STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing.

STATEMENT OF THE CASE

On June 24, 2008, authorities were dispatched to Horry County's Huckabee Heights neighborhood after receiving reports of a shooting. (R. 92-93). The ensuing investigation culminated in the trial and conviction of Brittany Johnson before the Honorable Edward B. Cottingham and a jury on February 7-10, 2011. (R. 1, 458, 467-68). Johnson received a thirty year sentence. (R. 501-02).

On appeal, Johnson claimed *inter alia*, that the trial court erred in failing to suppress her video statement arguing the statement was taken in violation of her Fifth Amendment right to

have counsel present during custodial interrogation. Br. of App. at p. 13. Specifically, Johnson, citing to Edwards v. Arizona, 451 U.S. 477 (1981) argued that because she allegedly invoked her right to counsel while in custody, the trial court, despite finding her testimony, "not plausible," erred in finding she knowingly, freely and voluntarily, waived her Miranda[1] rights as required in a pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing. Br. of App. at p. 14-15.

In response, the State argued the trial court correctly determined Johnson's testimony during the Denno hearing was "simply not plausible" and further explained the trial court was not required to take Johnson's statement as true under state law.[2] Br. of Resp. at p. 17. As a result, the State maintained the trial court's credibility determination, which was supported by the evidence, controlled the issue meaning Johnson's statement was voluntarily tendered and the State complied with the requirements of Miranda. Br. of Resp. at p. 17-18. Specifically, with respect to complying with Miranda, the State reasoned that since the trial court determined Johnson's testimony regarding her alleged invocation was not credible, the fact she received her Miranda rights and subsequently waived them, meant the State complied with the requirements of Miranda. Br. of Resp. at p. 18-19.

On June 26, 2013, this Court issued an unpublished, *per curiam* opinion pursuant to Rule 220(b), SCACR, reversing and remanding the case. See State v. Brittany Johnson, No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). The State now seeks rehearing.

BACKGROUND

On June 24, 2008, Teresa Cox drove her 1999 Jeep Grand Cherokee to her friend, Monica Burroughs' ("Victim") residence. (R. 194-95). Cox, who was stopping in on her way to work, parked her vehicle head-in in front of Victim's residence where she was greeted by Victim

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955); State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929).

and her stepsister, Joanne Davis. (R. 194, 195, 196). Thereafter, Victim got into the passenger seat of Cox's Grand Cherokee, next to Cox, while Davis proceeded to get into the backseat. (R. 157, 196-97). According to both Cox and Davis, they left the doors open. (R. 160, 198).

After Davis and Victim got into Cox's Grand Cherokee, the trio began discussing two pairs of designer sunglasses that Victim had recently purchased which prompted Victim to momentarily return to her residence to get the sunglasses in order to show them to Cox. (R. 160-61, 197). When she returned to the Grand Cherokee, Cox tried on one pair of sunglasses, said she did not like them, then tried on the other pair of sunglasses telling Victim she liked them. (R. 197). Cox added that Victim's former boyfriend, Franklin "Putty" Pyatt, would be mad that Victim was wearing one of his favorite designer's sunglasses. (R. 197). The conversation then shifted, when both Cox and Davis observed Johnson approaching the Grand Cherokee on the passenger side. (R. 161, 198).

Cox, who believed Johnson was armed with a knife, and Davis, who recognized Johnson was armed with a gun, watched as Johnson attacked Victim with the gun as if she were pistol-whipping her. (R. 161-62, 164-65, 198-99). Reacting to the attack, Victim said "oh shit" and blocked Johnson's blows while simultaneously trying to defend herself and get out of the car. (R. 163, 164-65, 199). Meanwhile, in response, both Cox and Davis jumped out of the Grand Cherokee and were attempting to run around the vehicle to help Victim, who was already separated from Johnson, when they heard a shot. (R. 162-63, 166-67, 199, 200-01). Next, Cox and Davis observed Victim running away from the Cherokee. (R. 168, 202). According to both women Johnson then began screaming "I told you I was going to get you, bitch" which she repeated four to five times before she ran away. (R. 169, 170, 203, 205). After Johnson left, both Cox and Davis ran to Victim who was in the bushes beside her residence. (R. 172, 206).

According to both women, Victim, who was unarmed, had been shot in the chest and was bleeding profusely. (R. 170, 206). She asked both women why she had been shot. (R. 172, 206).

In the aftermath of the incident, authorities, who had been called by Cox, were dispatched to the crime scene. (R. 92-93, 206, 219). Upon arriving at the crime scene, Detective John King of the Conway Police Department met with Cox and took her to the police station where he interviewed her. (R. 94). During the interview, Cox confirmed Victim's identity and further named Johnson as the perpetrator. (R. 95-96). The following day, King interviewed Davis. (R. 174). Thereafter, King, who learned Victim had died, sought and received an arrest warrant for Johnson. (R. 97-98). While authorities were initially unable to locate her, Johnson was subsequently apprehended by U.S. Marshals on July 2nd in Darlington County. (R. 98).

Following her apprehension by U.S. Marshals, Johnson was taken into custody by the Conway Police Department. (R. 99). When she was taken into Conway authorities' custody, she was told she was under arrest for Victim's murder and was advised of her Miranda[3] rights by Sergeant Shawn Addison[4] in the presence of King. (R. 100, 333). Additionally, Johnson was presented with an advisement of rights form which told her she had a right to remain silent (R. 103); anything she said could be used against her (R. 103); she had the right to speak with an attorney and have the attorney present during questioning (R. 103); if she could not afford an attorney, one would be appointed for her before any questioning commenced (R. 103-04); and if she chose to make a statement, she could stop at any time. (R. 104). King reviewed this form with Johnson, who then initialed the form nine different times to acknowledge that she

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

[4] The State, consistent with Appellant's brief, believes the person referred to in the Record at page 100 and page 333 as Sergeant Shawn Addison, is the same person referenced during the pre-trial, Denno hearing as Investigation Supervisor, Shaun Patterson. (R. 10).

understood her rights and wished to waive them to speak with King. (R. 100, 105-06). She then gave a statement which was recorded on video. (R. 101, 107). In the recorded statement, Johnson admitted she hit Victim with the gun before shooting her at a distance outside of the Grand Cherokee. (R. 344-46, 347).

PRESENTATION OF ISSUE

On February 7, 2011, Johnson's case was called to trial. (R. 1). During the pre-trial proceedings, the State, pursuant to Denno requested a hearing to determine whether her statement was freely, intelligently and voluntarily given. (R. 1-2). In the hearing, King testified he interviewed Johnson "around July 2nd" at the Conway Police Annex. (R. 9-10). Continuing, King said he was accompanied by Investigations Supervisor, Sergeant Shaun Patterson.[5] (R. 10). Additionally, King told the trial court that based upon his interview with Johnson, she was not under the influence of alcohol or drugs when she gave the statement and further noted that based upon her ability to answer his questions, he did not believe she suffered from any mental or physical condition which would impair her ability to understand the proceedings. (R. 10).

King then told the trial court that prior to the interview, which last approximately thirty (30) minutes, Johnson was advised of her Miranda rights which she subsequently waived. (R. 12). In particular, Johnson was advised that: (1) she had a right to remain silent (R. 12); (2) anything she said could be used against her (R. 12); (3) she had a right to an attorney (R. 12); (4) if she could not afford an attorney, one would be provided for her before any questioning commenced (R. 12); and (5) if she decided to make a statement, she had the right to stop at any time. (R. 12).

Thereafter, King explained that he also provided Johnson with an advisement of rights form which contained the Miranda warnings she had received. (R. 13). King further highlighted

[5] See footnote 6 *supra*.

that Johnson signed the portion of the form which indicated she wished to waive her rights and speak with authorities. (R. 13-14). King added that he provided Johnson with a copy of the form. (R. 14).

The State next asked King whether he had inquired as to whether Johnson wanted an attorney. (R. 15). In response, King replied that he had, explaining that Johnson told him she did not want an attorney and during the questioning, never said anything like "I think I want an attorney now" or "anything like that[.]" (R. 15).

On cross-examination, defense counsel questioned King as to whether Johnson had previously requested an attorney. (R. 19). In response, King said "to my recollection, she never asked for an attorney." (R. 19). Continuing, defense counsel questioned King as to whether Johnson may have inquired about an attorney prior to giving the statement. (R. 19-20). Again, King explained that he did not have any knowledge regarding any statements made by Johnson prior to her entering into the interview room. (R. 21).

Defense counsel then called Johnson to the stand where she testified regarding her initial apprehension by individuals that she believed, were State Troopers. (R. 22-23, 26-27). Specifically, Johnson stated that when she was initially apprehended, she was never told why she was under arrest and was never advised of her rights. (R. 23-24). Continuing, Johnson told the trial court that after her initial apprehension she was taken to the Darlington County Detention Center where she was booked, but still was not advised of her rights. (R. 24). She then testified that after a few hours, two individuals retrieved her from Darlington County and transported her to Horry County. (R. 25). When asked whether King was one of the two men who transported her, Johnson stated "I can't even remember." (R. 26).

Johnson then went on to state that she asked for an attorney multiple times stating, "the first time I asked for an attorney was with—while I was being signed over by whoever that Marshal was[.]" (R. 27). In particular, Johnson testified that she asked the Marshal whether she was going to need an attorney, claiming the Marshal responded that "he was pretty sure [she] would." (R. 28). Next, Johnson described the second time she allegedly requested an attorney testifying that upon her return to Conway, she was escorted to the interview room where she stated "I need an attorney for this, don't I?" (R. 28-29). She then stated that "their" response was, "[t]he Judge will—the Judge will take care of that. When you get downtown, he issues a warrant." (R. 29). Johnson never identified who gave this response.

On cross-examination, the State after hearing Johnson claim she requested counsel, sought to impeach Johnson by presenting Johnson with the advisement of rights form and confirming that she initialed that she understood she had a right to remain silent (R. 31, 34); anything she said could be used against her (R. 31, 34); if she made a statement she could stop at any time (R. 31-32, 34); and she had a right to an attorney. (R. 33, 34). In addition, Johnson acknowledged that despite understanding her rights, she wished to waive them. (R. 34). Johnson further confirmed the recorded video statement showed that she told officers she wanted to waive her rights. (R. 34).

The State then confirmed the following:

> And so now you're here today to say that at some point you asked for an attorney but you had all the time during the forty minute interview at any point on that form to say 'I want an attorney, I'm going to be quiet and I don't want to talk to you.'

(R. 35). In response, Johnson answered that she "was under the impression that the attorney wasn't just going to show up. You know, I wasn't going to get an attorney right then. (R. 35).

Johnson then acknowledged she was informed she had a right to remain silent and anything she said could be used against her. (R. 35).

Immediately following the conclusion of the hearing, the trial court determined:

> In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.
>
> I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.
>
> I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.
>
> I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.
>
> This statement if offered will be admitted into evidence.

(R. 36-37).

In response to the trial court's ruling, defense counsel objected explaining, "[o]ur objection to this statement being admitted into evidence is that it is uncontradicted that Ms. Johnson asked a representative of law enforcement and specifically said, "I need an attorney for this." (R. 37). Continuing, defense counsel noted that the law says "once that implication of the need for legal counsel is made that there is to be no further questioning, no further involvement between the defendant and law enforcement or the State unless and until the defendant indicates that they wish to speak." (R. 37-38). Thus, defense counsel concluded that because Johnson

allegedly invoked her right to counsel, the statement should not be admitted into evidence.[6] (R. 38).

Replying to defense counsel's argument, the State agreed that Johnson's alleged invocation was uncontradicted stating "we don't have anybody who says she ever asked that." (R. 40). The State then went on the highlight that Johnson had forty minutes of video recordings and a document where she could have invoked her right to counsel but failed to do so. (R. 40-41).

Ruling on the objection the trial court stated:

> I would conclude that her testimony on that issue is simply not plausible in that with Officer King she had ample opportunity to express her desire for her an attorney and that's obviously, indicated not only on Mr. King's testimony but on the video itself, and I note your objection for the record, Mr. Hazzard, but my findings as previously stated will stand.

(R. 41). The State subsequently introduced Johnson's video statement at trial over defense counsel's objection. (R. 107-08).

ARGUMENTS

I. The trial court correctly determined Johnson's testimony during the *Denno* hearing regarding her alleged invocation of her right to counsel was "simply not plausible" and since the trial court was not required to accept Johnson's testimony as true under state law, it did not err when it found the State proved Johnson's statement was freely, knowingly, and voluntarily tendered and taken in compliance with *Miranda*

Johnson contends the trial court erred in failing to suppress her video statement arguing the statement was taken in violation of her Fifth Amendment right to have counsel present during

[6] Additionally, defense counsel objected to the video recording because "the audio quality is not very good." (R. 38). The trial court agreed with the assessment regarding the audio quality of the video recording stating, "the audio—is not good at the beginning of it but it gets stronger as it ends[.]" (R. 40). However, a transcript of the recording was not put into evidence due to defense counsel's repeated objections. (R. 38-41).

custodial interrogation.[7] Br. of App. at p. 13. Specifically, Johnson, citing to *inter alia*, Edwards v. Arizona, 451 U.S. 477 (1981) explains that because she allegedly invoked her right to counsel while in custody, the trial court, which found her testimony on this issue, "simply not plausible," erred in finding she knowingly, freely and voluntarily, waived her Miranda rights.[8] Br. of App. at p. 14-15.

In response, the State submits Johnson's argument and the appellate panel's ruling on this issue overlooks the point of the trial court's credibility determination, which it believes controls this issue. In fact, the State agrees that if the trial court believed Johnson clearly and unequivocally invoked her right to counsel during custodial interrogation—Johnson would be correct in arguing the trial court's ruling was in error pursuant to Edwards and its progeny. However, because the trial court, which observed the witness during cross-examination on this matter and was in a better position than the appellate panel to judge the credibility of the accused, instead determined Johnson's testimony regarding her alleged invocation of her right to counsel was "simply not plausible" and therefore not credible evidence—Johnson's argument necessarily fails.

A. Appellate Court Review of a Trial Court's Preliminary Factual Findings when Determining the Admissibility of Evidence in a Criminal Trial

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[7] The State submits there is no Fifth Amendment right to have counsel present during custodial interrogation as the rule of Edwards is only a prophylactic rule protecting an accused's Fifth Amendment, Right to Remain Silent. See Davis v. U.S., 512 U.S. 452, 458 (1994) (holding Edwards is a prophylactic rule); Id. at 460 ("[T]he rule of Edwards is our rule, not a constitutional command; and it is our obligation to justify its expansion.").

[8] Johnson's argument on this ground is also incorrect as the Miranda and Edwards line of cases require not just a custodial situation but "a custodial situation and official interrogation." See Burket v. Angelone, 208 F.3d 172, 197 (4th Cir. 2000) ("Thus in order to implicate the *Miranda-Edwards* right to counsel prophylaxis, both a custodial situation and official interrogation are required.") (quoting U.S. v. Bautista, 145 F.3d 1140, 1147 (10th Cir) cert. denied 525 U.S. 911 (1998)). Here, even assuming Johnson's testimony was true, it is clear she was not being interrogated when, prior to receiving her Miranda rights, she claims she twice *inquired* about counsel at different times and to different people who she could not identify. (R. 28, 29). Moreover, it is doubtful that Johnson, who only *inquired* as whether she would need an attorney prior to being questioned rather than clearly and unequivocally invoking her right to counsel during custodial interrogation can invoke the prophylactic protection of Edwards on these facts. See Davis v. U.S., 512 U.S. 452, 459 (1994) ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.").

A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). The same standard of review applies to preliminary factual findings in determining the admissibility of evidence in criminal cases. Id. Therefore, on review, *the appellate court is bound by the facts* and is limited to reviewing whether the trial court abused its discretion. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003) (emphasis added). Moreover, the appellate court *may not reevaluate the facts based on its own view of the evidence* but must determine whether the trial court's ruling is supported by any evidence. Id. This standard of review was reiterated by the Supreme Court of South Carolina in State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006) where it explained appellate courts are bound by the trial court's preliminary factual findings in determining the admissibility of evidence in a criminal trial unless those findings are "clearly erroneous." 371 S.C. at 251, 639 S.E.2d at 39.

B. Appellate Review of a Trial Court's Factual Findings Regarding Credibility

South Carolina's appellate courts have historically given great deference to a trial court's factual findings regarding credibility determinations because the trial court, who heard the witness testify and observed their demeanor, was in a better position to evaluate a witness' credibility than their appellate counterparts.[9] For example, when reviewing whether a Batson

[9] See Ballard v. Roberson, 399 S.C. 588, 599, 733 S.E.2d 107, 112 (2012) (holding that despite conflicting testimony on a contested issue appellate courts give great deference to the credibility determinations of the circuit court); Kolle v. State, 386 S.C. 578, 593, 690 S.E.2d 73, 81 (2010) (J. Pleicones concurring) (stating appellate courts give great deference to a PCR court's credibility determinations and as a result the Supreme Court was required to defer to the PCR court's ruling that a witness was credible even where that witnesses testimony is directly refuted elsewhere in the record); Fiddie v. Fiddie, 384 S.C. 120, 126, 681 S.E.2d 42, 45 (Ct. App. 2009) (giving deference to the family court's credibility determination because the family court had the opportunity to hear the testimony and observe the witness on the stand); Clardy v. Bodolosky, 383 S.C. 418, 428, 679 S.E.2d 527, 532 (Ct. App. 2009) (deferring to the circuit court's credibility determination as the trial court was in a better position to evaluate the

violation has occurred, this Court has stated such a finding, "relies upon a credibility determination by the trial court and is entitled to great deference on appeal." State v. Smith, 321 S.C. 471, 473, 469 S.E.2d 57, 59 (1996). The same is true in post-conviction relief ("PCR") actions where the Court said, "we give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). The same rationale carries over to civil issues too, where the appellate court's standard of review controls the issue. See RRR, Inc. v. Toggas, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal."). The family court abides by a similar standard. See Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

C. Because the Trial Court was not Required to Accept Johnson's Testimony as True, the Trial Court was Free to Disregard her Testimony the Trial Court Decision to do so, was not Clearly Erroneous

When passing on preliminary questions of admissibility, the trial court is "not bound to accept as true the defendant's testimony." State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955) (quoting State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929)). Likewise, "[t]he fact that testimony is not contradicted directly does not render it undisputed." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct.App.2000). Moreover, a court is not required to accept undisputed evidence

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credibility of a witness); Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct. App. 1987) ("It is axiomatic that the probate court was in the best position to judge credibility.").

as establishing the truth where there is reason for disbelief. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003); Johnson v. Painter, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983). "This is especially true where the court finds the unchallenged testimony not convincing." Oktie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. at 338, 577 S.E. 2d at 474. Indeed, "[c]redibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." Id. (citing South Carolina Dep't of Soc. Serv. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001); Dorchester County Dep't of Soc. Serv. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996); South Carolina Dep't of Soc. Serv. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984).

Understanding this, the effect of the trial court's factual finding is clear—the trial court determined Johnson, who was impeached with her subsequent Miranda waiver, never inquired about counsel because her story was simply not plausible.[10] (R. 41). Moreover, because the trial court was not required to accept Johnson's testimony as true under state law, the trial court, acting as the preliminary finder of fact in the pre-trial hearing, did not err in making such a finding. Thus, because the trial court's credibility determinations are a factual finding and this Court is bound by the trial court's factual findings under its' standard of review unless the trial court's findings are clearly erroneous, the trial court did not err when it determined Johnson's statement was taken in compliance with the dictates of Miranda and was freely, knowingly and voluntarily tendered. (R. 36-37, 41). Indeed, the trial court was obviously in a better position than the appellate court in observing Johnson's credibility as it had the benefit of observing

[10] Notably, the State was not trying to prove a valid Miranda waiver when it cross-examined Johnson, but was instead simply attempting to use Johnson's Miranda waiver as a means of impeaching her previous testimony that she allegedly asked law enforcement about an attorney prior to being questioned by Conway authorities.

Johnson as she was being impeached with her subsequent Miranda waiver, and the supporting documentation showing the State complied with Miranda once the State sought to interrogate Johnson in a custodial setting.

Additionally, the State submits the trial court's credibility determination is supported by the evidence and is therefore, not clearly erroneous. In support of this assertion the State first notes the trial court's credibility ruling came after it had heard the State's witness and Johnson on the issues of whether her statement was voluntarily tendered and whether the State complied with Miranda. In other words, the trial court had the opportunity to observe Johnson's demeanor under the crucible of cross-examination while she was being impeached with her signed waiver of rights form. As such, the trial court clearly had a basis to find Johnson's testimony was not credible.

D. In Light of the Trial Court's Credibility Determination, the Record Shows the State Proved Johnson's Statement was Freely, Knowingly and Voluntarily Tendered and it Complied with Miranda

The State submits the trial court's *legal ruling* was correct—that under the totality of the circumstances, Johnson's statement was freely, knowingly and voluntarily tendered and taken in compliance with the requirements of Miranda. (R. 37, 41). First, as to Johnson's "uncontradicted" testimony regarding the invocation of her right to counsel, the State notes that under state law, particularly the cases cited in subsection (C), the trial court did not have to, and in fact did not, accept Johnson's testimony during the Denno hearing as true. (R. 41). Furthermore, for the reasons discussed above, the trial court's factual finding on this issue is not clearly erroneous meaning the appellate court is bound by the trial court's credibility determinations under Butler. See Butler, 353 S.C. at 388, 577 S.E.2d at 500-01 (holding that with respect to factual issues an appellate court is bound by the facts and may not reevaluate

them based upon its own view of the evidence unless those findings are clearly erroneous). As such, this Court is limited to determining, based upon the facts as the trial court found them to be, whether the trial court erred in its legal ruling that Johnson's statement was freely, knowing and voluntarily tendered and taken in compliance with Miranda. E.g. State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding the trial court, as a preliminary matter, must determine whether the accused's statement was knowingly, freely and voluntarily tendered and whether the accused received and understood his or her Miranda rights).

With this understanding in mind, the State submits the record clearly shows Johnson was apprised of her Miranda rights, voluntarily waived them and then freely, knowingly and voluntarily gave a statement revealing she killed Victim. In support of this, the State notes the balance of the evidence adduced at the Denno hearing supported the trial court's decision to admit Johnson's statement.

Specifically, King's testimony clearly reflected Johnson was properly advised of her Miranda rights, executed a valid Miranda waiver, and voluntarily issued a confession. In particular, the record shows King told the trial court that prior to the interview, which last approximately thirty (30) minutes, Johnson was advised of her Miranda rights which she subsequently waived. (R. 12). Notably, Johnson was advised that: (1) she had a right to remain silent (R. 12); (2) anything she said could be used against her (R. 12); (3) she had a right to an attorney (R. 12); (4) if she could not afford an attorney, one would be provided for her before any questioning commenced (R. 12); and (5) if she decided to make a statement, she had the right to stop at any time. (R. 12). Thereafter, King explained that he also provided Johnson with an advisement of rights form which contained the Miranda warnings she had received. (R. 13). King further highlighted that Johnson signed the portion of the form which indicated she wished

to waive her rights and speak with authorities. (R. 13-14). King added that he provided Johnson with a copy of the form. (R. 14).

Moreover, the record reflects Johnson's statement was knowingly, freely and voluntarily tendered. Here, the State notes there is no credible evidence showing Johnson was coerced into making a statement. To the contrary, King's testimony established Johnson, after being advised of her Miranda rights and after voluntarily waiving them, gave a statement to authorities, which was the product of her own free will. Specifically, King told the trial court that based upon his interview with Johnson, she was not under the influence of alcohol or drugs when she gave the statement and further noted that based upon her ability to answer his questions, he did not believe she suffered from any mental or physical condition which would impair her ability to understand the proceedings. (R. 10).

As a result, the record clearly establishes the State proved, by a preponderance of the evidence, and under the totality of the circumstances that Johnson was apprised of her Miranda rights, voluntarily waived them and then freely, knowingly and voluntarily issued a statement explaining she killed Victim. Accordingly, the State asks this Court to either grant rehearing or, in the alternative, issue a substituted opinion finding the trial court's ruling was correct on this issue and further finding no error on Johnson's additional claims of trial court error.

II. Even assuming Johnson's testimony regarding her alleged inquiry into counsel was truthful, Johnson was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel meaning the prophylactic rule from *Edwards* does not apply and, as a result, the trial court complied with *Miranda* when it admitted Johnson's testimony

Even if this Court were to assume Johnson's statements regarding her alleged inquiry as to whether she needed counsel were true, the record shows Johnson was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to

counsel. As a result, the rule from Edwards does not apply and the trial court would still be correct in finding the State complied with Miranda, even if it wished to do so as an additional sustaining ground.[11]

A. Edwards is Only Applicable to Custodial Interrogations and Johnson was not Being Interrogated when she Allegedly Inquired about Counsel

To protect the right granted by the Fifth Amendment, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, the Supreme Court, in Miranda, adopted prophylactic procedural rules that must be followed during custodial interrogations. 384 U.S. at 444. Specifically, the Miranda Court held that a suspect in custody "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. Generally, any statements elicited from a suspect in violation of these rules are inadmissible during the prosecution's case-in-chief. Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam). For example, as noted by Johnson, a suspect in custody who invokes his right to counsel cannot be subjected to *further police interrogation* until counsel is present or the suspect initiates further conversation. Edwards v. Arizona, 451 U.S. 477, 484–85, (1981).

The rationale behind the prophylactic rule from the Miranda and Edwards line of cases is that "*custodial interrogations*, in and of themselves, have inherently coercive effects on the accused" and therefore, advising the accused that he or she may have counsel present during questioning may protect against the violation of that person's Fifth Amendment Right Against

[11] See e.g. Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal); I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding the respondent, the winner in the lower court, may raise additional reasons the appellate court should affirm the lower court's ruling); Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (Ct. App. 2012) (same).

Compulsory Incrimination. U.S. v. Bautista, 145 F.3d 1140, 1147 (10th Cir. 1998) (emphasis added); Arizona v. Roberson, 486 U.S. 675, 685 (1988) (holding the Fifth Amendment right against compelled self-incrimination "is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation[.]")). "Thus, in order to implicate the Miranda–Edwards right to counsel prophylaxis, both a custodial situation and official interrogation are required." Id. "Absent either a custodial situation or official interrogation, Miranda and Edwards are not implicated." Id.; U.S. v. Roman–Zarate, 115 F.3d 778, 782 (10th Cir. 1997) (no Edwards violation when no "interrogation" occurred); U.S. v. LaGrone, 43 F.3d 332, 339 (7th Cir. 1994) ("in order for a defendant to invoke his Miranda rights the authorities must be conducting interrogation, or interrogation must be imminent"); Alston v. Redman, 34 F.3d 1237, 1244 (3rd Cir. 1994) (both a custodial situation and interrogation are needed to trigger Miranda protections).

With this in mind, the State notes Edwards does not apply to the current situation. Specifically, even if one were to assume Johnson's testimony was truthful—that she *inquired* about counsel—it is clear Johnson was not being interrogated when she made such an inquiry. Rather, Johnson's testimony only shows she allegedly asked whether she would need counsel at some point prior to arriving in Conway and then asked another person the same question during booking—obviously neither of these amount to interrogation. (R. 28-29). As such, the record clearly reflects Johnson was not subject to custodial interrogation when she claims she asked law enforcement if she would need an attorney. This being the case, the protections of both Miranda and Edwards are not implicated since there was simply no risk that an individual who was not questioning Johnson would coerce her into giving a statement and violating her Fifth

Amendment Right Against Compulsory Incrimination. As such, the State complied with Miranda.

B. Johnson Did not Clearly and Unequivocally Invoke her Right to Counsel

The State further notes that neither of Johnson's alleged questions asking whether she would need an attorney amount to a "statement that can reasonably be construed to be an expression of desire for the assistance of an attorney" as is required under McNeil v. Wisconsin, 501 U.S. 171, 178 (1991). Indeed, as the Supreme Court of the United States explained in Davis v. U.S., 512 U.S. 452, 459 (1994) "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." In fact, as the Court reiterated in Davis, "the suspect must unambiguously request counsel" and "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. at 459.

For example, in Davis, the Supreme Court of the United States determined the defendant's statement, "[m]aybe I should talk to a lawyer" did not invoke the right to counsel because the statement was not clear enough to alert a reasonable police officer that he was requesting an attorney. Id. at 458–62. Likewise, in Burket, the Fourth Circuit Court of Appeals found a defendant's statement, "I think I need a lawyer" was not a clear and unambiguous statement that would have alerted a reasonable police officer that he was invoking his right to counsel. Burket, 208 F.3d at 197-98.

Here, even assuming Johnson actually inquired about counsel at all, it is obvious she did not clearly and unequivocally invoke her right to counsel. This is perhaps best evidenced by

Johnson's own testimony where she explained that law enforcement officials who answered her questions responded to her request by indicating she would likely need an attorney. (R. 28-29). In other words, even according to Johnson, the officers who heard her alleged requests did not believe she was invoking her Miranda right to have counsel present during custodial questioning, but instead interpreted what Johnson had to say as being a *question*. Thus, even taking Johnson's inquiries regarding counsel as true, the State still complied with Miranda.

C. Because Miranda and Edwards were not Implicated, the State Complied with Miranda

For the reasons as set forth in argument I as well as in argument II, subsections (A) and (B), it is clear the trial court complied with Miranda, and Denno when it found:

> In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.
>
> I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.
>
> I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.
>
> I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.
>
> This statement if offered will be admitted into evidence.

(R. 36-37). As a result, the State asks this Court to grant rehearing or in the alternative substitute an opinion, further address Johnson's outstanding issues on appeal and affirm Johnson's conviction and sentence.

III. The appellate panel erred when it failed to determine whether Johnson had shown he was prejudiced as required by the standard of review, especially since the multiple eyewitnesses saw Johnson shoot Victim and Johnson admitted to shooting Victim in her testimony at trial

Finally, the State submits the appellate panel erred when it reversed without determining whether Johnson had demonstrated prejudice as is required under the standard of review. See Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). Indeed, it is clear that an appellant must show both legal error and prejudice in order to receive a reversal. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, the Appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Appellant was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel's opinion confirms it failed to consider whether the trial court's purported error was prejudicial as the standard of review requires.

In this case, this is especially troubling since, as explained in the statement of facts, multiple eyewitnesses saw Johnson approach Victim, pistol whip her and shoot her. (R. 161-62, 164-65, 198-99); (R. 162-63, 166-67, 199, 200-01). In fact, even Johnson noted this herself in her own testimony. Similarly, Tamika Skipper, who also testified for the defense, said much of

the same. Notably, while Johnson testified before the jury, she did not re-assert her claim from the Denno hearing that she had previously inquired about an attorney prior to receiving her Miranda rights. Additionally, the trial court, in its' charge to the jury, instructed the jury that the State must prove, beyond a reasonable doubt, that Johnson's statement was freely, knowingly and voluntarily tendered. Thus it would appear the jury, by convicting Johnson, found the State proved beyond a reasonable doubt, that Johnson's statement was freely, knowingly and voluntarily tendered. Nevertheless, the appellate panel, without so much as considering these facts, instead elected to reverse this case without explanation. As such, the State asks this Court to grant rehearing or in the alternative substitute an opinion on this issue, further address Johnson's outstanding issues on appeal, and affirm her conviction and sentence.

CONCLUSION

In light of the aforementioned arguments, the State respectfully asks this Court to grant rehearing or in the alternative, substitute an opinion affirming Johnson's conviction and sentence on all issues presented on appeal.

Respectfully Submitted,

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July 11, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have served the Petition for Rehearing on Appellant by depositing two (2) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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This 11th day of July, 2013.

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