STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

Appellate Case No. 2013-002027

REPLY BRIEF OF PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEY(S) FOR PETITIONER

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ARGUMENTS IN REPLY

I. Johnson's new argument, that the trial Court erred in its' credibility determination by considering her testimony on cross-examination regarding her receipt and subsequent waiver of her *Miranda* rights, is not only unpreserved, but is also incorrect as trial courts are vested with the authority to make preliminary findings of fact in determining the admissibility of evidence.

Johnson's latest argument, an argument which was not raised at trial, or before the court of appeals, is that the trial court abused its discretion "by employing a rule of general applicability that responding to police questioning without an attorney precludes the possibility that a defendant requested an attorney before questioning." Br. of Resp. at 3. Deciphering this, Johnson appears to argue that based on Johnson v. Zerbst, 304 U.S. 458 (1938),[1] Massiah v. U.S., 377 U.S. 201 (1964), Miranda v. Arizona, 384 U.S. 436 (1966) and Smith v. Illinois, 461 U.S. 91 (1984), the trial court's ability to make factual determinations regarding witness credibility is somehow limited. This argument, aside from lacking merit, is unpreserved and is contrary to South Carolina law, which vests trial courts with vast discretion in determining factual matters such as the credibility of witnesses.[2]

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[1] To eliminate confusion regarding the defendant in this case and the petitioner in Johnson v. Zerbst, the State, rather than referring to the case as "Johnson" per the normal practice, will instead refer to the case as "Zerbst."

[2] See State v. Banda, 371 S.C. 245, 639 S.E.2d 36, 39 (2006) (stating appellate courts are bound by the trial court's preliminary factual findings regarding the admissibility of evidence in pre-trial evidentiary hearings unless they are clearly erroneous); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003) (explaining appellate courts are bound by a trial court's factual findings absent a finding that they are clearly erroneous); State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (concluding appellate courts do 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); State v. Smith, 321 S.C. 471, 473, 469 S.E.2d 57, 59 (1996) (giving "great deference" to a trial court's preliminary credibility finding in ruling on a Batson motion); see also Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("[W]e give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses."); 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."); 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."); Ballard v. Roberson, 399 S.C. 588, 599, 733 S.E.2d 107, 112 (2012) (holding that despite

A. The issue is not preserved

Notably, Johnson's trial counsel never objected to the trial court's credibility determination in any form or fashion. In fact, defense counsel's objection during the Jackson v. Denno, 378 U.S. 368 (1968) hearing came before the trial court even issued its credibility determination regarding Johnson's testimony on the matter.[3] Specifically, the record shows Johnson's trial counsel only argued that the State did not comply with Miranda in light of defense counsel's allegation that the State violated the prophylactic rule from Edwards v. Arizona, 451 U.S. 477 (1981).[4] Indeed, defense counsel at trial, like appellate counsel at the court of appeals, took no issue with the trial court's finding that Johnson's account was "not plausible," but instead assumed the truth of Johnson's testimony and claimed the State violated Edwards.[5] Thus, since defense counsel only preserved the question of whether the trial court violated Edwards and did not preserve the question currently raised by Johnson, whether the trial court erred in its' assessment of Johnson's credibility, the State asks this Court to find this question unpreserved. See State v. Ellis, 397 S.C. 576, 581 n.4 , 726 S.E.2d 5, 8 n.4 (2013) ("It

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

[3] Compare (Supp. App. at 42-43) (objecting to the trial court's ruling on the Denno hearing on the basis that "once the implication of the need for legal counsel is made that there is to be no further questioning . . .") with (Supp. App. at 46) (ruling Johnson's testimony on her alleged questions concerning counsel were "simply not plausible" in light of the fact she had "ample opportunity to express her desire for her an attorney" as indicated in both Officer King's testimony and the video).

[4] Notably, 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.").

[5] For instance, Johnson's appellate counsel before the Court of Appeals argued, "[t]he 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 . . . she needed an attorney" (App. at 14).

is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding preservation rules require that issues and arguments must be raised to and ruled upon by a trial court in order to properly preserve them for appellate review); 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).

B. Johnson's argument lacks legal support

In addition to the preservation concerns presented by Johnson's new argument, Johnson's claim also lacks legal support. Specifically, while Johnson theorizes the trial court was somehow required to "take into account judicially recognized factors constraining [its] discretion" (Br. of Resp. at 12) with respect to credibility determinations, there is simply no authority for this proposition.

For example, while Johnson quotes language from Zerbst explaining "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and should "not presume acquiescence" in their waiver, Johnson neglects to mention Zerbst deals with the waiver of the Sixth Amendment Right to Counsel which, as stated in Montejo v. Louisiana, 556 U.S. 778, 786 (2009) only "attaches once the adversarial judicial process has been initiated." Moreover, even assuming the same logic applies to one's Fifth Amendment Right Against Self-Incrimination, which at least one federal appellate court has questioned,[6] Johnson has failed to present any authority showing the presumption language from Zerbst applies to a trial court's ability to make factual determinations regarding credibility. Indeed, there is certainly nothing

[6] See Watkins v. Laffler, 517 Fed. App'x. 488, 499 (6th Cir. 2013) (indicating the broad waiver language from Zerbst was overruled with respect to the prophylactic rule from Miranda in Edwards).

within Zerbst which could be read as requiring a trial court to assume the truth of a witness' testimony or limit the trial court's ability to assess credibility when a witness presents evidence regarding his or her alleged inquiry into counsel.[7] Such a conclusion would be especially troubling here where the trial court had the opportunity to view the witness under the crucible of cross-examination and contrast her uncorroborated, self-serving testimony with impeachment evidence in the form of a written and videotaped Miranda waiver.

Similarly, Johnson's claim that Massiah is somehow applicable to this situation is also dubious. Massiah, like Zerbst, is a case protecting an individual's Sixth Amendment Right to Counsel, a right that provides a criminal defendant involved in "the adversarial judicial process" with the guiding hand of counsel at critical stages within that process. Montejo, 556 U.S. at 786. Yet, Massiah, which involved a wired informant surreptitiously questioning a represented co-defendant in a non-custodial setting (a car), does not purport to address the concerns of police "badgering and overreaching" within the confines of "custodial interrogation" which are the basis for the Miranda and Edwards line of cases. Thus, Massiah should not be applied to such a context as the two situations are different and the rationales supporting their respective conclusions are different as well. Indeed, while Johnson suggests Massiah applies to one's Fifth Amendment Right to Self-Incrimination, the Massiah Court clearly was not addressing custodial

[7] To the contrary, a variety of appellate courts have affirmed a trial court's credibility determination finding a defendant's alleged invocation of his Miranda rights was not credible evidence. See U.S. v. Giles, 518 Fed. App'x. 181, 187 (4th Cir. 2013) (concluding the trial court did not err in finding the defendant's testimony—that he invoked and was denied his right to counsel after he was arrested—was not credible in light of the fact he subsequently spoke with law enforcement which amounted to an implied waiver of his rights under Fourth Circuit precedent); Thomas v. State, 292 Ga. 429, 432-33, 738 S.E.2d 571, 574 (2013) (affirming the trial court's ruling that testimony by the accused during a Denno hearing—that he invoked his right to counsel both before and during his interview—was not credible and as a result, the trial court did not err in its ruling in the Denno hearing); State v. Stephenson, 878 S.W.2d 530, 547 (Tenn. 1994) (finding the trial court did not err when it found defendant's testimony that he requested counsel was not credible). In fact, the Court of Appeals for the District of Columbia affirmed case in 2006 on the exact same facts as those that are currently before this Court. See Cade v. U.S., 898 A.2d 349, 353-54 (D.C. Ct. App. 2006) (affirming the trial court's ruling that the defendant's uncontradicted testimony—that he invoked his right to counsel to an unnamed officer prior to his videotaped waiver and confession—was not credible in light of his subsequent waiver of rights).

interrogation, nor its perceived coercive effects, when it found federal agents violated Massiah's rights by eavesdropping, post-indictment, on his conversation with a co-defendant turned informant without the benefit of counsel.

Furthermore, even assuming Massiah somehow applies to one's Fifth Amendment Right Against Self-Incrimination, there is nothing within the Court's opinion indicating Massiah modifies a trial court's ability to make factual determinations regarding witness credibility. In fact, Johnson has failed to provide any authority indicating the protections from Miranda and Edwards require trial courts to either assume the truth of an individual's testimony concerning an alleged inquiry regarding counsel, or engage in a presumption in favor of the defendant's credibility on such matters. This of course makes sense from a policy perspective as it would be hard to imagine a context in which a trial court, which has the opportunity to observe a witness under the crucible of cross-examination, would, despite this advantage, have to presume a defendant's claim regarding a constitutional right is in fact truthful.[8]

Additionally, despite Johnson's contention Miranda and Smith require trial courts to consider factors such as psychological coercion, deception, or badgering when making credibility determinations on questions of alleged inquiries regarding constitutional rights, neither Miranda, nor its' progeny actually say this. As explained in Rhode Island v. Innis, 446 U.S. 291, 297 (1980), Miranda recognized the inherently coercive nature of custodial interrogation and found that individuals subject to questioning in such conditions must be

[8] Notably, such a conclusion, in addition to adding a new layer of prophylaxis not required by cases such as Zerbst or Massiah, would also be at odds with established law which explains that a trial court is not required to accept a witness' testimony as true, even if such testimony is undisputed. See 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)); see also 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); 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); 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).

advised of their rights in order to prevent violations of their Fifth Amendment rights. Innis, 446 U.S. at 297 ("In its Miranda opinion, the Court concluded that in the context of 'custodial interrogation' certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination."). However, what the Miranda court did not say, is that trial courts must apply an additional layer of prophylaxis and assume, or even presume, that an individual who allegedly inquires about his or her constitutional rights is actually telling the truth. In fact it seems obvious that if the Supreme Court, either in Miranda, or in any of the cases that followed it, intended to require trial courts to consider factors such as psychological coercion, deception, or badgering when making factual determinations regarding credibility, it would have said so. But it did not.

Instead, the Court, in Smith, a case Johnson quotes in support of her argument, explains that the first step involved in analyzing whether an individual subject to custodial interrogation invoked his or her right to counsel is determining, "whether the accused actually invoked his right to counsel." Smith, 469 U.S. at 95. While Johnson appears to believe this statement in Smith merely requires a trial court to evaluate whether the alleged statement amounts to a clear and unequivocal invocation of the right to counsel, the State disagrees. Smith means what it says, trial courts should determine the credibility of the alleged inquiry and, in the event the statement is determined to be credible, analyze whether it is a clear and unequivocal invocation. A review of a variety of jurisdictions confirm this is the correct understanding of Smith as appellate courts have routinely upheld trial court findings which concluded testimony regarding a defendant's alleged invocation of his right to counsel was not credible.[9] This of course would be

[9] See U.S. v. Giles, 518 Fed. App'x. at 187 (concluding the trial court did not err in finding the defendant's testimony—that he invoked and was denied his right to counsel after he was arrested—was not credible in light of the fact he subsequently spoke with law enforcement which amounted to an implied waiver of his rights under Fourth Circuit precedent); U.S. v. Swagger, 221 Fed. App'x. 599, 600 (9th Cir. 2007) (finding district court did not

impossible under Johnson's reading of Smith which would require, as a matter of federal Constitutional Law, that a trial court either assume, or presume, that such statements are valid on their face. However, because no such requirement exists, the trial court in the present case did not abuse its discretion when it found Johnson's version of the facts—that she twice inquired about counsel prior to being advised of her Miranda rights, was "simply not plausible."

Indeed, as discussed in the State's opening brief, because: (A) the trial court is the preliminary finder of fact in a Denno hearing; (B) a trial court's credibility determinations are factual determinations which are entitled to great deference on appeal; and (C) the trial court is not required to accept the defendant's testimony as true, the trial court was free to disregard Johnson's testimony as implausible, and did not err in doing so. As a result, the trial court's ultimate ruling, that the inquiry never happened, and therefore no violation of the prophylactic rule from Edwards ever occurred, is correct and the Court of Appeals' ruling must be reversed.

II. Proving compliance with *Miranda* does not require the State to disprove a defendant's allegation that he or she invoked his or her right to counsel

Furthermore, while not advanced by Johnson on this occasion, the State submits that, contrary to Johnson's previous position in her return to the petition for writ of certiorari,

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err in finding defense witness who claimed defendant invoked his right to counsel was not credible, but remanding for credibility determination regarding an alleged post-arrest invocation); Sanna v. Dipaolo, 265 F.3d 1, 10 (1st Cir. 2001) (finding habeas petitioner's claimed Edwards violation lacked merit based upon state court's finding that defendant was not credible on the issue); Commonwealth v. Sanna, 424 Mass. 92, 100, 674 N.E.2d 1067, 1074 (1997) (upholding trial court's credibility determination finding defendant's allegation that he invoked his right to counsel was not credible); Commonwealth v. Day, 387 Mass. 915, 919, 444 N.E.2d 384 (1983) (affirming trial court's credibility findings which expressly rejected defendant's undisputed claim that he did not receive Miranda warnings); Thomas, 292 Ga. at 432-33, 738 S.E.2d at 574 (affirming the trial court's ruling that testimony by the accused during a Denno hearing—that he invoked his right to counsel both before and during his interview—was not credible and as a result, the trial court did not err in its ruling in the Denno hearing); Stephenson, 878 S.W.2d at 547 (finding the trial court did not err when it found defendant's testimony that he requested counsel was not credible);Cade, 898 A.2d at 353-54 (affirming the trial court's ruling that the defendant's uncontradicted testimony—that he invoked his right to counsel to an unnamed officer prior to his videotaped waiver and confession—was not credible in light of his subsequent waiver of rights).

compliance with Miranda does not require the State to disprove an allegation that the defendant invoked his or right to counsel. This is a credibility matter for the trial court.

While it is true that the State, during a Jackson v. Denno hearing, must prove, by a preponderance of the evidence and under the totality of the circumstances, that (A) the accused's statement was knowingly, freely and voluntarily tendered; and (B) the State complied with Miranda, "compliance" with Miranda does not mean the State must disprove an alleged invocation of the right to counsel. See 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). To the contrary, South Carolina case law regarding compliance with Miranda only requires the State to prove that the accused received and understood his or her Miranda rights for purposes of proving a valid waiver of the constitutional rights mentioned in Miranda. See Goodwin, 384 S.C. at 602, 683 S.E.2d at 507 (quoting State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992) ("Once the court determines that a defendant received and understood his rights, the court allows a confession into evidence.")). Thereafter, the issue of compliance with Miranda is only relevant insofar as it goes to the jury's determination regarding the voluntariness of the waiver of such rights, which, as discussed in Davis, must be proven to the jury beyond a reasonable doubt. Id.

Accordingly, in a case such as this, where the State disputes the defendant's assertion of an alleged invocation of counsel and, via the crucible of cross-examination, attempts to impeach the defendant, there is no requirement that the State introduce additional evidence to disprove the defendant's testimony. Rather, as mentioned above, South Carolina law only requires that the State prove (A) that the accused's statement was knowingly, freely and voluntarily tendered; and

(B) that the accused was advised of and understood the constitutional rights mentioned in Miranda. Compliance with the prophylactic rule of Edwards is not required, nor should it be where, as is the case here, the trial court found the alleged inquiry into counsel never occurred. Thus, the State asks this Court to reverse the judgment of the Court of Appeals and affirm the trial court's admission of Johnson's videotaped confession.

III. Johnson's second argument, aside from assuming the truth of Johnson's allegations, is also predicated upon two faulty assumptions: (A) that Johnson's inquiry as to whether she needed an attorney occurred while she was subject to custodial interrogation; and (B) that her inquiry into counsel amounted to a clear and unequivocal request for counsel. Neither of these assertions are correct.

While this appeal is resolved by the trial court's credibility determination—that Johnson's testimony regarding her inquiry into counsel never occurred—the State submits that even assuming the truth of Johnson's allegations, she was not subject to custodial interrogation when she made such an inquiry, nor did her inquiry amount to a clear and unequivocal request for counsel.

A. Contrary to Johnson's position, she was not subject to custodial interrogation when she allegedly inquired about counsel

As noted in the State's opening brief, because the Miranda and Edwards line of cases are a prophylactic rule designed to guard against the inherent pressures of custodial interrogation, a defendant must both be in custody and subject to "official interrogation" in order to invoke its' protections. Arizona v. Roberson, 486 U.S. 675, 685 (1988); U.S. v. Howard, 532 F.3d 755, 761 8th Cir. 2008). But what is "official interrogation?" In Innis, the Court, citing to Miranda, gave various examples of the types of "custodial interrogation" it believed created an environment in which "the interplay of interrogation and custody would subjugate the individual to the will of

his examiner," the reasons underlying the procedural safeguards set forth in Miranda. 446 U.S. at 299. These examples were described as follows:

- The use of psychological ploys to minimize the seriousness of the offense in order to induce the defendant to admit he committed the offense at issue;
- The use of a line-up in which coached witnesses would pick the defendant as the perpetrator in order to establish guilt as a predicate for additional interrogation;
- The use of a reverse line-up in which a defendant was identified by coached witnesses as the perpetrator of a fictitious offense so as to induce the defendant to confess to the actual offense in an effort to avoid prosecution from a false, and an often more serious, offense;

Id. With these examples in mind, the Court went on to state that interrogation is not only "questioning, but also "its function equivalent" explaining, "interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police, that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 300-01. Continuing, the Court, in footnote five of its' opinion, defined the phrase "incriminating response as meaning, "any response . . . that the *prosecution* may seek to introduce at trial." Id. at 301, n.5 (emphasis in original). Thus, despite Johnson's claim that "[o]nly a perverse rule would require a suspect to be smothered by the heat of oppressive interrogation before she is permitted to flee from it" that is exactly what the rule requires, as its' purpose is limited to protecting an individual's Right Against Self-Incrimination from "badgering" and "overreaching" by authorities. Smith, 469 U.S. at 95.

Understanding this, Edwards does not apply to the current situation as Johnson was not subject to "official interrogation" when she inquired about counsel. Specifically her testimony does not reflect she was being questioned at all when she inquired about counsel, nor does it reflect the "functional equivalent" of questioning as demonstrated by the examples described in

Innis. Likewise, because King said he did not speak with Johnson when the camera was off and the DVD played during the Denno hearing merely reflects Sgt. Patterson previously introduced himself to Johnson, there is no evidence Johnson was subject to questioning designed to elicit an incriminating response when she allegedly asked about counsel. In fact, even Johnson acknowledges she was not being questioned when she inquired about counsel, but merely asked about it once the door to the interview room was opened.

Moreover, while Johnson attempts to take the prophylactic protections of Miranda outside of the context of custodial interrogation by citing to case law indicating a defendant is also protected by the Miranda prophylaxis when interrogation is imminent, this claim is incorrect. Specifically, the case law utilizing the concept of imminent interrogation is in fact based on the Innis definition which explains "interrogation" for purposes of Miranda, applies not only to custodial questioning designed to elicit an incriminating response, but also to the examples mentioned in Miranda and Innis which are its "functional equivalent." Innis, 446 U.S. at 300-01. In other words, cases indicating Miranda applies where interrogation is imminent are simply an acknowledgement that an individual subject to the functional equivalent of Miranda protected questioning (i.e. the Miranda and Innis examples from above) are also protected by Miranda because those activities, much like questioning, are designed to elicit an incriminating response. To use an example, an individual in custody who is subjected to either of the line-up examples in Miranda and Innis does not have to wait until such a procedure is finished in order to be protected by Miranda since questioning is of course imminent, and indeed part of the process. Thus, the so-called "imminent" case law cannot be understood as protecting an individual outside of the context of custodial interrogation, but must instead be read as merely applying to inherently coercive activities that, like custodial interrogation, are designed to elicit

an incriminating response. See Innis, 446 U.S. at 300-01 ("We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."); U.S. v. Wright, 991 F.2d 1182, 1186 (4th Cir. 1993) (explaining Miranda protections do not apply to statements that are not the product of custodial interrogation). As such, even if Johnson's testimony were to be believed, the State did not violate Miranda since the alleged inquiry did not occur during custodial interrogation, but was instead what appears to be a spontaneous exchange that, if believed, occurred prior to either interrogation or its functional equivalent.[10]

B. Johnson did not clearly and unambiguously request the assistance of counsel

Despite the fact the trial court found Johnson's testimony was not plausible, Johnson ignores this and, via her brief, claims her additional testimony, "I need an attorney for this" represents a clear and unambiguous request for the assistance of counsel. The State disagrees.

Specifically, as explained by the State in its opening brief, an alleged request for counsel must 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

[10] The State further notes that, in light of King's testimony regarding the first questions asked of Johnson (i.e. her name, whether she was under the influence of drugs and alcohol) are not questions which are they type protected by Miranda as they are tantamount to booking questions. See Pennsylvania v. Muniz, 496 U.S. 582, 600-02 (1990) (recognizing a defendant's responses to questions elicited during booking are not subject to Miranda); U.S. v. Sweeting, 933 F.2d 962, 965 (11th Cir. 1991) ("An officer's request for 'routine' information for booking purposes is not an interrogation under Miranda.").

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. Thus, a request for the assistance of counsel must be both "clear" and "unambiguous" under the totality of the circumstances.

Here, assuming Johnson's alleged statement even occurred at all, Johnson's testimony, that she said, "I need an attorney for this" cannot be viewed in isolation. Instead, it must be viewed in light of all the attendant facts and circumstances, such as when the statement occurred, to whom it was made, how that individual responded to the alleged statement and whether the statement can even be considered a statement at all. The State submits that when viewing all of these circumstances in their entirety, the record reflects that, assuming the alleged statement even occurred and can be considered a statement at all, such a statement cannot be said to be a clear and unambiguous request for the assistance of counsel.

First, the State notes that perhaps the most important factor to consider is the context in which the alleged exchange leading up to the statement occurred. That is, even by Johnson's testimony, prior to any questioning when she unilaterally reached out to an unnamed law enforcement officer and, after seeing a door open asked, "[d]o I need an attorney for this?" a question which, as explained in the State's opening brief, is not a clear and unambiguous request for the assistance of counsel.[11] Further, it should also be noted that, according to Johnson's testimony, the officer, hearing Johnson's question, responded and explained when Johnson's

[11] See Mueller v. Angelone, 181 F.3d 557, 574 (4th Cir. 1999); U.S. v. Ogbuehi, 18 F.3d 807, 813-14 (9th Cir. 1994); Minehan v. State, 147 Md. App. 432, 443-44, 809 A.2d 66 (2002); Matthews v. State, 106 Md. App. 725, 737-38, 666 A.2d 912 (1995); State v. Taylor, 144 Ohio App.3d 255, 260, 759 N.E.2d 1281, 1285 (2001); State v. Jones, 914 S.W.2d 852, 860 (Mo. App. E.D. 1996); Collins v. State, 873 S.E.2d 149, 156 (Ind. Ct. App. 2007); Bean v. State, 913 N.E.2d 243, 251 (Ind. Ct. App. 2009); State v. Little, 203 N.C. App. 684, --, 692 S.E.2d 451, 456-57 (2010); People v. McBride, 273 Mich. App. 238, 243, 259, 729 N.W.2d 551 (2006); State v. Barrera, 130 N.M. 227, 22 P.3d 1177 (2001); Chaney v. State, 903 So.2d 951, 951-52, 30 Fla. L. Weekly D233 (Fla. Ct. of App., 3rd Dist. 2005); State v. Thomas, 711 So.2d 808, 813 (La. Ct. App. 1998); State v. Greybull, 579 N.W.2d 161, 162 (N.D. 1998); State v. Bailey, 256 Kan. 872, 889 P.2d 738, 743 (1995); State v. Jennings, 252 Wis.2d 228, 246, 647 N.W.2d 142, 151 (2002); Dinkins v. State, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995).

counsel would be appointed. This of course confirms the officer understood Johnson's question as being just that, a question.

Additionally, while Johnson adds that immediately after this she reportedly said, "I need an attorney for this," Johnson's testimony begs the question of what she meant when she said "this." For instance, while Johnson now argues "this" must refer to interrogation, the State questions Johnson's assertion as the record reflects Johnson was not subject to custodial interrogation and was not being questioned at the time the exchange occurred. Additionally, even combining this with King's testimony and the DVD, the record merely shows that, at some point in the five minute timeframe prior to questioning, Patterson introduced himself to Johnson. Thus, while Johnson's self-serving testimony implies that "this" must have referred to interrogation, the State submits this a dubious assertion in light of the fact Officer King had yet to arrive and Johnson had no way of knowing what would happen next. Indeed, it seems hard to imagine the alleged exchange could have amounted to an unambiguous request for the assistance of counsel when the facts and circumstances reveal Johnson had no way of knowing why she may need counsel's assistance. For example, because Johnson could have only guessed at what would happen next in the sequence of events, "this" could have just have easily been a statement referencing the entire adversarial process (i.e. she would soon be in need of attorney for purposes of fighting allegations against her). Accordingly, the State submits the exchange between Johnson and the unnamed officer in her testimony does not rise to the level of a clear and unambiguous request for the assistance of counsel during custodial interrogation.

IV. Even if the trial court erred in its credibility determination and *Miranda* applies, Johnson's assertion that prejudice is presumed is incorrect

Finally, Johnson, ignoring the trial court's credibility determination and assuming the inquiry regarding counsel amounts to an invocation during custodial interrogation, argues

prejudice should be presumed in this matter. This is incorrect as "[n]o definite rule of law governs [harmless error]; rather, the materiality and prejudicial character of *the error must be determined from its relationship to the entire case.*" State v. Collins, 2014 WL 4087597 (August 20, 2014) (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (emphasis added)).

As detailed in the State's opening brief, 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 Adams requires that the admission of such evidence be prejudicial and therefore an abuse of discretion. Id. Indeed, the case law explains an appellate court may "disturb a ruling admitting or excluding evidence only upon a showing of 'manifest abuse of discretion accompanied by probable prejudice'" State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) and the erroneous admission of evidence "is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010). In fact, evidence that is cumulative to other evidence may be harmless since "appellate courts will not set aside convictions due to insubstantial errors not affecting the result." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (citing State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). Thus, because Johnson admitted pulling trigger, did not claim self-defense and eyewitness testimony confirmed that Johnson approached Victim and killed her at a distance, the admission of Johnson's confession, which

merely corroborated this, should, in the event the admission of the confession is error at all, be considered harmless. Accordingly, the judgment of the Court of Appeals should be reversed and Johnson's conviction and sentence must be affirmed.

CONCLUSION

In conclusion, the State asks this Court to affirm the trial court's credibility determination and find, like the trial court, that Johnson's alleged exchange with an unnamed officer never occurred. Nevertheless, even assuming such an exchange did in fact occur, because such an exchange was not a clear and unambiguous request for the assistance of counsel and, in any event, did not occur during the course of custodial interrogation or its functional equivalent, there would be no violation of the prophylactic rule from Edwards meaning Johnson's claim would still fail. Further, even assuming Johnson's confession was erroneously admitted, any error would be harmless since the confession merely corroborated Johnson's own testimony in addition to the eyewitnesses who saw Johnson approach Victim and fatally shoot her. Accordingly, the State respectfully asks this Court to affirm Johnson's conviction and sentence and in doing so, reverse the judgment of the Court of Appeals.

Respectfully Submitted,

ALAN WILSON
Attorney General

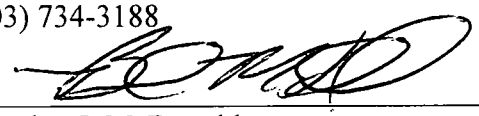
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

November 24th, 2014.

STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

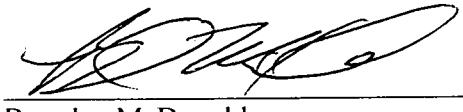
App. Case No. 2013-002027

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon:

Benjamin Tripp, Esquire
SCCID/Division of Appellate Defense
1330 Lady Street, Ste. #401
Columbia, SC 29201-3332

On this 24th day of November, 2014.



Brendan McDonald
S.C. Bar No. 77784
ATTORNEY FOR PETITIONER

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

November 24, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Brittany Johnson
Appeal from Horry County
Appellate Case No.: 2013-002027

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the Reply Brief of Petitioner, dated November 24, 2014, together with Certificate of Service.

Thank you for your consideration.

Sincerely,

Brendan J. McDonald
Assistant Attorney General

BJM/mv

cc: Benjamin Tripp, Esq., Appellate Defender
The Honorable Jimmy A. Richardson, Solicitor, Fifteenth Judicial Circuit
Trisha Allen, Victim Services