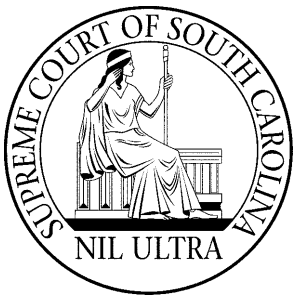

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 31, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Walter Rutledge Martin of the Greenwood County Magistrate's Court, Respondent.

Appellate Case No. 2022-000885

Opinion No. 28107
Submitted August 12, 2022 – Filed August 31, 2022

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Sara P. Morris, both of Columbia, for the Office of Disciplinary Counsel.

Robert Jamison Tinsley, Jr., Esquire, of Greenwood, for Respondent.

PER CURIAM: In this judicial disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to any sanction ranging from a confidential admonition up to a six-month definite suspension, and agrees to attend anger management counseling and pay costs. We accept the Agreement and issue a public reprimand.

I.

Respondent was admitted to practice law in South Carolina in 1994, and he has served as a magistrate judge in Greenwood County since May 2007.[1] The current Agreement arises from two separate incidents that occurred in the fall of 2021.

During the first incident, which occurred in September 2021, Respondent was presiding over a jury trial when defense counsel requested that a motion be heard outside the presence of the jury. Respondent agreed to hear the motion, and after the jury was escorted out, plaintiff's counsel and Respondent engaged in a heated exchange during which counsel challenged how Respondent knew of defense counsel's motion. Respondent scolded plaintiff's counsel for not listening and directed him to "get the f**king wax out of his ears." Judge then cleared his throat, apologized, and asked plaintiff's counsel to "take the wax out of his ears." At the conclusion of the hearing, Respondent again apologized for using profanity and immediately self-reported the misconduct to ODC.

The second incident occurred in November 2021 after the Greenwood County clerk staff notified Respondent late in the afternoon that he was assigned to preside over a jury trial the following morning at 9:30 a.m. Respondent subsequently complained to the Chief Magistrate in a loud and agitated manner and yelled at the scheduling clerk for failing to provide him timely notice of the jury trial. After the Chief Magistrate intervened, Respondent returned to his office and subsequently apologized to both the scheduling clerk and the Chief Magistrate.[2]

II.

Respondent admits that by his conduct he violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 2(A) (requiring a judge to act

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[1] Respondent's disciplinary history includes a 2012 public reprimand, which resulted from Respondent losing his temper and cursing at a defendant during bond court. *In re Martin*, 400 S.C. 254, 734 S.E.2d 165 (2012) (publicly reprimanding Respondent for stating to a defendant "I'll beat your a** if you call me a liar").

[2] Following these incidents, Respondent was not placed on interim suspension by this Court under Rule 17, RJDE, Rule 502, SCACR.

at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Canon 3(B)(4) (requiring a judge to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity). Respondent also admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR (providing a violation of the Code of Judicial Conduct is grounds for discipline).

By way of mitigation, Respondent explains that he has a fourteen-year-old son with severe autism, who is non-verbal, incontinent, and suffers from a severe form of epilepsy. In the two days preceding the first incident, Respondent had traveled to Charlotte for his son to have a 24-hour EEG performed for his epilepsy. On his way back home from the hospital in Charlotte, Respondent received a text message from a county clerk at 5:30 p.m. alerting him that he was scheduled for a civil jury trial the following morning.[3] Respondent also explained that at the time of these incidents, his wife had recently experienced several serious personal and health-related crises of her own. Respondent explains the demands of caring for his son, coupled with these other family stressors diminished his ability to contain his frustration. In an effort to avoid future inappropriate outbursts, Respondent enrolled in anger management counseling and sought additional healthcare for himself. Respondent reports this new treatment has resulted in significant improvement in Respondent's ability to cope with the stress of his family life. Respondent also submitted affidavits of support from various people, including the lawyer at whom he cursed in open court.[4] These affidavits describe Respondent as intelligent and even-tempered.[5]

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[3] Respondent also contends the chief magistrate had instructed the scheduling clerk only to email Respondent notice of the trial and not to call or text him notice, despite knowing Respondent was traveling for his son's medical appointments.

[4] The lawyer averred that despite being contacted by the former chief magistrate and a current magistrate court clerk requesting that he report the incident to the Office of Disciplinary Counsel, he refused to do so because he "did not feel it warranted reporting."

[5] Several of these affidavits also allude to personality conflicts between Respondent and others at the Greenwood County Magistrate's Court.

III.

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty days, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and the Commission on Judicial Conduct.

Within one year, Respondent shall complete an additional twenty hours of anger management counseling with a counselor, who must be approved by the Commission on Judicial Conduct (Commission) prior to the commencement of counseling. Should the counselor believe that more than twenty hours of counseling is necessary, Respondent shall notify the Commission and complete the number of hours recommended by the counselor. Within thirty days of completing counseling, Respondent shall ensure the counselor submits a written report to the Commission detailing Respondent's treatment and progress. Respondent's failure to complete this required counseling may be grounds for additional discipline. Additionally, Respondent is encouraged to continue seeking treatment from his current healthcare providers.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alicia M. Rudick, Petitioner,

v.

Brian R. Rudick, Respondent.

Appellate Case No. 2020-000431

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Darlington County
Cely Anne Brigman, Family Court Judge

Opinion No. 28108
Heard April 14, 2021 – Filed August 31, 2022

AFFIRMED

Gregory Samuel Forman, of Gregory S. Forman, PC, of Charleston and Karl Huggins Smith, of Smith Watts & Associates, LLC, of Hartsville, both for Petitioner.

Marian Dawn Nettles, of Nettles Turbeville & Reddeck, of Lake City and Kevin Mitchell Barth, of Barth, Ballenger & Lewis, LLP, of Florence, both for Respondent.

JUSTICE HEARN: Petitioner Alicia Rudick (Wife) raises a single issue before the Court: whether a former spouse who was both the primary wage earner and caretaker

may be a "supported spouse" under our statutory scheme governing alimony. The family court awarded Respondent Brian Rudick periodic alimony of $3,000 a month, and the court of appeals affirmed, reducing it by $300 monthly based on a mathematical miscalculation. We affirm the court of appeals.

FACTS

Husband and Wife married in 1999 and had three children before Wife filed for divorce in 2015. During the course of their marriage, Wife consistently earned a significantly higher income as an employee at Sonoco Products than Husband, who worked as a law enforcement officer. Early in the marriage, the couple built a 3,500 square foot home with a pool, and they owned a vacation timeshare in Disney throughout the marriage. In addition to earning approximately four times that of Husband, Wife was also the primary caretaker of the children. However, Husband also cared for the children, including assisting them with their homework, packing lunches, doing laundry, and being fully responsible for them when Wife traveled for work.

In 2016, the family court held a two-day trial and subsequently issued a final order that granted the divorce based on one year's separation, ordered Husband to pay child support, awarded Husband $3,000 per month in permanent periodic alimony, and divided the marital estate 60/40 in favor of Wife. Wife then filed a motion to reconsider, which the family court denied. Thereafter, Wife appealed to the court of appeals, which affirmed in part and reversed in part. The court disagreed with the family court's valuations of certain assets and with Wife's bonus income, the latter resulting in a decrease in alimony by $300 per month. Accordingly, the court of appeals reduced Wife's alimony obligation to $2,700 per month. We granted Wife's petition for a writ of certiorari.

ISSUE

Did the court of appeals err in affirming the alimony award when Wife was both the primary wage earner and caretaker, thus purportedly depriving Husband of "supported spouse" status under section 20-3-130 of the South Carolina Code?

STANDARD OF REVIEW

In appeals from the family court, appellate courts review the factual and legal conclusions de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018). However, de novo review does not require the Court to disregard the family court's factual findings because that court was in the best position to judge witness

credibility. *Lewis v. Lewis*, 392 S.C. 381, 388, 709 S.E.2d 650, 653 (2011) ("The tendency to affirm family court findings of fact may be traced to the two features noted above—the superior position of the trial judge to determine credibility and the appellant's burden to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court.").

DISCUSSION

Wife contends Husband is not a "supported spouse" and therefore does not meet the legal requirement to receive alimony or in the alternative, that the alimony award should be reduced. While Wife acknowledges our statutory scheme does not define the term "supported spouse," she argues that a spouse who is both the primary wage earner and caretaker does not fall within that definition. Specifically, Wife asserts Husband is not a supported spouse because he did not reduce his earning capacity in support of the marriage. In other words, because Husband did not depress his income by seeking employment which would allow him more time to care for the children, he was not a supported spouse. Additionally, Wife argues the family court overemphasized the statutory factor addressing the parties' standard of living during the marriage.

Conversely, Husband argues the court of appeals properly affirmed the family court's decision to award alimony, that Wife's argument elevates the term "supported spouse" to a contrived meaning not contemplated by the General Assembly, and that the term is descriptive only, and simply designates the person who receives alimony. Further, Husband argues the family court properly considered the parties' standard of living as one factor in awarding alimony. We agree with Husband.

Every state recognizes some type of alimony which may be awarded upon the dissolution of a marriage.[1] "In most jurisdictions, including South Carolina, courts

[1] Surprisingly, some states do not provide *any* statutory factors for the court to consider in determining whether to award alimony. *See, e.g.*, Kan. Stat. Ann. § 23-2902(a) (West 2021) ("A decree . . . may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances."); Mich. Comp. Laws Ann. § 552.23(1) (West 2021); Miss. Code Ann. § 93-5-23 (West 2021); N.D. Cent. Code Ann. § 14-05-24.1(1) (West 2021) ("Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for a limited period of time in accordance with this section."); S.D. Codified Laws § 25-4-41 (West 2021) ("Where a divorce is granted, the court may compel one party to make such suitable allowance to the other party for support during the life of that

are allowed to award alimony to any spouse who needs it to avoid significant disparity in the spouses' post-divorce financial standing." Emeritus Roy T. Stuckey, *Marital Litigation in South Carolina Substantive Law* 172 (4th ed. 2010). South Carolina's General Assembly has enacted a detailed statute which recognizes various forms of alimony and sets forth a panoply of factors that the family court "must consider and give weight in such proportion as it finds appropriate[.]" S.C. Code Ann. § 20-3-130(C) (2014). This provision includes the phrase "supported spouse" over a dozen times without defining it. However, a statute is not ambiguous merely because a term is undefined. Instead, when reviewing section 20-3-130 as a whole, it is clear the descriptive term "supported spouse" is used merely to delineate the person actually receiving alimony. We refuse to accept Wife's invitation to augment the language of the statute by requiring an alimony recipient to establish that he or she has actively reduced his or her earning capacity in order to support the marriage.

We find further support for this common-sense definition by reviewing section 20-3-130 as a whole. The General Assembly knew how to include a prerequisite to alimony, as it did by disqualifying a spouse who commits adultery from receiving alimony. S.C. Code Ann. § 20-3-130. We decline to engraft an additional requirement onto a provision that is otherwise clear on its face. *See Berkebile v. Outen*, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993) ("We can not [sic] construe a statute without regard to its plain and ordinary meaning, and we will not resort to subtle or forced construction in an attempt to limit or expand the scope of a statute.").

While we disagree with Wife's invitation to define the phrase "supported spouse" in a manner never heretofore recognized, we do agree with Wife that our jurisprudence has, at times, overemphasized the standard of living factor in deciding whether to award alimony. *See* S.C. Code Ann. § 20-3-130(C)(5). Alimony cases in this state both before and after the enactment of our alimony statute have consistently stated the primary purpose of an alimony award is to enable the supported spouse to maintain the standard of living enjoyed during the marriage. *See, e.g.*, *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014) ("Alimony is a substitute for the support normally incidental to the marital relationship. . . .' Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage.'") (internal citations omitted); *Craig v. Craig*, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005) ("Generally, alimony should

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other party or for a shorter period, as the court may deem just, having regard to the circumstances of the parties represented; and the court may from time to time modify its orders in these respects."); Wyo. Stat. Ann. § 20-2-114(a) (West 2021).

place the supported spouse, as nearly as practical, in the same position as enjoyed during the marriage."). We emphasize today that this consideration is only one of the twelve statutory factors that shapes an alimony award. *See* S.C. Code Ann. § 20-3-130(C)(1)-(12). However, this does not render our prior decisions addressing the parties' standard of living irrelevant. Apart from delineating specific factors to be considered in an alimony award, our General Assembly has also vested considerable discretion in the family courts by providing that the factors may be weighed "as it finds appropriate." Depending on the facts presented in a given case, some factors may assume more importance and be entitled to more weight than others. The family court here carefully weighed the relevant factors, and there is nothing in the record that suggests the court overemphasized this consideration in deciding to award Husband alimony. *See Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) ("[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations. Moreover, consistent with our constitutional authority for de novo review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact. Consequently, the family court's factual findings will be affirmed unless 'appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court.'") (quoting *Finley v. Cartwright*, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899)).

Before the court of appeals, Wife claimed the parties' marital situation was "unusual" and that it justified a departure from the principle that a spouse is entitled to support which places him or her—as far as practical—in the same position as he or she enjoyed during the marriage. The court of appeals properly rejected this argument, ostensibly not finding the situation sufficiently unusual. We likewise see nothing particularly unusual presented here, and instead view these facts as a fairly typical scenario in a modern marriage where both parents work outside the home and share the child-raising responsibilities as their work schedules permit. Indeed, the story of this couple's marriage is a familiar one. At its inception, both parties earned approximately the same salary, and bills and expenses were shared on a more or less equal basis. Husband chose law enforcement—a laudable vocation—while Wife selected business as her career field. However, even though both careers were demanding and important, one was valued more monetarily in our society than the other. After approximately seventeen years of marriage, Husband was still earning within a few thousand dollars of what he earned when the parties married, while Wife's income had more than quadrupled. During the course of their marriage, both parties were actively involved in the day-to-day lives of their three children, with Wife assuming primary responsibility when she was in town and Husband being in complete charge of the children during Wife’s frequent out-of-town business trips.

While the family court awarded custody to Wife, she specifically found Husband had been "a very involved father." We also agree with both the family court and court of appeals' determination that the parties enjoyed a comfortable standard of living and that Wife has the ability to pay alimony while still fulfilling her needs. Although these two factors are not controlling and we do not give undue weight to the standard of living factor in light of our discussion above, we nonetheless agree both weigh in favor of awarding Husband alimony.[2]

Finally, we decline to accept Wife's invitation to reduce the alimony award further. Unlike child support, which is determined pursuant to statutory guidelines, alimony has never been calculated to a mathematical certainty. *Rimer v. Rimer*, 361 S.C. 521, 527, 605 S.E.2d 572, 575 (Ct. App. 2004) (noting that in the calculation of a party's income for the purposes of determining alimony, "[f]ormulaic principles and bright-line rules will only hinder the ability of family court judges to reach an equitable result in this individualized, fact-intensive area of law"). Although only the alimony award is before the Court, we recognize that Wife

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[2] We reject the dissent's suggestion that requiring Wife to pay permanent, periodic alimony is "breathtaking." This was a marriage of significant duration and Wife's annual income of $184,801.42 exceeds Husband's law enforcement salary of $39,196.75 by over $145,000. Under these circumstances, and where the family court judge made findings of fact on the applicable alimony factors, the award of $3,000 per month—reduced to $2700 per month by the court of appeals—is far from breathtaking, but is instead quite ordinary. Moreover, that either party will be required to institute an action based on changed circumstances to alter the award is not absurd, as the dissent posits, but is, again, consistent with our statutory scheme. We also disagree that the alimony award must be "reviewed and revised" once the youngest child is emancipated. While the cessation of child support may constitute a reason to modify alimony in the future, it would be sheer speculation to decree today what may or may not constitute a substantial change in circumstances tomorrow. Crystal balls are the tools of fortune-tellers, not appellate judges. We have great confidence in our excellent cadre of family court judges to determine whether a substantial change of circumstances warranting a reduction in alimony has been established. Accordingly, we see no reason to depart from our current practice for modifying an award of alimony—filing an action based upon a substantial change of circumstances. *See Sharps v. Sharps*, 342 S.C. 71, 78, 535 S.E.2d 913, 917 (2000) (finding the termination of child support qualified as a substantial change in circumstances warranting modification of alimony but cautioning not all cases would qualify as such).

received sixty percent of the marital estate, despite Husband's direct and indirect contribution to the marital unit. Had Husband been awarded a lesser amount of alimony by the family court, he may well have received fifty percent of the marital estate, which our jurisprudence has recognized is the starting point for equitable division in a lengthy marriage. *Crossland v. Crossland*, 408 S.C. 443, 457, 759 S.E.2d 419, 426 (2014) (noting a fifty-fifty split is the proper starting point in dividing the marital estate). Indeed, in any equitable apportionment award, it is proper for the family court to consider whether a spouse will receive alimony. S.C. Code Ann. § 20-3-620(B)(9) (2014). We have previously acknowledged the potential interplay between an alimony award and the overall equitable apportionment in *Wilburn v. Wilburn*, 403 S.C. 372, 392, 743 S.E.2d 734, 745 (2013). There, we affirmed the family court's decision not to award alimony despite the spouse being a candidate due in part to the size and division of the marital estate. *Id.* In this case, we have the reverse situation where the family court awarded Husband a smaller share of the marital estate but awarded alimony. Thus, reducing Husband's alimony award risks unfairly altering the overall balance struck by the family court in reaching its decision. The court of appeals reduced Husband's award by $300 per month based on a mathematical error in determining Wife's annual bonus, and we decline to reduce it further. Moreover, we direct that Wife's payment, as reduced by the court of appeals, should commence the month following issuance of this opinion.

CONCLUSION

Accordingly, pursuant to our de novo review, we affirm the court of appeals' opinion awarding $2,700 per month in alimony.

AFFIRMED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: Alicia and Brian Rudick were forty-five years old in 2016 when the family court ordered $3,000 a month in periodic alimony with no end date. The idea that Alicia must pay Brian even the $2,700 to which the court of appeals reduced the award for the rest of their lives is breathtaking. The notion that Alicia may have this award reduced only by filing a new action and showing a substantial, unanticipated change in circumstances is also absurd. Neither the permanency of the award nor the practical impossibility of changing it is called for under the terms of our State's comprehensive statutory alimony scheme set forth in section 20-3-130 of the South Carolina Code (2014). Rather, the facts that Brian will receive this unnecessary windfall and Alicia must bear this unjust burden derive from two incorrect views of the law of alimony taken by the family court bench and bar.[3] The first is that there is a "preference" for periodic alimony. The second is that periodic alimony may end *only* upon the remarriage of the supported spouse, the death of either spouse, or a family court's determination in a later action that a substantial, unanticipated change in circumstances has occurred.

As I will explain, these views have no basis in section 20-3-130. If I were deciding this case, I would have denied periodic alimony altogether. Understanding, however, that I have been outvoted on this point, I respectfully disagree with the majority's decision to "decline . . . [Alicia's] invitation to reduce the alimony award further." I would find the alimony award is excessive both in amount and in duration, and would reduce the alimony award to $2,000 a month. I would further hold the family court should have ordered either that the alimony award ends after some finite period of time, such as when the youngest child turns eighteen years old, or that the award should be "reviewed and revised" at a similar point in time as specifically permitted by subsection 20-3-130(B)(1).

In the text that follows, I set forth my analysis of how periodic alimony—if it is to be awarded at all—should be calculated in this case.

I. Types of Alimony

Subsection 20-3-130(B) provides the various types of permanent alimony available to a family court. "Alimony . . . awards may be granted . . . in such amounts and for periods of time subject to conditions as the court considers just including, but not

[3] I concur in the majority's ruling to correct a third common misunderstanding of the law of alimony—the overemphasis of the subsection 20-3-130(C)(5) "standard of living" factor.

limited to:" "Periodic alimony" under subsection 20-3-130(B)(1), "Lump-sum alimony" under subsection 20-3-130(B)(2), "Rehabilitative alimony" under subsection 20-3-130(B)(3), and "Reimbursement alimony" under subsection 20-3-130(B)(4). Subsection 20-3-130(B)(6) also provides the family court may grant "Such other form of spousal support, under terms and conditions as the court may consider just, as appropriate under the circumstances without limitation to grant more than one form of support." These subsections give the family court broad authority to grant permanent alimony in any manner it deems appropriate under the specific circumstances of the case.

Our courts have stated that we recognize a "preference" for periodic alimony under subsection 20-3-130(B)(1). *See C.A.H. v. L.H.*, 315 S.C. 389, 391, 434 S.E.2d 268, 269 (1993) (comparing rehabilitative alimony under subsection 20-3-130(B)(3) and recognizing "the normal preference for permanent, periodic support" (citing *Johnson v. Johnson*, 296 S.C. 289, 301, 372 S.E.2d 107, 114 (Ct. App. 1988))); *Jenkins v. Jenkins*, 345 S.C. 88, 95, 545 S.E.2d 531, 535 (Ct. App. 2001) ("If a claim for alimony is well-founded, the law favors the award of permanent periodic alimony."); *Johnson*, 296 S.C. at 301, 372 S.E.2d at 114 (same). Importantly, the "preference" we have cited is not based on any statute. In fact, most of the cases recognizing the "preference" were decided before the comprehensive amendments to section 20-3-130 in 1990, during a time when a court's only alimony options were periodic and lump-sum alimony,[4] possibly rehabilitative alimony.[5] In light of the array of options the General Assembly gave to family courts under the terms of subsection 20-3-130(B) and the ever-changing family dynamic in which more and more households have two working spouses, I find it inappropriate to recognize any preference for

[4] *See C.A.H.*, 315 S.C. at 391, 434 S.E.2d at 269; *Smith v. Smith*, 425 S.C. 119, 132, 819 S.E.2d 769, 776 (Ct. App. 2018); *Ricigliano v. Ricigliano*, 413 S.C. 319, 331, 775 S.E.2d 701, 708 (Ct. App. 2015); *Jenkins*, 345 S.C. at 95, 545 S.E.2d at 535; *Therrell v. Therrell*, 299 S.C. 210, 212, 383 S.E.2d 259, 260 (Ct. App. 1989); *Canady v. Canady*, 296 S.C. 521, 525, 374 S.E.2d 502, 504 (Ct. App. 1988); *Johnson*, 296 S.C. at 301, 372 S.E.2d at 114; *Voelker v. Hillock*, 288 S.C. 622, 626, 344 S.E.2d 177, 180 (Ct. App. 1986).

[5] Before 1990, there was no statutory authority for a court to grant rehabilitative alimony. In *Herring v. Herring*, 286 S.C. 447, 451, 335 S.E.2d 366, 368 (1985), however, this Court discussed the possibility that rehabilitative alimony could be awarded in appropriate cases. That possibility became a certainty in 1990 with the enactment of subsection 20-3-130(B)(3).

one type of alimony over any other. Instead, I would encourage family courts to consider all alimony options set forth in subsection 20-3-130(B). I believe doing so would help family courts meet the statutory obligation to "grant alimony . . . in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just." § 20-3-130(A). *See Rimer v. Rimer*, 361 S.C. 521, 527, 605 S.E.2d 572, 575 (Ct. App. 2004) ("Formulaic principles and bright-line rules will only hinder the ability of family court judges to reach an equitable result in this individualized, fact-intensive area of law.").

II. Subsection 20-3-130(C)

When the General Assembly codified our comprehensive alimony scheme in 1990, it set forth specific factors the family court must consider in determining whether a party is entitled to alimony. § 20-3-130(C). These factors were largely taken from opinions of our courts before 1990. *See, e.g.*, *Lide v. Lide*, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981) (listing nine "factors to be considered in determining whether alimony should be awarded" (citing *Powers v. Powers*, 273 S.C. 51, 54, 254 S.E.2d 289, 291 (1979); *Nienow v. Nienow*, 268 S.C. 161, 170-71, 232 S.E.2d 504, 509 (1977))); *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973) (providing factors to consider in deciding whether to award alimony (citations omitted)).

The factors for this threshold determination are now set forth in subsection 20-3-130(C), which requires the family court "must consider and give weight in such proportion as it finds appropriate to *all* of the . . . factors." (emphasis added). The factors are, with some abbreviation,

> (1) the duration of the marriage together with the ages of the parties . . . ; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse . . . ; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties . . . apportioned to him or her in the . . . action; (9) custody of the children . . . ; (10) marital misconduct . . . ; (11) the tax consequences . . . ; (12) . . . any support obligation from a

> prior marriage or for any other reason of either party; and
> (13) such other factors the court considers relevant.

§ 20-3-130(C). The family court must analyze these factors in deciding whether to grant an award of alimony. If the family court determines the factors weigh in favor of an award of alimony, then the court must use the same factors to determine the particulars of the alimony award, including the type, amount, frequency, and duration of the payments.

I am confident that in conducting research in this case on the issue of alimony, I read every opinion of this Court and the court of appeals since the comprehensive alimony scheme was enacted in 1990. I have found it surprising—troubling—that hardly any of these opinions actually explain the importance and reasoning behind the statutory factors. In fact, prior to the majority's explanation of the standard of living factor in this case, I found only six appellate decisions that meaningfully explain how a factor should be applied. *See Sweeney v. Sweeney*, 426 S.C. 229, 233-34, 826 S.E.2d 299, 301-02 (2019) (discussing the subsection 20-3-130(C)(6) factor, current and reasonably anticipated earnings); *Crossland v. Crossland*, 408 S.C. 443, 452-55, 759 S.E.2d 419, 424-25 (2014) (discussing the subsection 20-3-130(C)(6) factor, current and reasonably anticipated earnings); *Patel v. Patel*, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001) (discussing the subsection 20-3-130(C)(5) factor, standard of living); *Butler v. Butler*, 385 S.C. 328, 340-41, 684 S.E.2d 191, 197 (Ct. App. 2009) (discussing the subsection 20-3-130(C)(5) factor, standard of living); *Browder v. Browder*, 382 S.C. 512, 520, 675 S.E.2d 820, 824 (Ct. App. 2009) (discussing the subsection 20-3-130(C)(6) factor, current and reasonably anticipated earnings); *Pirri v. Pirri*, 369 S.C. 258, 268-69, 631 S.E.2d 279, 285 (Ct. App. 2006) (discussing the subsection 20-3-130(C)(1) factor, duration of the marriage).

III. Analysis of Subsection 20-3-130(C) Factors

As each family court must do, I consider all statutory factors as subsection 20-3-130(C) requires. Many of the factors are overlapping and, thus, are difficult to analyze in isolation. However, the analysis below is my best effort at setting forth what I believe should be the collective result of the several factors particularly important in this case.

The first factor I consider important is "the duration of the marriage together with the ages of the parties . . . at the time of the divorce" under subsection 20-3-130(C)(1). In reality, this subsection sets forth two separate, though related, factors. At the time the divorce decree was filed in 2016, both parties were forty-five years

old and had been married almost seventeen years. The length of the marriage weighs in favor of more alimony, but the roughly thirty years each has remaining in their work life counsels against long-term interdependence through alimony. The law of alimony should act as an incentive to divorced men and women to become and remain independent—financially and otherwise. Both Alicia and Brian work in their chosen fields at the rates of pay that attend to each. The principles of equity important in family courts dictate that eventually they live off the salaries they earn for themselves rather than alimony received from the other.

The second and third important factors are "the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential" and "the employment history and earning potential of each spouse" under subsections 20-3-130(C)(3) and (4). Both parties are well-educated and neither needs additional training or education to achieve their full earning potential in their chosen fields. They are hardworking citizens whose contributions to their community are to be valued and encouraged. These factors refute any idea of awarding rehabilitative alimony. They also counsel against the long-term financial interdependence this award has created.

The fourth factor is "the standard of living established during the marriage" under subsection 20-3-130(C)(5). I agree with the majority that, in many of our prior decisions, the Court has placed unwarranted importance on this factor. I agree with the majority the comprehensive goals of alimony are set forth in the entirety of section 20-3-130. The family court "must consider and give weight in such proportion as it finds appropriate to all of the . . . factors," § 20-3-130(C), and on that basis "grant alimony . . . in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just," § 20-3-130(A).

Here, the parties enjoyed a nice standard of living during the marriage. Their home was 3,500 square feet with four bedrooms and four bathrooms, a pool, a pool house, and a workshop. The family often vacationed at their timeshare in Disney and went on at least one cruise during the marriage. However, a vacation home at Disney or a family trip on a cruise ship, as examples, are expenses that likely must be foregone after a family splits into two households. Similarly, the practical reality for this family is that Brian will probably not be able to afford a large home with a pool. Therefore, I would consider the standard of living established during the marriage less important to the determination of alimony in this case.

The fifth factor I find important—important in every alimony case—is "the current and reasonably anticipated earnings of both spouses" under subsection 20-3-130(C)(6). In the last three full years of the marriage, Alicia earned an average of $184,801.42, and Brian earned an average of $39,196.75. As to future earnings, Brian served twenty-two years as a police officer at the time of the divorce and was eligible to retire in three more years from then, which is now three years ago. It is reasonable to anticipate that at some point Brian will retire. The only evidence in the record before us regarding Brian's retirement intentions came from Alicia, who testified that when she pressed Brian to pursue career goals that would make him happy, Brian told her, "Give me a few more years, I've got my pension then I can figure out what I want to do after that." At his current age of fifty-one, Brian has numerous prime earning years ahead of him. With his retirement income—$21,006.72 per year[6] according to Alicia's accountant—and income he may earn from future work, it is reasonable to anticipate his overall earnings will increase, perhaps substantially.

I am aware of no corresponding reason to anticipate Alicia's earnings will increase, other than through the influence of inflation. In fact, a large percentage of Alicia's income in the years preceding the divorce was bonus income. In 2015, the last full year of their marriage, her salary income was $136,514.44, and her bonus income was $47,351.00. Alicia testified her bonus income depends on her performance, which she can control, and on the profitability of her employer in the prevailing market conditions, which she cannot control.[7] Assuming Alicia's bonus income for 2013 and 2014 was roughly equivalent to her bonus income for 2015, I compare Alicia's salary income of $137,215.05 plus uncertain future bonuses averaging

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[6] The accountant hired by Alicia made this calculation based on Brian's retirement at age fifty-five in 2026, rather than his date of retirement eligibility in 2019.

[7] Alicia did not ask the family court, the court of appeals, or this Court to differentiate between salary and bonus income. *But see Holmes v. Holmes*, 399 S.C. 499, 507, 732 S.E.2d 213, 217 (Ct. App. 2012) (discussing the family court's decision to treat bonus income differently, ordering a percentage of future bonuses in alimony); *Rimer*, 361 S.C. at 523 n.2, 605 S.E.2d at 573 n.2 (noting, "The family court did not consider the potential for bonuses in the alimony award"); *Lineberger v. Lineberger*, 303 S.C. 248, 250, 399 S.E.2d 786, 787 (Ct. App. 1990) ("In the award of additional alimony of 15% of husband's net bonuses, we hold the trial court [did not err] because the amounts are different each year and the bonuses have been a part of the overall income of the parties for many years.").

$47,586.37 over the last three years of the marriage, neither of which appear likely to increase substantially over time (totaling $184,801.42), with Brian's salary income of $39,196.75, which is more likely to increase over time with his eventual retirement and future earnings.[8] Because Alicia's current and anticipated earnings are substantially more than Brian's, this factor counsels in favor of alimony, at least in the short run.

The sixth factor I mention is "the current and reasonably anticipated expenses and needs of both spouses" under subsection 20-3-130(C)(7). I do not find this factor particularly important in this case because the record does not reflect any unusual expenses or needs of either party. As the family court found, "During the marriage, the parties were frugal and did not lead an outlandish lifestyle. That seems to be continuing for both." To the extent this factor is important at all, it counsels against granting Brian alimony because he already has the income to meet his expenses and needs.

The seventh factor I find important is "custody of the children" under subsection 20-3-130(C)(9). First, because Alicia has custody of the children, there are no "conditions or circumstances [that] render it appropriate that the custodian not be required to seek employment outside the home, or where the employment must be of a limited nature." *Id.* In other words, because Alicia has worked a full-time job outside the home for many years while having custody of the minor children, there is no need to award "the custodian" alimony. This—I believe—is the primary reason for the subsection 20-3-130(C)(9) factor. Thus, in this respect, the "custody" factor does not weigh in favor of alimony for Brian because he does not have custody.

There is another respect, however, in which the "custody of the children" may affect Brian's award of alimony: the eventual termination of his child support obligation. In this case, the youngest child turns eighteen years old in 2025, after which Alicia

[8] My analysis of "reasonably anticipated earnings," as required by subsection 20-3-130(C)(6), does not supplant the role of an unanticipated change of circumstances review under subsections 20-3-170(A) or (B) of the South Carolina Code (2014). Rather, I simply consider the information required to be considered under subsection 20-3-130(C)(6). *See Rimer*, 361 S.C. at 528, 605 S.E.2d at 576 ("Recognizing that the desired goal of finality is elusive in this area, our family court judges strive to recognize anticipated, foreseeable changes.").

will no longer have "custody" and Brian will no longer owe child support.[9] While the family court potentially considered Brian's child support obligation in fashioning the alimony award,[10] the family court did not consider the impact that termination of the obligation would have on the alimony payments upon the youngest child turning eighteen. *But see Rimer*, 361 S.C. at 528, 605 S.E.2d at 576 ("Recognizing that the desired goal of finality is elusive in this area, our family court judges strive to recognize anticipated, foreseeable changes.").

At the time of the family court's decision—August 2016—the termination of child support was far in the future. We have previously suggested it is proper in such a circumstance for the court to not consider the children turning eighteen, stating, "Because a court cannot always know what conditions will exist in the future, it would be arbitrary to automatically [change] alimony . . . in the far distant future based on the" termination of the child support obligation. *Sharps v. Sharps*, 342 S.C. 71, 77, 535 S.E.2d 913, 916 (2000). In *Sharps*, we recognized "termination of child support . . . is one situation where, even though the future event was known at the time of the separation, the trial court could not properly address that expected change in the divorce decree." *Id.* At the time we heard oral arguments in this case, however, the parties' eldest child had already turned eighteen years old. The middle child will turn eighteen in less than two years, and the youngest child will turn eighteen in less than three years.

I would find the General Assembly contemplated this type of situation when it included in subsection 20-3-130(B)(1)—"periodic alimony"—the provision, "The purpose of this form of support may include, but is not limited to, circumstances where the court finds it appropriate to order the payment of alimony on an ongoing basis where it is desirable to make a current determination and requirement for the ongoing support of a spouse *to be reviewed and revised as circumstances may dictate in the future*." (emphasis added). I am not aware of any published decision

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[9] Generally, child support obligations exist until the child reaches the age of majority—eighteen years old. S.C. Code Ann. § 63-3-530(A)(17) (Supp. 2021) (providing, with a few exceptions, "orders for child support run until the child turns eighteen years of age").

[10] The family court did not specifically mention child support in the alimony determination, but it did consider alimony in calculating the child support obligation, stating, "With the $3,000 alimony payment being taken into account . . . Defendant's monthly child support obligation would be the sum of $886."

specifically relying on this provision. However, I believe it can be an important tool for family courts to use in fulfilling the statutory obligation to "grant alimony . . . in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just." § 20-3-130(A). Under this provision, if the family court does not "know what [other] conditions will exist in the future," *Sharps*, 342 S.C. at 77, 535 S.E.2d at 916, or does not know when the anticipated changes in conditions may occur, and therefore decides not to address a future anticipated event, the court should recommend the award of alimony be "reviewed and revised" upon the occurrence of the anticipated event.[11] The cessation of a monthly child support obligation of $886 is an anticipated event that could substantially alter the financial circumstances of both parties. Such a recommendation by a family court would not require "review," nor would it require "revision." Rather, it would be simply an indication to the parties and to a later court that the initial family court has not accounted for the anticipated change in circumstances in setting alimony because the court recognizes that other circumstances or conditions may need to be considered in determining whether the change in circumstances should actually warrant a change in alimony. *See* 342 S.C. at 78, 535 S.E.2d at 917 (stating "a court hearing an application for a change in alimony should look . . . most importantly [to] whether the amount of alimony in the original decree reflects the expectation of that future occurrence").

IV. Alimony Award

I respectfully dissent from the majority in affirming the alimony award. I would reverse the court of appeals and deny alimony altogether. Given the award will not be reversed, I would reduce the award to $2,000 a month. I would also find it appropriate in this case to recommend "review and revision" of the alimony award when the youngest child turns eighteen years old.

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[11] Under subsection 20-3-170(A), courts have required an *un*anticipated change in circumstances as a prerequisite to a change in alimony. *See King v. King*, 400 S.C. 611, 618, 735 S.E.2d 551, 555 (Ct. App. 2012) ("The party seeking modification of alimony bears the burden of demonstrating a substantial *unforeseen* change in circumstances.") (emphasis added). Because a recommended "review and revision" is to account for an *anticipated* change in circumstances, the party requesting review should not be held to the "unforeseen change" standard.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amy Kovach, Plaintiff,

v.

Joshua S. Whitley and Karen Whitley, in her Individual Capacity, Respondents,

And

Joshua S. Whitley, Defendant/Counterclaimant,

v.

Amy Kovach, Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley, Defendant/Third-Party Plaintiff,

v.

Rodney Thompson, Third-Party Defendant,

Of whom Amy Kovach is the Petitioner.

Appellate Case No. 2021-000174

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 28109
Heard May 18, 2022 – Filed August 31, 2022

REVERSED

M. Dawes Cooke Jr. and Christopher Mark Kovach, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Petitioner Amy Kovach.

Jeffrey A. Breit, of Breit Drescher Imprevento, P.C., of Virginia Beach, Virginia, and Joshua Steven Whitley, of Smyth Whitley, LLC, of Charleston, both for Respondent Joshua S. Whitley; and William Howell Morrison, of Haynsworth Sinkler Boyd, P.A., of Charleston, for Respondent Karen Whitley.

PER CURIAM: In this appeal, we are asked to consider the propriety of a sanction imposed pursuant to Rule 11, SCRCP, against an attorney's client.[1] Petitioner Amy Kovach was fired from her job with the Berkeley County School District (BCSD) after pleading guilty to misconduct in office and misuse of public funds. Believing she had been a casualty of a political battle between warring factions in the BCSD, Kovach hired an employment attorney to file a grievance with the BCSD and a civil lawsuit against those she felt were responsible for her firing. After the attorney reviewed Kovach's guilty plea transcript and conducted

[1] *See generally* Rule 11(a), SCRCP ("The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.").

an independent investigation, she filed a civil conspiracy complaint against Josh Whitley and his mother Karen Whitley (collectively, Respondents), among others. Respondents immediately filed separate motions for Rule 11 sanctions against the attorney, asserting the complaint was at odds with the representations Kovach made when she entered her guilty plea. Despite Kovach's attempt to dismiss the lawsuit within one month of filing it—an attempt that was unsuccessful due to Respondents' resistance—Respondents requested nearly $250,000 in attorneys' fees. Ultimately, the trial court sanctioned the attorney $17,000, and additionally sanctioned Kovach $48,000. Kovach's attorney chose not to appeal. Therefore, only the sanction against Kovach is at issue here.

We find the imposition of a sanction against Kovach was an abuse of discretion. Kovach was represented by an experienced attorney who carefully and independently vetted Kovach's allegations and claims before determining she had a viable cause of action against Respondents. Although Rule 11 allows for the possibility of sanctions against a client,[2] it primarily speaks in terms of an attorney's professional responsibilities.[3] Rule 11 is not intended to be used as a

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[2] While not raised by the parties, we point out the obvious: Kovach did not personally sign the allegedly frivolous complaint. We therefore question whether Rule 11's *signature* requirement applies to Kovach at all here. *See, e.g.*, *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729–30 (2006) (affirming a Rule 11 sanction against a represented client when the client's "own deposition testimony directly contradict[ed] statements made in her affidavit," *which she personally signed*).

[3] Interestingly, at the trial level, Respondents implicitly conceded Rule 11 was primarily intended to foster lawyer responsibility, rather than curb a client's inappropriate behavior. *See* Note, Rule 11, SCRCP (explaining the signature requirement "represents a substantial forward step in *lawyer* responsibility," as it "places *on the lawyer who signs a pleading* the duty of good faith in preparing the pleading" (emphasis added)). Specifically, Respondents initially only requested a sanction be imposed against Kovach's attorney. However, prior to the sanctions hearing, Respondents amended their motion for sanctions to include a claim against Kovach *and* her attorney. Nonetheless, other than emphasizing the factual inconsistencies between Kovach's complaint and her guilty plea, Respondents had little (if anything) to say about Kovach's fault in filing the complaint. Rather, Respondents focused almost exclusively on the attorney's fault, arguing, among other things, that (1) "The attorney's pen in this case is twice as dangerous as []

weapon against a client represented by counsel, whose job it is to be knowledgeable of the law and advise a lay client on the best course of action.[4] Given the attorney's investigation prior to filing the complaint, and a complete lack of evidence that Kovach harassed or otherwise coerced her attorney into filing the complaint, we see no factual basis on which to justify an award of sanctions

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Kovach's lies because she has a higher duty as a lawyer. She has an ethical duty."; (2) "[T]he lawyer with the pen is the one that can cause the most damage and has the ability to stop it."; (3) "Lawyers have clients show up all the time wishing to strike out at people that have caused them problems. . . . We [attorneys] have a higher duty. We have a higher burden. That's why we have Rule 11. That's why we have the sanctions that are available for filing frivolous claims. Lawyers have a duty to investigate claims before they strike out like a client would and file suit against a bunch of people . . . ."; (4) "Clients come here and tell you all kinds of things. We [attorneys] do a reasonable investigation and find out that's not true, that didn't happen, it didn't happen on that day and this is the person who didn't do it to you. I can't represent you and I can't file suit."; (5) "[O]nly the lawyer had the ability to step back, and the lawyer chose to go blindly forward . . . ."; (6) "You don't have a blank slate as a lawyer to file frivolous causes of action just because your client wants retaliation. . . . [Kovach's attorney] forgot those principles when she filed suit, struck out, and said I'll just grab as many people as I can, defame as many people as I can because I'm a lawyer and I'm allowed to do that because lawyers can file anything in a pleading and get away with it."; and (7) "Lawyers are held to a higher standard."

[4] *Cf. Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) ("Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" (quoting *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990))). There is nothing in the record that would indicate Kovach requires deterrence from filing future frivolous claims.

against Kovach.[5] We therefore reverse the sanction against Kovach.[6]

REVERSED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JAMES, JJ., and Acting Justice James E. Lockemy, concur.

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[5] We also note there are a host of reasons the amount of the sanction against Kovach ($48,000) may be an additional abuse of discretion. However, because the prior issue is dispositive, we do not address the merits of the amount of the sanction. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding that an appellate court need not discuss remaining issues when determination of prior issue is dispositive).

[6] As stated previously, Kovach's attorney did not appeal the sanction imposed against her. Nothing in this opinion should be read as a comment on the propriety of either her decision to file the lawsuit on Kovach's behalf or the trial court's imposition of a sanction against the attorney.

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]

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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.

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 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

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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.

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 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.

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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."

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 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

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

[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.

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.

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.

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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.

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 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:

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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: Where you?

Brown: My house.

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.

[Two missed calls from Brown to Coleman]

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).

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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.

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 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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nicholas Benjamin Chhith-Berry, Appellant.

Appellate Case No. 2019-000352

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

Opinion No. 5943
Heard February 17, 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, and Senior Assistant Attorney General J. Anthony Mabry, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, all for Respondent.

KONDUROS, J.: Nicholas Benjamin Chhith-Berry appeals his convictions for murder and possession of a weapon during the commission of a violent crime. Chhith-Berry contends the trial court erred by (1) denying him immunity from

prosecution pursuant to the Protection of Persons and Property Act; (2) prohibiting a witness from testifying about the details of the deceased shooting two people four months prior to his death; (3) refusing to give an imperfect defense jury instruction; and (4) failing to grant his motion for a mistrial due to premature jury deliberations. We affirm.

FACTS

On May 11, 2014, Adam Berry drove his girlfriend Kayla Bass and his brother Nicholas Chhith-Berry to Kathy Polk's residence in South Congaree to pick up Bass's child. When they arrived, Jamie Galloway, Polk's son and the father of Bass's child, confronted Berry about driving while intoxicated with his child in the car. According to Chhith-Berry, Galloway spit in Berry's face. Chhith-Berry exited the vehicle and told Galloway to stop disrespecting his brother. Galloway responded by punching Chhith-Berry in the face, which knocked Chhith-Berry to the ground. After Chhith-Berry got up, he pulled a knife out of his pocket and moved towards Galloway. According to Polk, she got between Galloway and Chhith-Berry and told Chhith-Berry to put the knife away. Chhith-Berry put the knife away, got back into Berry's vehicle, and left with Berry, Bass, and Bass's child.

Later that day, Berry, Bass, and Chhith-Berry took Bass's child to Bass's mother's house. After hearing about the altercation with Galloway, Bass's mother, Tonya Griffin, told the group that if they felt something was wrong they should call the police and let them handle it. According to Griffin, Chhith-Berry replied "there's no reason to call the law. The next time I see the mother[]fucker, the mother[]fucker[i]s go[ing to] be dead. He won't be breathing." Chhith-Berry also began messaging his friends asking for a burner[1] and .22 rounds. In some of the messages, Chhith-Berry stated he had to take care of a problem and specifically referenced Galloway punching him.

About a week later, Berry, Bass, and Chhith-Berry returned to Polk's house to drop off Bass's child. According to Polk, she apologized for the way Galloway acted. Polk recalled that Chhith-Berry responded, "I'm not worried about it. I['ve] got [Galloway]."

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[1] A burner is an item, typically a weapon or phone, that cannot be traced back to the user.

On May 19, 2014, Berry, Bass, and Chhith-Berry picked up Kaysha Fontenot[2] and went to her residence in the Pine Ridge area of Lexington County. The four began socializing and drinking alcohol. Later, the mother of Berry's children, Haley Stone,[3] arrived at Fontenot's house but remained sober. Fontenot also invited Galloway over without telling him the others were there.

Katie Leavitt, who described Galloway as a "good friend," drove Galloway to Fontenot's house. Leavitt parked in the driveway and remained in the car while Galloway walked up to Fontenot's house. Galloway briefly entered Fontenot's house then walked back outside. Fontenot followed Galloway out of her house, and the two tried to have a conversation in the driveway; however, Bass interrupted and physically confronted Galloway. After Berry separated Bass from Galloway and Fontenot, Bass began verbally harassing Leavitt. Eventually, Leavitt exited her car and began fighting Bass; Fontenot then began fighting Leavitt. When the fight ended, Leavitt got into her car and drove away.

Galloway became angry with Bass because she caused Leavitt to leave, and Bass physically confronted Galloway again. Galloway asked Berry to intervene, but Berry declined to do so. Galloway eventually pushed Bass away from him, which caused her to fall to the ground. Berry then confronted Galloway, and Galloway responded by punching Berry in the face. Berry retaliated and the two exchanged a couple of punches each while wrestling their way onto Fontenot's porch.

Eventually, Galloway got on top of Berry in the corner of Fontenot's porch, and the two continued to exchange blows. While Galloway was on top of Berry, Chhith-Berry took his knife out of his pocket and stabbed Galloway. Fontenot called 911 and performed CPR on Galloway, but he bled to death. An autopsy revealed Galloway sustained twenty-five stab wounds from an object with a sharp edge: twenty-one to his back, two to the back of his head, one just below his right ear, and one to the front of his upper left arm.

Berry and Chhith-Berry got into Berry's vehicle and attempted to leave Fontenot's house, but a patrol officer for Pine Ridge responding to Fontenot's 911 call arrived

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[2] Fontenot also had a child with Galloway.

[3] To clarify, Galloway had children with Bass and Fontenot, Berry was dating Bass and had children with Stone, and Chhith-Berry was Berry's brother.

and prevented Berry and Chhith-Berry from leaving. The officer exited his vehicle, drew his gun, and ordered Berry and Chhith-Berry to get out of the vehicle and lay face down in front of it. Berry complied immediately, but Chhith-Berry told the officer to "go ahead and shoot [me]" before he complied with the officer's orders. The officer then placed Berry and Chhith-Berry in handcuffs, and paramedics treated them at Fontenot's residence.

One paramedic noted Chhith-Berry had "dried blood covering [his] face, neck, arms, lower legs[,] and clothes"; however, the only wounds he located on Chhith-Berry were two lacerations at the base of his little fingers. Chhith-Berry initially told paramedics he was sober before he admitted that he had consumed five shots, a few liquor drinks, marijuana, and "a bar-and-a-half" of Xanax. Chhith-Berry also initially stated he did not know how his fingers had been cut before he claimed he sustained the injuries defending himself and Berry from a knife attack by Galloway. Officers read Chhith-Berry his *Miranda*[4] rights and transported him to Lexington County Medical Center for further medical treatment. Unsolicited, Chhith-Berry told the officer detaining him that Galloway was fighting Berry and he was defending his brother.

Once investigators arrived at the hospital, they reread Chhith-Berry his *Miranda* rights and recorded their conversation. Chhith-Berry's story had several inconsistencies and changed several times. Investigators stopped the interview and went to talk to Berry; when they returned to Chhith-Berry's room, they woke him up and resumed questioning him. Chhith-Berry continued to change his story and contradict himself and other witnesses' accounts of events at both Polk's residence and Fontenot's residence. After interviewing Berry again, officers placed Chhith-Berry under arrest for murder and transported him to Lexington County Detention Center.

While in jail, Chhith-Berry called his mother and spoke to her and Berry. During the recorded phone call, Chhith-Berry said he was not going to "watch[his] brother get his ass kicked," expressed his dislike for Galloway for "think[ing] he was all hard and shit," bragged that he "fucked that boy up," and stated that he believed Galloway deserved to be dead. Berry told Chhith-Berry that he did not need to stab Galloway and that "it didn't need to go that far." In November 2014, a grand

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

jury indicted Chhith-Berry for murder and possession of a weapon during the commission of a violent crime; his jury trial began on December 12, 2016.[5]

At a pretrial hearing, Chhith-Berry moved for immunity from prosecution pursuant to section 16-11-440(C) of the South Carolina Code (2015).[6] During his immunity hearing, Chhith-Berry testified that he was scared when Galloway arrived at Fontenot's residence because he was much smaller than Galloway,[7] and Galloway had previously beaten him up at Polk's residence. Chhith-Berry also testified he feared Galloway because he knew Galloway was out on bond for two attempted murder charges for shooting two people. Chhith-Berry claimed Galloway liked to brag about his charges and told Chhith-Berry he "just wanted to shoot someone."

Regarding the night Galloway died, Chhith-Berry recalled that Galloway took his shirt off and began hitting Berry after the fight between the girls ended, but he could not recall what instigated the fight between Galloway and Berry. Chhith-Berry testified that he believed Berry was in danger of losing his life or sustaining great bodily injury because Berry's face was bleeding, Galloway continued to hit Berry, and Berry was "trapped on the porch." Chhith-Berry admitted he stabbed Galloway once in the shoulder blade with his knife to defend Berry and stated Galloway collapsed to the side, which allowed Berry to stand up.

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[5] Berry was unavailable to testify because one of Galloway's friends murdered him.

[6] That portion of the Protection of Persons and Property Act states the following:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . . .

§ 16-11-440(C).

[7] At the time of Galloway's death in 2014, Chhith-Berry estimated he was five feet and three inches tall and weighed 115 pounds. Chhith-Berry estimated Galloway was "probably close to 200 pounds, if not more," and "basically double [his] size." Galloway's autopsy indicated he was five feet and seven-and-a-half inches tall and weighed about 170 pounds.

Chhith-Berry explained his memory of what happened after he stabbed Galloway was "just kind of a blur." Chhith-Berry recalled that Galloway stopped fighting but also testified Galloway was still moving and could have gotten up to fight. Chhith-Berry also stated Berry hit Galloway when he stood up but could not remember whether Berry stabbed Galloway. Chhith-Berry could not account for the other twenty-four stab wounds.

After hearing Chhith-Berry's testimony, which was the only evidence presented at the immunity hearing, the trial court denied his motion for immunity.[8] The trial court ruled that Chhith-Berry did not prove "by a preponderance of the evidence that he needed to continue to defend his brother . . . [because] he was consistently not clear about what happened [after] the first blow . . . ." The trial court elaborated the "unclear picture" after Chhith-Berry's initial blow to Galloway "ma[d]e[] it a factual question."

Chhith-Berry argued it was irrelevant whether he was responsible for all the stab wounds and asserted "the question is[,] . . . when he struck that first blow[,] whether he was acting in accordance with the protections of the statute . . . ." Chhith-Berry maintained "the fact that he has no memory of what happened [after the first blow] should not affect whether or not he had the right to intervene and strike the . . . blow he did and he admits to striking." The trial court disagreed, reiterating that section 16-11-440(C) required Chhith-Berry "to prove more past the initial blow" and it had "not heard anything about what happened after that."

The State then moved in limine to exclude testimony about the facts that led to Galloway's two attempted murder charges. The State argued the testimony was not relevant unless Chhith-Berry testified about his own knowledge of the charges. Chhith-Berry asserted the testimony was relevant because it affected whether his fear of death or great bodily injury was reasonable and proffered testimony from Leavitt and Fontenot that they were aware Galloway had been charged with two counts of attempted murder. The trial court ruled the testimony was inadmissible because Leavitt also testified she was not aware of Galloway's reputation for violence and neither Leavitt nor Fontenot witnessed the incident that led Galloway's charges.

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[8] Chhith-Berry renewed his motion for immunity at the directed verdict stage and posttrial; the trial court properly denied both.

During the State's case-in-chief, the bailiff told the trial court that the jury had been participating in premature deliberations. The trial court gave the following instruction to the jury:

> Now this is important. We're still taking testimony, we're still hearing evidence. You-all are not allowed to discuss the case in any fashion among one another[,] even on breaks. I kind of caught wind of that. I don't know what was being discussed, but you can't do it because there's more witnesses coming, we don't have all the parts it takes to decide on whether it's the case or not, there's more to it. But it's important, it's part of your oath. You need to follow the instructions of the [c]ourt and my instructions are to not discuss the case until you get all of the testimony, all the evidence in the record and my instructions on the law because I haven't told you what the law is; that the law says this, this and this. I haven't given it to you yet, and that's important. So don't discuss the case. You can talk about the weather, you can talk about [the bailiff], you can talk about him, whatever you like, but not about the case.

The trial court then excused the jury for lunch. The record indicates Chhith-Berry did not object to the instruction or move for a mistrial. At the conclusion of the State's case-in-chief, Chhith-Berry moved for a directed verdict and renewed several motions that the trial court had previously denied, none of which were a motion for a mistrial.

After the trial court denied Chhith-Berry's motions, the State stated that it believed Chhith-Berry was going to call witnesses to testify about the facts that led to Galloway's attempted murder charges. The State maintained those facts were not admissible because Chhith-Berry was not aware of them and they did not correlate to the facts that led to Chhith-Berry's trial. Chhith-Berry admitted he planned to call one of the individuals Galloway shot, Orville Edwards, to testify about the facts that led to Galloway's attempted murder charges. Chhith-Berry maintained Edwards's testimony was admissible because he had firsthand knowledge of a specific instance of conduct that led to Galloway's reputation as a violent

individual. The State emphasized Galloway was never convicted and informed the trial court it had a witness that would contradict Edward's testimony.

The trial court indicated it did not "want to try two cases to just get one done" but allowed Chhith-Berry to proffer Orville Edwards's testimony. Edwards testified he was working at a Columbia bar in January 2014 when an upset young woman came in and said her boyfriend had beaten her up in the parking lot. Edwards and two other men went outside and told Galloway he needed to leave or they would call the police. Galloway initially left but shortly returned, and Edwards went back outside with the two other men to confront Galloway. As Edwards approached Galloway, someone yelled "he's got a gun." Edwards stated he and the two other men grabbed Galloway and tried to wrestle him to the ground in order to get the gun. However, Edwards was inconsistent on whether he struck Galloway and whether Galloway was ever wrestled to the ground. Edwards testified that Galloway shot him in the leg, his friend in the chest, and fired several more rounds into a crowd that had been watching. Galloway then got in his car and sped away.

The trial court expressed concern that Edwards's testimony would "confuse the jury." The trial court noted that it had already admitted evidence that Galloway was out on bond for two counts of attempted murder and was wearing an ankle monitor at the time of his death, Galloway "had a propensity to not be one to fight with," and Galloway had previously struck Chhith-Berry. The trial court explained the specific facts that led to Galloway's attempted murder charges could confuse the jury by getting into factual issues in a separate case. The trial court also determined the facts of Galloway's attempted murder charges were too far attenuated from his death to be admissible. However, the trial court stated it would not "restrict [Chhith-Berry] from calling a witness [to] say[Galloway] had pending charges."

During Chhith-Berry's case-in-chief, he testified that when Galloway arrived at Fontenot's house, he knew that Galloway had two pending attempted murder charges for shooting two people. Chhith-Berry also testified Galloway was bigger than him and had previously beaten him up, which made him so afraid that he urinated on himself. Chhith-Berry admitted he stabbed Galloway "at least one time" because he was afraid Galloway was going to beat Berry to death. However, Chhith-Berry could not account for Galloway's additional twenty-four stab wounds; he claimed he could not "recall anything after the first initial stab." Chhith-Berry did not repeat his immunity hearing testimony that he knew

Galloway bragged about shooting two people and heard Galloway claim he "just wanted to shoot someone."

Following Chhith-Berry's case-in-chief, the trial court held a charge conference. Chhith-Berry requested the following jury instruction:

> If you find that the [d]efendant believes he or another person was in danger of serious injury or death and believes that deadly force was necessary to avoid this danger but that you also find that either of these beliefs was not reasonable then you should consider whether the threat constituted adequate legal provocation as that term is used in defining the crime of [v]oluntary [m]anslaughter.

The trial court declined to give this instruction but gave a voluntary manslaughter instruction. Chhith-Berry objected to the trial court's decision not to give his requested jury instruction "about mistaken belief in the need for deadly force," but the trial court maintained its "charge as a whole [was] appropriate."

The jury began deliberating at 3:50 p.m. and returned guilty verdicts for murder and possession of a weapon during a violent crime at 4:14 p.m. The trial court sentenced Chhith-Berry to concurrent sentences of fifty years' imprisonment for murder and five years' imprisonment for possession of a weapon during a violent crime.

At a posttrial motions hearing, Chhith-Berry argued his rights to a fair trial and due process had been violated because the jury participated in premature deliberations. Chhith-Berry maintained the jury returning guilty verdicts after deliberating for less than thirty minutes following a three-day trial with fifty exhibits and thirty witnesses was evidence he was prejudiced by premature deliberations. Chhith-Berry asserted the trial court erred by denying his motion for a mistrial and renewed that motion; again, nothing in the record indicates Chhith-Berry made a contemporaneous objection or moved for a mistrial regarding premature jury deliberations or the insufficiency of the trial court's curative instruction.

The trial court ruled its curative instruction was "sufficient and appropriate" and declined to grant Chhith-Berry a new trial. The trial court also declined to grant

Chhith-Berry's motion for a new trial on the following grounds: (1) Chhith-Berry's immunity claim under section 16-11-440(C); (2) the exclusion of Edwards's testimony; and (3) Chhith-Berry's requested imperfect self-defense jury instruction. However, the trial court granted Chhith-Berry's motion to reconsider his sentence and reduced his sentence to forty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err by denying Chhith-Berry immunity from prosecution pursuant to the Protections of Persons and Property Act?

II. Did the trial court err by prohibiting Edwards's testimony?

III. Did the trial court err by failing to instruct the jury on the doctrine of imperfect defense?

IV. Did the trial court err by failing to grant Chhith-Berry's motion for a mistrial due to premature jury deliberations without a hearing?

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 337-38 (2020) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

LAW/ANALYSIS

I. Immunity under the Protection of Persons and Property Act

Chhith-Berry argues the trial court erred by denying him immunity from prosecution pursuant to the Protections of Persons and Property Act (the Act) because the evidence showed he satisfied the common law elements of defense of others and section 16-11-440(C). We disagree.

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567-68 (2019) (quoting *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)); S.C. Code Ann § 16-11-450(A) (2015) ("A person who uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . ."). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [an appellate court] reviews under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *Curry*, 406 S.C. at 370, 752 S.E.2d at 266). "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.* "In other words, the abuse of discretion standard of review does not allow [an appellate] court to reweigh the evidence or second-guess the [trial] court's assessment of witness credibility." *State v. Oates*, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017) (quoting *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014)).

"[T]he [trial] court's [immunity] ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." *Cervantes-Pavon*, 426 S.C. at 452-53, 827 S.E.2d at 569 (quoting *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013)). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [trial] court to deny immunity; the [trial] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Id.* at 451, 827 S.E.2d at 569. "[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "While the Act does not require a written order upon an immunity determination," *Cervantes-Pavon*, 426 S.C. at 452 n.4, 827 S.E.2d at 569 n.4, "the [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record," *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019).

Additionally, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant

in self-defense." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). "[I]n cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because that provision was enacted to extend the protections of the Castle Doctrine to '[ ]other place[s] where he has a right to be.'" *Glenn*, 429 S.C. at 118-19, 838 S.E.2d at 496 (second and third alterations in original) (quoting *State v. Scott*, 424 S.C. 463, 475, 819 S.E.2d 116, 121 (2018)).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he *reasonably believes it is necessary* to prevent death or great bodily injury to himself or another person . . . .

§ 16-11-440(C) (emphasis added).

Further, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978)). However, "[a] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." *Id.* (quoting 40 C.J.S. *Homicide* § 189 (2014)).

Here, the record is sufficient for this court to determine the trial court applied the correct burden of proof. The trial court clearly found that Chhith-Berry failed to prove by a preponderance of the evidence he was entitled immunity pursuant to section 16-11-440(C). *See Andrews*, 427 S.C. at 181, 830 S.E.2d at 13 ("[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence."). The record also supports the trial court's finding that Chhith-Berry was not entitled to immunity under section 16-11-440(C). Chhith-Berry had the burden of proving by a preponderance of the evidence that he reasonably believed his actions were necessary to prevent death or great bodily injury; his testimony was the only evidence he presented at the immunity hearing. Chhith-Berry testified that he stabbed Galloway once in the shoulder and that caused Galloway to fall off of Berry and stop fighting. Despite

Chhith-Berry's testimony that Galloway stopped fighting after the first stab wound, Galloway sustained another twenty-four unaccounted-for stab wounds.

Because of Chhith-Berry's inability to explain Galloway's twenty-four additional stab wounds, the trial court ruled that Chhith-Berry was not entitled to immunity under section 16-11-440(C) because he failed to prove "by a preponderance of the evidence that he needed to continue to defend [Berry.]" Indeed, even if Chhith-Berry was entitled to intervene on behalf of Berry, he was not entitled to continue stabbing Galloway after Galloway stopped fighting. Consequently, the record contains evidence the trial court applied the correct burden of proof and made findings that supported its denial of immunity. Accordingly, we affirm the trial court's finding that Chhith-Berry was not entitled to immunity. *See Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("[W]hile the [trial] court may not have set forth every detail of its analysis in the record, the record [wa]s nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of [our supreme court's] precedent.").

II. Prohibited Testimony

Chhith-Berry contends the trial court erred by prohibiting Edwards's testimony about the specific facts that led to Galloway's attempted murder charges. Chhith-Berry maintains the probative value of Edwards's testimony was not substantially outweighed by the danger of confusing the jury. We disagree.[9]

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[9] Chhith-Berry also asserts Edwards's testimony should have been admitted because it established Galloway's character for violence through a specific instance of conduct that related directly to Chhith-Berry's reasonable fear of Galloway and was essential to Chhith-Berry's self-defense claim. *See* Rule 405(b), SCRE ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may . . . be made of specific instances of that person's conduct."); *State v. Day*, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) ("In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless[,] . . . if [they were] directed against others, [they] were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm."). We do not address

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "[T]he more essential the evidence, the greater its probative value." *Id.* (alteration in original) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *Id.*

The trial court did not abuse its discretion in finding the danger of confusing the jury substantially outweighed the probative value of Edwards's testimony. While testimony about the specific facts of Galloway's attempted murder charges was probative of his violent nature, its probative value was limited because it would have been cumulative to evidence the trial court deemed admissible. The trial court admitted evidence that Galloway was out on bond for attempted murder charges at the time of his death for shooting two people; additionally, Chhith-Berry testified that he knew Galloway was out on bond for attempted murder for shooting two people and that Galloway had previously struck him.[10] This evidence sufficiently conveyed Galloway's violent nature.

More importantly, the testimony at issue was disputed and could have easily confused the jury. Edwards's testimony itself was inconsistent, and the State was prepared to rebut Edwards's testimony with a witness who would have testified Galloway acted in self-defense. The jury would have had to grapple with disputed

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this argument because, even assuming the testimony of Galloway's shooting was admissible as evidence of a specific instance of conduct under Rule 405(b), SCRE, the trial court did not abuse its discretion in determining the testimony's probative value was substantially outweighed by the danger of confusing the jury.

[10] While not prohibited, Chhith-Berry did not present to the jury his immunity hearing testimony that he knew Galloway bragged about shooting people and heard Galloway state that he returned to the bar because he "just wanted to shoot someone." That does not affect the trial court's ruling that Edwards's testimony was inadmissible because it would have confused the jury.

facts in a separate and untried self-defense case in which Galloway, the victim in Chhith-Berry's trial, was the defendant. The trial court aptly recognized Chhith-Berry and the State presenting conflicting testimony about the specific facts of Galloway's attempted murder charges would have required it to "try two cases to just get one done." Subjecting the jury to conflicting testimony about the facts of Galloway's attempted murder charges likely would have confused the jury, and that danger substantially outweighed any probative value the testimony could have provided. Therefore, the trial court did not abuse its discretion by admitting evidence of Galloway's attempted murder charges but prohibiting witness testimony about the specific facts. Accordingly, we affirm the trial court's decision to prohibit the testimony.

III. Imperfect Defense Jury Instruction

Chhith-Berry asserts the trial court erred by refusing to give his requested imperfect defense[11] jury instruction. Chhith-Berry maintains this instruction would have allowed the jury to convict him of voluntary manslaughter rather than murder if it determined he unreasonably believed Berry was in danger of losing his life or sustaining serious bodily injury. We disagree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812 (alteration in original) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "[T]o warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* (quoting *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603).

"South Carolina has not expressly adopted the doctrine of imperfect self-defense." *State v. Sams*, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). However, "the view taken in most treatises and jurisdictions that have discussed the imperfect self-defense doctrine is that it serves to reduce a charge of murder to voluntary manslaughter . . . ." *Id.* at 315-16, 764 S.E.2d at 517. Accordingly, "even if [South Carolina] were to accept the doctrine of imperfect self-defense . . . it would, at

[11] Because Chhith-Berry claims deadly force was necessary to prevent Berry's serious injury or death, the doctrine is more appropriately termed imperfect defense rather than imperfect self-defense.

most, entitle [defendants] to an instruction on voluntary manslaughter . . . ." *Id.* at 316, 764 S.E.2d at 517.

Chhith-Berry's contention the trial court erred by declining to give his requested jury instruction has no merit. The trial court is required to charge only the current and correct law, and South Carolina has not adopted the doctrine of imperfect defense. Moreover, our supreme court has noted the doctrine of imperfect defense would entitle a defendant to a voluntary manslaughter instruction, which Chhith-Berry received. Imperfect defense is simply not the law of South Carolina; even if it were, Chhith-Berry received a voluntary manslaughter instruction. Accordingly, the trial court did not err by refusing to give Chhith-Berry's requested jury instruction on imperfect defense.

IV. Premature Jury Deliberations

Chhith-Berry asserts the trial court erred by failing to grant his motion for a mistrial because he was prejudiced by premature jury deliberations. We disagree.

"[A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed." *State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999) (alteration in original) (quoting *State v. McGuire*, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979)). "Ordinarily, juror testimony concerning juror misconduct is not admissible unless the allegations of misconduct pertain to external influences." *Ethier v. Fairfield Mem'l Hosp.*, 429 S.C. 649, 654, 842 S.E.2d 355, 358 (2020). However, "premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." *Aldret*, 333 S.C. at 312, 509 S.E.2d at 813.

Nevertheless, our supreme court "ha[s] routinely held that a party must object at the first opportunity to preserve an issue for review." *Id.* ("In light of [the defendant's] failure to call the alleged juror misconduct to the trial court's attention at his first opportunity to do so, we hold he is procedurally barred from raising the issue."); *see also State v. Vang*, 353. S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding that the defendant failed to preserve for appellate review his contention that the trial court should have questioned each juror to determine whether premature deliberations had occurred because he did not object to the trial

court's ruling or contemporaneously request individual questioning of the jurors). Additionally, "appellate court[s] will not consider any fact which does not appear in the [r]ecord on [a]ppeal." Rule 210(h), SCACR.

Chhith-Berry failed to preserve this issue for appellate review. Chhith-Berry knew premature jury deliberations had allegedly taken place because the trial court gave a curative instruction,[12] yet Chhith-Berry did not object to the trial court's curative instruction, request that the trial court question the jury regarding premature deliberations, or move for a mistrial. Instead, Chhith-Berry waited until after the jury submitted its guilty verdict to raise the issue in a posttrial motion. The record does not support Chhith-Berry's assertion that he contemporaneously objected to the trial court's curative instruction and moved for a mistrial. Based on the record before us, Chhith-Berry first raised this issue in a posttrial motions hearing. Accordingly, Chhith-Berry did not preserve this issue for appellate review.

CONCLUSION

The trial court properly denied Chhith-Berry's immunity request, prohibited Edwards's testimony, and declined to give Chhith-Berry's requested imperfect defense jury instruction. Additionally, Chhith-Berry failed to preserve for appellate review his contention that he was prejudiced by premature jury deliberations. Accordingly, Chhith-Berry's convictions for murder and possession of a weapon during the commission of a violent crime are

AFFIRMED.

WILLIAMS, C.J. and VINSON, J., concur.

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[12] In *Aldret*, our supreme court set forth a *suggested* procedure for trial courts to follow when allegations of premature deliberations arise. 333 S.C. at 315, 509 S.E.2d at 815. "If such an allegation arises during trial, the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." *Id.* (emphasis and footnote omitted). The trial court was not required to follow this procedure, and our supreme court made clear that "allegations [of premature jury deliberations] must be raised at the first opportunity in order to be preserved for review." *Id.* at 315 n.6, 509 S.E.2d at 815 n.6.