RECEIVED

Jun 13 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2021-000313

THE STATE,

Respondent,

vs.

TAPPIA DEANGELO GREEN,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

O.T. Wallace Building
101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

"Whether the Court of Appeals erred by affirming the trial judge's denial of Petitioner's mistrial motion, where it held that a testifying defendant had the burden to prove he received Miranda warnings to establish a Doyle violation rather than concluding the prosecution, as the proponent of the evidence, had the burden to show a testifying defendant did not receive Miranda warnings before it could permissibly use his post-arrest silence for impeachment, particularly given evidence Petitioner received the warnings?" (footnotes omitted).

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals somehow err by affirming the trial judge's ruling denying Green's mistrial motion when: (1) Green—as the movant seeking the grant of a mistrial—bore the burden of establishing a Doyle violation actually occurred before he could be entitled to the relief he was requesting; and (2) the trial judge's factual finding Green had not been informed of his constitutional rights was supported by the evidence and testimony presented during trial, which meant no Doyle violation occurred in Green's case since it was constitutionally permissible for the solicitor to impeach Green's trial testimony with Green's post-arrest but pre-Miranda silence?

STATEMENT OF THE CASE

In August of 2015, Petitioner Tappia Deangelo Green was apprehended after unsuccessfully attempting to flee from law enforcement officers and arrested based on several outstanding warrants that stemmed from an incident that had occurred a few months earlier. In November of 2015, the Charleston County Grand Jury indicted Green for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime in connection to that earlier incident. On May 22, 2017, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Roger L. Couch, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Green as indicted. Following the verdict, the trial judge sentenced Green to concurrent terms of imprisonment of fifteen years for armed robbery, fifteen years for kidnapping, and five years for possession of a weapon during the commission of a violent crime. Green then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—issued a published opinion unanimously affirming Green's convictions. State v. Green, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021). Thereafter, Green petitioned the Court of Appeals for rehearing, and the petition was denied. Green then filed a petition for a writ of certiorari in the Supreme Court, and that petition was granted on March 15, 2022.

STATEMENT OF FACTS

On the afternoon of April 14, 2015, Keith Lee ("Victim"), who had moved to the Charleston area only two months earlier, drove his girlfriend, Karissa Aiken, to a bank located in North Charleston, South Carolina, so she could deposit her paycheck. (R. pp. 119-121; p. 185). Once they arrived, Aiken went inside the bank, and Victim remained outside in the car. (R. pp. 121-122). As he waited, a gold Chrysler PT Cruiser parked directly next to him, and its driver—a man in a red shirt—exited the vehicle and headed into the bank. (R. p. 122). A short time later, the man came back outside, he asked Victim for assistance jumpstarting his vehicle, and Victim graciously provided the requested help. (R. p. 122). Victim then returned to his own car and got back inside. (R. p. 123).

Just as he did, the man he had assisted suddenly approached him, put a gun to his head, pulled him from his car, and forced him into the backseat of the PT Cruiser. (R. pp. 58-59; pp. 123-125). Although Victim did not know his identity at the time, Green was waiting inside the PT Cruiser along with another man, and the driver—Johnathan Johnson—got back into the vehicle's driver's seat. (R. pp. 125-127; p. 158). The three men then all pointed guns at Victim, demanded he turn over his belongings, and proceeded to steal his jewelry and cash at gunpoint. (R. pp. 128-129). Following that, Green instructed Victim they would kill him if he did not come up with more, and Johnson, whose mother—unbeknownst to Victim at that time—worked with Victim, indicated he knew Green was employed at a Hardee's restaurant located in the Mount Pleasant area. (R. pp. 129-130). Green and the others then forced Victim to call his place of employment and verify his paycheck was ready for pick-up.[1] (R. pp. 130-131).

[1] Officers later confirmed Victim placed a call to the restaurant at approximately 3:30 p.m. on the date of the incident. (R. p. 327).

Once he had done so, the robbers tied Victim up and drove him to the restaurant. (R. p. 131). When they arrived there, Victim was untied, and Green warned him he would be killed if he did anything to obtain help while he was inside. (R. p. 134; p. 154). Johnson then escorted Victim into the restaurant, and, as he did so, he alerted Victim what was occurring was a gang initiation, he did not want to be a participant, his mother worked with Victim at Hardee's, and he would not let the others kill him. (R. p. 135). Following that, Victim, who was inside the restaurant for just three minutes in total, proceeded to quickly get his paycheck from the manager while Johnson looked on from nearby, and the two then returned to the PT Cruiser.[2] [3] (R. pp. 136-137; p. 334).

With Victim's paycheck now obtained, the robbers tied Victim up once more and drove him to a check cashing business located back in North Charleston. (R. pp. 139-140). Victim was then again untied, Green again threatened him, and Victim was forced to go into the business and cash his paycheck while once again accompanied by Johnson. (R. pp. 140-141; p. 154). After they had done so, Victim and Johnson returned to the PT Cruiser with Victim's money, which totaled just over $240. (R. p. 139; p. 141; p. 736).

[2] As the two returned to the PT Cruiser, they encountered Green and the other robber, who had jointly begun approaching the restaurant upon hearing sirens nearby. (R. pp. 136-137). Terrifyingly, Green explained to Victim he thought the panic button had been triggered inside the restaurant based on the sirens and he was coming inside to kill everyone until he saw Victim and Johnson returning. (R. p. 167).

[3] Later on during trial, Victim stated he had subtly—and unsuccessfully—tried to signal to the manager he needed help when he was picking up his paycheck. (R. p. 136). Meanwhile, the manager, Shania Burden, was called to testify as a defense witness, indicated she did not remember anything unusual happening on the date of the incident, and asserted Victim seemed to her to be behaving normally that day. (R. pp. 582-584). However, she acknowledged her interaction with Victim on that date was a quick one. (R. p. 589). Furthermore, Burden confirmed she saw Johnson come into the restaurant with Victim that day, but she also indicated Johnson neither worked there nor bought anything as a customer on that date. (R. pp. 588-589).

Upon Johnson's and Victim's return, Green took Victim's money before suggesting to his accomplices they take Victim to Johns Island, South Carolina, and kill him. (R. p. 141). However, Johnson pleaded with Green for Victim to be spared, and Green eventually agreed not to kill him. (R. pp. 142-144). The robbers then stopped at a gas station, Victim saw his girlfriend's vehicle parked at a nearby restaurant, he begged to be released while promising not to tell the police anything about what happened, and the robbers permitted Victim to leave. (R. pp. 71-72; pp. 142-144). As they did, Green assured Victim the robbery had not been personal and was just "business." (R. pp. 143-144).

Following that, Victim ran to his girlfriend's vehicle and alerted Aiken of what had happened. (R. pp. 144-145). Initially, Aiken was shocked and in disbelief, and she drove Victim to their home. (R. pp. 144-145). However, once there, she realized Victim was not joking and quickly alerted law enforcement of the robbery and kidnapping. (R. pp. 144-145; pp. 184-185; pp. 199-200). Shortly after that, law enforcement officers from the North Charleston Police Department rapidly rushed to the scene, and Victim, who seemed "very disturbed," recounted what had occurred. (R. p. 147; pp. 197-198; p. 200; pp. 295-298).

During the course of the ensuing investigation, Johnson was quickly identified as one of the suspects, and he voluntarily—although somewhat reluctantly—came to the North Charleston Police Department to provide a statement.[4] (R. pp. 186-187; pp. 190-191; p. 202; p. 209; p. 299). Once there, Johnson spoke with Detective Alexander Kaufman and admitted the robbery and kidnapping of Victim had occurred. (R. p. 300). However, Johnson insisted he only

[4] Significantly, Johnson arrived for that interview in a gold PT Cruiser matching the description of the robbers' vehicle, and, during a subsequent consent-based search of it, Victim's paycheck stub was found between the vehicle's front seats. (R. pp. 202-203; p. 205; p. 213; pp. 215-216; p. 299; p. 736).

personally participated in the crimes under duress and claimed he was held at gunpoint by the other perpetrators, including one called "Tampa." (R. p. 300).

As the investigation continued, Detective Kaufman discovered Green's nickname was "Tampa," and a photographic lineup was prepared and shown to Victim in response. (R. p. 281; p. 300; pp. 737-738). Upon viewing the six similar-looking photographs in that lineup, Victim identified Green's photograph as depicting one of the perpetrators of the robbery and kidnapping.[5] (R. pp. 50-51; p. 283; p. 285; p. 301; pp. 737-738).

A few months later, Green was tracked down and arrested in connection to the incident despite his concerted efforts to avoid capture.[6] (R. pp. 598-599). Following his arrest, Green was indicted for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime, and, after a nearly two-year period of pre-trial incarceration, he proceeded forward to trial on those charges. (R. p. 2; pp. 12-13; pp. 503-504).

During the course of trial, Victim testified about the terrifying robbery and kidnapping that occurred on the date of the incident, he identified Green in the courtroom as one of the perpetrators of the charged crimes, and evidence and testimony concerning his out-of-court identification of Green was also introduced. (R. pp. 117-172; p. 285; p. 301; pp. 737-738). Along with that evidence and testimony, the officers involved in the investigation into the

[5] At the time of the lineup, Victim indicated he was only 75% certain of his identification of Green and further stated he would be 100% certain if Green's teeth had been visible in the photograph due to the fact the robber he was identifying had gold teeth. (R. pp. 287-288). Notably, although Green did not have any visible gold teeth by the time of trial, Green was depicted as having gold teeth at some earlier point in a profile picture that was recovered from his social media account. (R. p. 86; p. 348; p. 351; p. 353).

[6] By his own admission, Green's efforts to avoid apprehension included leading officers on a high-speed vehicle chase, attempting to flee from officers on foot at the conclusion of the vehicle chase, and entering and hiding inside a random apartment that was not his own until forced to surrender. (R. pp. 546-549).

incident testified about what was uncovered through their investigation, including about Johnson's confession to involvement in the crimes and identification of Green as one of the perpetrators. (R. pp. 183-194; pp. 197-209; pp. 213-222; pp. 224-261; pp. 280-289; pp. 295-341; pp. 344-356). Likewise, evidence and testimony was presented demonstrating both Johnson's and Green's fingerprints were found on Victim's paycheck stub, which itself was established as having been recovered from a gold PT Cruiser connected to both the incident and Johnson. (R. pp. 203-205; pp. 215-219; p. 250; pp. 252-258; p. 261). In addition to that, evidence and testimony was presented establishing Johnson was at the bank shortly before the kidnapping occurred, Johnson and Victim were at the Hardee's restaurant a short time later, Green was in the parking lot of the same restaurant at the same time, and Green called Johnson multiple times throughout that time period, including during the brief periods of time Johnson was inside the bank and the restaurant. (R. pp. 301-306; pp. 346-348; pp. 352-354; p. 356).

Following the presentation of that evidence and testimony, the State rested, and Johnson, who had entered guilty pleas and been sentenced in connection to the incident prior to Green's trial, testified on behalf of the defense. (R. p. 362; pp. 368-369; p. 450). During the course of his testimony, Johnson admitted he and Green had been with Victim on the date of the incident. (R. p. 369; p. 414; p. 453). However, he claimed Victim fabricated his account of the events that occurred on that date and had really voluntarily accompanied him and the others in order to get money to repay him for drugs that had been purchased on credit.[7] (R. p. 369; p. 387). In making that particular claim, Johnson, who professed personal innocence despite having already pled guilty, repeatedly alternated between insisting he just happened to see Victim at the bank that

[7] Conveniently, Johnson maintained Victim owed him $240 in total, which just so happened to be almost exactly the same amount Victim received from his paycheck on the date of the incident. (R. p. 139; pp. 397-398; p. 736).

day while there on unrelated business and alleging Victim had actually called him that day to prearrange their meeting.[8] [9] (R. p. 369; pp. 389-391; p. 398; p. 458; p. 465). Furthermore, Johnson acknowledged he had said some of the things attributed to him through the entirely different account of the incident he had given to officers shortly after it occurred, but he insisted that earlier incriminating account was a lie he made up while intoxicated. (R. pp. 422-424; p. 430; pp. 432-435; p. 437-439; p. 449). However, Johnson—after professing his own innocence—inconsistently insisted his answers during the guilty plea hearing were truthful, including his answer telling the plea judge the solicitor's recitation of the facts of the charged crimes was correct, and he further acknowledged the earlier account of the incident he had provided to the police was consistent with the facts recited by the solicitor during that plea hearing.[10] (R. pp. 467-468; p. 471). Nevertheless, Johnson maintained Green was, in fact, not actually guilty of the charged crimes. (R. p. 478).

Subsequent to Johnson's testimony, Green elected to testify in his own defense. (R. p. 486). During his testimony, Green admitted he was with Johnson on the date of the incident and

[8] During his testimony, Johnson also acknowledged he had written letters to the solicitor after he was arrested, including one sent eight months after the incident in which he stated Green did not have anything to do with "anything that [he] had going on that day." (R. p. 372; p. 377; p. 449; pp. 474-475).

[9] When confronted with his own phone records, Johnson acknowledged the alleged call from Victim did not appear within them and asserted it was coincidentally the only call made to him that was missing from those records. (R. p. 392).

[10] In another striking inconsistency, Johnson claimed Green called him during the brief period of time he was inside the restaurant with Victim getting the paycheck, quickly pivoted to claiming it was actually another individual who called from Green's phone, and asserted that individual told him he wanted him to get him a soda. (R. pp. 419-420). However, Johnson was then quickly forced to admit he did not actually *answer* the call he received from Green's phone while he was inside the restaurant based on the information contained in his phone records, but he nonetheless bizarrely insisted the other individual did tell him he wanted a soda during the unanswered call. (R. p. 421).

encountered Victim that day. (R. pp. 488-489). However, he insisted Victim was never threatened, held at gunpoint, or forced to do anything on that date and, instead, voluntarily went with them to get his paycheck, cash it, and hand over the money he received from it in order to pay off a debt he owed to Johnson.[11] (R. pp. 490-497).

Thereafter, on cross-examination, the solicitor—without objection—asked Green why he had not told his exculpatory version of events to the police back in 2015. (R. pp. 502-503). In response, Green answered:

> What you mean, why not tell the police? I was never questioned. There was, like, a warrant issued directly for my arrest. I ain't never wrote a statement; I ain't never did an interview; I ain't never did any of those things. This is the first time I'm collaborating on this story since I was locked up.

(R. p. 503). The solicitor then—without objection—asked several more questions about why Green had not spoken with or contacted law enforcement prior to trial, including when arrested. (R. pp. 503-504). Green replied: "I didn't get locked up until three months later after this crime and *there was no talking*. It was just straight, we have a warrant for your arrest, take you to county jail, that's that, deal with it with the courts. You know how police do." (R. p. 504) (emphasis added). Green further explained he "had nothing to talk about then." (R. p. 505).

Following that response, the solicitor queried: "You had nothing to talk about then?" (R. p. 505). At that point, defense counsel objected, asserted the solicitor was commenting on Green's failure to talk to the police, and contended doing so constituted an improper comment on his Fifth Amendment rights. (R. pp. 505-505). The trial judge then sustained the objection and

[11] As part of his testimony, Green further denied anyone in his group was in possession of a gun on the date of the incident and, while discussing the presence of guns, falsely testified there was "nothing illegal about [him] bearing arms." (R. pp. 508-509). Based on that false testimony, the solicitor was later permitted to impeach Green with the fact he had previously been convicted of a felony and, thus, could not legally possess a firearm. (R. pp. 571-573).

instructed the solicitor to "move on," and the solicitor did so without ever revisiting the subject of Green's pre-trial silence throughout the remainder of his questioning of Green. (R. pp. 506-521; pp. 523-527).

While Green's testimony was still ongoing, the trial was recessed for the evening. (R. p. 537). On the following morning, the trial judge indicated he had discussed a potential issue related to Doyle v. Ohio, 426 U.S. 610 (1976), with counsel and noted he had been informed by the solicitor there was nothing in Green's case file indicating Green had ever been informed of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). (R. pp. 540-541). In response, defense counsel asserted they did not know Green was *not* informed of his rights and indicated Green was willing to testify he had, in fact, been informed of them. (R. p. 541). The trial judge then initiated an in camera hearing to address the matter. (R. pp. 545-546).

During the course of that hearing, Green testified he was arrested after coming out of an apartment he had been hiding in and surrendering to officers. (R. pp. 548-549). After his surrender and arrest, Green claimed a stocky male officer dressed in green attire recognized him, alerted him he had several outstanding arrest warrants, and proceeded to advise him of his rights. (R. p. 546; pp. 549-552; p. 555). Following that sequence of events, Green indicated he was then transported to jail by a female officer, and he confirmed that female officer did *not* inform him of his rights since the male officer had supposedly already done so. (R. pp. 546-547; pp. 552-553). Furthermore, regarding the specific rights he was advised of, Green insisted he was *only* advised he had a right to remain silent and anything he said could and would be held against him in a court of law. (R. p. 555).

In rebuttal to Green's testimony, the solicitor proffered testimony from Officer Danielle Smoak. (R. p. 598). During her testimony, Officer Smoak explained she was the officer who

personally took Green into custody on the date of his arrest, she handcuffed him after he surrendered, and she then secured him in her locked patrol vehicle while awaiting the transport unit to arrive to take him to jail. (R. pp. 598-601; pp. 604-607). She further explained she did not advise Green of his rights on that date, did not observe anyone inform him of his rights in her presence, and never saw any officer get into the patrol car with Green after he was secured. (R. p. 606). Furthermore, she identified Officer Brandon VanAusdal as the only officer at the scene matching the physical description Green provided of the officer who allegedly informed him of his rights. (R. p. 601). Beyond that, Officer Smoak conceded she could not say with absolute certainty no one spoke to Green after she arrested him. (R. p. 602; pp. 607-608). However, she explained that usually did not occur, and she noted the officers with the transport unit neither informed suspects of their rights nor conducted interrogations. (R. p. 602; p. 607).

In addition to that, Officer VanAusdal also testified about the matter outside the jury's presence. (R. pp. 610-611). During his testimony, Officer VanAusdal stated he responded on the date of Green's arrest to assist along with his police dog, Mojo, after Green fled into an apartment building. (R. pp. 610-611). Officer VanAusdal further explained his only involvement was warning Green he would release Mojo, who would bite Green, if Green did not surrender. (R. p. 611). Moreover, Officer VanAusdal confirmed he did not advise Green of his rights, did not hear anyone else advise Green of his rights, and typically only advised suspects of their rights before he interrogated them. (R. pp. 611-612; p. 614).

After all that in camera testimony had been presented, defense counsel moved for a mistrial while contending the State failed to prove beyond a reasonable doubt "nobody else talk[ed] to [Green] out there." (R. p. 615; p. 618; p. 620). In response, the solicitor noted the relevant case law made clear the rule from Doyle was not applicable if a suspect had not been

informed of his rights and contended the testimony presented refuted Green's testimony on that point. (R. pp. 618-620). As a result, the solicitor argued his questioning of Green was not improper since Green had not been advised of his rights. (R. p. 620).

Upon considering the matter, the trial judge disagreed the State was required to prove Green had not been informed of his rights beyond a reasonable doubt before being permitted to question him about his silence, but he indicated it would be his finding that fact had been proven beyond a reasonable doubt if such a standard was applicable. (R. pp. 620-621). The trial judge then ruled sufficient evidence had been presented establishing Green had not been informed of his rights and, therefore, found no Doyle violation had occurred in Green's case. (R. p. 621). As a result, the trial judge denied defense counsel's mistrial motion and indicated the solicitor's questioning would be permitted to stand. (R. p. 621).

Subsequent to that ruling, the parties presented their closing arguments to the jury. (R. pp. 623-682). During the State's closing argument remarks, the solicitor did *not* make any arguments about or references to Green's failure to reveal his exculpatory story until trial. (R. pp. 623-653; pp. 671-682). After that, the trial judge instructed the jury on the applicable law, and the case was then submitted to the jury. (R. pp. 682-701; p. 707). Ultimately, upon deliberating on the matter for a little less than forty minutes, the jury convicted Green as indicted. (R. p. 707; p. 713; p. 715).

Following his convictions, Green appealed, arguing—amongst other things—the trial judge purportedly erred by allowing the admission of evidence of his post-arrest silence in violation of his due process rights. (App'x p. 6; pp. 13-24). On appeal, the Court of Appeals affirmed. State v. Green, 432 S.C. 572, 578, 854 S.E.2d 626, 629 (Ct. App. 2021). In resolving Green's issue related to his post-arrest silence, the Court of Appeals first considered Green's

appellate claim the trial judge's finding Green had not been informed of his rights was allegedly unsupported by the evidence and rejected that claim after determining there was evidence in the record supporting the trial judge's finding. Id. at 591, 854 S.E.2d at 636. Next, the Court of Appeals considered Green's appellate claim the trial judge committed a legal error by allowing him to be impeached with his post-arrest silence when the record contained some evidence he had been informed of his rights. Id. at 592-593, 854 S.E.2d at 637. Once again, the Court of Appeals rejected Green's claim. Id. In doing so, the Court of Appeals concluded "the burden is upon the defendant to show a Doyle violation has occurred." Id. at 594, 854 S.E.2d at 638. Furthermore, even assuming the burden had actually been on the State as opposed to Green, the Court of Appeals determined the trial judge still did not commit any error because there was evidentiary support for the trial judge's finding Green had not been informed of his rights and, thus, the solicitor could permissibly impeach Green with his post-arrest silence. Id. at 595-596, 854 S.E.2d at 638-639. Finally, in light of the fact the issue arose on appeal after Green's motion for a mistrial was denied, the Court of Appeals analyzed whether the trial judge's ruling in that regard had been erroneous. Id. at 597, 854 S.E.2d at 639. Upon doing so, the Court of Appeals instructed:

> Given the specific difficulty facing the trial judge, including the manner in which the issue arose, the fact that the trial court sustained defense counsel's objection to the line of questioning, the fact that the jury was never privy to the trial court's ultimate ruling that the questioning did not violate Doyle, and the fact that no other testimony on the matter was elicited before the jury after the trial court sustained the defense objection, we find no abuse of discretion in the trial court's denial of Green's motion for mistrial.

Id. at 598, 854 S.E.2d at 640.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When an appellate issue relates to a trial judge's factual findings, an appellate court is bound by those findings—including when they involve "preliminary factual findings in determining the admissibility of certain evidence in criminal cases"—unless they are clearly erroneous. Id. at 6, 545 S.E.2d at 829. Therefore, on appeal, an appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by *any* evidence." Id. (emphasis added). Meanwhile, when reviewing a decision regarding whether to grant the extreme remedy of a mistrial, an appellate court will not disturb a trial judge's discretionary ruling on such a matter absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."); see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's ruling denying Green's mistrial motion because: (1) Green—as the movant seeking the grant of a mistrial—bore the burden of establishing a Doyle violation actually occurred before he could be entitled to the relief he was requesting; and (2) the trial judge's factual finding Green had not been informed of his constitutional rights was supported by the evidence and testimony presented during trial, which meant no Doyle violation occurred in Green's case since it was constitutionally permissible for the solicitor to impeach Green's trial testimony with Green's post-arrest but pre-Miranda silence.

Green contends the Court of Appeals erred by affirming the trial judge's denial of his motion for a mistrial. In support of that contention, Green maintains the Court of Appeals committed reversible error by concluding a defendant should bear the burden of establishing a Doyle violation has occurred. Green further maintains the State failed to meet its burden of demonstrating a Doyle violation had *not* occurred in his case because he personally testified during trial he had been informed of his rights and no evidence was purportedly presented to refute that particular claim. As a result, Green asserts a mistrial should have been granted in his case based on the Doyle violation that supposedly had been committed and, thus, the trial judge erred by declining to grant one. To the contrary, Green bore the burden of establishing a Doyle violation occurred in his case since he was the one seeking the grant of a mistrial based on such a violation. Furthermore, even if the burden of establishing a Doyle violation was somehow not Green's under the circumstances involved, no Doyle violation occurred in Green's case because there was evidence presented to support the trial judge's finding Green had not been informed of his constitutional rights, which made it constitutionally permissible for the solicitor to impeach Green's trial testimony with his post-arrest, pre-Miranda silence. Accordingly, the trial judge did not abuse his broad discretion or otherwise err by denying Green's mistrial motion based on a Doyle violation that did not actually occur, and, regardless of who had the burden of establishing

such a violation, the Court of Appeals correctly affirmed the trial judge's factually-supported ruling on appeal. Green's convictions should be affirmed.

Ordinarily, when circumstances exist that would naturally lead an individual to reveal a pertinent fact but the individual fails to avail himself or herself of an opportunity to do so, it is proper to question the individual about his or her failure to reveal the pertinent fact when the opportunity existed to do otherwise because such a failure can be probative towards issues such as fabrication and credibility. See Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (recognizing silence can be probative while noting "if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting"); Jenkins v. Anderson, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); see also Raffel v. United States, 271 U.S. 494, 497 (1926) ("[A criminal defendant's] failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference [regarding credibility.]"); cf. State v. Nathari, 303 S.C. 188, 195, 399 S.E.2d 597, 602 (Ct. App. 1990) (explaining a witness's failure to come forward earlier with exculpatory information was a proper subject of cross-examination because that fact bore on the witness's credibility). In fact, calling a jury's attention to *any* delay in a disclosure of sexual abuse is an exceedingly-common and routinely-employed tactic used by the defense in a sexual abuse case based on a belief such a delay raises doubt as to the credibility of the victim's testimony.[12] See, e.g., State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 251 (Ct.

[12] Notably, due to the *perceived* significance of a victim's failure to stop sexual abuse by immediately disclosing towards the victim's credibility, impeachment of victims based on delays in disclosure consistently occurs in criminal sexual conduct trials in South Carolina and

App. 2015) ("At trial, [Brown] cross-examined the minor victims extensively regarding their delays in disclosure as well as the varying accounts of the abuse they gave authorities. . . . Such behavior undoubtedly became a fact at issue in this case, raising questions of credibility or accuracy that might not be explained by experiences common to jurors."), abrogated on other grounds by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

However, when the silence involved is the silence of a criminal defendant and it follows the giving of Miranda warnings, such silence *loses* its probative force due to the fact "[s]ilence in the wake of [those] warnings may be nothing more than the [defendant]'s exercise of" the rights articulated through those warnings. Doyle v. Ohio, 426 U.S. 610, 617 (1976); see Wainwright v. Greenfield, 474 U.S. 284, 291 n. 6 (1986) (explaining the rule from Doyle "derives from the implicit assurances of the Miranda warnings"). Accordingly, the use of a defendant's post-Miranda silence for impeachment purposes is improper and constitutes a violation of the defendant's due process rights. Doyle, 426 U.S. at 619; see State v. Simmons, 360 S.C. 33, 39, 599 S.E.2d 448, 450 (2004) ("Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence. Doyle rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." (citation and internal quotations omitted)). "The obvious purpose [of that prohibition] is to try to prevent jurors from

---

elsewhere despite the fact such delays are generally recognized by experts in the field as not being unusual, unexpected, or concerning. See John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)).

improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see Greenfield, 474 U.S. at 292 ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

Importantly though, when an arrested defendant has *not* been given Miranda warnings, the probative force of any post-arrest silence remains unaffected or undiminished as the rationale for its loss is inapplicable. Fletcher v. Weir, 455 U.S. 603, 605-606 (1982); see Brown v. State, 375 S.C. 464, 472, 652 S.E.2d 765, 769 (Ct. App. 2007) ("Doyle and its progeny have thus made clear that it is the breach of the implied assurance contained in the Miranda warnings that violates the fundamental fairness required by the Due Process Clause."). Thus, "[i]n the absence of the sort of affirmative assurances embodied in the Miranda warnings," a defendant who chooses to testify during trial can be impeached with his or her post-arrest silence without such impeachment violating the defendant's due process rights. Weir, 455 U.S. at 607; see United States v. Wilchcombe, 838 F.3d 1179, 1190 (11th Cir. 2016) ("[I]t is constitutionally permissible to use a defendant's post-arrest, pre-Miranda silence to impeach a defendant."); State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004) (instructing the State can permissibly impeach a defendant's trial testimony with the defendant's "silence after arrest but prior to the giving of the Miranda warnings"); Brown, 375 S.C. at 747, 652 S.E.2d at 770 ("The United States Supreme Court has held the use of post-arrest silence for impeachment purposes is allowed when no Miranda warnings are given."); see also United States v. Quinn, 359 F.3d 666, 678 (4th Cir. 2004) (explaining the "central premise of Doyle" was "due process is denied *only*

when the government induces a defendant's post-arrest silence with the assurance that such silence will not be used against the defendant" (emphasis added)).

In the case sub judice, Green was arrested for committing a kidnapping and armed robbery of Victim. At the time of the incident that led to Green's arrest, Green was accompanied by two—and perhaps three—other confederates, and, at trial, he claimed he and those confederates did not commit *any* crimes against Victim, who instead allegedly voluntarily accompanied them and freely handed over his money to pay off a debt.[13] As a result, Green's version of events at trial was totally inconsistent with him having *any* criminal liability whatsoever, and it could purportedly be supported by multiple individuals others than himself. Thus, Green had a logical, natural, and compelling reason to reveal his corroborable account of innocence at the time of his arrest for the exceedingly-serious crimes with which he had been accused. See Brecht, 507 U.S. at 628 ("[Pre-Miranda] silence *is probative* and does not rest on any implied assurance by law enforcement officers that it will carry penalty." (emphasis added)); Jenkins, 447 U.S. at 239 (recognizing witnesses have traditionally been permitted to be impeached with "their previous failure to state a fact in circumstances in which that fact naturally would have been asserted"); cf. State v. McGinnis, 320 S.E.2d 297, 300 (N.C. Ct. App. 1984) ("The test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense at trial. . . . [I]t would clearly have been natural for defendant to have told the arresting police officer that the shooting with which defendant was accused was accidental, if defendant believed that to be the case."). However, instead of doing

[13] During his testimony, Johnson seemed at one point to imply there was a fifth individual in the PT Cruiser along with him, Green, their other associate, and Victim. (R. p. 405). However, Johnson further stated he was not willing to say who that particular individual was, and, like many other aspects of his testimony, Johnson did not testify clearly and consistently regarding the number of individuals present in the vehicle on the date of the incident. (R. p. 401; p. 405).

so, Green remained entirely silent both at the time of his arrest and for a substantial period of time following that before revealing during trial for the first time publicly his exculpatory account of the incident.

Critically, under such circumstances, Green's post-arrest silence was a key fact bearing on the credibility of his exculpatory story *unless* that silence followed an implicit assurance from the authorities suggesting to Green it would carry no penalty. See McIntosh, 358 S.C. at 595 S.E.2d at 490 ("The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of the Miranda warnings, in order to impeach the defendant's testimony at trial. Due process is not violated because such silence is probative and *does not rest on any implied assurance by law enforcement authorities that it will carry no penalty*." (citations, brackets, and internal quotations omitted)). Importantly though, at the time the solicitor sought to impeach Green's trial testimony with his earlier silence, *no* evidence had been presented to suggest Green had ever been informed of his rights, and, as the trial judge later noted, nothing in Green's case file supported a conclusion to the contrary. Cf. State v. Bell, 347 S.C. 267, 271, 554 S.E.2d 435, 437 (Ct. App. 2001) ("In the present case, *there was no evidence* in the record that Bell ever received Miranda warnings, and we will not presume the warnings were given at the time of arrest. . . . [H]er arrest alone is insufficient to implicitly induce Bell to remain silent. Therefore, we find no due process violation occurred as a result of the State's cross-examination of Bell." (emphasis added and citations omitted)). Therefore, in the absence of anything suggesting Green's silence followed or was the product of any implicit assurances from the authorities that it would not be used against him, that silence had probative value towards Green's credibility, and the solicitor could constitutionally use it to impeach Green's trial testimony without running afoul of the rule articulated in Doyle. See Brecht, 507 U.S. at

628 (instructing pre-Miranda silence "is probative" due to the fact it does not rest on any assurances from law enforcement it will not be used against the defendant); see also Portuondo v. Agard, 529 U.S. 61, 69 (2000) ("The prosecutor's comments in this case . . . concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness. When a defendant assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." (citations, brackets, and internal quotations omitted)); United States v. Robinson, 485 U.S. 25, 33 (1988) ("The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." (citations, brackets, and internal quotations omitted)). And, prior to denying Green's Doyle-based mistrial motion that was raised in response to the solicitor's questioning, the trial judge considered evidence and testimony on the matter before finding a sufficient basis had been established to demonstrate Green had *not* been informed of his rights, and the trial judge's factual finding in that regard was supported by the evidence and testimony presented to him. See State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (explaining an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous"); cf. United States v. Cummiskey, 745 F.2d 278, 278-279 (3d Cir. 1984) (affirming Cummiskey's convictions following a remand that led to the district court judge making a factual determination Cummiskey had not been informed of his rights). Accordingly, no Doyle violation occurred in Green's case, and Green was not—and could not have been—entitled to the extreme remedy of a mistrial based on a trial error that did not actually occur. See State v.

Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.").

In arguing to the contrary, Green—relying on the decision of the Third Circuit Court of Appeals in United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984)—contends the Court of Appeals erred by concluding a defendant like him should have to bear the burden of establishing a Doyle violation occurred. See United States v. Cummiskey, 728 F.2d 200, 206 (3d Cir. 1984) ("We hold . . . that when a testifying defendant makes an objection to the prosecutor's cross-examination with respect to post-arrest silence, it is the prosecutor's burden, under Rule 104(b)[of the Federal Rules of Evidence], to establish that Miranda warnings were not given prior to the silence relied upon for impeachment purposes."); see also United States v. Foster, 995 F.2d 882, 883 (9th Cir. 1993) ("In accordance with the reasoning of the Third Circuit, we hold that the government has the burden of demonstrating that the warnings were not given."). Critically though, in Green's case, Green was the one moving for a mistrial based on an alleged Doyle violation, and, thus, he logically should have been—and was—required to bear the burden of establishing entitlement to the extreme remedy *he* was seeking.[14] See State v. Council, 335 S.C.

[14] Beyond that, the Cummiskey decision, which is the primary authority relied upon by Green to support his allegation of error based on the Court of Appeals's conclusion regarding who bears the burden of establishing a Doyle violation, appears to be somewhat inconsistent with the United States Supreme Court's post-Doyle decisions addressing impeachment of a defendant with silence. More specifically, the Third Circuit Court of Appeals appeared to justify its conclusion in Cummiskey based on its view the Doyle decision held post-arrest silence was not relevant "when the action of remaining silent occur[red] after the witness ha[d] received Miranda warnings." Cummiskey, 728 F.2d at 205. In light of that view of Doyle, the Third Circuit Court of Appeals determined a prosecutor could not impeach a defendant with silence "[a]bsent record evidence" establishing the defendant had *not* been informed of his rights. Id. at 206. Significantly though, the United States Supreme Court has made clear a defendant's silence is ordinarily probative and only loses its probative force such that it is fundamentally unfair to use for impeachment purposes if and when Miranda warnings are given. See Brecht, 507 U.S. at 628

1, 13, 515 S.E.2d 508, 514 (1999) ("In order to receive a mistrial, *the defendant* must show error and resulting prejudice." (emphasis added)); State v. Tuckness, 257 S.C. 295, 303, 185 S.E.2d 607, 610 (1971) ("The burden on motion for mistrial because of *anything occurring during trial* is upon movant to show not only error, but resulting prejudice." (emphasis added)); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("The burden is on the movant to show not only error, but resulting prejudice in order to justify a mistrial."). Therefore, the Court of Appeals committed no error by concluding a defendant has the burden of establishing a Doyle violation occurred before being entitled to a mistrial based on one, and its decision in that regard was and is consistent with United States Supreme Court, South Carolina, and out-of-state precedent touching on the matter. See Weir, 455 U.S. at 605 (reversing a grant of relief based on a purported violation of Weir's due process rights through the prosecution's use of his post-arrest silence in a case in which "the record *[did] not indicate* that respondent

---

(explaining pre-Miranda silence "is probative"); Weir, 455 U.S. at 607 ("*In the absence* of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." (emphasis added)). Due to that fact, the United States Supreme Court concluded no Doyle violation had been shown to have occurred in a case in which the "the record did not indicate" whether an individual had been advised of his rights before being impeached with his post-arrest silence. Weir, 455 U.S. at 605; see Weir v. Fletcher, 680 F.2d 437, 438 (6th Cir. 1982) (directing the district court judge to dismiss Weir's petition for writ of habeas corpus with prejudice because "the record [wa]s inconclusive" on the issue of whether the silence Weir was impeached with was post-Miranda silence); see also Caprino v. Commonwealth, 670 S.E.2d 36, 38-39 (Va. Ct. App. 2008) ("Receiving Miranda warnings from a law enforcement officers serves as a *prerequisite* of a Doyle violation . . . and absent this *predicate* showing, post-arrest silence is probative and does not rest on any implied assurances by law enforcement authorities that it will carry no penalty[.]" (emphasis added and citations and internal quotations omitted)). Accordingly, notwithstanding the fact the issue involved in Green's case hinged on who had the burden of proving entitlement to a mistrial, the decision in Cummiskey does not appear to be an entirely sound one and should not be followed. See Mattox v. State, 395 S.E.2d 288, 290 (Ga. Ct. App. 1990) (declining to follow the Third Circuit Court of Appeals's decision in Cummiskey after concluding it was not consistent with the United States Supreme Court's decision in Weir).

Weir received any Miranda warnings during the period in which he remained silent immediately after his arrest" (emphasis added)); Powell v. State, 424 S.E.2d 333, 335 (Ga. Ct. App. 1992) ("The burden is on the defendant to show that the Miranda warnings were given prior to the post-arrest silence used by the State for impeachment purposes."); Lainhart v. State, 916 N.E.2d 924, 936 (Ind. Ct. App. 2009) (indicating a defendant asserting a Doyle violation bears the burden of showing Miranda warnings were given prior to the post-arrest silence used for impeachment purposes); McGrone v. State, 807 So. 2d 1232, 1234-1235 (Miss. 2002) (concluding no Doyle violation had been established in a case in which no evidence was introduced establishing Miranda warnings were given); State v. Cummings, 779 S.W.2d 10, 12 (Mo. Ct. App. 1989) (finding no Doyle violation was established even though the prosecutor impeached Cummings with his post-arrest silence because "nothing in the record indicate[d], nor d[id] appellant allege, that he was given Miranda warnings immediately upon his arrest"); State v. Lackman, 395 P.3d 477, 484 (Mont. 2017) (finding no Doyle violation despite impeachment with post-arrest silence due to the fact "the record does not reflect whether Lackman was given Miranda warnings"); McGinnis, 320 S.E.2d at 300 ("[McGinnis] has failed to show that he was given Miranda warnings and therefore he has not met his burden of proving a denial of due process under the 14th amendment."); Royal v. State, 761 P.2d 497, 500 (Okla. Crim. App. 1988) (concluding it is necessary for the defendant to show the prosecutor's impeachment extended to post-Miranda silence in order for a Doyle violation to be established); Brown, 375 S.C. at 481, 652 S.E.2d at 773-774 (concluding Brown "did not meet his burden of proving the solicitor committed a Doyle violation" in light of the fact "there [wa]s no evidence in the record that Brown ever received the Miranda warnings").

Beyond that, Green further contends the State failed to meet its supposed burden of establishing he was not informed of his rights before impeaching him with his post-arrest silence while pointing to his own self-serving testimony as support for his apparent claim the trial judge should have found he had, in fact, been informed of his rights. Critically though, the trial judge, who was in a superior position to evaluate the credibility of the witnesses that testified during trial, concluded sufficient evidence had been presented establishing Green had not been informed of his rights after hearing and evaluating what was presented to him. See State v. Tutton, 354 S.C. 319, 325-326, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."); cf. State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified[.]"). In fact, the trial judge indicated he would have found it had been demonstrated beyond a reasonable doubt Green had not been informed of his rights if it was necessary for such a standard to be met. And, in making that particular factual finding, the trial judge had evidentiary support for his conclusion, which necessitated—and continues to necessitate—affirmance of the trial judge's factual finding on appeal regardless of whether Green now wishes a contrary finding had been made. See Cummiskey, 728 F.2d at 206 ("[T]he [trial] court's ruling [on whether Miranda warnings were given] would be *determinative* of admissibility—and thus of the propriety of using post-arrest silence, as was done by the prosecutor here—for impeachment. Thus, if the trial court should find that no Miranda warnings were given at the time of Cummiskey's arrest, no purpose would be served by a new trial." (emphasis added)); cf. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000) ("[Quattlebaum] . . . challenges the factual findings underpinning the court's rulings of law.

However, this Court is bound by the trial court's factual findings unless they are clearly erroneous.").

Specifically, looking to that evidentiary support, Officer Smoak and Officer VanAusdal each testified they had not informed Green of his rights at the time of his arrest, and, although neither could definitively say with absolute certainty no one else did, both confirmed they did not see anyone else inform Green of his rights while providing explanations that supported a conclusion no one else was likely to have informed Green of his rights before he was transported from the scene. Based on that testimony, the trial judge had a factual basis upon which to conclude Green had *not* been informed of his rights. Cf. State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008) ("Based upon Black's testimony, we cannot conclude the trial court's ruling is unsupported by any evidence."). Meanwhile, Green, who admittedly lied during the course of his trial testimony, initially claimed "there was no talking" after he was arrested before pivoting to a claim he was, in fact, informed of his rights by an individual that could only have been Officer VanAusdal based on the description he provided *prior to* being placed into Officer Smoak's patrol vehicle.[15] See Rutland v. State, 415 S.C. 570, 577-578, 785 S.E.2d 350, 353 (2016) (recognizing the existence of a prior inconsistent statement can discredit a witness and cause his or her credibility to suffer during trial). Beyond that, Green's claim of being informed of his rights was undermined by the fact he indicated he was *only*—conveniently for his version of events—informed of the portion of the rights articulated in Miranda that directly

[15] For what it is worth, Green also did not respond to the solicitor's questions seeking to impeach him with his failure to reveal his exculpatory story until trial by claiming his failure to do so was based on his exercise of his right to remain silent. Cf. State v. Leecan, 504 A.2d 480, 488 (Conn. 1986) ("[T]he defendant in this case testified that he had disclosed nothing to the police, not because of any official warning received at arraignment or at any other time, but because this attorney advised him to remain silent. It appears, therefore, that neither the police nor any other government personnel can reasonably be deemed to have induced the defendant's postarrest silence, *as is essential to support a claimed violation of Doyle*." (emphasis added)).

related to his right to remain silent. See Miranda v. Arizona, 384 U.S. 436, 479 (1966) (explaining a suspect—*prior to custodial interrogation*—must be warned: (1) he has a right to remain silent; (2) any of his statements may be used against him; (3) he has a right to an attorney; and (4) an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one). As a result, the trial judge, who was not required to simply accept Green's testimony as truthful or dispositive, could and validly did conclude a sufficient factual basis had been presented to find Green had not been informed of his rights such that he could be impeached with his post-arrest silence without violating the rule articulated in Doyle, and there were and are no proper grounds upon which to disturb that supported factual finding on appeal. See State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) (explaining a trial judge's factual conclusions ordinarily "will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion"); see also Okatie River, L.L.C. v. Se. Site Prep, L.L.C., 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003) (explaining a trial judge is *not* required to accept even undisputed testimony "where there is reason for disbelief"); cf. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (rejecting a contention the trial judge was required "to accept the accused's version of the underlying facts").

Accordingly, because the solicitor's impeachment of Green with his post-arrest silence was constitutionally proper in light of the fact there was factual support in the record for the trial judge's finding Green had not been informed of his rights, the trial judge committed no error by denying a mistrial motion based on a Doyle violation that did not occur during Green's trial, and the Court of Appeals—regardless of who ultimately bore the burden concerning the Doyle violation—correctly affirmed the trial judge's factually-supported ruling on appeal. See Weir, 455 U.S. at 607 ("In the absence of the sort of affirmative assurances embodied in the Miranda

warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony."); see also Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (explaining an appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence"); Harris, 340 S.C. at 63, 530 S.E.2d at 628 (instructing a trial judge's ruling on a mistrial motion "will not be disturbed on appeal absent an abuse of discretion amounting to an error of law"). Green's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

June 13, 2022