FIRST DIVISION
PHIPPS, C. J.,
ELLINGTON, P. J., and MCMILLIAN, J.

March 25, 2015

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A14A1853. JACKSON v. THE STATE.

MCMILLIAN, Judge.

Matthew Jackson appeals following the denial of his motion for new trial after a jury convicted him of twenty-eight counts of armed robbery, two counts of possession of a firearm during the commission of a felony, and one count of theft by receiving stolen property. On appeal, Jackson argues that the trial court erred in denying his motion to suppress evidence taken from his mother's house pursuant to two search warrants based on evidence discovered during what he contends was an illegal sweep of the house. He further asserts that the State violated its duties under *Brady v. Maryland*, 373 U.S. 83 (83 SCt 1194, 10 LE2d 215) (1963), by failing to disclose the disciplinary history of one of the officers involved in the sweep or to produce that officer at the suppression hearing. Finding no error, we affirm.

Our Supreme Court has determined that the appellate courts of this State should apply the following principles when considering a trial court's ruling on a motion to suppress:

> First, when a motion to suppress is heard by the trial judge, that judge sits as the trier of facts. The trial judge hears the evidence, and his findings based upon conflicting evidence are analogous to the verdict of a jury and should not be disturbed by a reviewing court if there is any evidence to support [them]. Second, the trial court's decision with regard to questions of fact and credibility must be accepted unless clearly erroneous. Third, the reviewing court must construe the evidence most favorably to the upholding of the trial court's findings and judgment.

(Citation omitted.) *Miller v. State*, 288 Ga. 286, 286-287 (1) (702 SE2d 888) (2010). See also *Hughes v. State*, __ Ga. __ (1) (Case No. S14G0622, decided March 16, 2015). And "[t]o the extent an issue concerns a mixed question of fact and law, we accept the trial court's findings on disputed facts and witness credibility unless they are clearly erroneous, but independently apply the law to the facts." *Jones v. State*, 291 Ga. 35, 37 (1) (727 SE2d 456) (2012).

At the hearing on the motion to suppress, Detective Harry Arthur McGarvey of the Paulding County Sheriff's Office testified that on March 2, 2006, he was called

to the scene of an armed robbery at a dry cleaning business in Paulding County involving two men wearing black ski masks. The police received information that the suspects had been driving a tan Audi automobile, and within about 15 minutes, another officer discovered a silver Audi in a parking lot "about a quarter of a mile away" in the direction in which the suspects' car had been traveling. The hood of the car was still "real hot," as if it recently had been driven. The officers subsequently determined that the car had been stolen, and they recovered latent prints from the vehicle, which were identified as belonging to Jackson and a man named Gregory Gardiner. Based on this evidence, the Paulding County Sheriff's Office obtained arrest warrants for both men on a charge of theft by receiving stolen property.

McGarvey later investigated a second armed robbery at a Mexican restaurant, involving four males who made everyone in the restaurant get on the ground and then took their wallets, purses, and cell phones. Both the robbery at the dry cleaners and the robbery at the restaurant involved men wearing black ski masks, and in both crimes, the men used a shotgun and a handgun.

Investigator Joseph Lee Garland, who was assigned to the United States Marshals Service's Southeast Regional Fugitive Task Force (the "Task Force"), also testified at the suppression hearing. He said he was contacted by Paulding County

officers to assist in the apprehension of Jackson on a charge of theft by receiving a stolen vehicle. Garland was able to locate two addresses for Jackson, and officers from the Task Force, Cobb County, and Paulding County, including McGarvey, decided to look for Jackson at his mother's home in Cobb County. On the night of March 22-23, 2006, after conducting surveillance at that location, the officers placed a perimeter around the property and then approached the house to knock on the front door. Garland said the door was opened by Jackson's mother. And "[a]bout as quick as she opened the door," the officers identified themselves and at that point they saw Jackson walk up the steps from the basement of the house and stand by his mother in the foyer. The officers had already crossed the threshold of the house when they took Jackson into custody, but Garland could not say whether Jackson was inside or outside the house at the moment of his actual arrest.

Afterwards, as was their "standard procedure," Garland said the officers informed Jackson's mother that they were conducting a protective sweep of the house for their safety, i.e., to make sure that everybody in the house was contained and the officers knew where they were so there would be "no ambushes or surprises or anything." Garland explained that they had information about the prior armed robberies, and they were still looking for three other suspects. The officers did not

know if any of the suspects, including Gardiner, were in the residence or not, so during the search, the officers looked "anywhere a person might hide." McGarvey waited outside with Jackson during this sweep. But Cojo Joyner, an investigator with the Atlanta Police Department assigned to the Task Force, participated in the sweep of the basement, where police found a man named Robert Watkins. Watkins was removed from the house "probably within the first ten to fifteen minutes" of the officers' arrival at the house. Officers also ran a check on each person at the house for outstanding warrants, and after discovering one for Watkins, the officers took him into custody.

Both Garland and McGarvey testified, over the defense's hearsay objections, that Joyner also discovered a weapon and ammunition, although they were not present when the discovery occurred. According to McGarvey, Joyner saw the handle of the gun in plain view in between two mattresses in the basement during the sweep. McGarvey later spoke with Joyner about his discovery of the gun, and at or around 3:25 a.m., McGarvey and another officer obtained a search warrant for the house.[1] They returned to the house to execute that warrant and during the subsequent search,

[1] The officers actually obtained two search warrants that night, one that referenced only the crime of theft by taking and another that also referenced a charge of armed robbery; however, police only executed the latter warrant.

officers recovered, inter alia, two wallets, one containing Mexican currency and the other containing a Mexican identification card; credit cards, including at least one card later identified as belonging to a victim in the restaurant robbery; two scales; two handguns; and ammunition, including five shotgun shells.

Subsequently, McGarvey executed a second search warrant for the house. During that search, officers recovered a number of items, including at least one item (a Palm Pilot) that fit the description of the items taken from victims at the Mexican restaurant.

Jackson's mother, Joan Etta Jackson Peoples, also testified at the suppression hearing, stating that the police arrived at her house at around 11:00 p.m. when she was in bed. Peoples said that her 14-year-old daughter opened the door, and after hearing noise, Peoples left her bedroom and walked down the hall to see her daughter standing at the doorway, crying, and a police officer standing "with a gun to her." The officers directed Peoples and her daughter outside, and after she told them that her younger son, who was 15 at the time, was inside, sick, an officer retrieved him and brought him outside, too. When Jackson, her older son, came up the stairs, the officers pointed their guns at him, escorted him outside, and handcuffed him. The officers then went back into the house and began looking around and later brought

Watkins outside. Sometime later, they escorted Peoples into Watkins's bedroom and showed her a gun that was under the couch, which had been turned over. Peoples said the gun was not located between the mattresses or near the bed.

Based on this evidence, the trial court denied the motion to suppress in part and granted it in part. The trial court first found the protective sweep was proper based on "ample articulable facts which, when taken together with the rational inferences from those facts," might have caused "a reasonably prudent officer" to believe that "the home of defendant might well harbor an individual posing a danger to those on the arrest scene." In particular, the trial court found that "[b]ased on the knowledge of the facts surrounding the investigation of the theft by taking and armed robbery, the officers were aware of a confederate who might be harbored" in the house, and "officers noted the presence of multiple persons in the home emerging from different parts of the house." The trial court noted that Jackson "himself came from an area downstairs where the officers could not see and could reasonably fear the concealment of another individual posing a danger."

The trial court further found that both warrants executed at the house were supported by sufficient probable cause and the magistrate had a substantial basis for issuing them. The trial court also concluded that the language in the first warrant

identifying "firearms used in an armed robbery" was adequate and that the officers had sufficient probable cause to seize items relating to the Mexican restaurant robbery. However, the trial court granted the motion to suppress as to the scales and a lighter found in the house because no probable cause existed for the officers to believe that those items were involved in any armed robbery.

Subsequently, at trial, Officer Spencer McAllister of the Paulding County Sheriff's Office testified that he was present at the scene when Jackson was arrested and that he participated in the protective sweep of the house. That sweep occurred immediately after Jackson was removed from the house, when police officers went downstairs to the area where Jackson had been. McAllister located Watkins downstairs in a bedroom. Watkins was laying in bed with the covers over him, and when McAllister commanded him to show his hands, Watkins replied, "F you." Unsure if Watkins had a weapon, McAllister asked for assistance. As other officers moved in, McAllister turned his attention away and "deep cleared" an area he saw through an open doorway. After he called that room "clear," he returned and saw that Watkins had been removed.

Officer Joyner testified at trial that after the officers had cleared the house of people, "while doing a secondary sweep," he observed, in plain view, the butt of a

handgun extending from a folded futon mattress in one of the bedrooms. On cross-examination, he confirmed that when he was searching the room for people during the protective sweep, he did not see that gun, but only saw it in a second sweep.

1. Jackson first asserts that the trial court erred in ruling that the officers' prospective sweep of his mother's home was incident to a valid arrest because the arrest warrant issued against him was void as it did not include the information required in OCGA § 17-4-41.[2] Although Jackson contends that he preserved this issue by raising it in his amended motion to suppress, that motion contains no such argument and no reference to OCGA § 17-4-41. Moreover, the trial court's order denying the motion does not address the issue. In fact, it appears that Jackson raised this issue for the first time in a supplemental brief in support of his motion for new trial.

Under these circumstances, "[t]he decision whether to set aside its previous order denying the motion to suppress was within the discretion of the trial court." (Citation and punctuation omitted.) *Huntley v. State*, 244 Ga. App. 212, 214 (2) (535 SE2d 270) (2000). See also *Pickens v. State*, 225 Ga. App. 792, 796 (1) (c) (484 SE2d

[2] Jackson does not argue on appeal, however, that police lacked probable cause to arrest him.

731) (1997). Jackson does not assert that he had no copy of the arrest warrant at the time he filed his motion to suppress and offers no excuse for his delay in raising the issue. See *Young v. State*, 282 Ga. 735, 738 (653 SE2d 725) (2007) (defendant waived ground for motion to suppress where he failed to raise it in written motion to suppress and thus failed to put State on notice of issue). In any event, a copy of the arrest warrant was introduced into evidence at trial, but Jackson did not ask the court during the trial to reconsider its ruling, nor did he renew his motion to assert any argument about the content of the arrest warrant. *Young*, 282 Ga. at 738 (suggesting proper procedure where new ground arises at trial is to ask for continuance to formally amend motion to suppress); *Gunsby v. State*, 248 Ga. App. 18, 21 (545 SE2d 56) (2001); *Boatright v. State*, 192 Ga. App. 112, 119 (11) (385 SE2d 298) (1989). Accordingly, we find no abuse of discretion by the trial court in declining to reconsider its earlier ruling in response to the arguments raised in the motion for new trial.[3]

[3] Jackson argues that even if he failed to properly preserve the issue, we should nevertheless consider the issue because a warrant that fails to comply with OCGA § 17-4-41 is void, rendering his arrest a nullity. Pretermitting Jackson's argument that the warrant was void for lack of specificity, we find no abuse of discretion by the trial court because Jackson had a copy of the warrant, at the latest, by the time of trial, yet failed to raise this issue until after the jury issued its verdict. See *Ware v. State*, 258 Ga. App. 706, 707 (1) (574 SE2d 898) (2002) (where defendant failed to argue at trial

2. Jackson next argues that no protective sweep was authorized because police lacked reasonable articulable suspicion that dangerous individuals were in the house after they arrested him.

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327 (110 SCt 1093, 108 LE2d 276) (1990). And it is well settled that

> [p]olice officers are authorized to make a protective sweep in conjunction with an in-home arrest when they possess "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."

Lawson v. State, 299 Ga. App. 865, 870 (2) (684 SE2d 1) (2009), quoting *Maryland v. Buie*, 494 U.S. at 334 (III). Moreover, "[a]lthough we review police actions from the standpoint of a hypothetical 'reasonable' officer, we must measure those actions

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that arrest warrant was invalid, he is precluded from making that argument on appeal).

from the foresight of an officer acting in a quickly developing situation and not from the hindsight of which judges have benefit." (Citation and punctuation omitted.) *Nelson v. State*, 271 Ga. App. 658, 661 (1) (c) (610 SE2d 627) (2005).

Here, the trial court found "ample articulable facts, . . . when taken with the rational inferences" therefrom, to support the officers' protective sweep, citing the continuing search for the other suspects involved in the armed robberies and the presence of numerous people in the home. We find that the evidence supports the trial court's factual findings and that the trial court committed no clear error.

Although the arrest warrant only referenced the charge of theft by receiving, when police arrived at the house that night, they suspected that Jackson had been involved in the armed robberies along with one to three other men, and they had a warrant out for Gardiner, one of his suspected confederates. Given the nature of the underlying crimes, the officers had a basis to be concerned about the possibility of persons in the home possessing firearms, which could be used against them.

Additionally, the house was a split level, the front door of which opened into a foyer, with stairs going up and other stairs going down in close proximity to the door, but no other rooms were on the same level with the foyer. Police observed Peoples and her two younger children in one area of the house. Peoples testified that

she came out of her bedroom down the hall to the front door, and police retrieved her younger son from his bedroom, which apparently was on the upper floor of the house.[4] Jackson, on the other hand, came into the foyer from downstairs,[5] an area into which the police had no clear view. Police located Watkins in the downstairs area. The record also contains evidence to support a conclusion that the police searched only in locations where a person could be concealed.

Under these circumstances, we find that the officers' protective sweep of the premises to look for persons potentially posing a danger was lawful, even though Jackson was already in custody at the time. See *Park v. State*, 308 Ga. App. 648, 653 (1) (708 SE2d 614) (2011) (upholding protective sweep where police were unsure whether occupants were armed and dangerous); *Lawson*, 299 Ga. App. at 870 (2) (sweep not unreasonable where one suspect to armed robbery answered the front door, causing police to suspect that second person related to the crime was concealed somewhere in the home and presented a possible danger); *Moorer v. State*, 286 Ga.

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[4] Jackson testified that the downstairs bedrooms were occupied by Jackson, Watkins, and a third, 20-year-old son, who was incarcerated at the time.

[5] Given this evidence, we find no merit to Jackson's argument that the trial court clearly erred in finding that there were "multiple persons in the home emerging from different parts of the house."

App. 395, 397 (1) (649 SE2d 537) (2007) (sweep justified where officers knew two men involved in armed robbery and both had guns when they committed the crime and having located one man in house, it was reasonable to ascertain if other man involved in crime was there as well); *Powell v. State*, 245 Ga. App. 796 (538 SE2d 857) (2000) (upholding protective sweep due to nature of the crime involved and surrounding circumstances, even though objects of arrest warrant had already been removed from the scene); *State v. Scott*, 176 Ga. App. 887, 889 (2) (339 SE2d 276) (1985) ("The reasonably-based belief that another occupant was present at this time of night and had access to a rifle which was then not accounted for, justified the protective sweep to assure that no one would shoot at the officers as they were leaving.").[6]

3. Jackson asserts that the police nevertheless exceeded the lawful scope of any sweep when Joyner conducted a secondary sweep after the initial protective sweep had cleared the house of people. Joyner testified for the first time at trial and stated

[6] See also *United States v. Burrows*, 48 F3d 1011, 1017 n. 9 (7th Cir. 1995) (noting that an "unknown assailant who attacks officers departing from an arrestee's home poses an equivalent, if not greater, risk to the safety of the officers and others as does the assailant who attacks the officers upon entry").

that he found the gun during this secondary sweep after the officers had already cleared the house of people.

Pretermitting whether the secondary sweep was unlawful under the circumstances, this issue was not raised in Jackson's motion to suppress or at the suppression hearing, where the only evidence showed that the gun at issue had been found during a single protective sweep. Nevertheless, when the issue of a secondary sweep arose at trial, Jackson failed to either renew his motion to suppress to assert the additional ground or to ask the trial court to reconsider its ruling in light of Joyner's testimony.[7] Instead, he waited until his motion for new trial to raise the issue. Under these circumstances, we cannot say that the trial court abused its discretion in declining to reconsider its earlier ruling in light of Joyner's testimony. See *Gunsby*, 248 Ga. App. at 21 (2); *Huntley*, 244 Ga. App. at 214 (2).

4. Jackson further contends that the evidence garnered from the execution of the two search warrants at his mother's house should be excluded as fruit of the

[7] Although the trial court granted Jackson's counsel a continuing objection to the introduction of any items of evidence discussed in the motion to suppress or seized in the search warrants discussed at the hearing, that objection necessarily was limited to the grounds previously raised by Jackson and considered by the trial court. See *Parrott v. State*, 318 Ga. App. 545, 549 (1) (736 SE2d 436) (2012); *Norman v. State*, 197 Ga. App. 333, 336 (4) (398 SE2d 395) (1990).

poisonous tree because they both arose from evidence discovered during the protective sweep. However, as we affirm the trial court's decision upholding the legality of the protective sweep, we find this contention to be without merit and thus we do not address Jackson's arguments regarding the inevitable discovery and the independent source doctrines.

5. Jackson also asserts that the State violated its duties under *Brady v. Maryland* by failing to disclose Joyner's disciplinary history and by failing to produce him at the motion to suppress hearing. He argues that by failing to produce Joyner at the suppression hearing, the State was allowed to avoid the possibility that the trial court would learn the gun was found in a secondary sweep. He also asserts that the State "successfully suppressed" Joyner's disciplinary record, "which could have been used to hurt his credibility" at the suppression hearing.

However, Jackson has failed to demonstrate that he raised a *Brady* issue at trial or at any time in the proceedings below, and we have found no such argument or objection. Although Jackson raised the issue of Joyner's absence at the suppression hearing, he did so in the form of hearsay objections to the other officers' testimony

about the circumstances of finding the gun.[8] However, he never asserted that the State's failure to produce Joyner at the hearing constituted a *Brady* violation. Moreover, Jackson raised no *Brady*, or any other, objection when Joyner testified about the "secondary sweep" at trial. Accordingly, Jackson waived appellate review of any *Brady* issue based on Joyner's absence from the suppression hearing. *Walker v. State*, 288 Ga. 174, 179 (3) (c) (702 SE2d 415) (2010); *Walker v. State*, 282 Ga. 703, 706 (4) (653 SE2d 468) (2007).

Additionally, Jackson did not assert any *Brady* violation regarding Joyner's disciplinary history in his written motion for new trial or at the motion hearing. Although Jackson's attorney cited Joyner's disciplinary history at the hearing in arguing that the trial court erred in relying on the other officers' hearsay testimony

[8] The hearing on Jackson's motion to suppress was held on February 8, 2007, and at that time, as well as at the present time, Georgia law allowed the admission of hearsay evidence at a suppression hearing in determining the existence of probable cause. See *Stinski v. State*, 281 Ga. 783, 784 (1), n. 1 (642 SE2d 1) (2007); *Banks v. State of Ga.*, 277 Ga. 543 (1) (592 SE2d 668) (2004) (recognizing longstanding rule allowing admission of hearsay to determine probable cause); *Copeland v. State*, 325 Ga. App. 668, 670 (1) (754 SE2d 636) (2014) ("[T]he trial judge may admit hearsay testimony at the hearing, giving it such weight and credit as he deems proper, although such evidence may not be admissible at trial.") (citation and punctuation omitted). But even if the trial court erred in allowing the hearsay testimony, Joyner testified at trial regarding the circumstances of finding the gun, and in ruling on a motion to suppress we consider not only the evidence at the hearing but also the evidence at trial. *Park v. State*, 308 Ga. App. 648, 651 (1) (708 SE2d 614) (2011).

in ruling on the motion to suppress, he never mentioned *Brady*.[9] The trial court held a subsequent hearing on Jackson's motion for reconsideration of the trial court's verbal announcement that he would be denying the motion for new trial. During that hearing, counsel argued whether Joyner's disciplinary history constituted relevant and admissible evidence, but no mention was made of a *Brady* violation. Although Jackson cited *Brady* in a brief filed after that hearing, he did so in support of his argument that Joyner's disciplinary history was relevant and admissible. But in none of the post-trial proceedings does Jackson assert that the State breached any duty under *Brady*. The trial court subsequently issued a written order denying both the motion for new trial and the motion to reconsider.[10]

Because Jackson has not pointed us to, and we have not found, anywhere in the record where Jackson ever argued that the State had breached its duties under *Brady*, the issue is waived. See *Williams v. State*, 326 Ga. App. 665, 670 (4) (757 SE2d 267)

[9] Jackson's attorney stated that he had requested the disciplinary history about one month before trial, and had received it the day before the hearing.

[10] In that order, the trial court made a specific finding that Joyner's disciplinary history was irrelevant and thus it did not consider such evidence in reaching its decision, but Jackson does take issue with that ruling on appeal.

(2014) (issues presented for the first time on appeal furnish nothing for Court of Appeals to review).

Judgment affirmed. Phipps, C. J., and Ellington, P. J., concur.