable cause were that “Johnny Pritchard [was] shot, black male [was] seen running from the - - from the direction of the residence, dropping a phone in the ditch,” and that the phone belonged to Appellant “without question.” R. 89, ll. 7-12; R. 83, ll. 22-24. To support its conclusion that the phone belonged to Appellant, the state argued to the judge that information not known to the magistrate supported the conclusion. Specifically, the state argued the phone had a picture on its lock screen. R. 89, ll. 21-23. The picture was of Appellant and his girlfriend, which the police determined after first locating

Appellant's girlfriend and asking her to identify the person in the photograph with her. R. 90, ll. 1-20. In short, the state seemed to concede that the statement regarding Appellant matching the descriptions was false and argued instead that the affidavit supported a finding of probable cause without consideration of the false statement. Further, the state seemed to concede that the affidavit contained only a conclusion about the phone and failed to supply the necessary information that allegedly supported the conclusion. Nevertheless, the solicitor argued the affidavit supported probable cause for the search.

Judge Nicholson wanted to know if any case said "a police officer has got to sit down and put in great detail what the descriptions are, other than putting a conclusion or a statement in there under oath in his affidavit that he matched these descriptions in his opinion." R. 85, ll. 11-22. Ultimately, Judge Nicholson denied the motion to exclude the fruits of law enforcement's search of Appellant's residence. R. 91, ll. 20-22.

On January 3, 2017, the police searched Appellant's home pursuant to the flawed search warrant. R. 238, ll. 3-9. In the bedroom that law enforcement claimed belonged to Appellant, the police found two boxes of ammunition under a box spring. R. 239, ll. 8-14; R. 285, l. 23 – R. 286, l. 10. According to one of the officers, one of the boxes contained some "CCI .9 mm Luger" and some "Speer .9mm Luger." R. 241, ll. 3-5; R. 245, ll. 8-20.

During the trial, it was revealed that when the police arrived at the scene of the shooting, they found "a Speer .9mm Luger shell casing that was recovered from the living room floor of the residence." R. 229, ll. 4-5. Additionally, a state's witness told the jury that the fired bullet recovered from Pritchard's body during the autopsy was "most consistent with [a] .9mm Luger caliber bullet." R. 401, l. 16 – R. 402, l. 9. Based upon further examination, the witness opined the fired bullet was either Fabrique Nationale, Ruger, or Smith and Wesson. R. 403, ll. 3-10. The

witness also examined the shell casing found at Pritchard's home. R. 403, ll. 18-25. According to the witness, the shell casing was "Speer manufacturer .9mm Luger caliber." R. 404, ll. 17-18. She opined the cartridge case and the fired bullet were both .9mm Luger caliber. R. 404, ll. 19-22. Finally, and critically, the witness opined that "a few" of the rounds in the box of ammunition found in Appellant's house had "a Speer-head stamp with the same color case and type of bullet that [she] examined in this case." R. 409, l. 18 – R. 410, l. 3.

During his closing argument, the solicitor capitalized on the ammunition the police illegally seized from Appellant's home and the testimony he was able to illicit based upon the judge's erroneous ruling permitting its introduction. He told the jurors that "the ammo, the Speer .9 mm Luger rounds found under [Appellant's] box spring" were the "same" "make and caliber of ammunition" "as the one that killed Johnny Pritchard." R. 487, ll. 13-21.

Discussion

Appellant's right for his affects to be free from a search not based upon probable cause is rooted in the United States Constitution and the South Carolina Constitution. The Fourth Amendment to the United States Constitution provides for

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Additionally, the South Carolina Constitution provides similarly "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated" and for "no warrants [to] issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

searched, the person or thing to be seized, and the information to be obtained.” S.C. Const. Art. 1, § 10.

Thus, a search warrant must be based upon probable cause. “Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise.” Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff’s Dep’t, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court held that the Fourth and Fourteenth Amendments gave defendants the right to challenge the veracity of warrant affidavits after the warrants were issued and executed in certain circumstances, including where the affidavit omits necessary information. The Court explained that “where 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 requires that a hearing be held at the defendant’s request.” Franks v. Delaware, 438 U.S. 154, 155-156 (1978). If the falsity or reckless disregard for the truth is established by a

preponderance of the evidence, then the court must set aside the false material and determine whether the affidavit's remaining content provides probable cause. Id. In other words, first, a defendant must show the affidavit contained deliberately false statements or false statements made with reckless disregard for the truth. Second, a defendant must show that excluding those false statements, the warrant does not establish probable cause.

Our Supreme Court, applying Franks, found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The Court found the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. The Court then examined the affidavit by excluding the false information and inserting the exculpatory information. Id. at 555, 524 S.E.2d at 397. The Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id.

The Court presumed that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit. However, the Court found the information omitted in Missouri's case went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The Court explained that the omitted information did more than create "some uncertainty," rather it created "an affirmative hurdle which the remaining portions of the affidavit must overcome." Id. at 555-556, 524 S.E.2d at 397-398. Although finding the case presented a "close call on the probable

cause determination,” the Court held the combination of the officer’s false statement and omission of critical facts “pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant.” Id. at 556, 524 S.E.2d at 398.

Just as our Court has held that material information omitted from a warrant may qualify as a false statement or reckless disregard of the falsity of the statement, other federal courts of appeals have concluded the same. See Madiwale v. Savaiko, 117 F.3d 1321, 1327 (11th Cir. 1997); United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980).

The search warrant affidavit for Appellant’s home contained deliberately false statements and omissions. Contrary to the affidavit’s assertion that Appellant matched the witnesses’ descriptions of the person seen running from the shooting scene, Appellant only “matched the descriptions” in the most rudimentary of ways because the descriptions were vastly different from each other. In fact, the state argued that the descriptions expressed two commonalities: (1) black male, and (2) medium build. If this were all that were necessary to satisfy probable cause, then the requirement would be meaningless. Thus, the state argued, Appellant matched the descriptions. However, the descriptions were much more vivid and wildly contrary to each other.

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.

Frankly, Appellant did not match the descriptions provided, except in the most basic sense because he was a black male of medium build. However, the police informed the magistrate that

Appellant *matched* the descriptions of the assailant provided by the witnesses. This was a false statement. To the extent there was any truth to the statement, it was made with reckless disregard of the truth because of the considerable disagreement among the witnesses on the description of the assailant and the distinctive attributes provided for which Appellant did not match.

Further, the statements in the search warrant affidavit regarding the cell phone were merely conclusions without any basis for the magistrate to determine probable cause. “Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.” State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997) (internal quotation omitted).

Removing the false statements from the search warrant affidavit reveals a lack of probable cause. Second Supp. R. 1. Further, supplying the significant omitted information reveals a lack of probable cause. Appellant did not match the detailed descriptions, including a distinctive hairstyle and clothing, offered by the witnesses. At best, Appellant matched the most basic description offered by those witnesses of a black male of medium build. By offering a mere conclusion as to the cell phone’s ownership, the police failed to provide the magistrate with a basis for linking Appellant to the phone. The trial judge erred in failing to suppress the evidence that resulted from the execution of the search warrant pertaining to Appellant’s home.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court vacate his conviction and sentence for attempted armed robbery and dismiss the armed robbery indictment against him. As to Issues II and III, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of June, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

June 16, 2020

s/Susan B. Hackett

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