

**ORIGINAL**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of General Sessions  
Edward B. Cottingham, Circuit Court Judge

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Unpub. Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013), App. Case No.2011-185926

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THE STATE,

PETITIONER,

v.

BRITTANY JOHNSON,

RESPONDENT.

**RECEIVED**

SEP 26 2013

S.C. Supreme Court

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**APPENDIX TO PETITION FOR  
WRIT OF CERTIORARI**

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THE STATE,

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BRITTANY JOHNSON,

APPELLANT

Appellate Case No. 2011-185926  
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FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court reversibly erred by admitting Appellant's video statement to law enforcement where Appellant's uncontradicted testimony at the Jackson v. Denno hearing was that, before police began recording, she indicated to the one officer present that she needed an attorney, yet law enforcement continued with the interrogation after a second officer arrived?
  
- II. Whether the trial court reversibly erred by failing to grant a mistrial for premature jury deliberation where, during trial, the jury sent a note saying, "we are all in agreement that we need to see and hear the video tape again"?
  
- III. Whether the trial court reversibly erred by failing to charge the jury with self-defense where the record contained evidence that, prior to the shooting, several women exited of a parked vehicle and surrounded Appellant in a threatening manner when Appellant walked passed in a parking lot?
  
- IV. Whether the trial court reversibly erred by failing to charge the jury with involuntary manslaughter where the record contained evidence that Appellant was armed in self-defense, a struggle for the gun occurred, and the fatal shot was not intentionally fired?

STATEMENT OF THE CASE

Appellant Brittany Alexis Johnson was indicted on September 25, 2008, by the Horry County grand Jury for murder. R. 1, ll. 15-17; the charge stemmed from the shooting of Monica Burroughs on June 24, 2008. R. 477 (Indictment). Appellant's case proceeded to trial before the Honorable Edward B. Cottingham, and a jury, from February 7 through 11, 2011. Ronald Hazzard (Counsel) represented Appellant, while the State was represented by Scott A. Graustein.

On the third day of deliberations, the jury found Appellant guilty as charged. R. 458, ll. 16-19. The trial court sentenced Appellant to thirty years imprisonment. R. 467, ln. 24—R. 468, ln. 1.

STATEMENT OF THE FACTS

Appellant, a seventeen year old single mother, was romantically involved with Franklin Putty Pyatt (Pyatt). R. 288, ln. 19—R. 289, ln. 4. Yet, Pyatt lived with Monica Burroughs (Burroughs) and he was also involved with her. R. 290, ln. 15—R. 291, ln. 5; R. 339, ln. 25—R. 339, ln. 8. Burroughs confronted Appellant on several occasions between August of 2007 and June 24, 2008. R. 291, ln. 14—R. 305, ln. 15; R. 313, ln. 10—R. 315, ln. 25. On one occasion approximately five weeks prior to the shooting, Appellant testified that she was walking with her child through the fence of the apartment complex where Burroughs lived when Burroughs confronted Appellant by presenting a black handgun in her purse and threatened Appellant to stay away from Pyatt. R. 313, ln. 10—R. 315, ln. 25.

On June 24, 2008, Appellant and her child were both at the home of her friend, Tamika Skipper (Skipper), across the street from the same apartment complex. R. 251, ln. 1—R. 252, ln. 7; R. 253, ll. 4-17. In the early afternoon, Appellant left to go to a “bootlegger’s” apartment in the complex to purchase cigars and strawberry cookies. R. 255, ln. 9—R. 256, ln. 24; R. 329, ll. 8-23. According to Skipper’s testimony, she went out onto her porch and saw Appellant in the parking lot across the street in the complex walking to the bootlegger’s apartment. Skipper also saw a vehicle approximately two parking spaces away from Appellant; she saw the vehicle back up, saw its brake lights come on, and saw four women—including Teresa Cox Dozier (Cox), Liz, Joanne Davis (Davis), and Burroughs—come out of the vehicle and subsequently surround Appellant in a threatening manner. Skipper stated she ran toward Appellant, but that she heard a shot by the time she

was half way there. R. 257, ln. 15—R. 264, ln. 24. Skipper stopped, saw Appellant “[j]ust standing there—stuck,” and shouted at Appellant to run. R. 264, ll. 5-14.

Two occupants of the vehicle with Burroughs on June 24, 2008, also testified. R. 157, ll 3-24. Although their testimony on direct examination differed from Skipper’s, they acknowledged their previous statements given to law enforcement, which indicated the gun went off in a struggle, and that Appellant was unlikely aware that she shot Burroughs. For example, Davis, the stepsister of Burroughs, indicated she was in the backseat when the incident began, Cox was in the driver’s seat, and Burroughs was in the front passenger seat. R. 154, ll. 4-7; R. 157, ll. 3-24. On cross-examination, she acknowledged her prior statement given to law enforcement the day after the shooting, and affirmed the following events: (a) that “when the gun went off, they were struggling;” (b) “yeah, they were struggling. My sister was trying to take it from her. They were struggling;” (c) when I heard the gun go off, that’s when I immediately dropped;” and (d) “but I could see them before I dropped. They was together.” R. 182, ll. 7-14; R. 183, ll. 10-14; R. 184, ln. 22—R. 185, ln. 25. Further, although Davis did not initially recall Burroughs ever owning a gun, she acknowledged that she told law enforcement that her “sister had a gun. She had one.” R. 186, ll. 4-13.

Teresa Cox Dozier (Cox) also testified at trial, and likewise acknowledged her prior statement given to law enforcement on the afternoon of June 24, 2008. Specifically, Cox did not deny telling police the following: “She must be didn’t know she shot her. She probably thought, you know, maybe she shot in the air or something.” R. 208, ll. 2-3; R. 209, ll. 10-18.

After Appellant was arrested in Darlington County on July 2, 2008, she was transported to the Conway Police Department Annex. She was booked, and taken to the interrogation room by a Sergeant Shawn Addison (Addison).<sup>1</sup> R. 9, ln. 17—R. 10, ln. 11; R. 333, ll. 1-20. At the Jackson v. Denno<sup>2</sup> hearing, Appellant testified that as she entered the room, she told the officer “I need an attorney for this, don’t I?” and, “I need an attorney for this.” She continued to testify that the officer’s response was that “the judge will take care of that. When you get downtown, he issues a warrant.” After that exchange, Appellant told the trial court she “was under the impression that it was okay. It was okay to talk.” R. 28, ln. 15—R. 29, ln. 21. The officers subsequently began to record Appellant’s interaction with them in the interrogation room. Detective John Glenn King (King) entered, and Addison then Mirandized Appellant with King present and the camera on, after which Appellant gave a video statement. R. 9, ln. 17—R. 17, ln. 14. Appellant confirmed at the Jackson v. Denno hearing that she did not initiate the conversation with law enforcement after she asked for an attorney. R. 35, ln. 23—R. 36, ln. 1.

King also testified at the Jackson v. Denno hearing, and said that he never spoke with Appellant prior to the video camera starting. However, King acknowledged that the video indicated Addison “introduced himself to [Appellant] earlier.” King also indicated that he had no knowledge of whether Appellant asked Addison for an attorney. R. 19, ln. 9—R. 20, ln. 13.

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<sup>1</sup> Although the record is initially unclear whether the officer was Sergeant Shaun Patterson, or Shawn Addison, both King and Appellant refer to Sgt. Addison in their testimony to the jury. R. 10, ll. 5-11; R. 100, ll. 15-17; R. 333, ll. 1-20.

<sup>2</sup> 378 U.S. 368, 84 S.Ct. 1774 (1964).

Counsel moved for suppression of Appellant's video statement to law enforcement. Specifically, Counsel asserted that Appellant's testimony regarding the need for the presence of an attorney was uncontradicted, and that once the right to an attorney is implicated, there is to be no further questioning; yet, despite Appellant's invocation of her right to legal counsel, law enforcement continued forward with the interrogation. R. 37, ln. 17—R. 38, ln. 8.

The State conceded, “[y]our Honor, um, it’s uncontradicted. We don’t have anybody who says she never asked that.” R. 40, ll. 21-23. However, the State further argued that Appellant “had forty minutes of tape and . . . could have indicated at any point that she had asked for an attorney but she did [not] during any of that time.” R. 40, ln. 21—R. 41, ln. 1.

The trial court first held that Appellant's statement was given freely, voluntarily, and in compliance with Miranda v. Arizona,<sup>3</sup> and that she waived her rights “to remain silent and to have counsel present with her at the interview and interrogation.” R. 36, ln. 12—R. 37, ln. 11. After hearing the arguments of Counsel and the State regarding Appellant's invocation of her right to counsel, the court concluded that “[Appellant's] testimony on that issue is simply not plausible in that with Officer King she had ample opportunity to express her desire for her 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.” R. 41, ll. 2-7. Over Counsel's repeated objections, the video statement was played on multiple occasions for the jury. R. 101, ll. 15-18; R. 107, ln. 22—R. 108, ln. 12.

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<sup>3</sup> 384 U.S. 368, 84 S.Ct. 1774 (1964).

On the second day of trial, the court received a note from the jury stating as follows: “We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding.” R. 137, ll. 1-7; R.\* (Court Exhibit #8, Juror Note). Counsel objected because the note indicated improper discussion regarding the elements and facts of the case by the jury, and moved for a mistrial. R. 138, ln. 22—R. 138, ln. 14. Counsel then argued that, if the court did not grant a mistrial, then playing the video again before the jury hears any other evidence would place undue weight on this piece of evidence. R. 138, ln. 15—R. 139, ln. 2.

The trial court held “there’s no basis in this note for me to assume they’ve discussed any issue in the trial.” R. 139, ll. 3-5. The court then ordered “additional microphones put up so that the jury will understand the contents of that tape.” R. 139, ll. 10-12. The court also brought in additional loud speakers. R. 141, ll. 4-11. When the jury returned to the courtroom, the trial court explained, “[w]e have attempted to amplify the situation by putting up some additional microphones . . .” R. 148, ll. 3-5. It then instructed the jury as follows:

Now, I do want to tell you that it is perfectly alright for y’all to agree that the video is improper and ask to see it again but remember my admonitions of yesterday with regards to any issues in the trial of this case. You must not discuss it with each other under any circumstances until I have given you the case for your trial—for your deliberation.

R. 148, ll. 11-16. The video was again played over Counsel’s renewed objections. R. 16-20. Out of the presence of the jury, the trial court later stated that it “sat near the jury box and had an opportunity to observe the video from their perspective, and it—the sound was vastly improved.” R. 151, ll. 6-8.

The video was also played again to the jury during its deliberations pursuant to another request. Although the trial court explained to the jury that it had “seen it twice,” the jury nonetheless wished to see it again. R. 425, ll. 1-16. Accordingly, the trial court accommodated. R. 425, ln. 18—R. 430, ln. 19.

Finally, during the jury charge conference, Counsel’s requests included instructions for self-defense and involuntary manslaughter. R. 449, ln. 1-4. Counsel specifically argued that testimonial evidence from Davis, Cox, and Skipper existed in the record supporting the charges, and Appellant was entitled to them. R. 355, ln. 5-11; R. 363, ll. 14-22; R. 364, ll. 1-13. The State argued Appellant was involved in unlawful conduct and thus involuntary manslaughter was inappropriate. R. 362, ln. 13—R. 363, ln. 2. It further argued the evidence did not contradict statements that the Appellant “had the gun out and, in fact, struck.” R. 364, ll. 17-19.

The trial court held the evidence was uncontradicted that Appellant went to the vehicle with a loaded gun in her hand. R. 363, ll. 3-10; R. 365, ll. 9-18. The court also held that “[t]he defendant can’t go to the scene of a difficulty, then claim self-defense.” R. 366, ll. 4-8. As such, over Counsel’s objections, the trial court denied both self-defense and involuntary manslaughter jury instructions. R. 366, ln. 8—R. 368, ln. 1; R. 386, ll. 6-11; R. 474 (Court’s Exhibit #9, Memorandum of Law).

The trial court first instructed the jury regarding the law, and then permitted closing arguments, during which the State repeatedly referenced language from Appellant’s video statement. R. 418, ln. 9—448, ln. 11; R. 419, ln. 23—R. 420, ln. 17; R. 420, ln. 22—R. 421, ln. 2; R. 421, ll. 14-25.

The jury found Appellant guilty of murder on the third day of deliberations. 492, ll. 16-19. In the sentencing phase, the trial court told Appellant “[t]here was no way in the world that [Counsel] could get around your video sworn statement where you said, ‘I pulled the trigger.’ Quote, unquote.” R. 460, 19-21. Appellant was sentenced to thirty years imprisonment. R. 467, ln. 24—R. 468, ln. 1.

This appeal follows.

ARGUMENT

- I. **The trial court reversibly erred by admitting Appellant’s video statement to law enforcement where Appellant’s uncontradicted testimony at the Jackson v. Denno hearing was that, before police began recording, she indicated to the one officer present that she needed an attorney, yet law enforcement continued with the interrogation after a second officer arrived.**

The trial court reversibly erred by failing to suppress Appellant’s video statement, which was taken in violation of Appellant’s right to have counsel present during custodial interrogation. “In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 368, 84 S.Ct. 1774, 16 L.Ed.2d 694 (1964).” State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010). “[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689 (1980); State v. Howard, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988).

“Miranda . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.” Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981); see also U.S. Const. amend. V; State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Furthermore, “when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85. Thus, “[o]nce an accused requests counsel, police interrogation must cease unless the accused himself ‘initiates further communication,

exchanges, or conversations with the police.” State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (holding defendant’s statement, “I think I need a lawyer,” constituted an unambiguous invocation of the right to counsel); see also Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the case at bar, Appellant gave her statement to police while she was in custody, after she invoked her right to counsel, and after law enforcement reinitiated the interrogation in violation of Miranda and Edwards. First, Appellant was unquestionably in police custody when Addison brought her into the interrogation room on July 2, 2008. She was already arrested by United States Marshals in Darlington earlier that day, and then transported by officers from Conway to the Conway Police Department Annex where she was booked.

Second, it is uncontradicted that Appellant invoked her right to counsel when she was brought into the interrogation room by Addison. The test of whether a person invoked the right to counsel is “whether the accused’s statement ‘can reasonably be construed to be an expression of a desire for the assistance of an attorney.’” Kennedy, 333 S.C. at 430, 510 S.E.2d at 715. (quoting McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209 (1991)). As the Kennedy Court explained, no ambiguity or equivocation exists “[i]f the desire for counsel is presented ‘sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’” Kennedy, 333 S.C. at 430, 510 S.E.2d at 715 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355 (1994)).

Here, Appellant testified that she told Addison, “I need an attorney for this, don’t I?” and, “I need an attorney for this.” R. 28, ln. 21—R. 29, ln. 3. As in Kennedy, Appellant’s statement is sufficiently clear that a police officer would reasonably construe

it as an expression of a desire for the assistance of an attorney. Accordingly, Appellant's statement constitutes an invocation of her right to counsel. See Kennedy, 333 S.C. at 430, 510 S.E.2d at 715-16. As a result, Appellant's Fifth and Fourteenth Amendment rights were violated when police continued to go forward with interrogation at their initiative after Appellant invoked her right to counsel. As conceded by the State, it is uncontradicted that Appellant invoked her right to counsel; it is also uncontradicted that the police reinitiated the interrogation after Appellant invoked. R. 19, ln. 9—R. 20, ln. 13; R. 35, ln. 23—R. 36, ln. 1; R. 40, ll. 21-23. Consequently, the only evidence in the record pertaining to the critical time of invocation of the right to counsel, and reinitiation of the interrogation all shows that Appellant's statement was taken after invocation of her right, and reinitiation by police.

Furthermore, the trial court's rationale supporting its finding that Appellant waived her right to counsel—that Appellant's testimony was implausible because “she had ample opportunity to express her desire for her attorney and that's, obviously indicated not only on Mr. King's testimony but on the video itself”—is belied by standing case law. R. 41, ll. 2-7. As stated by the Edwards Court, “when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right *cannot* be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85 (emphasis added). Thus, contrary to the trial court's ruling, the fact that Appellant responded to further police-initiated custodial interrogation cannot establish a waiver of her right to counsel even if Appellant was advised of her rights. Accordingly, the trial court reversibly erred by finding Appellant waived her right to counsel, and subsequently admitting Appellant's video statement into evidence.

Finally, Appellant was prejudiced by the improper admission of the video statement. The jury specifically focused on the video statement both during the trial and later during its deliberations. On the first occasion, the jury sent a note to the trial court specifically saying, “We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding.” R. 137, ll. 1-7; R. 473 (Court Exhibit #8, Juror Note). Further, the trial court emphasized the evidence when, upon its own initiative, had additional microphones and more loud speakers brought into the courtroom to “amplify the situation . . . .” R. 148, ll. 3-5. In this way, the trial court itself amplified the prejudice to Appellant by placing added weight and emphasis on Appellant’s improperly admitted video statement.

On the second occasion, the jury again asked to hear the Appellant’s video statement during its deliberations, which the trial court accommodated. R. 425, ln. 18—R430. 459, ln. 19. Therefore, it is undeniable that the jury placed significant importance on Appellant’s video statement. This was compounded by the State’s repeated use of Appellant’s statement throughout the trial, including closing argument. R. 418, ln. 9—448, ln. 11; R. 419, ln. 23—R. 420, ln. 17; R. 420, ln. 22—R. 421, ln. 2; R. 421, ll. 14-25. Under such circumstances, it is likely that the outcome of the trial would have been different if the trial court suppressed Appellant’s video statement. This understanding is confirmed by the trial court’s own words to Appellant: “There was no way in the world that [Counsel] could get around your video sworn statement where you said, ‘I pulled the trigger.’ Quote, unquote.” R. 460, 19-21.

Accordingly, Appellant’s conviction should be reversed, and her case remanded for a new trial. Edwards, 451 U.S. at 480, 101 S.Ct. at 1882-83.

**II. The trial court reversibly erred by failing to grant a mistrial for premature jury deliberation where, during trial, the jury sent a note saying, “we are all in agreement that we need to see and hear the video tape again.”**

The trial court reversibly erred by failing to grant a mistrial where the jury sent a note indicating it prematurely deliberated regarding Appellant’s video statement. “A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged.” State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986). As explained by the Supreme Court, “the reason for this rule is apparent”:

The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979); see also Joyner, 289 S.C. at 437, 346 S.E.2d at 712. Additionally, instructions by the trial court “which invite jurors to engage in premature deliberations constitute reversible error.” State v. Aldret, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999).

In the case at bar, the jury’s note indicated it engaged in deliberations regarding Appellant’s video statement during the trial. The jury note included the following:

We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding.

R. 137, ll. 1-7; R. 473 (Court Exhibit #8, Juror Note). The fact that the jury stated they were “all in agreement” that they *needed* to see and hear Appellant’s video statement to law enforcement again indicated deliberation. In other words, this agreement constitutes deliberation regarding a critical piece of the State’s evidence in its case against Appellant.

Additionally, Appellant was prejudiced by the trial court's grant of the jury's request to see and hear the video at that time. First, as explained above, Appellant's video statement to police was taken in violation of her Fifth and Fourteenth Amendment rights, and should have been suppressed pursuant to Edwards and its progeny. See § I, supra. Thus, the jury was permitted to hear an improper confession of Appellant again.

Second, the trial court not only permitted the jury to see and hear the video again, but it also placed additional microphones and speakers in the courtroom in an overt attempt to "to amplify the situation . . . ." R. 148, ll. 3-5. In this way, the trial court improperly added weight and emphasis to the tainted video statement.

Finally, the trial court also gave the jury confusing instructions regarding premature deliberations. Specifically, the court provided the following instructions to the jury immediately before replaying Appellant's amplified video statement:

*Now, I do want to tell you that it is perfectly alright for y'all to agree that the video is improper and ask to see it again but remember my admonitions of yesterday with regards to any issues in the trial of this case. You must not discuss it with each other under any circumstances until I have given you the case for your trial—for your deliberation.*

R. 148, ll. 11-16. These instructions by the trial court are confusing on the specific issue of premature jury deliberations, and invited the jury to discuss the case. Joyner, 289 S.C. at 438, 346 S.E.2d at 712 (reversing where "[t]he challenged instructions invited the jury to discuss the case, which is tantamount to deliberation, prior to its completion and is reversible error."). Therefore, a mistrial is necessary not only due to the prejudice to Appellant, but also due to the trial court's inconsistent instruction to the jury regarding premature deliberations. See, e.g. McGuire, 272 S.C. at 551-52, 253 S.E.2d at 105

(“Inconsistent statements on the part of the judge, relative to the jury discussing the case before deliberations began, will not likely occur upon a new trial.”).

**III. The trial court reversibly erred by failing to charge the jury with self-defense where the record contained evidence that, prior to the shooting, several women exited a parked vehicle and surrounded Appellant in a threatening manner when Appellant walked passed in a parking lot.**

The trial court reversibly erred by refusing to charge the jury with the law of self-defense. “If there is any evidence in the record from which it could be reasonably inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error.” State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008).

The four elements of self-defense are as follows: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant was in actual imminent danger of losing his life or sustaining serious bodily injury, or he actually believed he was in imminent danger of the same; (3) if the defense is based on the defendant’s belief of imminent danger, then it must be shown that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that the circumstances would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of life; and (4) the defendant had no other probable means of escape. Id. 378 S.C. at 649, 664 S.E.2d at 469.

Additionally, a defendant has the right to act upon appearances, and does not have to wait for another to get the drop on him before acting in self-defense. See, e.g., State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997) (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955), and State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936)). Finally, the last element of self-defense is further understood to mean the following: “that it is one’s duty to avoid taking human life where it is possible to prevent it even to the extent of

retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.” Jackson, 227 S.C. at 279, 87 S.E.2d at 685.

In the present case, evidence of self-defense was presented through the testimony of Skipper. First, Skipper stated Appellant went across the street to buy cigars and strawberry cookies from a bootlegger that lived doors down from Burroughs’ apartment, which was across the street from Skipper’s home. According to Skipper’s testimony, she saw a vehicle approximately two parking spaces away from Appellant. The vehicle backed up, hit the brakes, and four women exited—including Cox, Liz, Davis, and Burroughs. The women then surrounded Appellant in a threatening manner. R. 257, ln. 15—R. 264, ln. 24.

Under these circumstances as testified to by Skipper, Appellant did not bring on the difficulty; she was walking across the street to purchase items. Also, Appellant was in actual imminent danger of losing her life or sustaining serious bodily injury, or reasonably believed she was in imminent danger of the same; Appellant was just surrounded in a threatening manner by four women who leapt from a vehicle near her, and one of the women—Burroughs—previously threatened Appellant with a gun five weeks before this incident. Moreover, a reasonably prudent person of ordinary firmness and courage would have entertained the belief that the circumstances would warrant striking a fatal blow in order to save herself from serious bodily harm or loss of life; as indicated above, not only was Appellant suddenly surrounded by four women, but also Appellant was aware that at least one owned a gun and previously threatened her with it. Finally, Appellant had no other probable means of escape because she was surrounded. Therefore, under the testimony

provided by Skipper, evidence is present in the record supporting the instruction of self-defense.

Additionally, the State's argument that there is no evidence indicating Appellant did not strike first is of no moment. Simply stated, Appellant had the right to act upon appearances, and did not have to wait for another, such as Burroughs, to get the drop on her before acting in self-defense. See, e.g., Nichols, 325 S.C. at 117, 481 S.E.2d at 121; Jackson, 227 S.C. at 271, 87 S.E.2d at 681; Rash, 182 S.C. at 42, 188 S.E.2d at 435. Therefore, Appellant was entitled to the jury instruction on self-defense, and the trial court reversibly erred by refusing to do so. See Light, 378 S.C. at 650, 664 S.E.2d at 469 ("If there is any evidence in the record from which it could be reasonably inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.").

**IV. The trial court reversibly erred by failing to charge the jury with involuntary manslaughter where the record contained evidence that Appellant was armed in self-defense, a struggle for the gun occurred, and the fatal shot was not intentionally fired.**

The trial court also reversibly erred by refusing to charge the jury with involuntary manslaughter. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (providing a court must view the facts in the light most favorable to a defendant when determining if evidence required a charge on the lesser included offense of involuntary manslaughter).

“Importantly, our courts have long emphasized that to warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). Thus, a request to charge a lesser-included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Involuntary manslaughter is the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); see also Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). Further, evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey, 305 S.C. at 447, 409 S.E.2d at 392.

In the case at bar, evidence is present in the record supporting the charge of involuntary manslaughter. First, the testimony of both Davis and Cox indicate Appellant did not intend to shoot. Davis acknowledged her prior statement given to law enforcement the day after the shooting, and affirmed: (a) that “when the gun went off, they were struggling;” (b) “yeah, they were struggling. My sister was trying to take it from her. They were struggling;” (c) “when I heard the gun go off, that’s when I immediately dropped;” and (d) “but I could see them before I dropped. They was together.” R. 182, ll. 7-14; R. 183, ll. 10-14; R. 184, ln. 22—R. 185, ln. 25. Additionally, Cox testified and did not deny telling police that “[Appellant] must be didn’t know she shot her. She probably thought, you know, maybe she shot in the air or something.” R. 208, ll. 2-3; R. 209, ll. 10-18. This testimony, taken in the light most favorable to Appellant, indicates that there was a struggle over the gun, and the shooting was unintentional with reckless disregard for the safety of others.

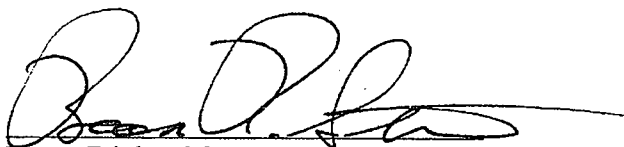
Second, Appellant was engaged in lawful activity, as she was armed in self-defense. See § III, supra. “A person can be acting lawfully, even if he is in unlawful

possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” Crosby, 355 S.C. at 52, 584 S.E.2d at 112; see also Light, 378 S.C. at 649, n.6, 664 S.E.2d at 469, n.6; Burriss, 334 S.C. at 265, n.10, 513 S.E.2d at 109, n.10. As such, it is irrelevant whether Appellant was old enough to possess a handgun; what is relevant is that Appellant was entitled to arm herself in self-defense at the time the shot went off. Further, as previously discussed, testimony from Davis and Cox on cross-examination indicated the gun went off during a struggle between Burroughs and Appellant. Accordingly, the trial court reversibly erred by refusing to charge the jury with the lesser-included offense of involuntary manslaughter.

CONCLUSION

For the foregoing reasons, Appellant Brittany A. Johnson respectfully requests reversal of her conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of January, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

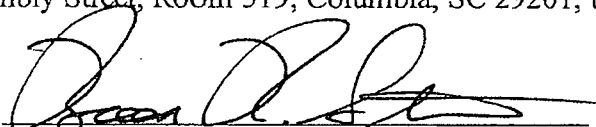
BRITTANY JOHNSON,

APPELLANT

Appellate Case No. 2011-185926

CERTIFICATE OF SERVICE

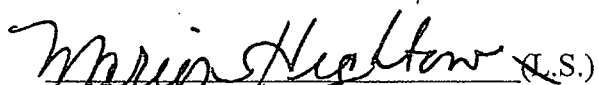
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of January, 2013.



Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of January, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

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THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

---

**FINAL BRIEF OF RESPONDENT**

---

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**QUESTIONS PRESENTED**

- I. Whether the trial court's credibility determination was clearly erroneous where Appellant's testimony during the Jackson v. Denno hearing regarding her alleged invocation of her right to counsel was "simply not plausible."
- II. Whether the trial court abused its discretion in denying defense counsel's motion for a mistrial based on alleged premature deliberations, when the trial court found "there's no basis [in the jury's note] for me to assume that [the jury] discussed any issue in the trial."
- III. Whether the trial court abused its discretion in failing to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates Appellant, after approaching the car in which the victim was seated, then hitting her with a handgun after which she pointed and presented a firearm at the victim and shot her, was not without fault in bringing about the difficulty.
- IV. Whether the trial court abused its discretion in failing to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that Appellant approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim.

## INTRODUCTION

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 appellant, Brittany Johnson ("Appellant"). (R. 458, 467-68).

## STATEMENT OF THE CASE

The State agrees with Appellant's statement of the case.

## STATEMENT OF THE FACTS

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 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 Appellant approaching the Grand Cherokee on the passenger side. (R. 161, 198).

Cox, who believed that Appellant was armed with a knife, and Davis, who recognized Appellant was armed with a gun, watched as Appellant 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 Appellant’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 Appellant, 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 Appellant 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 Appellant 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 Appellant 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 Appellant. (R. 97-98). While authorities were initially unable to locate Appellant, she was subsequently apprehended by U.S. Marshalls on July 2nd in Darlington County. (R. 98).

Following her apprehension by U.S. Marshalls, Appellant 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<sup>1</sup> rights by Sergeant Shawn Addison<sup>2</sup> in the presence of King. (R. 100, 333). Additionally, Appellant was presented with an advisement of rights form which told Appellant 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 Appellant, who then initialed the form nine different times to acknowledge that she 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, Appellant admitted she hit Victim with the gun before shooting her at a distance outside of the Grand Cherokee. (R. 344-46, 347).

#### A. The Jackson v. Denno Hearing

On February 7, 2011, Appellant's case was called to trial. (R. 1). During the pre-trial proceedings, the State, pursuant to Jackson v. Denno, 378 U.S. 368 (1964) requested a hearing to determine whether Appellant's statement was freely, intelligently and voluntarily given. (R. 1-2). In the hearing, King testified he interviewed Appellant "around July 2nd" at the Conway Police Annex. (R. 9-10). Continuing, King said he was accompanied by Investigations

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>2</sup> 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, Jackson v. Denno 378 U.S. 368 (1964) hearing as Investigation Supervisor, Shaun Patterson. (R. 10).

Supervisor, Sergeant Shaun Patterson.<sup>3</sup> (R. 10). Additionally, King told the trial court that based upon his interview with Appellant, she was not under the influence of alcohol or drugs when she gave the statement and further noted that based upon Appellant's ability to answer his questions, he did not believe Appellant 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, Appellant was advised of her Miranda rights which she subsequently waived. (R. 12). In particular, Appellant 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 Appellant could not afford an attorney, one would be provided for her before any questioning commenced (R. 12); and (5) if Appellant decided to make a statement, she had the right to stop at any time. (R. 12).

Thereafter, King explained that he also provided Appellant with an advisement of rights form which contained the Miranda warnings Appellant had received. (R. 13). King further highlighted that Appellant 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 Appellant with a copy of the form. (R. 14).

The State next asked King whether he had inquired as to whether Appellant wanted an attorney. (R. 15). In response, King replied that he had, explaining that Appellant 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 Appellant had previously requested an attorney. (R. 19). In response, King said "to my recollection, she never

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<sup>3</sup> See footnote 1 *supra*.

asked for an attorney.” (R. 19). Continuing, defense counsel questioned King as to whether Appellant 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 to Appellant prior to her entering into the interview room. (R. 21).

Defense counsel then called Appellant to the stand where she testified regarding her initial apprehension by individuals that she believed, were State Troopers. (R. 22-23, 26-27). Specifically, Appellant 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, Appellant 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). Appellant 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 Appellant stated “I can’t even remember.” (R. 26).

Appellant 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, Appellant 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, Appellant 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). Appellant never identified who gave this response.

On cross-examination, the State, after identifying and presenting Appellant with the advisement of rights form confirmed that Appellant 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, Appellant acknowledged that despite understanding her rights, she wished to waive them. (R. 34). Appellant 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, Appellant 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). Appellant 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 Appellant allegedly invoked her right to counsel, the statement should not be admitted into evidence.<sup>4</sup> (R. 38).

Replying to defense counsel's argument, the State agreed that Appellant'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 Appellant 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:

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<sup>4</sup> 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).

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).

### **B. The "Premature Deliberation Issue"**

Following the trial court's ruling on the Jackson v. Denno issue, a Blair<sup>5</sup> hearing was conducted, after which, a jury was selected and sworn. (R. 41-79, 80-83). The trial court then gave its opening remarks and both parties presented opening statements. (R. 83-88). Next, the State called King as its first witness and Appellant's video statement, State's Exhibit #4, was introduced and played for the jury over defense counsel's objection. (R. 107-08). Immediately after the video was played, the trial court informed the jury:

Madame Foreman, anything that is introduced into evidence including this video will be with you in the jury room during your deliberations, and of course, we'll set up if you and your jury wants to hear all or some portion of it, we'll make it available to you either in the jury room or bring you back out here.

I understand, as you do, that some parts are somewhat unintelligible but it will be available for you or any member of your jury to play it back or any part of it as long as you choose.

(R. 108). The jury then asked whether it was "possible to have a written transcript with that[.]"

(R. 109). Responding to this question, the trial court said "[w]e'll see if we can do so. Some portions of it are unintelligible, but we'll make appropriate inquiry." (R. 109). Thereafter, King resumed his testimony and at the end of his testimony, the trial court concluded the first day of trial. (R. 135).

After instructing the jury on the appropriate time to report to the courtroom, the trial court instructed the jury as follows:

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<sup>5</sup> State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

Do not discuss this case with anyone. Permit no one to discuss it with you. You must not even discuss it among yourselves until I have given you the case for deliberation.

Sometimes, two or three jurors as we break at night get around their car. They start discussing some issue in the case but that's improper for the following reason. Ultimately, your decision must be the unanimous decision of all twelve of you, and if several of you are discussing some issue, you are depriving your fellow jurors of your thought process, and they're entitled to that.

So, Madame Foreman, under no circumstances let any conversation transpire in the jury room regarding issues in this case until I have given it to you for your deliberation.

(R. 135-36). The jury was then dismissed for the day.

The next day, prior to the start of trial, the jury sent the trial court a note stating, "[w]e are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." (R. 137). The trial court then inquired into the parties positions on the matter, at which point defense counsel objected, arguing the note "indicates improper discussion regarding this case" and moved for a mistrial. (R. 137-38). Additionally, defense counsel objected on the ground that by playing the video recording again, it would place "undue weight" on the evidence. (R. 138).

Ruling on this argument the trial court found:

First, with reference to a mistrial, there's no basis in this note for me to assume they've discussed any issue in the trial.

The record will reflect and should reflect, and I say it now, the playing of the video was totally imperfect in many ways, particularly in sound, and this Court and jury could not even hear what was said.

In accordance with the jury's request, I am having additional microphones put up so that the jury will understand the contents of the tape.

Obviously, they were concerned, and you will have to agree that some of it was inaudible. You will have to agree with that because it's apparent that it was.

The jury has said and has specifically requested that they view now this document which is in evidence, and in accordance with their request, I'm going to do it for several reasons.

One is they requested it.

Two, it was entered by the first witness, and no other witness has come on the jury box—jury—on the witness stand.

And, three, I'm doing it because the initial rendering of this video was imperfect in a number of ways, particularly sound, and I feel obligated to honor the jury's request who say to me 'Judge, we listened to it but we could understand it.' And that would be the contents of this letter.

(R. 139-40). The trial court then reiterated, "it's clear to me that the jury couldn't understand it. That's all I'm doing." (R. 140). The trial then stated, "I want the record to reflect that I am bringing in additional speakers at this time. We are outside the presence of the jury so that they can understand it more intelligently." (R. 141). With that, speakers were set up so as to amplify the situation and the trial court said, "[t]he record will reflect that she was barely in a whisper and I want this record to reflect it." (R. 144-45). Subsequently, the second day of trial began, and in accordance with the jury's wishes and the trial court's finding, State's Exhibit #4, the video recording, was played for the jury over defense counsel's objection. (R. 147, 148).

### **C. Defense Counsel's Requests to Charge**

After the jury reviewed the video recording, the State called Davis, Cox, Peter Cestare, who supervised in the collection of evidence, Dr. Edward Proctor, an expert in forensic pathology and Owen Rodmaker, who assisted King in the investigation. (R. 153-190, 218-27, 230-45, 245-48). Next, the State rested, and after the denial of Appellant's directed verdict motion, Appellant elected to present a defense providing testimony from *inter alia*, Tamika Skipper and herself. (R. 248, 249, 250-281, 286-351).

#### **1. Tamika Skipper's Testimony**

In particular, Skipper testified that she saw Appellant on the date in question around noon adding Appellant was with her son. (R. 251-52). Continuing, Skipper stated she left to get lunch at a nearby Subway and left Appellant with the key to her residence. (R. 254). Skipper then told the jury that upon her return to her residence, she found Appellant had locked the door. (R. 254). After beating on the door for what she believed was five minutes, Appellant unlocked Skipper's door. (R. 254). She said Appellant was apparently asleep. (R. 254). Next, Skipper explained Appellant asked her to take care of her son, while she went to "the bootlegger." (R. 255, 256). When Appellant left to go to the bootlegger, Skipper went outside before returning to her residence. (R. 257). Later, Skipper emerged from her residence and saw "Brittany across the street . . . Monica in a jeep backing out and then . . . the brake lights jump on and four car doors open up[.]" (R. 257). Skipper further told the jury that by the time everyone was out of the car, she started running. (R. 257).

Defense counsel then reviewed Skipper's testimony with her, confirming that Skipper came out of her house, saw the jeep backing up, saw the brake lights come on, watched as all four car doors opened, and Cox, "Liz," Davis and Victim allegedly surrounded Appellant. (R. 260-62). Skipper said that as she was running towards Appellant she heard a shot go off, at which point "everybody [was] screaming and hollering." (R. 262). Immediately afterwards, Skipper admitted telling Appellant to "run." (R. 262). Skipper further related that she believed the group was going to "jump" Appellant, but added "[w]hatever [Appellant] and [Victim] got going that's between her and Monica but no one else was going to touch her. (R. 262). Skipper also told the jury that when the shot was fired, Appellant, whose back was towards Skipper, "wasn't that close" to Victim, but explained they were within an arm's reach. (R. 263). Skipper admitted she did not see the gun until after Appellant shot Victim. (R. 265-66).

On cross-examination, the State questioned Skipper as to her recollection of the event at issue. (R. 272-73). Specifically, the State asked Skipper whether she saw the entire incident to which Skipper responded that she did not. (R. 273-74, 276). Continuing, the State asked Skipper whether something could have happened between the time she went into her residence and the time she emerged from the residence. (R. 276). Answering the question, Skipper said, "I don't know" and clarified that she did not know if anything happened while she was inside the house. (R. 277). In fact, Skipper admitted she could not definitely say that Appellant did not strike Victim first. (R. 277). This was corroborated on redirect examination, when Skipper again admitted she had no knowledge as to whether Appellant or Victim started the altercation. (R. 278-79).

## 2. Appellant's Testimony

As detailed above, Appellant testified in her own defense. (R. 286-351). During her testimony, Appellant explained she had been dating Franklin "Putty" Pyatt, who lived with Victim. (R. 288-89, 290). Continuing, Appellant told the jury that on August of 2007, nearly a year before the incident now at issue occurred, Victim learned that Appellant was dating Pyatt, which resulted in a confrontation between the two women. (R. 291-92). A couple of months later, Appellant said that she and Victim had another confrontation where Victim threatened to beat her. (R. 299-300). Appellant also revealed that on December of 2007, she and Victim got into a physical altercation after Appellant keyed Pyatt's vehicle. (R. 301, 304-05). Appellant told the Court, "I was pretty much getting the best of her and [Pyatt] jumped on me. (R. 305).

Appellant continued to shed light on her relationship with Victim, adding that in March of 2008, Victim had called her and told her, "whatever was between me and [Pyatt] was between me and [Pyatt], and I agreed with her, and I told her that was fine." (R. 312). Appellant then

proceeded to tell the jury that in May of 2008, a little over a month before the shooting, Victim allegedly threatened her after hearing that Appellant was supposedly pregnant with Pyatt's child. (R. 314). Elaborating on the incident, Appellant testified that Victim approached her, reached into her purse, displayed the handle of a gun to her and walked away. (R. 314-15).

Appellant's testimony also revealed that in the days leading up to the shooting, specifically, June 23rd, she and Pyatt had gotten into a fight. (R. 321). Describing the incident, Appellant stated the fight was physical and afterwards, Appellant walked into Huckabee Heights and began arguing with Pyatt. (R. 321). Continuing, Appellant admitted she returned to Pyatt and Appellant's residence when she poured lighter fluid on Pyatt's vehicle. (R. 321-22). She then returned a third time, approximately twenty (20) minutes later, armed with a gun and "intentions of shooting [Pyatt]." (R. 323). Appellant explained she did not shoot Pyatt because, "he was gone" but admitted to threatening both Victim and Pyatt. (R. 323-24).

Moving to the day of the shooting, Appellant corroborated Skipper's testimony that she arrived at Skipper's residence, Skipper left and she went to sleep in Skipper's residence. (R. 327). In addition, Appellant offered that after she awakened and let Skipper in, the two decided to smoke marijuana, which in turn prompted Appellant to head to the bootlegger's to purchase cigars so they could smoke the marijuana. (R. 329). When she proceeded to the bootlegger's house, Appellant told the jury that Davis called her name, adding that Davis was in front of Victim's residence. (R. 330). From there, Appellant claimed she "was not sure" what happened next, but admitted pulling the trigger. (R. 330, 337-38). Elaborating, Appellant explained, "I was just standing there, and I saw her in front of me with the shot going off." (R. 338).

On cross-examination, Appellant admitted to bringing a loaded .45 caliber handgun to Huckabee Heights, and, on the day before, standing in front of Victim and Pyatt's residence

screaming, “come on out and eat—the bullets.” (R. 315-16). Additionally, Appellant admitted she saw Victim in the vehicle with the doors open, when she went to the bootlegger’s. (R. 343-44). Likewise, Appellant admitted that in her statement to police, she took the .45 caliber handgun out, hit Victim with the gun, they struggled momentarily, after which Appellant, who was now outside of the car, separated from her and shot Victim. (R. 344-45). Appellant again confirmed that when she shot Victim there was some distance between herself and Victim. (R. 345-46). The State then asked Appellant about the accuracy of her account of the events to which Appellant responded, “I felt like I was wrong. I killed somebody, and that was on my conscience.” (R. 347). When asked to confirm that she killed someone, Appellant again admitted she killed Victim and agreed with the State that “it was wrong.” (R. 347-48).

### 3. The Charge Conference

During the charge conference, defense counsel requested a charge on, *inter alia*, self-defense and involuntary manslaughter. (R. 354). With respect to involuntary manslaughter, the trial court initially denied Appellant’s request, but after hearing counsel’s argument—that Skipper, Davis and Cox each testified in some capacity that the shooting was unintentional—told defense counsel it would consider the request. (R. 355). It then advised both parties to research the issue and present their arguments the next morning. (R. 358-59).

The trial court then addressed defense counsel’s request regarding self-defense stating, “[y]ou don’t have any request for self-defense” referencing defense counsel requests to charge which were previously submitted to the trial court. (R. 359). Defense counsel agreed saying, “[n]o, sir, Your Honor. I was going to make that an oral motion for a standard self-defense charge.”

Thereafter, the trial court ruled finding:

The case is clear. You can't start a difficulty of your own volition and it ensues into a struggle and the claim self-defense. You just can't do that.

The problem you have here is uncontradicted that she loaded herself with a 45 and went to where the unfortunate victim was and was later killed by that 45. So I would decline any self-defense charge in this case.

(R. 359). Defense counsel then asked that his objection be noted for the record. (R. 359). However, defense counsel failed to advance an argument supporting his request for a charge on self-defense.

The next morning, the trial court took up the involuntary manslaughter issue. (R. 359). In arguing against a charge on involuntary manslaughter the State explained that because Appellant was clearly involved in unlawful conduct when she produced the weapon, pointed and presented it and fired it Appellant was not entitled to charge on involuntary manslaughter since the conduct was likely to cause death or injury. (R. 362-63).

After hearing the State's argument, the trial court said, "I understand that involuntary manslaughter can be charged under certain circumstances, particularly when even an unlawful act not tending to create great bodily injury or death but the evidence is uncontradicted here that your client sought out the deceased. (R. 363). Continuing, the trial court noted that Appellant went to the Grand Cherokee with a loaded .45 stating "[y]ou just can't go looking for somebody, and its' uncontradicted that she did it with the gun in her hand." (R. 363).

In response, defense counsel highlighted that the evidence was not uncontradicted arguing Skipper's testimony showed the individuals exited the car and proceeded towards Appellant in a threatening manner. (R. 363). Replying to defense counsel's argument, the trial court stated, "[t]he problem is your client admits that not only she had the gun but said, 'I shot her.'" (R. 363). Defense counsel then cited to State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) and State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) for the proposition that

the question is simply whether any evidence exists to support a charge on a lesser-included offense. (R. 364).

Next, the trial court asked the State about Skipper's testimony adding, "I don't think she said what [defense counsel] said she said." (R. 365). Responding to the trial court's question, the State agreed with the trial court stating Skipper testimony did not conflict with "the statements that the defendant had the gun out and, in fact, struck." (R. 364). Specifically, the State explained that Skipper, when asked if she could say Appellant did not strike Victim first, said she could not say that. (R. 364). The trial court then ruled Appellant was not entitled to an instruction on involuntary manslaughter. (R. 365).

Moving to the self-defense request, the trial court, again without any argument from defense counsel supporting a self-defense charge, ruled that pursuant to State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) "the defendant can't go to the scene of the difficulty, then claim self-defense." (R. 366). When defense counsel attempted to object, the trial court merely mentioned "I'm not going to charge involuntary manslaughter." (R. 366). Thereafter, the trial court charged the jury and defense counsel reiterated its previous objections following the charge. (R. 386). Following closing arguments, the jury deliberated for approximately two days before ultimately finding Appellant guilty of murder. (R. 387-421, 424-57, 458).

### STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

### ARGUMENTS

- I. The trial court correctly determined Appellant's testimony during the *Jackson v. Denno* hearing regarding her alleged invocation of her right to counsel was "simply not plausible"

Appellant contends the trial court erred in failing to suppress Appellant's video statement arguing the statement was taken in violation of Appellant's Fifth Amendment right to have counsel present during custodial interrogation. Br. of App. at p. 13. Specifically, Appellant, 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 Appellant's testimony on this issue, "simply not plausible" erred in finding Appellant knowingly, freely and voluntarily, waived her Miranda rights. Br. of App. at p. 14-15.

In response, the State submits Appellant's argument misses the point of the trial court's credibility determination, which the State believes controls this issue. In fact, the State agrees that if the trial court had believed Appellant's testimony—that she clearly and unequivocally invoked her right to counsel while in police custody—Appellant would be correct in arguing the trial court's ruling was in error pursuant to Edwards and its progeny. However, because the trial court instead determined Appellant's testimony regarding her alleged invocation of her right to counsel was "simply not plausible" and therefore not credible evidence—Appellant's argument necessarily fails.

Indeed, the State notes that 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, there is nothing which requires the State to present every witness who may have knowledge about a statement made by the defendant, nor can the State's failure to

present every such witness subsequently render the statement inadmissible. State v. Brown, 212 S.C. 237, 247, 47 S.E.2d 521, 525-26 (1948).

In State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006) the Supreme Court of South Carolina 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. Thus, when an appellate court reviews the trial court's preliminary factual findings, they do 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." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Thus, the only question left to answer is whether the trial court's decision to admit the testimony is supported by any evidence.

After finding Appellant's statement was voluntarily tendered and determining the State complied with the requirements of Miranda, 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 Appellant allegedly invoked her right to counsel, the statement should not be admitted into evidence. (R. 38).

Replying to defense counsel's argument, the State agreed that Appellant's alleged invocation was uncontradicted stating "we don't have anybody who says she ever asked that."

(R. 40). The State then went on to highlight that Appellant 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).

Here, the State submits the trial court's ruling that under the totality of the circumstances, Appellant's statement was freely, knowingly and voluntarily tendered and was taken in compliance with the requirements of Miranda, was supported by the evidence. First, as to Appellant's "uncontradicted" testimony regarding the invocation of her right to counsel, the State notes that under Boone and McAlister, the trial court did not have to, and in fact did not, accept Appellant's statement as true.

Additionally, the balance of the evidence adduced at the Jackson v. Denno hearing supported the trial court's decision to admit Appellant's statement. Indeed, King's testimony clearly reflected Appellant was properly advised of her Miranda rights, executed a valid Miranda waiver, and voluntarily issued a confession. Specifically, King told the trial court that prior to the interview, which last approximately thirty (30) minutes, Appellant was advised of her Miranda rights which she subsequently waived. (R. 12). In particular, Appellant 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 Appellant could not afford an attorney, one would be provided for her before any questioning commenced (R. 12); and (5) if Appellant

decided to make a statement, she had the right to stop at any time. (R. 12). Thereafter, King explained that he also provided Appellant with an advisement of rights form which contained the Miranda warnings Appellant had received. (R. 13). King further highlighted that Appellant 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 Appellant with a copy of the form. (R. 14). Accordingly, the State submits the trial court's ruling is supported by the evidence.

II. The trial court correctly determined the jury did not engage in premature deliberations, but instead, was merely informing the trial court it was unable to hear Appellant's statement

Appellant also argues the trial court erred in failing to grant a mistrial arguing the jury's note was evidence the jury engaged in premature deliberations, or in the alternative, that the trial court's instructions invited jurors to engage in premature deliberations. Br. of App. at p. 18. Specifically, Appellant maintains the jury's note, by the fact it says, "all in agreement" implicitly indicates the jury engaged in premature deliberations. Br. of App. at p. 18.

Quite simply, the State disagrees and submits the trial court was correct in finding there were no premature deliberations since the record clearly shows the jury simply could not hear the audio of Appellant's statement.<sup>6</sup> In particular, the State notes the jury, consistent with their previous requests for a transcript of the exhibit, could, without discussing the substance of the case, have simply asked one another whether they could hear the exhibit and, once they agreed they could not, written the note without discussing the merits or the issues in the case. Indeed, based upon the trial court's clear instruction to refrain from discussing the issues in this case, it would seem the jury likely did not participate in premature deliberations, especially since jurors

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<sup>6</sup> Furthermore, the State notes Appellant's argument regarding the trial court's jury instructions on this issue are not preserved for appellate review due to counsel's failure to register an objection to the instructions. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review).

are presumed to follow the law. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) (“A jury is presumed to [have followed the trial judge’s] instructions.”)).

These propositions are further supported by the record which clearly establishes that the jury’s note was the product of poor audio quality as opposed to evidence of premature jury deliberation. In fact, immediately after the video was played, the trial court informed the jury:

Madame Foreman, anything that is introduced into evidence including this video will be with you in the jury room during your deliberations, and of course, we’ll set up if you and your jury wants to hear all or some portion of it, we’ll make it available to you either in the jury room or bring you back out here.

*I understand, as you do, that some parts are somewhat unintelligible but it will be available for you or any member of your jury to play it back or any part of it as long as you choose.*

(R. 108). The jury then asked whether it was “possible to have a written transcript with that[.]”

(R. 109). Responding to this question, the trial court said “[w]e’ll see if we can do so. Some portions of it are unintelligible, but we’ll make appropriate inquiry.” (R. 109). Thereafter, King resumed his testimony and at the end of his testimony, the trial court concluded the first day of trial. (R. 135).

After instructing the jury on the appropriate time to report to the courtroom, the trial court instructed the jury as follows:

*Do not discuss this case with anyone. Permit no one to discuss it with you. You must not even discuss it among yourselves until I have given you the case for deliberation.*

Sometimes, two or three jurors as we break at night get around their car. They start discussing some issue in the case but that’s improper for the following reason. Ultimately, your decision must be the unanimous decision of all twelve of you, and if several of you are discussing some issue, you are depriving your fellow jurors of your thought process, and they’re entitled to that.

*So, Madame Foreman, under no circumstances let any conversation transpire in the jury room regarding issues in this case until I have given it to you for your deliberation.*

(R. 135-36). The jury was then dismissed for the day.

The next day, prior to the start of trial, the jury sent the trial court a note stating, “[w]e are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding.” (R. 137). The trial court then inquired into the parties positions on the matter, at which point defense counsel objected, arguing the note “indicates improper discussion regarding this case” and moved for a mistrial. (R. 137-38). Additionally, defense counsel objected on the ground that by playing the video recording again, it would place “undue weight” on the evidence. (R. 138).

Ruling on this argument the trial court found:

First, with reference to a mistrial, there’s no basis in this note for me to assume they’ve discussed any issue in the trial.

The record will reflect and should reflect, and I say it now, the playing of the video was totally imperfect in many ways, particularly in sound, and this Court and jury could not even hear what was said.

In accordance with the jury’s request, I am having additional microphones put up so that the jury will understand the contents of the tape.

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The jury has said and has specifically requested that they view now this document which is in evidence, and in accordance with their request, I’m going to do it for several reasons.

One is they requested it.

Two, it was entered by the first witness, and no other witness has come on the jury box—jury—on the witness stand.

And, three, I'm doing it because the initial rendering of this video was imperfect in a number of ways, particularly sound, and I feel obligated to honor the jury's request who say to me 'Judge, we listened to it but we could understand it.' And that would be the contents of this letter.

(R. 139-40). The trial court reiterated, "it's clear to me that the jury couldn't understand it. That's all I'm doing." (R. 140). The trial then stated, "I want the record to reflect that I am bringing in additional speakers at this time. We are outside the presence of the jury so that they can understand it more intelligently." (R. 141). With that, speakers were set up so as to amplify the situation and the trial court said, "[t]he record will reflect that she was barely in a whisper and I want this record to reflect it." (R. 144-45).

Accordingly, the State submits the trial court correctly denied defense counsel's motion for a mistrial since the evidence clearly shows the jury did not engage in premature deliberations, but instead simply could not hear the audio portion of Appellant's statement. Therefore, the State asks this Court to affirm on this issue.

- III. The trial court was correct in declining to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates Appellant, after approaching the car in which the victim was seated and hitting her with a handgun, then pointed and presented a firearm at the victim and shot her

Here, Appellant, citing to State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), a case which trial counsel used to support an instruction on involuntary manslaughter (R. 354), argues Skipper's testimony supports a charge on self-defense. Br. of App. at p. 22-23. The State disagrees for two reasons.

#### A. The Issue is Not Preserved

First, defense counsel failed to present Appellant's current argument to the trial court in support of a charge on self-defense, instead presenting this argument as a request for the lesser-included offense of involuntary manslaughter. (R. 363-65). See State v. Rios, 388 S.C. 335,

341-42, 696 S.E.2d 608, 611 (Ct. App. 2010) (concluding an appellant may not raise an objection to a jury charge for the first time on appeal); Rule 20(a), SCRCrimP. (West 2012) (explaining all requests for legal instructions to the jury shall be submitted at the close of evidence or earlier and must include accurate citation to authority); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

While trial counsel admittedly made a request for a charge on self-defense, the State submits this argument, which by counsel's own admission was not a written request and thus could not have contained any citation to authority as required by Rule 20(a), SCRCrimP., was conclusory and failed to alert the trial court to any authority supporting the charge. Specifically, the trial court, after reviewing defense counsel's written requests to charge, said "[y]ou don't have any request for self-defense" referencing defense counsel's requests to charge which were previously submitted to the trial court. (R. 359). Defense counsel agreed saying, "[n]o, sir, Your Honor. I was going to make that an oral motion for a standard self-defense charge."

Thereafter, the trial court ruled finding:

The case is clear. You can't start a difficulty of your own volition and it ensues into a struggle and the claim self-defense. You just can't do that.

The problem you have here is uncontradicted that she loaded herself with a 45 and went to where the unfortunate victim was and was later killed by that 45. So I would decline any self-defense charge in this case.

(R. 359). Defense counsel then asked that his objection be noted for the record, and the parties recessed for the day with instructions to research the question of involuntary manslaughter. (R. 359-61).

The following day, defense counsel argued Skipper's testimony supported a charge on involuntary manslaughter explaining the testimony allegedly showed the individuals exited the car and proceeded towards Appellant in a threatening manner. (R. 363). Replying to this argument the trial court stated, "[t]he problem is your client admits that not only she had the gun but said, 'I shot her.'" (R. 363). Defense counsel then cited to State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) and State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) for the proposition that the question is simply whether any evidence exists to support a charge on a lesser-included offense. (R. 364).

Continuing the discussion on the involuntary manslaughter charge, the trial court asked the State about Skipper's testimony adding, "I don't think she said what [defense counsel] said she said." (R. 365). Responding to the trial court's question, the State agreed with the trial court stating Skipper's testimony did not conflict with "the statements that the defendant had the gun out and, in fact, struck." (R. 364). Specifically, the State explained that Skipper, when asked if she could say Appellant did not strike Victim first, said she could not say that. (R. 364). The trial court then ruled Appellant was not entitled to an instruction on involuntary manslaughter. (R. 365).

Moving to defense counsel's prior self-defense request, the trial court, again without any argument from defense counsel supporting a self-defense charge, ruled that pursuant to State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) "the defendant can't go to the scene of the difficulty, then claim self-defense." (R. 366). When defense counsel attempted to object, the trial court

merely mentioned “I’m not going to charge involuntary manslaughter.” (R. 366). Thereafter, the trial court charged the jury and defense counsel reiterated its previous objections following the charge. (R. 386).

In I’On, the Supreme Court of South Carolina explained the “preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*” 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I’On Court found, “the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Id.

Here, the State submits this issue is not properly preserved for appellate review because defense counsel did not comply with the dictates of I’On and Rule 20(a), SCRCrimP. by failing to provide the trial court with any authority supporting its request to charge. Thus, the argument itself, that Skipper’s testimony allegedly supported a charge on self-defense, is not preserved for appellate review.

#### **B. Appellant is not entitled to an Instruction on Self-Defense**

Even if this issue is properly before this Court, the State submits the trial court was correct in finding Appellant was not entitled to an instruction on self-defense as there was no evidence contradicting the testimony the Appellant hit Victim with the gun and then pointed and presented a firearm before shooting the Victim. As such, there is nothing to show Appellant did not bring about the difficulty.

“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” State v. Williams, 367 S.C. 192, 195, 624 S.E.2d

443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, “[t]o warrant reversal, a trial court’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). “The law to be charged must be determined from the evidence presented at trial.” Id. If there is any evidence to support the requested charge, the trial court should grant the request; Williams, 367 S.C. at 195, 624 S.E.2d at 445 and the evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). Nevertheless, “[a] self-defense charge is only required when the evidence supports it.” State v. Jackson, 384 S.C. 29, 35, 681 S.E.2d 17, 20 (Ct. App. 2009) (citing State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)).

There are four elements required by law to establish a case of self-defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

Id.

Under South Carolina law, “one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense[.]” State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). In fact, “[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-

defense as a justification or excuse for a homicide.” Jackson 384 S.C. at 36, 681 S.E.2d at 20 (quoting Bryant, supra). An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. Jackson, 384 S.C. at 29, 681 S.E.2d at 20-1.

Here, Appellant contends the trial court erred when it found Skipper’s testimony did not contradict the evidence regarding the events leading up to the shooting. As detailed above, the trial court denied Appellant’s request for a self-defense charge because the uncontradicted evidence showed Appellant brought about the difficulty by loading a .45 caliber handgun, hitting Victim with the handgun and then pointing and presenting the handgun at Victim before shooting her. (R. 359, 365). Thus, while Appellant argues she has the right to act on appearances, noting that Skipper’s testimony revealed that four women got out of the car and surrounded Appellant, this statement ignores that Skipper, whose back was to Appellant, admits she did not see the entirety of the incident.

Specifically, the State asked Skipper whether she saw the entire incident to which Skipper responded that she did not. (R. 273-74, 276). Continuing, the State asked Skipper whether something could have happened between the time she went into her residence and the time she emerged from the residence. (R. 276). Answering the question, Skipper said, “I don’t know” and clarified that she did not know if anything happened while she was inside the house. (R. 277). In fact, Skipper admitted she could not definitely say that Appellant did not strike Victim first. (R. 277). This was corroborated on direct examination, when Skipper again admitted she had no knowledge as to whether Appellant or Victim started the altercation. (R. 278-79). Therefore, any testimony by Skipper regarding who brought about the difficulty could not entirely contradict Davis and Cox’s testimony regarding how the events unfolded.

Accordingly, because the only evidence in the record established that Appellant hit Victim while she and the rest of its occupants were inside the car, something which Skipper admits she was not present to observe, the evidence adduced at trial supports the trial court's denial of the self-defense charge on this basis.<sup>7</sup> (R. 161-62, 164-65, 198-99).

IV. The trial court correctly declined to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that Appellant approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim

Appellant contends the trial court erred in declining to charge the jury with involuntary manslaughter. In support of this argument, Appellant argues defense counsel's cross-examination of Davis yielded evidence supporting an inference that Appellant and Victim were allegedly struggling when the gun discharged. Br. of App. at p. 25. Additionally, Appellant maintains Cox's testimony on cross-examination was susceptible to an inference that Appellant was unaware that she shot Victim. Br. of App. at p. 25. The Stated disagrees.

It is the evidence presented at trial that determines the law with which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

As to lesser-included offenses, the law requires that a jury must be charged on a lesser-included offense if, "there is evidence from which it could be inferred that a defendant

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<sup>7</sup> Additionally, the State submits both Cox's and Davis' testimony regarding Appellant's statements, "I told you I was going to get you, bitch" support the trial court's ruling that Appellant, who admitted she was armed with a .45 caliber handgun, intended to approach Victim. (R. 169, 170, 203, 205). Moreover, as there is no evidence Appellant, by being surrounded by a group of unarmed women, was in imminent danger or *believed* she was in imminent danger, Appellant would be unable to show she is entitled to a charge on self-defense.

committed the lesser offense rather than the greater.” State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Conversely, a trial court may eliminate instructing the jury on a lesser-included offense where there is no evidence tending to reduce the crime from the greater offense to the lesser. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). When determining whether a defendant is entitled to a charge, the court reviews the facts in the light most favorable to the defendant. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

“Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.” State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010). “To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others.” State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). “Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.” Pittman, 373 S.C. at 571, 647 S.E.2d at 167. “A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” Crosby, 355 S.C. at 52, 584 S.E.2d at 112. “The negligent handling of a loaded gun will support a charge of involuntary manslaughter.” State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). In addition, evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge.” Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008).

Initially, the State submits the first prong of involuntary manslaughter simply does not apply to the facts of this case since the conduct at issue—hitting someone with a loaded, .45 caliber handgun and then pointing it at them and firing—while unlawful activity, is clearly unlawful activity which *does tend to cause death or great bodily harm*. Thus, the remaining question is whether Appellant was “engaged in lawful activity with reckless disregard for the safety of others[,]” such that she should have receive a charge on involuntary manslaughter.

The State submits Appellant is not entitled to a charge on involuntary manslaughter as the trial court correctly determined Appellant was not engaging in a lawful activity when she approached Victim with a loaded .45 caliber handgun and struck her. Understanding this, Appellant cannot demonstrate that at any point following her decision to assault Victim, she was acting in a lawful manner as South Carolina law so requires. Therefore, Crosby and Tisdale do not apply because Appellant was not entitled to arm herself in self-defense, since the uncontroverted testimony, as discussed above, shows she initiated the encounter with the Victim by pistol-whipping her and thus bringing about the difficulty. Likewise, because the only evidence within the record shows that Appellant initiated the encounter with Victim and was the first and only person to pistol-whip anyone, Appellant cannot demonstrate that she was merely handling the weapon negligently when it unintentionally discharged as Appellant contends. Accordingly, the State submits the trial court did not abuse its discretion.

### CONCLUSION

For the aforementioned reasons, the State respectfully asks this court to affirm the rulings of the trial court as well as Appellant’s underlying conviction and sentence.

Respectfully Submitted,

ALAN WILSON  
Attorney General

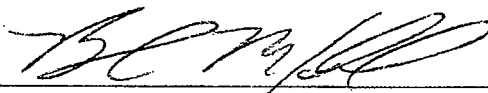
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Brendan J. McDonald  
ATTORNEY(S) FOR RESPONDENTS

January 7, 2013.

STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

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THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

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 Attorney General

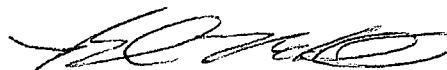
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ATTORNEY(S) FOR RESPONDENTS

January 7, 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 Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Breen Richard Stevens, Esq.  
SCCID/Division of Appellate Defense  
1330 Lady Street, Ste. #401  
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This 7<sup>th</sup> day of January, 2013.



Brendan McDonald  
Assistant Attorney General  
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ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Brittany Johnson, Appellant.

Appellate Case No. 2011-185926

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Appeal From Horry County  
Edward B. Cottingham, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-288  
Heard May 14, 2013 – Filed June 26, 2013

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**REVERSED and REMANDED**

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Appellate Defender Breen Richard Stevens of Columbia,  
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, all of  
Columbia; and Solicitor Jimmy A. Richardson, of  
Conway, for Respondent.

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**PER CURIAM:** In this criminal appeal, Brittany Johnson challenges her murder conviction, arguing the trial court erred in: (1) admitting her statement to police

into evidence after her invocation of the right to counsel was not honored; (2) failing to grant a mistrial after the jury prematurely deliberated; (3) denying her request to instruct the jury on self-defense; and (4) denying her request to instruct the jury on involuntary manslaughter. We reverse and remand for a new trial pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting Johnson's statement to police: *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (noting the trial court must make an affirmative finding that there was no violation of *Miranda v. Arizona*<sup>1</sup> during a *Jackson v. Denno*<sup>2</sup> hearing before admitting a statement into evidence); *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) (noting the State has the burden to prove a defendant validly waived his *Miranda* rights); *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) ("If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police.").

2. As to the remaining issues: *State v. Williams*, 399 S.C. 281, 289 n.3, 731 S.E.2d 338, 342 n.3 (Ct. App. 2012) (declining to reach the remaining issues when reversal of one issue disposes of the entire appeal).

**REVERSED and REMANDED.**

**SHORT, THOMAS, and PIEPER, JJ., concur.**

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<sup>1</sup> 384 U.S. 436 (1966)

<sup>2</sup> 378 U.S. 368 (1964).

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

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THE STATE,

RESPONDENT,

v.

BRITTANY JOHNSON,

APPELLANT

---

**PETITION FOR REHEARING**

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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<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>2</sup> 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<sup>3</sup> rights by Sergeant Shawn Addison<sup>4</sup> 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

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>4</sup> 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.<sup>5</sup> (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

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<sup>5</sup> 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.<sup>6</sup> (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

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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

<sup>7</sup> 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.”).

<sup>8</sup> 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 (4<sup>th</sup> 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 (10<sup>th</sup> 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.<sup>9</sup> For example, when reviewing whether a Batson

<sup>9</sup> 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 witness' 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.” Okatie 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.<sup>10</sup> (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

<sup>10</sup> 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.<sup>11</sup>

**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

<sup>11</sup> 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); 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 (10<sup>th</sup> 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 (3<sup>rd</sup> 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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Brendan J. McDonald  
ATTORNEY(S) FOR RESPONDENTS

July 11, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

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THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

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**CERTIFICATE OF SERVICE**

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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:

Benjamin John Tripp, Esq.  
SCCID/Division of Appellate Defense  
1330 Lady Street, Ste. #401  
Columbia, SC 29201

This 11<sup>th</sup> day of July, 2013.



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ATTORNEY FOR RESPONDENT

# The South Carolina Court of Appeals

The State, Respondent,

v.

Brittany Johnson, Appellant.

Appellate Case No. 2011-185926

\_\_\_\_\_  
ORDER  
\_\_\_\_\_

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

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*Paul G. Shortz* J.

\_\_\_\_\_  
*Paul W. Thomas* J.

\_\_\_\_\_  
*Daniel G. Pieper* J.

Columbia, South Carolina

cc:  
Breen Richard Stevens  
Brendan Jackson McDonald

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Jimmy A. Richardson, II  
Benjamin John Tripp

**FILED**  
22 August 201