

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

William H. Seals, Circuit Court Judge

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Aug 31 2020

S.C. SUPREME COURT

BRITTANY A. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000012

APPENDIX

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1 Madame Foreman?

2 MADAME FOREMAN: Yes, sir.

3 THE COURT: Did you raise your hand?

4 MADAME FOREMAN: I raised my hand.

5 THE COURT: All right. Thank you so much.

6 The jury has indicated by the raising of their right hand
7 that the verdict is unanimous.

8 Anything further from the jury?

9 MR. HAZZARD: Nothing further regarding the jury, Your
10 Honor.

11 THE COURT: All right, sir.

12 The jury has requested that they be here for the
13 sentencing, and they are certainly entitled to do that.

14 After sentencing, I'll hear any appropriate post-trial
15 motions.

16 Have the defendant come forward. Have the defendant
17 come forward here for me in front of me.

18 (The defendant stands before the Court.)

19 THE COURT: Counsel for the defense, I'll be glad to
20 hear any post-trial motions at the conclusion of these
21 proceedings. Is that satisfactory?

22 MR. HAZZARD: That is satisfactory, Your Honor.

23 THE COURT: Okay.

24 Ms. Johnson, I have sat here all week listening to the
25 testimony. I've been on the Bench now on my twenty-seventh

1 year. From the testimony I conclude that this is one of the
2 most callous, pre-meditated murders that I've ever witnesses
3 in my courtroom.

4 You stalked that poor girl, the mother of four children,
5 for three days. Even the day before you killed her, you said,
6 "Come on out and eat some of my bullets."

7 On that day when she was sitting in her car with her two
8 friends minding her own business, you went over with a forty-
9 five and started beating her.

10 By your own testimony you said, "I pulled the trigger,
11 and I'm sorry for it."

12 I have to tell you, though, in spite of the overwhelming
13 testimony, that jury deliberated here for about three days,
14 one of th best jurors I've ever had the opportunity of working
15 with. They must have sent me fifteen communications on
16 various things.

17 During the trial of the case you were represented by Ron
18 Hazzard who gave you the best possible defense that he could
19 under the circumstances. There was no way in the world that
20 he could get around your video sworn statement where you said,
21 "I pulled the trigger." Quote, unquote.

22 "And I'm sorry for it."

23 It was a callous, pre-meditated murder, and I have no
24 comment to make about it except the evidence in this case
25 fully justifies the verdict of guilty of murder rendered by

1 this jury.

2 I'll be glad to hear from you, now, or your distinguished
3 counsel.

4 Mr. Hazzard, I'll be glad to hear from you here or Ms.
5 Johnson. She faces under this charge in my discretion a
6 sentence of thirty years or life in prison.

7 Be glad to hear from you on that issue.

8 MR. HAZZARD: Thank you, Your Honor.

9 As the Court knows after having - - -

10 THE COURT: Let me say this to you.

11 You gave her a defense at absolutely no cost to her, and
12 I congratulate you on the efforts that you did on her behalf.

13 Thank you.

14 MR. HAZARD: Thank you, Your Honor.

15 I appreciate that.

16 THE COURT: Go ahead.

17 MR. HAZZARD: As the Court is aware at the time this
18 happened Brittany was three weeks past her seventeenth
19 birthday. She had just turned seventeen years old.

20 The Court is also aware that this young lady had one of
21 the hardest and horrendous and horrific and most unimaginable
22 upbringings that any child could ever have or be expected to
23 endure.

24 As the Court also knows in matters that we handled prior
25 to the jury being involved in the case, Ms. Johnson has been

1 treated at Waccamaw Mental Health for most of her life
2 starting at around the age of eleven and twelve with regard to
3 her adolescence, and that her treatment has been for what she
4 suffered as a child, for the, ah, manic depressive, somewhat
5 by-polar action she has or the depression that she has been
6 diagnosed for.

7 As the Court knows, she's on three different forms of
8 medication: Seroquel, Vizarill and Prosac, and that the
9 woman who is with you standing beside me here today is much
10 different from the raging young lady that I met two years ago
11 before her medication was fine-tuned, and I must point out
12 that Ms. Johnson spent part of her time awaiting trial. She
13 has been incarcerated since she made arrangements with the
14 Marshals to come pick her up on July 2, 2008. She has been
15 incarcerated since that time.

16 And a good part of that time, about a year or so of that
17 time, she spent up in Columbia with the South Carolina
18 Department of Corrections receiving specific psychiatric
19 treatment, and that was where they were able to finally fine-
20 tune the mediation and get her the treatment that she needs,
21 and, um, that's why this young lady who has been here with you
22 this week is not an angry, raging, obstinate individual that
23 existed back in June of 2008. She is a young woman that has
24 not caused this Court any problem whatsoever except for the
25 admonition to pleas speak up because you talk to softly.

1 And there is no question that what happened on June 24th
2 of 2008, was an absolute tragedy that cannot be changed,
3 cannot be changed but I would ask the Court when you consider
4 the testimony that you heard from this witness stand even two
5 and a half years after the fact to the young lady that you saw
6 with the confused, the raging, the emotional and upset young
7 lady you saw on that video that did make most statements that
8 the Court mentioned. That's not the same lady you're seeing
9 here this week, and the Court knows that.

10 Judge, you've been doing this twenty-seven years. You
11 have learned to a far greater degree than I probably ever will
12 how to judge and evaluate individuals, and I'm sure you know
13 that the woman you saw in the video and the woman who is here
14 now are two different people.

15 I simply point out to you that this young lady does have
16 a son who as a result of her actions on that day in 2008, will
17 now, undoubtedly, grow up without his mother, and I am sure
18 that Ms. Burrough's family knows that they are dealing,
19 obviously, with her four small children who are growing up
20 without their mother.

21 Brittany has done the only thing she can do which is to
22 say, "I am sorry for my actions."

23 She did not sugar coat in the stand.

24 She did say, "I've got the responsibility because my hand
25 was on the gun and on that trigger."

1 We simply ask Your Honor that whatever lenience and mercy
2 that you can give that you seriously consider and give.

3 THE COURT: One of the significant pieces of testimony
4 in this entire trial that stood out before me. When that poor
5 victim, the mother of four young children, dying on the steps
6 of her apartment said, "Why?"

7 Looked up at her sister and said, "Why?"

8 And it was just because of the pre-meditated malice in
9 her heart that she shot and killed that unfortunate victim.

10 I do want to tell the jury that when someone has been
11 admitted for examination to the hospital, we have a complete
12 hearing out of your presence with appropriate doctors to
13 testify. Those doctors clearly said that she knew right from
14 wrong, had the capacity to enter-act with her attorney and
15 could certainly stand trial for murder.

16 Based on that medical testimony, I concluded, and
17 properly so, that it was proper that we go forward.

18 Ms. Johnson, I take no pleasure in imposing a sentence
19 upon you because your actions greatly concern me on this
20 occasion, particularly the pre-meditated aspect of it when you
21 stalked for three days trying to kill her.

22 Why somebody didn't stop it at that time, I'll never
23 know. When you stood outside that house and said, "Come on
24 out. I'm going to let you eat three bullets," somebody,
25 somewhere in that entire project should have said, "Go get her

1 before additional trouble erupts."

2 Why somebody didn't, I don't know but under the fact that
3 they didn't, that young girl in the prime of life is dead
4 leaving four young children.

5 I'm going to give you a modicum of mercy.

6 MR. GRAUSTEIN: Your Honor.

7 THE COURT: Yes.

8 MR. GRAUSTEIN: I'm sorry, Your Honor.

9 Would it be appropriate for the victims to address the
10 Court prior to sentencing.

11 THE COURT: I will listen to one of them, not all of
12 them. We've all heard the testimony but I'll be glad.
13 They're entitled to do that. That's fair, and I think the
14 jury would want to hear them.

15 Have the gentleman come stand on the left-hand side over
16 here.

17 (The father of the victim stands before the Court.)

18 THE COURT: I know these proceedings would be extremely
19 difficult for you but you have the right to make a statement,
20 and I'm glad to hear. May I have your name, please.

21 MR. BURROUGHS: My name is Ervin Burroughs. I'm
22 Monica Burroughs' father. Last spelled B-u-r-r-o-u-g-h-s.

23 THE COURT: Come forward a little bit, please.

24 Mr. Burroughs, as I indicated, as the father of the
25 deceased, I know these proceeding have been very difficult for

1 you. Be glad to hear from you.

2 MR. BURROUGHS: Well, most I am here for - - wait
3 a minute - - for these kids.

4 These are my kids, Monica kids.

5 THE COURT: You may show them to the jury if you care
6 to.

7 Proceed.

8 MR. BURROUGHS: Well, my daughter talked to me
9 all the time, and she called me.

10 Brittany stalked her more and more than one time. She
11 called me. She said, "Daddy, she going to kill me."

12 I told her to move. That's what she was doing when
13 Brittany killed her. She was going to pick the kids of from
14 my house, and the one thing - - the reason I'm here, God be
15 with me, is for her kids. Two of the kids staying - - I've
16 had them kids in counseling for a year.

17 But I got to for her and they say there was four witness,
18 three witness. There was six witness because them two kids
19 seen everything. They - - the oldest one went outside and
20 said, "Granddaddy, I ask her why she kill my momma," and said
21 Brittany picked the gun up and pointed it at him and put it
22 back down.

23 And I - - what hurt me, and Brittany know what she's
24 doing. She know what she doing. She had sense enough to know
25 some other child could pick that gun up and put it down. She

1 know what she been doing.

2 That's all I want to say. Thank you.

3 SENTENCE OF THE COURT

4 THE COURT: Ms. Johnson, as I was getting ready to say
5 that this was a pre-meditated murder if I ever saw one. I
6 charged manslaughter to the jury to give them an opportunity
7 but this case was never a manslaughter. It was murder.

8 Even under manslaughter, you could receive and would
9 receive thirty years in jail.

10 When one is convicted of murder, the trial judge has two
11 options:

12 One, life imprisonment; or

13 Two, thirty years in jail.

14 Given your age and the fact that you do have a young
15 child, I want to give you the opportunity to some day somehow
16 to get back out of jail if you behave yourself while in jail.

17 Of course, during the two years you've been in jail, I'm
18 aware of the fact that you hit another patient over the head
19 with a food tray, and you also in these last two years
20 assaulted one of the arresting officers.

21 Now, I tell you that if you ever want to get out of jail,
22 you'll never get out if you continue that sort of conduct, and
23 you've done this while awaiting trial for this case.

24 Having said that, I'm going to give you a modicum of
25 mercy by sentencing you to the State Penitentiary for a period

1 of thirty years.

2 You may be discharged.

3 Thank you.

4 Madame Foreman, ladies and gentlemen, let me first say to
5 you that none of you asked to come into court and to be the
6 judge and jury in such a serious case. Knowing human nature,
7 I suspect that all of you would have wished somebody else
8 would have had that responsibility, and I understand that but
9 having given - - been given that responsibility as citizens of
10 this county and this magnificent country, you've met your
11 obligations as jurors.

12 I want to congratulate the Solicitor's Office and the
13 defense and police officers of this county in bringing this
14 forward but when somebody deliberately, maliciously with
15 malice aforethought deliberately takes the life of another, if
16 we are to have peace and justice in our county, they must be
17 brought to justice, and by your verdict, you have done that,
18 and the people of Horry County and the State of South Carolina
19 are in your gratitude, and we thank all of you.

20 You are now dismissed.

21 Now, let me say this to you.

22 This case given the nature of it has brought a lot of
23 attention. I'm sure the news medial is going to want to talk
24 to you. If you choose to talk to them, you may. If you
25 choose not to, just say, "I don't want to discuss it."

1 I leave that to your good discretion whether you want to
2 discuss it with anybody or somebody or nobody.

3 Just remember. I know that the news media is going to be
4 hounding you, and if you don't to participate just say, "I've
5 done my duty. I have nothing further to say."

6 I would ask that the Foreman be escorted to my chambers
7 for just a minute.

8 The rest of you may be excused and thank you so much for
9 your dedicated services. You have my gratitude, too.

10 Thank you.

11 All right, sir.

12 We're going to take just a fifteen minute break. Those
13 who are not interested - - wait a minute. I want them to
14 leave very quietly, please.

15 Officers, I want them to very leave quietly but we going
16 to be in recess for fifteen minutes.

17 (The Court recesses this trial and thereafter reconvenes
18 the trial of this case.)

19 THE COURT: Be seated.

20 All right.

21 Mr. Hazzard.

22 POST-TRIAL MOTIONS AND RULING OF THE COURT

23 MR. HAZZARD: Yes, sir, Your Honor.

24 At this time the defense makes a motion for a new trial
25 asking the Court to grant the defendant a new trial. The

1 basis of that motion is we feel the evidence adduced at trial
2 was insufficient to support the verdict rendered.

3 THE COURT: You've heard my comments on that, of
4 course.

5 As I indicated before, her testimony alone was sufficient
6 to go to the jury, and there is more than ample testimony to
7 show malice aforethought and murder in the first degree, and
8 I respectfully deny that motion.

9 MR. HAZZARD: Okay.

10 The only other matter would be that during the course of
11 the trial, there were certain transcripts that were referred
12 to by me. The sealed copies were provided to the Court for
13 the Court's review. I would ask that those be marked as
14 Court's Exhibits - -

15 THE COURT: They will be.

16 MR. HAZZARD: - - in case there's a question for the
17 appellate court.

18 THE COURT: All right.

19 Anything further.

20 MR. HAZZARD: No.

21 That would be it.

22 THE COURT: Do you care to make any remarks, Solicitor?

23 MR. GRAUSTEIN: No, Your Honor.

24 THE COURT: I didn't think so.

25 COURT REPORTER: Your Honor, I would like to have on

1 record the number of these transcripts that I'm suppose to
2 have.

3 THE COURT: Let's get on the record with the numbers
4 of the transcripts we're suppose to have.

5 MR. HAZZARD: There are three transcripts: One from Ms.
6 Joanne Davis, one from Ms. Teresa Cox and one from Ms. Tamika
7 Smith.

8 COURT REPORTER: Thank you.

9 (The Court Reporter accepts these as Court's Exhibits
10 #20, #21 and #22.)

11 THE COURT: Any further motions.

12 MR. HAZZARD: None on behalf of the defendant, Your
13 Honor.

14 THE COURT: Mr. Hazzard, I, again, publicly want to say
15 that you did an outstanding job, particularly, confronted with
16 some overwhelming facts against your positions including the
17 defendant's own video.

18 Your representation of this defendant without any cost to
19 her exemplifies some of the very finest that we have in our
20 judicial system, that somebody guilty of murder unable to
21 obtain an attorney can find and have such astute services as
22 you rendered.

23 I thank you for that.

24 MR. HAZZARD: Thank you, Your Honor.

25 THE COURT: All right.

1 Anything further with regards to this case.

2 MR. GRAUSTEIN: Nothing from the State, Your Honor.

3 THE COURT: All right.

4 (The Court adjourned the trial of this case.)

5 - - - END OF TRANSCRIPT - - -

STATE VS JOHNSON
086526-3648

Horry County Courthouse
RANDOM STRIKE SHEET

Court
Reporter

507515

JUDGE NAME :

TRIAL TYPE : Criminal

PANEL ID : COTTINGHAM 2-7

COURTROOM JAR

DESCRIPTION : COTTINGHAM 2-7

Sorted by: Random Nbr

Trial

STATE PLANNING DEPARTMENT							
NAME	DOB/REF	RACE	SEX	CH	ST	REMARKS	
1 Succo, Judith A	355	W	F	()	()	()	✓
2 Eddy, Henry W III	97	W	M	()	D	()	X
3 Brenner, Todd A	37	W	M	()	D	()	X
4 Attaway, Lashonda K	5	B	F	()	S	()	X
5 Royall, Theodore S III	305	W	M	()	D	()	X
6 Powell, Edward W	283	W	M	()	()	()	✓
7 Tyler, Michael D	371	W	M	()	()	()	✓
8 Kratzer, Tara R	205	W	F	()	S	()	X
9 Gwaltney, Mark E	151	W	M	()	D	()	X
10 Charles, Harriet Young	62	W	F	()	()	()	✓
11 Richardson, Dustin L	298	W	M	()	()	X	Excluded
12 Little, Derek A	220	W	M	()	()	()	✓
13 Fowler, Bruce G	112	W	M	()	D	()	X
14 Livingston, Mitchell W	223	W	M	()	S	()	X
15 Hucks, Larry A	177	W	M	()	D	()	X
16 Wirenski, Kathleen A	396	W	F	()	()	()	✓
17 Ningen, Russell K	268	W	M	()	()	()	✓
18 Glenn, Rodrick C	130	WB	M	()	()	()	✓
19 Brantley, Tomika R	32	W	F	()	()	X	Excluded
20 Greenleaf, Amanda A	142	W	F	()	()	()	✓
21 Strickland, Jonathan S	351	W	M	()	D	()	X
22 Roessler, Ashley N	303	W	F	()	S	()	X
23 Gore, Trevor W	134	W	M	()	()	()	✓

Horry County Courthouse

RANDOM STRIKE SHEET

JUDGE NAME :

TRIAL TYPE: Criminal

PANEL ID : COTTINGHAM 2-7

COURTROOM JAR

DESCRIPTION : COTTINGHAM 2-7

Sorted by: Random Nbr

Trial

NAME	ORIGIN NUMBER	RACE	SEX	DATE OF BIRTH	DATE OF STRIKE	DATE OF STRIKE	REMARKS
24 Scott, Maureen A	320	W	F	()	D	()	X
25 Hall, Don C	156	W	M	()	D	()	X
26 Hammond, Sharri L	157	W	F	()	()	()	✓
27 Morillo, Fred D JR	260	W	M	()	D	()	X
28 Warren, Margaret	385	B	F	()	()	()	✓
29 Crumling, Gary B	83	W	M	()	D	()	X
30 Brown, Everett R	43	W	M	()	S	()	X
31 Walker, Thomas M	381	W	M	()	()	()	✓
32 Koerner, Paul J	203	W	M	()	D	()	X
33 Mcmanus, Margaret L	247	W	F	()	()	()	✓
34 Strickland, Russell G SR	352	W	M	()	()	()	
35 Hyman, William H	183	W	M	()	()	()	
36 Pyatt, Vivian		B	F	()	()	X	Excused
37 Yankauskas, Edward J	400	W	M	()	()	()	
38 Mitchell, Jackie	259	B	M	()	()	()	
39 Neese, Ellen	265	W	F	()	()	()	
40 Miller, Mary A	256	B	F	()	()	()	

Total Number of Jurors:

40

** END OF REPORT **

CERTIFICATE OF COURT REPORTER

509

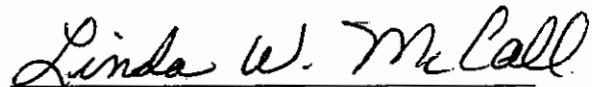
1 STATE OF SOUTH CAROLINA)

2 COUNTY OF Horry)

3
4 I, the undersigned Linda W. McCall, Official Court
5 Reporter for South Carolina Court Administration, do hereby
6 certify that the foregoing is a true, accurate and complete
7 Transcript of Record of the proceedings had and evidence
8 introduced in the trial of the captioned case, relative to
9 appeal, in the Court of General Sessions of Horry County, South
10 Carolina.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13 August 3, 2011

14 
15

16 Linda W. McCall

17 Official Reporter
18
19

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

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR 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).¹ R. 9, ln. 17—R. 10, ln. 11; R. 333, ll. 1-20. At the Jackson v. Denno² 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.

¹ 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.

² 378 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,³ 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.

³ 384 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. Burriess, 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', with a long horizontal flourish extending to the right.

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.

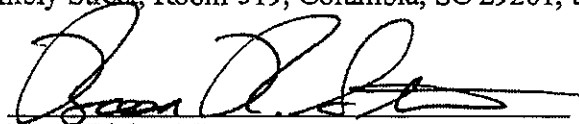
BRITTANY JOHNSON,

APPELLANT

Appellate Case No. 2011-185926

CERTIFICATE OF SERVICE

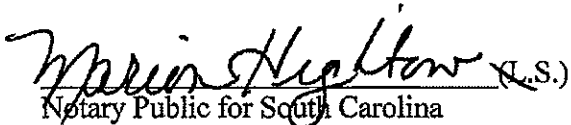
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of January, 2013.



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.

ORIGINAL

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

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 Miranda¹ rights by Sergeant Shawn Addison² 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

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² 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.³ (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

³ 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.⁴ (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:

⁴ 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 Blair⁵ 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:

⁵ 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.⁶ 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

⁶ 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.

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 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.⁷ (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

⁷ 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,

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Attorney General

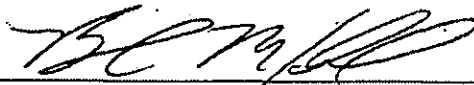
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

January 7, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

CERTIFICATE OF COMPLIANCE

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).

ALAN WILSON
Attorney General

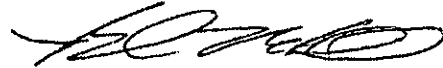
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THE STATE,

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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.
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Columbia, SC 29201

This 7th day of January, 2013.


Brendan McDonald
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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

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

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

REVERSED and REMANDED

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.

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*¹ during a *Jackson v. Denno*² 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.

¹ 384 U.S. 436 (1966)

² 378 U.S. 368 (1964).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

PETITION FOR REHEARING

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

STATEMENT OF THE CASE

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

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

have counsel present during custodial interrogation. Br. of App. at p. 13. Specifically, Johnson, citing to Edwards v. Arizona, 451 U.S. 477 (1981) argued that because she allegedly invoked her right to counsel while in custody, the trial court, despite finding her testimony, “not plausible,” erred in finding she knowingly, freely and voluntarily, waived her Miranda¹ rights as required in a pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing. Br. of App. at p. 14-15.

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

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

BACKGROUND

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

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955); State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929).

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

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

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

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

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

Following her apprehension by U.S. Marshals, Johnson was taken into custody by the Conway Police Department. (R. 99). When she was taken into Conway authorities' custody, she was told she was under arrest for Victim's murder and was advised of her Miranda³ rights by Sergeant Shawn Addison⁴ in the presence of King. (R. 100, 333). Additionally, Johnson was presented with an advisement of rights form which told her she had a right to remain silent (R. 103); anything she said could be used against her (R. 103); she had the right to speak with an attorney and have the attorney present during questioning (R. 103); if she could not afford an attorney, one would be appointed for her before any questioning commenced (R. 103-04); and if she chose to make a statement, she could stop at any time. (R. 104). King reviewed this form with Johnson, who then initialed the form nine different times to acknowledge that she

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

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

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

PRESENTATION OF ISSUE

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

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

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

⁵ See footnote 6 *supra*.

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

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

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

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

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

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

The State then confirmed the following:

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

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

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

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

In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.

I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.

I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.

I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.

This statement if offered will be admitted into evidence.

(R. 36-37).

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

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

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

Ruling on the objection the trial court stated:

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

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

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.¹⁰ (R. 41). Moreover, because the trial court was not required to accept Johnson’s testimony as true under state law, the trial court, acting as the preliminary finder of fact in the pre-trial hearing, did not err in making such a finding. Thus, because the trial court’s credibility determinations are a factual finding and this Court is bound by the trial court’s factual findings under its’ standard of review unless the trial court’s findings are clearly erroneous, the trial court did not err when it determined Johnson’s statement was taken in compliance with the dictates of Miranda and was freely, knowingly and voluntarily tendered. (R. 36-37, 41). Indeed, the trial court was obviously in a better position than the appellate court in observing Johnson’s credibility as it had the benefit of observing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.

I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.

I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.

I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.

This statement if offered will be admitted into evidence.

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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July 11, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

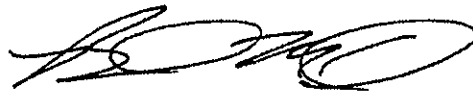
APPELLANT

CERTIFICATE OF SERVICE

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

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This 11th day of July, 2013.



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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.

Paul G. Shortz J.
Paul W. Roman J.
Daniel G. Pieper J.

Columbia, South Carolina

cc:

Breen Richard Stevens

Brendan Jackson McDonald

RECEIVED

AUG 23

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FILED

22 August 201

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), App. Case No. 2011-185926

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals. (App. 97-98).

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QUESTIONS PRESENTED

- I. Whether the appellate panel erred in reversing the trial court's ruling in a Jackson v. Denno, 378 U.S. 368 (1964) hearing where the trial court determined, as a factual matter, that Johnson's testimony during the Denno hearing, specifically her testimony that she allegedly invoked her right to counsel was "simply not plausible" and where the trial court was not required to accept Johnson's testimony as true under state law.
- II. Even assuming Johnson's testimony from the Jackson v. Denno, 378 U.S. 368 (1964) hearing is true, whether the appellate panel erred in reversing the trial court's ruling where Johnson was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel.
- III. Whether 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 multiple eyewitnesses saw Johnson shoot Victim and Johnson admitted to shooting Victim in her testimony at trial.

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. (App. 17). 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 Miranda¹ rights as required in a pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing. (App. 18-19).

In response, the State argued the trial court correctly determined Johnson's testimony during the Denno hearing was "simply not plausible" and further explained the trial court was not required to take Johnson's statement as true under state law.² (App. 52). 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. (App. 52-53). 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

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955); State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929).

rights and subsequently waived them, meant the State complied with the requirements of Miranda. (App. 53-54).

On June 26, 2013, the appellate panel issued an unpublished, *per curiam* opinion pursuant to Rule 220(b), SCACR, reversing and remanding the case on the Miranda issue, and declining to address the remainder of the issues. (App. 71-72). The State then sought rehearing, which the panel subsequently denied. (App. 73-96); (App. 97-98).

The State now seeks certiorari since: (1) the trial court was not required to accept Johnson's testimony as true under established South Carolina law, and instead, consistent with its role as preliminary finder of fact in pre-trial evidentiary rulings, determined Johnson's testimony was not credible, a finding which the appellate panel was required to accept under its standard of review; (2) even assuming Johnson's testimony during the *Denno* hearing was true, Johnson was not subject to custodial interrogation when she inquired about counsel and did not unequivocally invoke her right to counsel meaning *Edwards* does not apply and the trial court was correct in finding authorities complied with *Miranda*; and (3) the appellate panel erred when it neglected to determine whether the purported error was prejudicial as required under its standard of review.

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 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 Miranda³ rights by Sergeant Shawn Addison⁴ 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 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,

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

⁴ The State, consistent with Johnson'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).

Johnson admitted she hit Victim with the gun before shooting her at a distance outside of the Grand Cherokee. (R. 344-46, 347).

PRESENTATION OF ISSUE

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

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

Thereafter, King explained that he also provided Johnson with an advisement of rights form which contained the Miranda warnings she had received. (R. 13). King further highlighted that Johnson signed the portion of the form which indicated she wished to waive her rights and

⁵ See footnote 4 *supra*.

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

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

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

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

Johnson then went on to state that she asked for an attorney multiple times stating, "the first time I asked for an attorney was with—while I was being signed over by whoever that

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

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

The State then confirmed the following:

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

(R. 35). In response, Johnson answered that she “was under the impression that the attorney wasn’t just going to show up. You know, I wasn’t going to get an attorney right then. (R. 35). Johnson then acknowledged she was informed she had a right to remain silent and anything she said could be used against her. (R. 35).

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

In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.

I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.

I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.

I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.

This statement if offered will be admitted into evidence.

(R. 36-37).

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

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

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

Ruling on the objection the trial court stated:

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

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

ARGUMENTS

- I. Because the trial court determined Johnson's testimony during the *Jackson v. Denno* hearing that she allegedly invoked her right to counsel was "simply not plausible," and South Carolina state law does not require the trial court to accept Johnson's testimony as true, the appellate panel erred when it found the State failed to prove Johnson's statement was freely, knowingly, and voluntarily tendered and taken in compliance with *Miranda*

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

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

custodial interrogation.⁷ (App. 17). Specifically, Johnson, citing to *inter alia*, Edwards v. Arizona, 451 U.S. 477 (1981) explains that because she allegedly invoked her right to counsel while in custody, the trial court, which found her testimony on this issue, “simply not plausible,” erred in finding she knowingly, freely and voluntarily, waived her Miranda rights.⁸ (App. 17-18).

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

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

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

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

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

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

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

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

C. Because the Trial Court was not Required to Accept Johnson’s Testimony as True, the Trial Court was Free to Disregard her Testimony and the 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,

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.”).

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 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.¹⁰ (R. 41). Moreover, because the trial court was not required to accept Johnson’s testimony as true under state law, the trial court, acting as the preliminary finder of fact in the pre-trial hearing, did not err in making such a finding. Thus, because the trial court’s credibility determinations are a factual finding and appellate courts are bound by the trial court’s factual findings under its’ standard of review unless such 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,

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

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 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 grant certiorari, reverse the appellate panel's ruling and reinstate Johnson's conviction and sentence.

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

Even if this Court were to assume Johnson's statements regarding her alleged inquiry as to whether she needed counsel were true, the record shows Johnson was not being interrogated

when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel. As a result, the rule from Edwards does not apply and the trial court would still be correct in finding the State complied with Miranda, even if it wished to do so as an additional sustaining ground.¹¹

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

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

The rationale behind the prophylactic rule from the Miranda and Edwards line of cases is that “*custodial interrogations*, in and of themselves, have inherently coercive effects on the accused” and therefore, advising the accused that he or she may have counsel present during

¹¹ See e.g. Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal); P’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).

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

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

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

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

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

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

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

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

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

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

In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.

I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.

I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.

I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.

This statement if offered will be admitted into evidence.

(R. 36-37). As a result, the State asks this Court to grant certiorari, reverse the appellate panel's rulings and reinstate 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 certiorari, reverse the appellate panel's ruling and reinstate Johnson's conviction and sentence.

CONCLUSION

In light of the aforementioned arguments, the State respectfully asks this Court to grant certiorari, reverse the appellate panel's ruling, and reinstate Johnson's conviction and sentence.

Respectfully Submitted,

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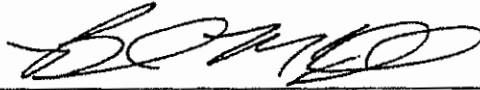
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

September 23, 2013.

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), App. Case No. 2011-185926

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

PROOF OF SERVICE

I, Brendan J. McDonald, certify that I have served the Petition for Writ of Certiorari on this Court, the Court of Appeals and counsel for Respondent as required by Rule 242(c), SCACR. With respect to Respondent, service was affected by depositing two (2) copies of the Petition for Writ of Certiorari in the United States mail, first class postage prepaid, to counsel for Respondent, addressed as follows:

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

This 23rd day of September, 2013.



BRENDAN J. McDONALD, #77784
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ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

APPELLATE CASE NO. 2013-002027

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Whether the trial court erred in determining Respondent did not invoke her right to counsel at the start of her interrogation by considering that she continued speaking to police officers without being provided an attorney even though she testified that she requested one?

- II. Whether the evidence supported the finding that Respondent's request for counsel during interrogation was not clear and unequivocal where she testified that she told an officer in the interrogation room, "I need an attorney for this" and that the officer responded, "The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant."

- III. Whether Respondent suffered prejudice from the presentation to the jury of her inadmissible statements in the interrogation video where the jury specifically requested multiple times to see the video and where in closing, the State argued that Respondent's statements constituted evidence establishing malice aforethought for purposes of the murder charge against her.

COUNTERSTATEMENT OF THE CASE

On September 25, 2008, the Horry County grand jury indicted Respondent Brittany Alexis Johnson on one count of murder. R. 1, ll. 15-17; R. 477. On February 7, 2011, Respondent's case proceeded to trial before the Honorable Edward B. Cottingham and a jury. Ronald Hazzard represented Respondent and Scott A. Graustein represented the State. R. 1, ll. 1-17; R. 2, l. 11 – R. 3, l. 17.

The evidence presented at trial showed that on June 24, 2008, Respondent was involved in a shooting in Conway. R. 92, ll. 5-23. Respondent was walking to an acquaintance's apartment through a parking lot when she encountered a vehicle with four female occupants, including a local woman with whom Respondent had recently had a number of hostile confrontations. R. 257, l. 15 – R. 264, l. 24; R. 291, l. 14 – R. 305, l. 15; R. 313, l. 10 – R. 315, l. 25. A physical altercation ensued between the woman and Respondent, both of whom were armed with pistols. The fight developed into a struggle over control of one of the pistols, which ultimately discharged, killing the woman. R. 161, l. 10 – R. 166, l. 25; R. 182, l. 7 – R. 186, l. 13; R. 198, l. 12 – R. 202, l. 5.

The State sought to introduce into evidence a DVD recording of Respondent's interrogation by police shortly after her arrest in early July of 2008. R. 8, l. 12 – R. 41, l. 8. In the *Jackson v. Denno*¹ hearing, Respondent testified that law enforcement officers apprehended her in Darlington County and booked her into the county jail. The officers did not Mirandize her or tell her the reason for her arrest. During the booking, Respondent asked one of the officers whether she needed an attorney, and he responded that "[h]e was pretty sure I would." R. 22, l. 13 – R. 28, l. 13.

¹ 378 U.S. 368 (1964).

A few hours later, two police officers from Horry County came to retrieve Respondent. R. 24, l. 23 – R. 25, l. 2. Respondent testified that when they arrived back at their office in Horry County, the officers immediately began interrogating her:

A: When we got back to Conway, upon entering the, um, the police department on Racepath, I thought – well, I thought I would just be, like, booked in and then put in jail but when I got there and they opened up the door to the interview room and when I went in there, I realized what was going on, and I said, “I need an attorney for this, don’t I?”

Q: Uh-huh.

A: And I said, “I need an attorney for this.”

Q: All right.

A: And their response was, “The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant.”

R. 28, l. 21 – R. 29, l. 6. Respondent stated that she then “was under the impression that it was okay. It was okay to talk.” R. 28, l. 15 – R. 29, l. 21.

Retired Conway Police officer John King testified that he and officer Shaun Patterson² questioned Respondent in an interview room at their Racepath Street annex. He presented Respondent with a Miranda rights advisement form, which he read aloud and which she signed. Respondent then answered questions from officer King without an attorney present. Officer King said that his interaction with Respondent appeared in its entirety in the video recording, and Respondent never asked in his presence for an attorney. However, he admitted that, as officer Patterson stated in the video recording, Patterson had spoken with Respondent in introducing

² During trial, King referred to the second officer in the room as Shawn Addison. R. 100, ll. 15-17; R. 333, ll. 1-20.

himself before the recording started and outside of King's presence. King had no personal knowledge as to the substance of that conversation. R. 8, l. 25 – R. 21, l. 15.

Respondent objected to the admission of the video, arguing that the uncontradicted testimony established that she requested and was denied the presence of an attorney, and therefore her responses to the ensuing questioning were inadmissible. R. 37, l. 17 – R. 38, l. 7.

The State conceded, "Your 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 Respondent "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, l. 21 – R. 41, l. 1.

The trial court initially held that Respondent's statement was given freely, voluntarily, and in compliance with *Miranda v. Arizona* and that she waived her rights "to remain silent and to have counsel present with her at the interview and interrogation." R. 36, l. 12 – R. 37, l. 11. After the arguments of Respondent and the State regarding her invocation of the 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 Respondent's contemporaneous objections, the video statement was played on multiple occasions for the jury. R. 101, ll. 15-18; R. 107, l. 22 – R. 108, l. 12. On one such occasion during the second day of trial, the court received a note from the jury stating, "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. Respondent objected, pointing out that the note indicated improper discussion regarding the elements and facts of the case

by the jury, and moved for a mistrial. R. 138, l. 22 – R. 138, l. 14. Counsel also argued that if the court did not grant a mistrial, then playing the video again before the jury heard any other evidence would place undue weight on the DVD. R. 138, l. 15 – R. 139, l. 2. The trial court denied the objection and motions, stating “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.

In its closing, the State referred to Respondent’s statements on the video multiple times. R. 418, l. 9 – R. 421, l. 25. In particular, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on certain statements:

As far as showing malice aforethought, if she had that gun – she was holding that gun, she just decided, “I’m going to pull the trigger and shoot Monica.”

That’s it. That’s all the malice aforethought you need. “I’m going to pull the trigger.”

So, she left – so, she said she had a gun the day before. So, she – she went and got her gun.

R. 418, ll. 4-11. After closing arguments, Respondent moved the court to charge self-defense and involuntary manslaughter. R. 449, ll. 1-4. The court denied the motion, stating the evidence in the record established without contradiction that Respondent went to the vehicle with a loaded gun in her hand, and “[t]he defendant can’t go to the scene of a difficulty, then claim self-defense.” R. 363, l. 3 – R. 368, l. 1.

The video was also played pursuant to the jury’s request during deliberations. R. 425, l. 18 – R. 430, l. 19.

On February 11, 2011, the jury found Respondent guilty as charged. R. 452, l. 1; R. 458, ll. 16-19. The trial court sentenced her to thirty years imprisonment. R. 467, l. 24 – R. 468, l. 1. 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, ll. 19-21.

On appeal Respondent argued that the trial court erred in considering the evidence that Respondent continued speaking with the police officers to support the finding that she never invoked her right to counsel. App. 14 – App. 17. The appeals court reversed and remanded, citing *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) for the proposition that the State has the burden to prove a valid waiver of Miranda rights and *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) for the proposition that once a suspect invokes the right to counsel, police interrogation must stop unless the suspect initiates further communication. App. 71 – App. 72. The State filed a petition for rehearing, which the appeals court denied. App. 73 – App. 97.

ARGUMENT

I. The trial court erred in considering Respondent’s continued participation in the interrogation without being provided an attorney as evidence that she did not invoke her right to counsel at the start of the interrogation.

The trial court erred in considering Respondent’s continued participation in the interrogation without being provided an attorney as evidence that she did not invoke her right to counsel at the start of the interrogation. “In *Miranda v. Arizona*, the [United States Supreme Court] determined that the Fifth and Fourteenth Amendments’ prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.” *Edwards v. Arizona*,

451 U.S. 477, 481-82 (1981) (citing *Miranda v. Arizona*, 84 U.S. 436, 479 (1964)). “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*.” *State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010) (citation omitted); *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). This inquiry is two-fold:

First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam) (citations omitted).

The first determination is objective and requires the articulation of a desire that counsel be present “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. U.S.*, 512 U.S. 452, 458-59 (1994); *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998). As a bright line rule, only statements or circumstances leading up to and during the request are relevant to the question of invocation. *Smith v. Illinois*, 469 U.S. at 98. Subsequent statements are not relevant to the question of invocation but “are relevant only to whether the accused waived the right he had invoked.” *Id.*

“Once 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) (quoting *Edwards v. Arizona*, 451 U.S. at 485). Further, his subsequent statements are inadmissible absent a finding that he knowingly and

voluntarily relinquished or abandoned his *Miranda* rights. *Edwards v. Arizona*, 451 U.S. at 482. After a request for counsel, a valid waiver is not established merely because the accused “responded to further police-initiated custodial interrogation even if he has been advised of his rights.” *Id.* at 484.

In this case the State had the burden at trial to prove by a preponderance of the evidence that Respondent did not invoke her right to an attorney. Respondent testified that when she entered the interrogation room, she told an officer, “I need an attorney for this.” Further, she testified that the officer directly and specifically responded to the question. The testimony constituted competent evidence that she invoked her right to counsel.

The State did not adduce any evidence to contradict Respondent’s testimony and even conceded so much. Although Respondent and the State agreed only two particular officers could have been the individual to whom Respondent allegedly made the request, the State only produced one of them at trial. Officer King agreed that although he did not recall Respondent making the request to him, the second officer had spoken with Respondent before the recording started and outside of King’s presence. King had no personal knowledge as to the substance of the conversation. Thus, the State did not vitiate Respondent’s affirmative, competent evidence that she invoked the right to counsel.

The trial court erred in merging the discrete inquiries of invocation and waiver. It contemplated the interrogation encounter as a whole in determining whether Respondent invoked her right to counsel and considered incompetent evidence that Respondent continuously talked with the officers. Instead, the court should have decided whether, by the preponderance of the evidence, Respondent actually invoked her right to counsel upon walking into the interrogation room as she

testified. The court was required to base that decision on the acts and circumstances leading up to and at that moment and not thereafter.

Similarly, if in such a case the continued discussion alone were sufficient to show lack of credibility and prove that no actual invocation occurred, then the State could preclude virtually every seemingly defendant from showing invocation simply by failing to produce an investigator at trial to confirm her request. Accordingly, the trial court committed a clear error in evaluating the relevance and sufficiency of the evidence presented, and this Court should affirm the appeals court's reversal and remand.

II. The evidence could not support the finding that Respondent's statement was not a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later.

The evidence could not support the finding that Respondent's statement was not a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later. As stated above, invocation merely requires the articulation of a desire that counsel be present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. While statements or circumstances leading up to and during the request are relevant to the question of invocation, those subsequent to the request are not.

"[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). "Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response." *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). See also *U.S. v. LaGrone*, 43 F.3d 332, 339-40 (7th Cir. 1994) ("[I]n order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent. Such a requirement advances the twin goals of *Miranda*: providing an opportunity for the defendant to dissipate the compulsion and allowing law enforcement the ability to conduct investigations.").

In this case, Respondent testified she told one of the officers in the interrogation room, “I need an attorney for this.” Further, based on her testimony of the officer’s response, the evidence established that the officer heard and understood the request.

The State argues in its petition that Respondent only inquired about the need for counsel. The State mischaracterizes the record. In its Statement of the Case, it cites Respondent’s testimony, “I need an attorney for this, don’t I?” while omitting her very next statement on the record, “I need an attorney for this.”

The record also shows Respondent invoked her Miranda right to an attorney for purposes of the impending police interrogation. Logically, a suspect must be able to invoke the Miranda prophylaxis prior to an actual question or prompt from police. In this case, Respondent requested counsel to an investigating officer as she was walking into a room she understood to be used for interrogations, and questioning was in fact impending. The State argues that Respondent was required to *invoke* her rights *during* interrogation. This argument fails because the boundaries of interrogation pose an issue for determining when Miranda safeguards apply; the issue is not determinative of when a suspect must summon the safeguards. Only a perverse rule would require a suspect to be smothered by the heat of oppressive interrogation before she is permitted to flee from it.

III. Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial enhanced the prejudice.

Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial enhanced the prejudice. “Ordinarily, the admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial . . . assum[ing] the existence of testimony both ways upon a disputed issue, and is based upon the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence.” *S.C. State Highway Dep’t v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 484, 485 (1965). *See also Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

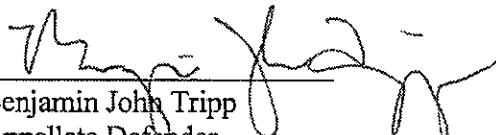
Here, a presumption existed that the trial court’s presentation to the jury of Respondent’s self-incriminating statements prejudiced her case. Additionally, the record shows that the video was played on multiple occasions for the jury, including during the presentation of evidence and deliberations. The jury twice specifically requested to watch the video because it was important to their understanding of the case. In its closing, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on Respondent’s statements that she considered beforehand obtaining the pistol and shooting the decedent. Finally, the trial court refused to charge self-defense and involuntary manslaughter because the evidence in the record, including Respondent’s statements from the video, established without contradiction that Respondent knowingly accosted the decedent with the pistol and

therefore could not claim to have merely responded to a provocation or attack. Accordingly, the appeals court properly reversed and remanded the case based on the trial court's prejudicial error.

CONCLUSION

For the foregoing reasons, the trial court erred in admitting Respondent's interrogation video into evidence, and Respondent requests that this Court affirm the decision of the appeals court to reverse and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 22nd day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

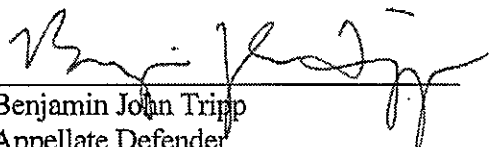
BRITTANY JOHNSON,

APPELLANT

APPELLATE CASE NO. 2013-002027

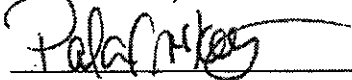
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of November, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 22nd day
of November, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

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), App. Case No. 2011-185926

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

- I. Contrary to Johnson's First Argument in his Return, the Trial Court did not Rule that Johnson Failed to Invoke her Right to Counsel at the Start of the Interrogation, but Instead Ruled, as a Factual Matter, that Johnson's Testimony, that she Inquired about Counsel Prior to her Interview, was simply not Plausible and as such, no Edwards Violation Occurred

In argument one of Johnson's Return to Petition for Writ of Certiorari, she contends the trial court erred "in determining Respondent did not invoke her right to counsel at the start of her interrogation by considering that she continued to speak to police officers without being provided an attorney even though she testified that she requested one." Ret. to Pet. for Writ of Cert. at 2. However, this was not the trial court's ruling.

Rather, as detailed in the State's petition for writ of certiorari, the trial court, after hearing Johnson's testimony and observing her demeanor, determined her testimony was "simply not plausible." (R. 17-18). In other words, a review of the record reflects the trial court simply declined to accept Johnson's version of the facts—that she twice inquired about counsel prior to being advised of her Miranda¹ rights—a ruling which is clearly supported by the evidence. Indeed, as discussed in argument I in the State's petition for writ of certiorari, because (A) the trial court is the preliminary finder of fact in a Jackson v. Denno, 378 U.S. 368 (1964) hearing;² (B) a trial court's credibility determinations are factual determinations which are entitled to great deference on appeal;³ and (C) the trial court is not required to accept the defendant's testimony

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003); State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006).

³ 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's 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

as true,⁴ the trial court was free to disregard Johnson's testimony as implausible. As a result, the trial court's ultimate ruling, that the inquiry never happened and therefore there was no violation of the prophylactic rule from Edwards v. Arizona, 451 U.S. 477 (1981) is correct and the Court of Appeals' ruling reversing the trial court must be reviewed.

II. Johnson's Legal Assertion, that the Trial Court could not Consider the State's Impeachment of Johnson During Cross-Examination, is Incorrect as the Trial Court was Serving as the Preliminary Finder of Fact and the State's Burden of Showing Compliance with *Miranda* only Requires the State to Prove that the Accused was Advised of and Understood his or her *Miranda* Warnings for Purposes of Proving a Valid Waiver of the Accused's Constitutional Rights

Furthermore, the legal argument advanced by Johnson, that the trial court erred in considering the State's impeachment of Johnson during her cross-examination because it was an allegedly improper means of proving compliance with *Miranda*, is simply at odds with the law. As detailed in footnote two above, South Carolina law clearly permits a trial court to serve as a preliminary finder of fact in motions such as a Jackson v. Denno hearing. E.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003); State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Additionally, as noted in footnote four, the trial court, when serving as a preliminary finder of fact, is not required to accept a defendant's testimony as true. 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)). Thus, as detailed above, there was simply no legal error when the trial court, acting

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.").

⁴ 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).

in its' fact finding capacity, determined Johnson's testimony regarding her alleged inquiry into counsel was not plausible in light of her demonstrated understanding of her constitutional rights, and her subsequent waiver of such rights.

Moreover, while Johnson maintains that, as a matter of law, compliance with Miranda means the State must prove that Johnson did not invoke her right to an attorney, the State again disagrees. 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 Edwards⁵ 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 that certiorari be granted.

III. Johnson's First and Second Arguments are also Predicated upon Two Faulty Assumptions: (1) that Johnson's Inquiry as to Whether she Needed an Attorney Constituted a Clear and Unequivocal Invocation of Her Right to Counsel; and (2) that her Inquiry into Counsel Occurred when she was Subject to Custodial Interrogation. Neither of these Assertions are Correct.

Johnson's brief, specifically arguments one and two, are premised upon two incorrect assumptions: one that Johnson's alleged inquiry, "I need an attorney for this, don't I?" was a clear and unequivocal invocation of her Fifth Amendment right to counsel; and two, that assuming such an inquiry actually occurred, which is of course contrary to the trial court's finding, the inquiry occurred while she was being interrogated. These assertions are addressed in the State's petition for writ of certiorari.

In particular, the legal assumption made by Johnson, that her alleged inquiry regarding counsel amounted to a clear and unequivocal invocation, is at odds with established precedent as detailed in argument II(B) of the State's petition for writ of certiorari. See e.g. Davis v. U.S., 512 U.S. 452, 458-62 (explaining the statement "maybe I should talk to a lawyer" was not a clear and unequivocal invocation of Davis' right to counsel); Burket v. Angelone, 208 F.3d 172, 197-98 (4th Cir. 2000) (holding the statement "I think I need a lawyer" did not amount to a clear and

⁵ 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.").

unequivocal invocation of the defendant's right to counsel). Additionally, Johnson's factual assumption, that her alleged inquiries regarding counsel occurred during a custodial interrogation, is addressed in argument II(A) of the State's petition where it is explained that these alleged inquiries both occurred prior to her being interviewed with the latest occurring during her booking. (R. 28-29). Thus, regardless of the trial court's credibility determination, Edwards does not apply to these facts since this case, unlike Edwards involves a mere inquiry regarding counsel in a non-custodial setting. Therefore, certiorari should be granted and the Court of Appeals ruling must be reversed.

CONCLUSION

In conclusion, the State submits the aforementioned arguments in reply to Johnson's return to the petition for writ of certiorari. Further, the State stands on the arguments contained within the petition with respect to the Court of Appeals' apparent failure to assess prejudice as is required by the standard of review as mentioned in argument III of the petition. Finally, the State asks that this Court grant certiorari to Court of Appeals summary reversal of the conviction and sentence of Brittany Johnson.

Respectfully Submitted,

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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

December 2, 2013.

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), App. Case No. 2011-185926

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

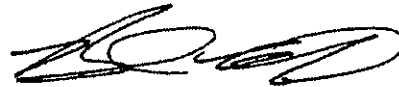
RESPONDENT.

PROOF OF SERVICE

I, Brendan J. McDonald, certify that I have served the Reply to the Return to the Petition for Writ of Certiorari on Respondent by depositing two (2) copies of the Reply to the Return to the Petition for Writ of Certiorari in the United States mail, first class postage prepaid, to counsel for Respondent, addressed as follows:

Benjamin Tripp
SCCID/Division of Appellate Defense
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This 2nd day of December, 2013.



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The Supreme Court of South Carolina

The State, Petitioner,

v.

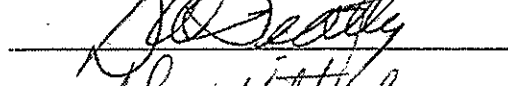
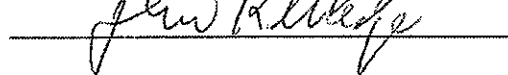
Brittany Johnson, Respondent.

Appellate Case No. 2013-002027

Lower Court No. 2008-GS-26-03648

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Brittany Johnson*, Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

	C.J.
	J.
	J.
	J.

Kaye G. Hearn, J., not participating.

Columbia, South Carolina

September 11, 2014

cc:

The Honorable Jenny Abbot Kitchings
 The Honorable Melanie Huggins-Ward
 Benjamin John Tripp, Esquire
 Brendan Jackson McDonald, Esquire

SEP 11 2014

CLERK

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

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ATTORNEY(S) FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals. (App. 97-98).

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QUESTIONS PRESENTED

- I. Whether the appellate panel erred in reversing the trial court's ruling in a Jackson v. Denno, 378 U.S. 368 (1964) hearing where the trial court determined, as a factual matter, that Johnson's testimony during the Denno hearing, specifically her testimony that she allegedly invoked her right to counsel was "simply not plausible" especially since the trial court was not required to accept Johnson's testimony as true under state law.
- II. Even assuming Johnson's testimony from the Jackson v. Denno, 378 U.S. 368 (1964) hearing is true, whether the appellate panel erred in reversing the trial court's ruling where Johnson was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel.
- III. Whether the appellate panel erred when it failed to determine whether Johnson had shown she was prejudiced as required by the standard of review, especially since multiple eyewitnesses saw Johnson shoot Victim and Johnson admitted to shooting Victim in her testimony at trial.

STATEMENT OF THE CASE

On June 24, 2008, authorities were dispatched to Horry County's Huckabee Heights neighborhood after receiving reports of a shooting. (Supp. App. 97-98). 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. (Supp. App. 1, 6, 463, 472-73). Johnson received a thirty year sentence. (Supp. App. 472-73).

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. (App. 17). 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 Miranda¹ rights as required in a pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing. (App. 18-19).

In response, the State argued the trial court correctly determined Johnson's testimony during the Denno hearing was "simply not plausible" and further explained the trial court was not required to take Johnson's statement as true under state law.² (App. 52). 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. (App. 52-53). 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

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955); State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929).

rights and subsequently waived them, meant the State complied with the requirements of Miranda. (App. 53-54).

On June 26, 2013, the appellate panel issued an unpublished, *per curiam* opinion pursuant to Rule 220(b), SCACR, reversing and remanding the case on the Miranda issue, and declining to address the remainder of the issues. (App. 71-72). The State then sought rehearing, which the panel subsequently denied. (App. 73-96); (App. 97-98). Thereafter, the State sought certiorari which this Court granted.

The State now asks this Court to reverse the judgment of the appellate panel in light of the following: (1) the trial court was not required to accept Johnson's testimony as true under established South Carolina law, and instead, consistent with its role as preliminary finder of fact in pre-trial evidentiary rulings, determined Johnson's testimony was not credible, a finding which the appellate panel was required to accept under its standard of review; (2) even assuming Johnson's testimony during the Denno hearing was true, Johnson was not subject to custodial interrogation when she inquired about counsel and did not unequivocally invoke her right to counsel meaning Edwards does not apply and the trial court was correct in finding authorities complied with Miranda; and (3) the appellate panel erred when it neglected to determine whether the purported error was prejudicial as required under its standard of review.

BACKGROUND

On June 24, 2008, Teresa Cox drove her 1999 Jeep Grand Cherokee to her friend, Monica Burroughs' ("Victim") residence. (Supp. App. 199-200). 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. (Supp. App. 199, 200, 201). Thereafter, Victim got into the passenger seat of Cox's Grand Cherokee, next to Cox, while Davis proceeded

to get into the backseat. (Supp. App. 162, 201-02). According to both Cox and Davis, they left the doors open. (Supp. App. 165, 203).

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. (Supp. App. 165-66, 202). 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. (Supp. App. 202). Cox added that Victim's former boyfriend, Franklin "Putty" Pyatt, would be mad that Victim was wearing one of his favorite designer's sunglasses. (Supp. App. 202). The conversation then shifted, when both Cox and Davis observed Johnson approaching the Grand Cherokee on the passenger side. (Supp. App. 166, 203).

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. (Supp. App. 166-67, 169-70, 203-04). 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. (Supp. App. 168, 169-70, 204). 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. (Supp. App. 167-68, 171-72, 204, 205-06). Next, Cox and Davis observed Victim running away from the Cherokee. (Supp. App. 173, 207). 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. (Supp. App. 174, 175, 208, 210). After Johnson left, both Cox and Davis ran to Victim who was in the bushes beside her residence. (Supp. App. 177, 211). According to both women, Victim, who was unarmed,

had been shot in the chest and was bleeding profusely. (Supp. App. 175, 211). She asked both women why she had been shot. (Supp. App. 177, 211).

In the aftermath of the incident, authorities, who had been called by Cox, were dispatched to the crime scene. (Supp. App. 97-98, 211, 224). 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. (Supp. App. 99). During the interview, Cox confirmed Victim's identity and further named Johnson as the perpetrator. (Supp. App. 100-01). The following day, King interviewed Davis. (Supp. App. 179). Thereafter, King, who learned Victim had died, sought and received an arrest warrant for Johnson. (Supp. App. 102-03). While authorities were initially unable to locate her, Johnson was subsequently apprehended by U.S. Marshals on July 2nd in Darlington County. (Supp. App. 103).

Following her apprehension by U.S. Marshals, Johnson was taken into custody by the Conway Police Department. (Supp. App. 104). 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 rights by Sergeant Shawn Addison³ in the presence of King. (Supp. App. 105, 338). Additionally, Johnson was presented with an advisement of rights form which told her she had a right to remain silent (Supp. App. 108); anything she said could be used against her (Supp. App. 108); she had the right to speak with an attorney and have the attorney present during questioning (Supp. App. 108); if she could not afford an attorney, one would be appointed for her before any questioning commenced (Supp. App. 108-09); and if she chose to make a statement, she could stop at any time. (Supp. App. 109). King reviewed this form with Johnson, who then initialed the form nine different times to acknowledge that she understood her rights

³ The State, consistent with Johnson'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. (Supp. App. 15).

and wished to waive them to speak with King. (Supp. App. 105, 110-11). She then gave a statement which was recorded on video. (Supp. App. 106, 112). In the recorded statement, Johnson admitted she hit Victim with the gun before shooting her at a distance outside of the Grand Cherokee. (Supp. App. 349-51, 352).

PRESENTATION OF ISSUE

On February 7, 2011, Johnson's case was called to trial. (Supp. App. 6). During the pre-trial proceedings, the State, pursuant to Denno requested a hearing to determine whether her statement was freely, intelligently and voluntarily given. (Supp. App. 6-7). In the hearing, King testified he interviewed Johnson "around July 2nd" at the Conway Police Annex. (Supp. App. 14-15). Continuing, King said he was accompanied by Investigations Supervisor, Sergeant Shaun Patterson.⁴ (Supp. App. 15). 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. (Supp. App. 15).

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. (Supp. App. 17). In particular, Johnson was advised that: (1) she had a right to remain silent (Supp. App. 17); (2) anything she said could be used against her (Supp. App. 17); (3) she had a right to an attorney (Supp. App. 17); (4) if she could not afford an attorney, one would be provided for her before any questioning commenced (Supp. App. 17); and (5) if she decided to make a statement, she had the right to stop at any time. (Supp. App. 17).

⁴ See footnote three *supra*.

Thereafter, King explained that he also provided Johnson with an advisement of rights form which contained the Miranda warnings she had received. (Supp. App. 18). King further highlighted that Johnson signed the portion of the form which indicated she wished to waive her rights and speak with authorities. (Supp. App. 18-19). King added that he provided Johnson with a copy of the form. (Supp. App. 19).

The State next asked King whether he had inquired as to whether Johnson wanted an attorney. (Supp. App. 20). 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[.]" (Supp. App. 20).

On cross-examination, defense counsel questioned King as to whether Johnson had previously requested an attorney. (Supp. App. 24). In response, King said "to my recollection, she never asked for an attorney." (Supp. App. 24). 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. (Supp. App. 24).

Defense counsel then called Johnson to the stand where she testified regarding her initial apprehension by individuals that she believed, were State Troopers. (Supp. App. 27-28, 31-32). 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. (Supp. App. 28-29). 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. (Supp. App. 29). She then testified that after a few hours, two individuals retrieved her from Darlington County

and transported her to Horry County. (Supp. App. 30). When asked whether King was one of the two men who transported her, Johnson stated "I can't even remember." (Supp. App. 31).

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[.]" (Supp. App. 32). 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." (Supp. App. 33). 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?" (Supp. App. 33-34). 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." (Supp. App. 34). 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 (Supp. App. 36, 39); anything she said could be used against her (Supp. App. 36, 39); if she made a statement she could stop at any time (Supp. App. 36-37, 39); and she had a right to an attorney. (Supp. App. 38, 39). In addition, Johnson acknowledged that despite understanding her rights, she wished to waive them. (Supp. App. 39). Johnson further confirmed the recorded video statement showed that she told officers she wanted to waive her rights. (Supp. App. 39).

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.'

(Supp. App. 40). 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."

(Supp. App. 40). Johnson then acknowledged she was informed she had a right to remain silent and anything she said could be used against her. (Supp. App. 40).

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.

(Supp. App. 41-42).

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." (Supp. App. 42). 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.” (Supp. App. 42-43). Thus, defense counsel concluded that because Johnson allegedly invoked her right to counsel, the statement should not be admitted into evidence.⁵ (Supp. App. 43).

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.” (Supp. App. 45). The State then went on to 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. (Supp. App. 45-46).

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.

(Supp. App. 46). The State subsequently introduced Johnson’s video statement at trial over defense counsel’s objection. (Supp. App. 112-13).

ARGUMENTS

- I. Because the trial court determined Johnson’s testimony during the *Jackson v. Denno* hearing—that she allegedly invoked her right to counsel—was “simply not plausible,” and South Carolina state law does not require the trial court to accept Johnson’s testimony as true, the appellate panel erred when it found the State failed to prove Johnson’s statement was freely, knowingly, and voluntarily tendered and taken in compliance with *Miranda*

⁵ Additionally, defense counsel objected to the video recording because “the audio quality is not very good.” (Supp. App. 43). 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[.]” (Supp. App. 45). However, a transcript of the recording was not put into evidence due to defense counsel’s repeated objections. (Supp. App. 43-46).

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 custodial interrogation.⁶ (App. 17). 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.⁷ (App. 17-18).

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

⁶ 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.”).

⁷ Johnson’s argument on this ground is also incorrect as the Miranda and Edwards line of cases require not just a custodial situation but “a custodial situation and official interrogation.” See Burket v. Angelone, 208 F.3d 172, 197 (4th Cir. 2000) (“Thus in order to implicate the Miranda-Edwards right to counsel prophylaxis, both a custodial situation and official interrogation are required.”) (quoting U.S. v. Bautista, 145 F.3d 1140, 1147 (10th Cir) *cert. denied* 525 U.S. 911 (1998)). Here, even assuming Johnson’s testimony was true, it is clear she was not being interrogated when, prior to receiving her Miranda rights, she claims she twice *inquired* about counsel at different times and to different people who she could not identify. (Supp. App. 33, 34). 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.”).

counsel was “simply not plausible” and therefore not credible evidence—Johnson’s argument necessarily fails.

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

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.⁸ For example, when reviewing whether a Batson

⁸ 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

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). This 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.”). Thus, the State submits the law is clear, in a case such as this, the appellate panel was required to give great deference to the trial court’s credibility determination and absent a complete lack of evidence supporting the trial court’s ruling, was in fact bound by such a ruling.

C. Because the Trial Court was not Required to Accept Johnson’s Testimony as True, the Trial Court’s Decision to Disregard her Testimony 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

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.”).

(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 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 during cross-examination, never inquired about counsel because her story was simply not plausible.⁹ (Supp. App. 46). 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

⁹ 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.

hearing, did not err in making such a finding.¹⁰ Thus, because the trial court's credibility determinations are a factual finding and appellate courts are bound by the trial court's factual findings under its' standard of review unless such 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. (Supp. App. 41-42, 46). 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 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.

¹⁰ E.g., 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); 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); 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); U.S. v. Giles, 518 Fed. Appx. 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).

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.¹¹ (Supp. App. 42, 46). 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. (Supp. App. 46). 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. Goodwin, 384 S.C. at 601, 683 S.E.2d at 507 (holding the trial court, as a preliminary matter, must determine whether the

¹¹ Further, while Johnson will likely argue that, as a matter of law, compliance with Miranda means the State must prove that Johnson did not invoke her right to an attorney, the State again disagrees. While it is true that the State, during a 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.

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 lasted approximately thirty (30) minutes, Johnson was advised of her Miranda rights which she subsequently waived. (Supp. App. 17). Notably, Johnson was advised that: (1) she had a right to remain silent (Supp. App. 17); (2) anything she said could be used against her (Supp. App. 17); (3) she had a right to an attorney (Supp. App. 17); (4) if she could not afford an attorney, one would be provided for her before any questioning commenced (Supp. App. 17); and (5) if she decided to make a statement, she had the right to stop at any time. (Supp. App. 17). Thereafter, King explained that he also provided Johnson with an advisement of rights form which contained the Miranda warnings she had received. (Supp. App. 18). King further highlighted that Johnson signed the portion of the form which indicated she wished to waive her rights and speak with authorities. (Supp. App. 18-19). King added that he provided Johnson with a copy of the form. (Supp. App. 19).

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. (Supp. App. 15).

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 reverse the appellate panel's ruling and reinstate Johnson's conviction and sentence.

- 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, this Court could find, as an additional sustaining ground,¹² that the rule

¹² See e.g. Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal); I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding the respondent, the winner in the lower court, may raise additional reasons the appellate court should affirm the lower court's ruling); Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (Ct. App. 2012) (same).

from Edwards does not apply and therefore the trial court was correct in finding the State complied with Miranda for purposes of its ruling in the Denno hearing.

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). “Interrogation” has been held to mean police questioning or conduct which is calculated to, expected to, or likely to evoke admissions. Commonwealth v. Whitman, 252 Pa. Super. 66, 380 A.2d 1284 (1977).

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 Compulsory Incrimination. U.S. v. Bautista, 145 F.3d 1140, 1147 (10th Cir. 1998) (emphasis added); Arizona v. Roberson, 486 U.S. 675, 685 (1988) (holding the Fifth Amendment right

against compelled self-incrimination “is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation[.]”). “Thus, in order to implicate the Miranda-Edwards right to counsel prophylaxis, both a custodial situation and official interrogation are required.” Id. “Absent either a custodial situation or official interrogation, Miranda and Edwards are not implicated.” Id.; U.S. v. Howard, 532 F.3d 755, 761 (8th Cir. 2008) (“In order for a Defendant’s Miranda rights to apply the individual must be in custody and interrogated.”); U.S. v. Roman-Zarate, 115 F.3d 778, 782 (10th Cir. 1997) (no Edwards violation when no “interrogation” occurred); U.S. v. LaGrone, 43 F.3d 332, 339 (7th Cir. 1994) (“in order for a defendant to invoke his Miranda rights the authorities must be conducting interrogation, or interrogation must be imminent”); Alston v. Redman, 34 F.3d 1237, 1244 (3rd Cir. 1994) (both a custodial situation and interrogation are needed to trigger Miranda protections).

With this in mind, the State notes Edwards does not apply to the current situation. Specifically, even if one were to assume Johnson’s testimony was truthful—that she *inquired* about counsel—it is clear Johnson was not being interrogated when she made such an inquiry.¹³ 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.¹⁴ (Supp. App. 33-34). 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

¹³ There is no assertion that Johnson’s inquiry occurred during her videotaped interview.

¹⁴ Furthermore, there is nothing in the record to suggest that Johnson’s questions regarding counsel came in response to any sort of questioning by law enforcement, however, even if this were the case, Johnson’s questions would not necessarily trigger Miranda’s protections. 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.”).

both Miranda and Edwards are not implicated since there was simply no risk that Johnson, who was not being questioned, would be coerced into giving a statement in violation of her Fifth Amendment Right Against Compulsory Incrimination. See 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 question that, if believed, occurred during transport and again at booking.

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 his 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.

Similarly, a variety of appellate courts have understandably found questions concerning counsel do not amount to a clear and unambiguous request for their presence. E.g. Mueller v. Angelone, 181 F.3d 557, 574 (4th Cir. 1999) (holding the question "Do you think I need an attorney here?" did not trigger the Edwards prophylaxis); U.S. v. Ogbuehi, 18 F.3d 807, 813-14 (9th Cir. 1994) (finding the question "Do I need a lawyer?" or "Do you think I need a lawyer?" was not an unequivocal and unambiguous invocation of the accused's right to counsel). Notably, in Minehan v. State, 147 Md. App. 432, 443-44, 809 A.2d 66 (2002) the Maryland Court of Special Appeals found the question "Should I get a lawyer?" was not a sufficiently clear invocation of the right to counsel. This was also the case in Matthews v. State, 106 Md. App. 725, 737-38, 666 A.2d 912 (1995) where the Court of Special Appeals determined the question "Where's my lawyer?" was not a clear invocation of the accused's right to counsel.

Maryland is not alone as a variety of other state appellate courts have also determined that questions related to counsel do not rise to the level of being a clear and unambiguous request for counsel. For instance, in State v. Taylor, 144 Ohio App.3d 255, 260, 759 N.E.2d 1281, 1285 (2001) the Ohio Court of Appeals for the Second District found the question, "Do I need an attorney?" was both ambiguous and equivocal meaning it did not require police to stop questioning. Courts in Missouri, Indiana, North Carolina, Michigan, New Mexico, Florida, Louisiana, North Dakota, Kansas, Texas and Wisconsin have all agreed, finding the question

"Do I need an attorney?" is neither unequivocal, nor unambiguous and therefore does not trigger the prophylactic rule from Edwards.¹⁵

Here, even assuming Johnson actually inquired about counsel at all, it is obvious she did not clearly and unequivocally request counsel as the context in which the inquiry occurred clearly reflects Johnson was asking a question rather than demanding the presence of an attorney. This is perhaps best evidenced by Johnson's own testimony where she explained that after asking "I need an attorney for this don't I?" law enforcement officials responded to her request by indicating she would likely need an attorney. (Supp. App. 33-34). In other words, even according to Johnson, the officers who heard her alleged requests did not reasonably 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*.¹⁶ Thus, even taking Johnson's inquiries regarding counsel as true, Edwards would not apply to facts of this case and therefore, the State complied with the requirements of Miranda.

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

As explained above, even if Johnson's inquiries regarding counsel were to be believed, the inquiries did not occur in a custodial setting and did not amount to an unambiguous and unequivocal request for the assistance of counsel. As result, it is clear the prophylactic protections from both Miranda and Edwards are not triggered and therefore, the trial court did not err when it found the State complied with Miranda, and Denno. Specifically, as

¹⁵ 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).

¹⁶ This of course makes sense in light of the fact Johnson was not being interviewed when she inquired about counsel.

demonstrated in Argument I, the trial court did not abuse its discretion when it found Johnson's confession was: (1) freely and voluntarily tendered without duress, coercion, undue influence or threats; and (2) taken in compliance with Miranda in that Johnson was advised of her Miranda rights, understood them and knowingly and voluntarily waived them. (Supp. App. 41-42). Moreover, for the reasons expressed in Argument I above, there is no doubt the trial court's ruling was supported by the evidence. Accordingly, the State asks this Court to reverse the appellate panel's rulings and reinstate 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 Adams requires that the admission of such evidence be prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked this as a review of the appellate panel's opinion reveals that the panel never determined whether the trial court's purported error was prejudicial as required by the standard of review. Indeed, had the appellate panel applied such an analysis the State submits that the panel would have likely found the

admission of Johnson's confession was harmless in light of the fact she admitted to shooting Victim and did not receive an instruction on self-defense.

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). Further, 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). Moreover, 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)). That said, "[n]o definite rule of law governs this finding; 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)). Stated differently, the relevant question under a harmless error analysis is whether the alleged error, when compared to the entirety of the record, including the individual facts and circumstances of the case at hand, was "unimportant in relation to everything else the jury considered on the issue in question." Yates v. Evatt, 500 U.S. 391, 403 (1991).

Here, the State submits the admission of Johnson's confession was harmless because her confession was cumulative to her testimony on direct examination and again on cross, that she "pulled the trigger." (Supp. App. 343, 346, 352-53). This is especially true here because Johnson, who according to multiple eyewitnesses approached Victim and pistol whipped her, did

not claim she acted in self-defense nor did she receive a self-defense charge. (Supp. App. 166-67, 169-70, 203-04); (Supp. App. 167-68, 171-72, 204, 205-06, 364). Furthermore, both Cox and Davis, the same eyewitnesses who observed Johnson approach the Grand Cherokee and pistol whip Victim, also testified that immediately after the shooting occurred Johnson began screaming "I told you I was going to get you, bitch" which she repeated four to five times before she ran away. (Supp. App. 174, 175, 208, 210). In fact, much of this was even corroborated by defense witness Tamika Skipper, who admitted Johnson confronted the Victim and further acknowledged that she heard a gunshot in the course of Johnson and Victim's confrontation prompting her to advise Johnson to flee the scene. (Supp. App. 268-69). As a result, the State submits that even assuming the trial court erred in admitting Johnson's confession, when comparing the confession to the balance of the evidence, including the eyewitness testimony combined with Johnson's admission that she shot Victim, any error was harmless. 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 reverse the appellate panel's ruling and reinstate Johnson's conviction and sentence.

CONCLUSION

In light of the aforementioned arguments, the State respectfully submits the trial court did not abuse its discretion in admitting Johnson's confession during the Denno hearing and even if it did, any error was harmless when cast against the balance of the evidence in this case. Accordingly, the State asks this Court to reverse the appellate panel's ruling, and reinstate Johnson's conviction and sentence.

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ATTORNEY(S) FOR RESPONDENTS

October 14, 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 Brief of Petitioner in the above referenced case has been served upon:

Benjamin Tripp, Esquire
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On this 14th day of October, 2014.



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT

APPELLATE CASE NO. 2013-002027

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the trial judge abused his 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 the questioning.

II. Whether Respondent's statement to an officer that "I need an attorney for this" and the officer's response that "The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant" was a clear and unequivocal request for counsel.

III. Whether Respondent suffered prejudice from the presentation to the jury of an interrogation video where the jury specifically requested multiple times during trial and deliberation to watch the video and where in closing, the State argued that Respondent's statements in the video constituted evidence establishing malice aforethought for purposes of the murder charge against her.

STATEMENT OF THE CASE

On September 25, 2008, the Horry County grand jury indicted Respondent Brittany Alexis Johnson on one count of murder. Supp. App. 6, ll. 15-17; Supp. App. 482-483. On February 7, 2011, Respondent's case proceeded to trial before the Honorable Edward B. Cottingham and a jury. Ronald Hazzard represented Respondent and Scott A. Graustein represented the State. Supp. App. 6, ll. 1-17; Supp. App. 7, l. 11 – Supp. App. 8, l. 17. On February 11, 2011, the jury found Respondent guilty as charged. Supp. App. 457, l. 1; Supp. App. 463, ll. 16-19. The trial judge sentenced her to thirty years imprisonment. Supp. App. 472, l. 24 – Supp. App. 473, l. 1.

On appeal the South Carolina Court of Appeals reversed and remanded in an unpublished opinion. *State v. Johnson*, Op. No. 2013-UP-288 (S. C. Ct. App. filed June 26, 2013); App. 71 – App. 72. The State filed a petition for rehearing, which the court denied. App. 73 – App. 98.

ARGUMENT

STATEMENT OF FACTS

The evidence presented at trial showed that on June 24, 2008, Respondent was involved in a shooting in Conway. Supp. App. 97, ll. 5-23. Respondent was walking to an acquaintance's apartment through a parking lot when she encountered a vehicle with four female occupants, including a local woman with whom Respondent had recently had a number of hostile confrontations. Supp. App. 262, l. 15 – Supp. App. 269, l. 24; Supp. App. 296, l. 14 – Supp. App. 310, l. 15; Supp. App. 318, l. 10 – Supp. App. 320, l. 25. A physical altercation ensued between the woman and Respondent, both of whom were armed with pistols. The fight developed into a struggle over control of one of the pistols, which ultimately discharged, killing the woman. Supp. App. 166, l. 10 – Supp. App. 171, l. 25; Supp. App. 187, l. 7 – Supp. App. 191, l. 13; Supp. App. 203, l. 12 – Supp. App. 207, l. 5.

The State sought to introduce into evidence a DVD recording of Respondent's interrogation by police shortly after her arrest in early July of 2008. Supp. App. 13, l. 12 – Supp. App. 46, l. 8. In the *Jackson v. Denno*¹ hearing, Respondent testified that law enforcement officers apprehended her in Darlington County and booked her into the county jail. The officers did not Mirandize her or tell her the reason for her arrest. During the booking, Respondent asked one of the officers whether she needed an attorney, and he responded that "[h]e was pretty sure I would." Supp. App. 27, l. 13 – Supp. App. 33, l. 13.

A few hours later, two police officers from Horry County came to retrieve Respondent from Darlington. Supp. App. 29, l. 23 – Supp. App. 30, l. 2. Respondent

¹ 378 U.S. 368 (1964).

testified that when they arrived back at their office in Horry County, the officers immediately began interrogating her:

A: When we got back to Conway, upon entering the, um, the police department on Racepath, I thought – well, I thought I would just be, like, booked in and then put in jail but when I got there and they opened up the door to the interview room and when I went in there, I realized what was going on, and I said, “I need an attorney for this, don’t I?”

Q: Uh-huh.

A: And I said, “I need an attorney for this.”

Q: All right.

A: And their response was, “The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant.”

Supp. App. 33, l. 21 – Supp. App. 34, l. 6. Respondent stated that she then “was under the impression that it was okay. It was okay to talk.” Supp. App. 33, l. 15 – Supp. App. 34, l. 21.

Retired Conway Police officer John King testified that he and officer Shaun Patterson² questioned Respondent in an interview room at their Racepath Street annex. He presented Respondent with a Miranda rights advisement form, which he read aloud and which she signed. Respondent then answered questions from Officer King without an attorney present. Officer King said that his interaction with Respondent appeared in its entirety in the video recording, and Respondent never asked in his presence for an attorney. However, he admitted that, as officer Patterson stated in the video recording, Patterson had spoken with Respondent in introducing himself before the recording started and outside of

² During trial, King referred to the second officer in the room as Shawn Addison. Supp. App. 105, ll. 15-17; Supp. App. 338, ll. 1-20.

King's presence. King had no personal knowledge as to the substance of that conversation. Supp. App. 13, l. 25 – Supp. App. 26, l. 15.

The trial judge initially stated that Respondent's statement was given freely, voluntarily, and in compliance with *Miranda v. Arizona* and that she waived her rights "to remain silent and to have counsel present with her at the interview and interrogation." Supp. App. 41, l. 12 – Supp. App. 42, l. 11. Respondent objected, arguing that the uncontradicted testimony established that she requested and was denied the presence of an attorney, and therefore her responses to the ensuing questioning were inadmissible. Supp. App. 42, l. 17 – Supp. App. 43, l. 7. The State conceded, "Your Honor, um, it's uncontradicted. We don't have anybody who says she never asked that." Supp. App. 40, ll. 21-23. However, the State further argued that Respondent "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." Supp. App. 45, l. 21 – Supp. App. 46, l. 1. The trial judge responded 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." Supp. App. 46, ll. 2-7.

Over Respondent's contemporaneous objections, the video statement was played on multiple occasions for the jury. Supp. App. 106, ll. 15-18; Supp. App. 112, l. 22 – Supp. App. 113, l. 12. On one such occasion during the second day of trial, the judge received a note from the jury stating, "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." Supp. App. 142, ll. 1-7; Supp. App. 478. Respondent objected, pointing out

that the note indicated improper discussion regarding the elements and facts of the case by the jury, and moved for a mistrial. Supp. App. 142, l. 22 – Supp. App. 143, l. 14. Counsel also argued that if the court did not grant a mistrial, then playing the video again before the jury heard any other evidence would place undue weight on the DVD. Supp. App. 142, l. 15 – Supp. App. 144, l. 2. The trial judge denied the objection and motions, stating “there’s no basis in this note for me to assume they’ve discussed any issue in the trial.” Supp. App. 144, ll. 3-5. The judge then ordered “additional microphones put up so that the jury will understand the contents of that tape.” Supp. App. 144, ll. 10-12. The judge also brought in additional loud speakers. Supp. App. 146, ll. 4-11.

In its closing, the State referred to Respondent’s statements on the video multiple times. Supp. App. 423, l. 9 – Supp. App. 426, l. 25. In particular, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on certain statements:

As far as showing malice aforethought, if she had that gun – she was holding that gun, she just decided, “I’m going to pull the trigger and shoot Monica.”

That’s it. That’s all the malice aforethought you need. “I’m going to pull the trigger.”

So, she left – so, she said she had a gun the day before. So, she – she went and got her gun.

Supp. App. 423, ll. 4-11. After closing arguments, Respondent moved to charge self-defense and involuntary manslaughter. Supp. App. 454, ll. 1-4. The judge denied the motion, stating the evidence in the record established without contradiction that Respondent went to the vehicle with a loaded gun in her hand, and “[t]he defendant can’t go to the scene of a difficulty, then claim self-defense.” Supp. App. 368, l. 3 – Supp. App. 373, l. 1.

The video was also played pursuant to the jury's request during deliberations. Supp. App. 430, l. 18 – Supp. App. 435, l. 19.

In the sentencing phase, the trial judge 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.” Supp. App. 465, ll. 19-21.

On appeal Respondent argued that the trial judge erred in considering the evidence that Respondent continued speaking with the police officers to support the finding that she never invoked her right to counsel. App. 14 – App. 17. In reversing and remanding, the South Carolina Court of Appeals cited *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) for the proposition that the State has the burden to prove a valid waiver of Miranda rights and *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) for the proposition that once a suspect invokes the right to counsel, police interrogation must stop unless the suspect initiates further communication. App. 71 – App. 72. The State filed a petition for rehearing, which the appeals court denied. App. 73 – App. 97.

STANDARD OF REVIEW

“On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion.” *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009). An abuse of discretion occurs when a trial court's ruling “reveals no discretion was exercised.” *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). See also *United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007) (“A district court abuses its discretion when it

. . . fails to consider judicially recognized factors constraining its exercise of discretion [or] relies on erroneous factual or legal premises.”).

In *James v. Jacobsen*, the Court of Appeals for the Fourth Circuit explicated abuses of discretion by “failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule” and “by failure, in attempting to exercise discretion, adequately to take into account judicially recognized factors constraining its exercise.” *James v. Jacobsen*, 6 F.3d 233, 239 (4th Cir. 1993). The court explained that an abuse of discretion occurs when a “conclusion [is] based upon a general rather than a particularized assessment of the equities involved,” and particularly when the conclusion “announces itself as a flat rule of general application based upon strongly felt personal predilection.” *Id.* at 240-41.

DISCUSSION

- I. **The trial judge abused his 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 the questioning.**

The trial judge abused his 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 the questioning. The State has a very stringent burden to prove a valid waiver of the right to counsel.

[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that

case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted).

In *Massiah v. United States*, the U.S. Supreme Court held that once a defendant's constitutional right to counsel accrues, the defendant cannot be presumed to have waived his right to counsel based merely on his response to police questioning without counsel present. *Massiah v. U.S.*, 377 U.S. 201, 204-207. (1964). The rule applies a fortiori when police use a confidential informant to surreptitiously interrogate such a defendant. *Id.* at 206. Thus, the defendant in that case did not waive his right to counsel merely by speaking to a jailhouse snitch without his attorney, and his statements to the informant were inadmissible. *Id.*

Two years later, in *Miranda v. Arizona*, the U.S. Supreme Court held that a defendant's statements in the absence of counsel during custodial interrogation are inadmissible when the defendant has not been specifically advised of his right to have an attorney present. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). In other words, a defendant cannot validly waive his constitutional right to counsel during custodial questioning without being specifically advised of the right beforehand. The Court's central concern in implementing the prophylaxis of a specific warning was that police officers, zealous in ferreting out crime, tend to elicit statements through psychological coercion of an isolated defendant in incommunicado interrogation. Thus, the warning is necessary to protect against overbearing, inquisition-style questioning that is impermissible under the Constitution. *Id.* at 447-449.

Almost twenty years later, in *Smith v. Illinois*, the U.S. Supreme Court explained that when a defendant in custodial interrogation gives statements to police in the absence

of an attorney but avers that he requested one prior to the interrogation, two procedural stages are implicated:

First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam) (citations omitted). The Supreme Court explained that ceasing question upon a proper request for an attorney was absolutely necessary to protect against the risk of “‘badgering’ or overreaching’—explicit or subtle, deliberate or unintentional—[which] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.” *Id.* at 98 (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983)).

In this case, the trial judge applied a general rule that responding to police questioning without an attorney precludes the possibility that a defendant actually requested an attorney before the questioning. Specifically, the trial judge stated that Appellant’s express and unrefuted claim that she requested an attorney prior to entering the interrogation room was not plausible because she had ample opportunity during the interrogation to repeat her desire for her attorney but did not.

In employing this rule of general applicability, the trial judge failed both to adequately take into account judicially recognized factors constraining his discretion in the matter and to particularly assess the equities involved. First, the judge failed to consider to any extent the possibility of coercion prohibiting Appellant from feeling free

to re-request an attorney. Appellant faced two officers in an interrogation room in a police office. She explained that she had just made a request for an attorney to another officer, who told her one would be arranged later. As described above in the *Massiah* line of cases, Appellant—isolated, outnumbered, and subjected to incommunicado interrogation—realistically could have been psychologically coerced to answer the officer's questions without making any resistance, including by asking the officers to stop the interrogation entirely and wait for an attorney to be appointed and transported. In this manner, the trial judge failed entirely to acknowledge the longstanding principle that statements to police are, in themselves, inherently unreliable evidence from which to infer that a defendant did not invoke the right to counsel. His decision therefore could not have resulted from a proper exercise of discretion.

Second, the trial judge failed to assess the particularities of the situation described to him in order to determine whether Appellant actually made the initial request to Officer Patterson. Appellant testified that she asked Officer Patterson just before entering the interrogation room, and Officer Patterson told her a judge would later appoint one. Under these circumstances, Appellant, assured by the auspices of the proper judicial procedures, would have felt that her rights were fully protected in cooperating with the police. Accordingly, she may have believed that she was speaking "off the record" or that her statements would not be usable against her for whatever procedural reason. Or she may have been willingly engaged in small talk, waiting for attorney to arrive, and been unwittingly led into discussions about the incident.

More troubling, the facts before the trial judge could have indicated that the officers willfully disregarded Appellant's actual request. Officer Patterson admitted on

the video and Officer King testified at the hearing that Officer Patterson and Appellant spoke before the recording started and outside of King's presence. Officer Patterson did not appear at the hearing to contradict Appellant's account and Officer King had no knowledge of the substance of the conversation. This "officer shuffling" provided plausible deniability for the officer who did appear in court to testify that he did not actually hear Appellant request an attorney. By refusing to acknowledge even one of these possibilities to any extent in favor of a rule of general applicability, the trial judge abused the discretion that was entrusted to him for particularized application on a case-by-case basis.

II. Respondent made a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later.

Respondent made a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later. As stated above, invocation of counsel merely requires the articulation of a desire that counsel be present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. While statements or circumstances leading up to and during the request are relevant to the question of invocation, those subsequent to the request are not.

"[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). "Interrogation can be either express questioning or its

functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response.” *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). *See also U.S. v. LaGrone*, 43 F.3d 332, 339-40 (7th Cir. 1994) (“[I]n order for a defendant to invoke his Miranda rights the authorities must be conducting interrogation, or interrogation must be imminent. Such a requirement advances the twin goals of Miranda: providing an opportunity for the defendant to dissipate the compulsion and allowing law enforcement the ability to conduct investigations.”).

In *Davis v. United States*, the U.S. Supreme Court stated that the determination of whether a defendant sufficiently invoked the right to counsel is objective and requires the articulation of a desire that counsel be present “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. U.S.*, 512 U.S. 452, 458-59 (1994).

In this case, Respondent testified she told one of the officers in the interrogation room, “I need an attorney for this.” Further, based on her testimony of the officer’s response, the evidence established that the officer heard and understood the request.

The State argues that Respondent only inquired about the need for counsel. The State mischaracterizes the record. In its Statement of the Case, it cites Respondent’s testimony, “I need an attorney for this, don’t I?” while omitting her very next statement on the record, “I need an attorney for this.”

The record also shows Respondent invoked her Miranda right to an attorney for purposes of the impending police interrogation. Logically, a suspect must be able to invoke the Miranda prophylaxis prior to an actual question or other prompt from police.

In this case, Respondent requested counsel to an investigating officer as she was walking into a room she understood to be used for interrogations, and questioning was in fact impending. The State argues that Respondent was required to invoke her rights *during* interrogation. This argument fails because the boundaries of interrogation pose an issue for determining when Miranda safeguards apply; the issue is not determinative of when a suspect must summon the safeguards. Only a perverse rule would require a suspect to be smothered by the heat of oppressive interrogation before she is permitted to flee from it.

III. Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial and deliberation enhanced the prejudice.

Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial and deliberation enhanced the prejudice. "Ordinarily, the admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial . . . assum[ing] the existence of testimony both ways upon a disputed issue, and is based upon the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence." *S.C. State Highway Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 484, 485 (1965). *See also Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

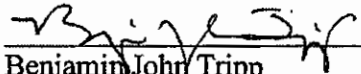
Here, a presumption existed that the trial court's presentation to the jury of Respondent's self-incriminating statements prejudiced her case. Additionally, the record

shows that the video was played on multiple occasions for the jury, including during the presentation of evidence and deliberations. The jury twice specifically requested to watch the video because it was important to their understanding of the case. In its closing, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on Respondent's statements that she considered beforehand obtaining the pistol and shooting the decedent. Finally, the trial court refused to charge self-defense and involuntary manslaughter because the evidence in the record, including Respondent's statements from the video, established without contradiction that Respondent knowingly accosted the decedent with the pistol and therefore could not claim to have merely responded to a provocation or attack. Accordingly, the appeals court properly reversed and remanded the case based on the trial court's prejudicial error.

CONCLUSION

For the foregoing reasons, the trial court erred in admitting Respondent's interrogation video into evidence, and Respondent requests that this Court affirm the decision of the appeals court to reverse and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 13th day of November, 2014.

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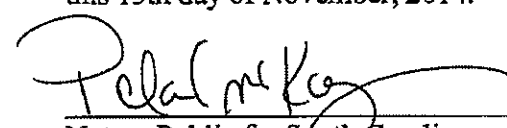
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of November, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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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

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

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,

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); Minchan 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

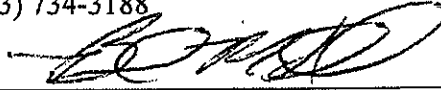
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

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.

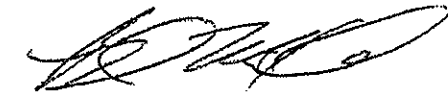
App. Case No. 2013-002027

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
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On this 24th day of November, 2014.



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

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Brittany Johnson, Respondent.

Appellate Case No. 2013-002027

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27565
Heard March 4, 2015 – Filed August 19, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General Brendon Jackson McDonald, all of
Columbia, and Solicitor Jimmy A. Richardson II, of
Conway, for Petitioner.

Appellate Defender Benjamin John Tripp, of Columbia,
for Respondent.

RECEIVED

AUG 19 2015

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision

reversing Respondent Brittany Johnson's conviction for murder and remanding the case for a new trial. We reverse the decision of the court of appeals.

FACTUAL/PROCEDURAL HISTORY

On July 2, 2008, Brittany Johnson was arrested in Darlington County by United States Marshals for the shooting death of Monica Burroughs (the victim), which occurred on June 24, 2008, in Horry County.¹ Following her apprehension and initial incarceration in the Darlington County Detention Center, Johnson was transferred to the Conway Police Department in Horry County.

At trial, the State sought to introduce a videotaped recording of the police's interrogation of Respondent after she was arrested, and the court held a *Jackson v. Denno*² hearing to assess the voluntariness of the statement.

At the hearing, the State called Officer John King, who testified he and another officer interviewed Respondent at the Conway Police Department after she was arrested. King testified that the interview lasted approximately thirty minutes, and the videotape represented the extent of his interaction with Respondent. King testified that Respondent did not appear to be under the influence of alcohol or drugs when she gave her statement or to suffer from any mental or physical condition that would impair her ability to understand the questions; did not request a break from questioning, either to use the restroom or make a telephone call; and did not request anything to eat or drink. Further, King testified that he neither threatened Respondent, nor made any promises to her during the interrogation.

King explained that he orally advised Respondent of her rights pursuant to *Miranda v. Arizona*,³ and provided Respondent with an advisement of rights form

¹ Respondent, then seventeen years old, attacked the unarmed victim while the victim was seated in a friend's vehicle, "pistol-whipped" her, and ultimately shot her. Two witnesses confirmed the events of the shooting. In her statement to police, Respondent described a series of confrontations with the victim in the lead up to the shooting.

² 378 U.S. 368 (1964).

³ 384 U.S. 436 (1966).

that also listed the *Miranda* warnings. Specifically, King testified that he advised Respondent: (1) that she had a right to remain silent; (2) that anything she said could be used against her in court; (3) that she had a right to an attorney; (4) that if she could not afford an attorney, one would be provided for her prior to any questioning; and (5) that if she decided to make a statement, she had the right to stop speaking to police at any time. King testified that Respondent waived her rights orally and also by initialing and signing the form provided to her.

King further testified that he specifically asked Respondent if she desired to have an attorney present during the questioning, and Respondent replied, "no," and otherwise did not invoke her right to counsel during the interview.

Defense counsel called Respondent to testify. Contrary to King's testimony, Respondent testified that she was neither advised of her rights when she was arrested in Darlington County, nor when she was "booked" into jail at the Darlington County Detention Center, where she waited to be transferred to Horry County. However, Respondent testified that she repeatedly asked for an attorney:

- Q. At any point did you ask for an attorney?
- A. Yes, sir [T]he first time I asked for an attorney was . . . while I was being signed over by whoever [sic] that Marshal was that signed my paperwork.
- Q. And who did you ask, the Marshal or the people who were waiting to get you?
- A. The Marshal because at the time I was in, like, a partition where it's locked on both sides while he did my fingerprints and signed some paperwork to hand me back over to them.^[4]
- Q. Okay. And when you asked this . . . gentleman, what specifically did you say regarding an attorney as best you can recall?
- A. I just asked him was I going to need an attorney.

⁴ Respondent could not recall any identifying features or names of the arresting officers or the two officers who transferred her to Horry County.

Q. Okay. You asked if you were going to need an attorney?

A. Uh-huh.

Q. Okay. And what did the Marshal say?

A. He was pretty sure I would.

Q. Okay. And after that did you ever ask anyone regarding receiving legal assistance?

A. Yes, sir.

Q. Okay. And tell the Court about that. When and what were the circumstances under which you made that request?

A. When we got back to Conway, upon entering the . . . police department . . . , I thought . . . I would just be, like, booked in and then put in jail but when I got there and they opened up the door to the interview room and when I went in there, I realized what was going on, and I said, "I need an attorney for this, don't I?"

Q. Uh-huh.

A. And I said, "I need an attorney for this."

Q. All right.

A. And their response was, "The Judge will . . . take care of that. When you get downtown, he issues a warrant."

Q. Uh-huh.

A. And that was the end of that.

Q. So, you said, "I need an attorney for this."

....

Q. And once you received that response, once you requested an attorney and were told that the Judge would take care of it later, did you believe you had the right at that point to not answer any questions?

A. I was under the impression that it was okay. It was okay to talk.

During cross-examination, the State sought to discredit Respondent's testimony by eliciting testimony that she was experienced with the criminal justice system and had been represented by counsel in the past in the juvenile justice system. In addition, Respondent acknowledged that despite understanding her rights, she wished to waive them at that time, and further confirmed the recorded statement displayed her telling officers that she wished to waive her rights.

Based on this testimony, the trial court determined "beyond a reasonable doubt . . . 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." Moreover, the trial court found that Respondent,

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.

Finally, the trial court found that Respondent "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," that "the decision to make the statement was a product of the defendant's own unfettered will," and that Respondent "had the capacity to comprehend the meaning and effects of waiving her constitutional rights." Therefore, the trial court found that the statement, if offered during trial, would be admitted into evidence.

Defense counsel objected to the ruling, explaining that it was "uncontradicted" that Respondent specifically said "I need an attorney for this" to a member of law enforcement, and therefore, the interviewing officers had no legal right to question Respondent "unless and until [Respondent] indicate[d] that [she] wish[ed] to speak." Consequently, defense counsel argued that the statement should not be admitted into evidence because Respondent invoked her right to counsel. On the other hand, the State argued that there was no evidence—other than Respondent's own testimony—that Respondent invoked her right to counsel, emphasizing Respondent's subsequent waiver of her rights and the videotaped interview in which she never invoked her right to counsel.

The trial court concluded that Respondent's testimony regarding her invocation of her right to counsel was "simply not plausible in that with Officer King she had ample opportunity to express her desire for . . . an attorney . . . , indicated not only on Mr. King's testimony but on the video itself," and therefore, his ruling regarding the voluntariness of Respondent's statement would remain in effect.

The State subsequently introduced Respondent's videotaped statement at trial over defense counsel's objection.⁵ In her recorded statement, Respondent admitted she hit the victim with a gun before shooting her. The jury ultimately found Respondent guilty of murder, and the trial court sentenced her to thirty years' imprisonment.

Respondent appealed to the court of appeals. On appeal, she argued, *inter alia*, that the trial court erred in admitting her statement to police into evidence after she invoked her right to counsel. Specifically, Respondent, citing *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* rights as required in a pretrial *Jackson v. Denno* hearing.

Without discussion, the court of appeals reversed and remanded Respondent's conviction, finding the trial court erred in admitting Respondent's statement to police. *See State v. Johnson*, No. 2013-UP-288 (S.C. Ct. App. June 26, 2013) (citing *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286

⁵ The testimony surrounding the voluntariness of Respondent's statement that the jury heard was similar to the testimony adduced at the *Jackson v. Denno* hearing.

(2001) ("If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police."); *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. 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* during a *Jackson v. Denno* hearing before admitting a statement into evidence).

On appeal, the State asserts that the court of appeals (1) applied an incorrect appellate standard of review in assessing the trial judge's factual findings, (2) erred in reversing the trial court's ruling where Respondent was not being interrogated when she inquired about counsel and did not unequivocally invoke her right to counsel, and (3) failed to consider if Respondent was prejudiced by the admission of the evidence.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); *see also State v. Kelly*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

LAW/ANALYSIS

With respect to the dispositive issue on appeal, the State asks this Court to reverse the decision of the court of appeals because the trial court, as the preliminary fact-finder in a pre-trial evidentiary hearing, determined that Respondent's testimony was not credible, and the court of appeals was required under the applicable standard of review to accept this finding unless unsupported by the evidence. On the other hand, Respondent argues the trial court abused its discretion by employing a rule that responding to police questioning without an

attorney precludes the possibility that a defendant requested an attorney before the questioning.

When analyzing a criminal defendant's invocation of her right to counsel, a trial court must make two separate inquiries:

First, courts must determine whether the accused actually invoked his right to counsel. *See, e.g., Edwards v. Arizona*, 451 U.S., at 484–85 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); *Miranda v. Arizona*, 384 U.S. at 444–45 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards v. Arizona*, 451 U.S. at 485, 486, n.9.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam).

Because the trial court found Respondent's testimony that she actually invoked her right to counsel was "simply not plausible"—or lacked credibility—Petitioner cannot satisfy the first prong of the inquiry.⁶

Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *See, e.g., State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (stating that in preliminary evidentiary matters, appellate court review is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record). Moreover, it is well-established under South Carolina law that credibility determinations are entitled to

⁶ If an accused invokes her right to counsel, she may only be questioned thereafter in the presence of counsel, and her responses to further questioning outside the presence of counsel are admissible only if she initiates further questioning and then knowingly and intelligently waives her previously invoked right to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. at 94–99. Here, the State admits that if the Court found Respondent clearly and unequivocally invoked her right to counsel, then the subsequent statement to police would have been inadmissible.

great deference. *See, e.g., State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 333 (1998) (Toal, J., dissenting) ("On appeal, [the appellate court is] to ascertain whether the trial court abused its discretion in admitting the evidence. Our task is not to engage in a de novo review of the evidence. Nor are we to usurp the authority of the trial court by attempting to judge the credibility of witnesses. The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." (citations omitted)); *Sumpter v. State*, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994) ("Because the trial court's findings . . . rest largely on his evaluation of demeanor and credibility, those findings are given great deference.").

Here, the trial court's finding that Respondent lacked credibility is supported by the record. Not only did the trial court find that Respondent's testimony was not credible in assessing Respondent's actual demeanor on the witness stand, we note that Respondent could not recall with much specificity where or to whom she invoked her right to counsel, and fumbled in her responses as to whether her request was unequivocal. *Cf. 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); *Thomas v. State*, 738 S.E.2d 571, 574 (Ga. 2013) (affirming the trial court's ruling that testimony by the accused during a *Jackson v. Denno* hearing that he invoked his right to counsel both before and during his interview was not credible). Further, there is no requirement under the law that the trial court must believe a criminal defendant's version of events. *See State v. Boone*, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (stating that when deciding preliminary questions of admissibility, the trial court is "not bound to accept as true the defendant's testimony" (citation omitted)); *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed." (citation omitted)). The practical effect of the trial court's finding that Respondent lacked credibility is that no invocation (either equivocal or unequivocal) occurred, as there was no other evidence that Respondent invoked her right to counsel prior to giving her statement.

Because the effect of the credibility finding is that Respondent did not unequivocally invoke her right to counsel, we further uphold the trial court's finding that Respondent's statement was voluntary. *See Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is

inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement.") (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979))).⁷

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

REVERSED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

⁷ We need not reach the issues of whether Respondent was subjected to custodial interrogation when she allegedly invoked her right to counsel and whether Respondent was prejudiced by the trial court's admission of the videotape at trial because the credibility issue is dispositive. See *Futch v. McAllister Towing of Georgetown, Inc.*, 355 S.C. 598, 578 S.E.2d 591 (1999).

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT

APPELLATE CASE NO. 2013-002027

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2013-UP-288

MOTION TO REMAND

Under Rule 240(a), SCACR, and in response to this Court's Opinion No. 27565 filed August 19, 2015, Respondent respectfully moves this Court to remand this case to the South Carolina Court of Appeals pursuant to the procedure applied in *State v. Grovenstein*, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999) and based on the following.

1. Respondent appealed her conviction to the Court of Appeals and filed her final brief on January 7, 2013. Respondent argued the following four issues:
 - 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?
2. On June 26, 2013, the Court of Appeals issued its Unpublished Opinion No. 2013-UP-288 reversing Respondent's conviction by ruling on issue (i) and declining to reach the remaining issues.
 3. On September 23, 2013, Petitioner petitioned this Court to reverse the ruling of the Court of Appeals.

Because the Court of Appeals only ruled on issue (i) and this Court's Opinion reversed that ruling, Respondent is entitled to a review of issues (ii), (iii), and (iv). Accordingly, Respondent respectfully moves this Court to remand her case to the Court of Appeals for a review of these issues.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

This 20th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Appeal from Horry County

 Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

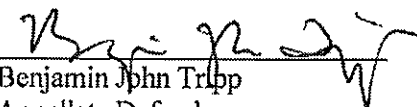
BRITTANY JOHNSON,

RESPONDENT

APPELLATE CASE NO. 2013-002027

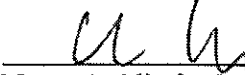
 CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Remand in the above-entitled case has been served upon Brendan J. McDonald, Esquire, this 20th day of August, 2015.


 Benjamin John Tripp
 Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 19th day
 of August, 2015.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: May 12, 2025.

STATE OF SOUTH CAROLINA
In the Supreme Court

The State,

Petitioner,

v.

Brittany Johnson,

Respondent

Appellate Case No. 2013-002027

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

Opinion No. 27565
Heard March 4, 2015—Filed August 19, 2015

RETURN TO MOTION TO REMAND

I. INTRODUCTION

Comes now Petitioner, the State of South Carolina (“The State”), and makes return to Respondent Brittany Johnson’s (“Johnson”) motion to remand. As explained below, because Johnson, rather than raising each of her arguments supporting the court of appeals’ ruling to this Court, instead elected to sit on these arguments in hopes of getting a second bite of the appellate apple via remand, the State submits these grounds are abandoned and asks that Johnson’s motion be denied. To rule otherwise would not only encourage piecemeal litigation of appellate arguments, but would also dis-incentivize a prevailing party below from raising additional sustaining grounds to this Court and would prolong the appellate process. In the alternative, and in the event this Court disagrees with the State’s abandonment analysis, the State asks this Court,

in the interest of judicial economy, to address Johnson's remaining arguments as contained within the Appendix and in light of the proper admission of Johnson's video confession.

II. BACKGROUND

On June 24, 2008, Johnson shot and killed Monica Burroughs. (Supp. App. 337, 343, 349-52). Johnson was subsequently indicted for murder. (Supp. App. 482-83). She was tried and convicted before the Honorable Edward B. Cottingham and a jury on February 7-10, 2011 in Conway. (Supp. App. 1, 6, 463, 472-73). Johnson received a thirty year sentence. (Supp. App. 472-73).

On appeal, Johnson sought reversal of her conviction arguing the trial court erred by:

- (1) admitting [her] video statement;
- (2) failing to grant a mistrial for alleged premature jury deliberation;
- (3) failing to charge the jury with self-defense; and
- (4) failing to charge the jury with involuntary manslaughter.

(App. 1).

In response, the State, via its Final Brief of Respondent explained:

- (1) the trial court correctly determined [Johnson]'s testimony during the *Jackson v. Denno* hearing regarding her alleged invocation of her right to counsel was simply not plausible;
- (2) [t]he 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 [Johnson's] statement;
- (3) [t]he 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; and
- (4) the trial court correctly declined to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that

[Johnson] 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

(App. 30).¹

On June 26, 2013 the court of appeals reversed Johnson's murder conviction and sentence finding the trial court erred in admitting her statement to police and declining to address Johnson's remaining issues. See State v. Johnson, No. 2013-UP-288 (S.C. Ct. App. June 26, 2013). The State unsuccessfully sought rehearing in the court of appeals. (App. 73-96); (App. 97-98).

Subsequently, this Court granted the State's petition for writ of certiorari and unanimously reversed the court of appeals, concluding the trial court's credibility determination controlled the issue. State v. Johnson, Op. No. 27565, (filed August 19, 2015). Notably, Johnson, despite having briefed three other arguments in support of reversing her conviction in the court of appeals, failed to raise any of these issues as additional sustaining grounds before this Court.² Nevertheless, she now seeks a remand for the court of appeals to consider these arguments.³ Because we believe these issues are abandoned, and since Johnson's failure to raise

¹ Pursuant to Rule 242(e), SCACR, the briefs are contained within the appendix. (App. 1-70). The record on appeal is contained within a supplemental appendix. (Supp. App. 1-473).

² See 1'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief."); Maxey v. R.L. Bryan Co., Inc., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988) (citing May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 376 (Ct. App. 1986) (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)).

³ Notably, Johnson claims she is "entitled" to a remand pursuant to State v. Grovenstein, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999). However, a review of footnote six reveals nothing to support Johnson's claim, but instead merely reveals Grovenstein's case was remanded without discussion. While it is indeed true that South Carolina, via Rule 201, SCACR grants aggrieved individuals a right to appeal, such a right is not absolute and does not require that a litigant's claim be heard. In fact, as this Court is well aware, both appeals, as well as arguments, may be waived by failing to comply with any number of procedural requirements. See e.g., Rule 203(b)(2), SCACR, (stating a notice of appeal must be served on all respondents within ten days after the sentence is imposed); State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701 (2002) (stating the Supreme Court of South Carolina has consistently held Rule 203(b), SCACR's service requirement is jurisdictional); Rule 208(b)(1)(B), SCACR, (stating broad general statements may be disregarded by the appellate court and ordinarily, no point will be considered which is not set forth in the statement of issues of appeal); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly

these grounds would fortuitously provide her with a second bite of the appellate apple, the State opposes Johnson's motion to remand and instead ask this Court to either: (a) find Johnson's argument abandoned and therefore deny the motion; or (b) in the interest of judicial economy, address Johnson's remaining issues in light of, among other things, her properly admitted video-taped confession.

III. DISCUSSION

A. Abandonment of Respondent's Arguments

As an initial matter, the State suggests that Johnson, having already briefed her arguments for reversing her conviction in the court of appeals, abandoned further consideration of those arguments when she failed to raise them as additional sustaining grounds before this Court. See I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief."); Maxey v. R.L. Bryan Co., Inc., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988) (citing May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 376 (Ct. App. 1986) (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)). Indeed, there is no question that Johnson, as the prevailing party in the court of appeals, *could* have raised the arguments from her previous brief to this Court as an additional sustaining ground under Rule 208(b)(2), SCACR as her arguments are included as part of the record under Rule 242(e)(1)'s, requirement that the Appendix contain "[a] copy of . . . the briefs." See Rule 208(b)(2), SCACR (2015) ("Respondent's brief may also

raised to it); Rule 208(b)(1)(D), SCACR (stating an argument must be supported by citations to authority); Doe v. Roe, 379 S.C. 291, 300, 665 S.E.2d 182, 186-87 (Ct. App. 2008) overruled on other grounds (holding conclusory arguments not supported by authority are considered abandoned for purposes of appellate review); 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); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Stated differently, Johnson is not entitled to a remand, especially since her additional arguments are abandoned and even if they were not, judicial economy favors summary disposition of her remaining arguments.

contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).”); Rule 220(c), SCACR (2015) (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); Rule 242(e)(1), SCACR (2015) (explaining that with respect to certiorari to the court of appeals, “[t]he Appendix shall include . . . [a] copy . . . of the briefs”). Furthermore, there is no question that an additional sustaining ground can be “abandoned” by failing to raise the issue in an appellate brief pursuant to I’On, Maxey, and May. See I’On, 338 S.C. at 420, 526 S.E.2d at 723 (“Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief.”); Maxey, 295 S.C. at 336 n.2, 368 S.E.2d at 467 n.2 (citing May, 289 S.C. 549, 347 S.E.2d 376 (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)). Therefore, in light of I’On, Maxey, and May, the State submits Johnson, as the prevailing party in the court of appeals, abandoned the arguments that are the subject of her motion to remand by failing to raise them via her response brief. Accordingly, the State submits a remand to consider these issues is unnecessary.

B. Judicial Economy

In the alternative, and in light of the fact the remaining issues are fully briefed and contained with the Appendix along with the Record on Appeal, the State further opposes Johnson’s motion to remand as the interest of judicial economy is best served by addressing her remaining issues.⁴ This is especially true in light of the fact this Court has now determined

⁴ See e.g., Woodson v. D.L.I. Properties, L.L.C., 406 S.C. 517, 528 n.10, 753 S.E.2d 428, 434 n.10 (2014) (finding the court of appeals committed error when it affirmed a grant of summary judgment on the basis of a lack of a sufficient record, but declining to remand the issue for consideration by the court of appeals and addressing the merits of the issue “in the interest of judicial economy”); State v. Kromah, 401 S.C. 340, 354, 737 S.E.2d 490, 497 (2013) (concluding the court of appeals erroneously found an issue was not preserved but declining to remand the merits of the issue to the court of appeals and instead, “in the interest of judicial economy” considering the issue); Furtick v. S.C. Dep’t of Prob., Parole and Pardon Servs., 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (declining

Johnson's video-taped confession was properly admitted. See State v. Johnson, Op. No. 27565, (filed August 19, 2015) ("Because the effect of the credibility finding is that [Johnson] did not unequivocally invoke her right to counsel, we further uphold the trial court's finding that Respondent's statement was voluntary."). For instance, even assuming Johnson's second argument is correct—that the trial court erred when, after instructing the jury not to deliberate, it returned with a note reflecting that they all agreed they needed to re-hear Johnson's confession—the State submits the result of such an error—viewing admissible evidence—could not possibly be prejudicial, especially since the trial court found the jury's reason for asking to replay the video was due to audio issues and was not the product of premature deliberation.⁵ (Supp. App. 137, 140, 144-45).

Moreover, the State submits that the admission of Johnson's video confession, when combined with the uncontroverted facts in footnote one of this Court's opinion, ultimately addresses Johnson's third and fourth arguments, that she was allegedly entitled to a self-defense and involuntary manslaughter charge. Specifically, this Court explained, via footnote one of its opinion, that Johnson "attacked the unarmed victim while the victim was seated in a friend's vehicle, 'pistol whipped' her, and ultimately shot her" adding that this account was "confirmed" by "two witnesses." State v. Johnson, Op. No. 27565, n.1 (filed August 19, 2015). Thus, these facts, which are uncontroverted, necessarily mean Johnson was not entitled to a jury charge on self-defense or involuntary manslaughter.⁶

to remand question regarding parole eligibility to administrative law judge and instead addressing merits of the claim "for the sake of judicial economy"); Southern Bell Tel. and Tel. Co. v. Hamm, 360 S.C. 70, 75 409 S.E.2d 775, 778 (1991) (addressing an issue on appeal "in the interest of judicial economy" "since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue.").

⁵ For a more complete discussion on this matter please consult pages 55-58 of the Appendix.

⁶ Specifically, the uncontradicted testimony established Johnson, by attacking the unarmed victim, pistol whipping and shooting her, could not meet the elements necessary for a jury charge on self-defense as "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). These same facts precluded Johnson from receiving a charge on involuntary

Finally, even if Johnson was correct on each of the arguments she now seeks to have addressed via remand, the fact remains that a jury would have never considered any verdict other than murder after: (1) viewing Johnson's video confession; (2) hearing both eyewitnesses; and (3) listening to Johnson's own testimony—specifically that she intended to shoot the victim. Thus, even if we were to assume the trial court erred as to any or all of these issues, any error would be harmless. See State v. Gathers, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt.”). As a result, the State submits the interest of judicial economy is best served by addressing these issues rather than remanding them to the court of appeals for further consideration.

IV. CONCLUSION

In conclusion, the State asks that Johnson's motion for remand be denied. Specifically, the State submits Johnson should not be rewarded by her failure to raise additional sustaining grounds to this Court, especially where those grounds are plainly meritless as discussed both above and as set out more fully in the Appendix. Further, in the event this Court disagrees with the State's suggestion that Johnson has abandoned the arguments contained within her brief to the court of appeals, we respectfully request that, in the interest of judicial economy, the Court address Johnson's remaining grounds and affirm Johnson's conviction and sentence.

manslaughter since attacking the unarmed victim, pistol whipping and shooting her would not meet either of the definitions of voluntary manslaughter, and there was no other evidence to support such an instruction. See State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (“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*.”) (emphasis added). Indeed, Johnson's actions were clearly unlawful and obviously were intended to cause death or great bodily injury. Likewise, because Johnson was not acting in self-defense as explained above, her use of the firearm was not lawful and therefore she could not receive a charge under the second definition of involuntary manslaughter. For a more complete discussion of these issues please consult pages 58-66 of the appendix.

Respectfully Submitted,

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Attorney General

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Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

August 31, 2015.

STATE OF SOUTH CAROLINA
In the Supreme Court

The State,

Petitioner,

v.

Brittany Johnson,

Respondent

Appellate Case No. 2013-002027

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

Opinion No. 27565
Heard March 4, 2015—Filed August 19, 2015

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return to Motion to Remand of Petitioner in the above referenced case has been served upon:

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

On this 31st day of August, 2015.



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

The Supreme Court of South Carolina

The State, Petitioner,

v.

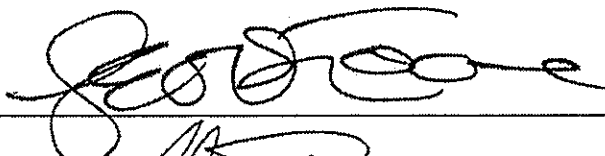
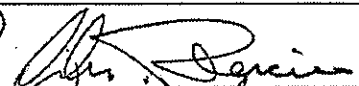
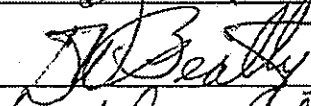
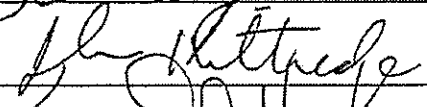
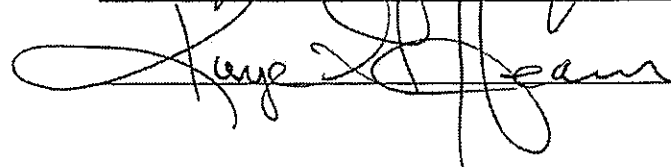
Brittany Johnson, Respondent.

Appellate Case No. 2013-002027

Lower Court Case No. 2008GS2603648

ORDER

The Motion to Remand filed by respondent is granted.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina

November 6, 2015

cc:

Jimmy A. Richardson, II, Esquire

Benjamin John Tripp, Esquire

Brendan Jackson McDonald, Esquire

The Honorable Melanie Huggins-Ward

The Honorable Jenny Kitchings

**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

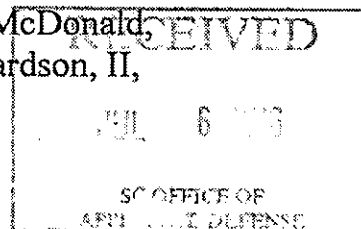
Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Unpublished Opinion No. 2016-UP-353
Submitted March 1, 2016 – Filed 2016-UP-353

AFFIRMED

Breen Richard Stevens, of Orangeburg; and Appellate
Defender Benjamin John Tripp, of Columbia, for
Appellant.

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



PER CURIAM: Brittany Johnson appealed her conviction for murder, arguing the trial judge erred in (1) admitting a statement she made to the police, (2) refusing to grant a mistrial, (3) refusing to charge the jury on self-defense, and (4) refusing to submit the charge of involuntary manslaughter to the jury. In 2013, this court issued an opinion reversing Johnson's conviction and remanding the matter for the new trial based solely on Johnson's arguments concerning the admissibility of her statement to the police. *State v. Johnson*, Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). The State petitioned for a writ of certiorari, and in 2015 the Supreme Court of South Carolina reversed this court's decision, holding the trial court's finding that Johnson lacked credibility was supported by the record and the admission of her statement to the police was therefore proper. *State v. Johnson*, 413 S.C. 458, 467-68, 776 S.E.2d 367, 371-72 (2015).

Johnson then moved to remand the case to this court pursuant to the procedure applied in *State v. Grovenstein*, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999), for a review of the issues raised in her appeal that were not addressed by this court in its 2013 opinion. The Supreme Court granted the motion and remanded the matter to this court. We affirm on the remaining issues that Johnson raised in her appeal.¹

1. We affirm the trial court's refusal to declare a mistrial based on Johnson's allegation that the jury engaged in premature deliberations. Johnson moved for a mistrial on the second day of her three-day trial immediately after the trial court received a note from the jury requesting a second opportunity to view the recording of Johnson's videotaped statement to the police.² Although "premature deliberations may affect the fundamental fairness of a trial,"³ the trial court acted within its discretion in finding the jurors' actions did not amount to misconduct that would compromise the jury's impartiality. See *State v. Carmack*, 388 S.C. 190, 198, 694 S.E.2d 224, 228 (Ct. App. 2010) ("The trial court has broad discretion in assessing allegations of juror misconduct' and unless such misconduct affects the 'jury's impartiality, it is not [of the type] as will affect the verdict.'" (quoting *State*

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² The note advised that all jurors agreed a second viewing was necessary.

³ *State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999).

v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 105 (1998)). Here, the note indicates only that the jury had trouble hearing the recording because of its poor sound quality, a problem the court itself had acknowledged immediately after the recording was played during the trial. There was no reason to believe the jurors had engaged in deliberations. *See Black's Law Dictionary* 519 (10th ed. 2014) (defining "deliberate" as "to *weigh and analyze* all the evidence after closing arguments" (emphasis added)).

2. We hold the trial court correctly denied Johnson's request to instruct the jury on self-defense. There was no evidence in the record to support a finding that Johnson was without fault in bringing about the difficulty. In her statement to the police, Johnson admitted she hit the victim when she approached the jeep in which the victim and the victim's friends were seated, and this admission supports the finding that Johnson was the initial aggressor. At trial, Johnson stated she could not remember the events that took place during her altercation with the victim; therefore, although her trial testimony is not consistent with her police statement, it does not provide evidence that she was without fault in bringing about the difficulty that led to the victim's death. Although a witness testified on Johnson's behalf that she saw the occupants of the jeep exit the vehicle and surround Johnson, this witness admitted she could not deny the allegation that Johnson struck the victim first. Because the record lacks evidence of at least one of the required elements of self-defense, Johnson was not entitled to a self-defense charge. *See State v. Santiago*, 370 S.C. 153, 161, 634 S.E.2d 23, 28 (Ct. App. 2006) (affirming the denial of a self-defense charge because "the record demonstrates as a matter of law the absence of at least one element of self-defense").

3. Finally, we affirm the denial of Johnson's request to charge involuntary manslaughter and reject her argument that she was entitled to this charge because of evidence that she was lawfully armed in self-defense and the victim's death occurred as the result of an accidental discharge of her gun when the two struggled over it. We are mindful of prior decisions in which the Supreme Court of South Carolina noted that evidence of a struggle over a weapon between a defendant and the victim supports an involuntary manslaughter charge. *See, e.g., State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) ("[T]he fact petitioner and [the victim] were struggling over the weapon is sufficient evidence for submission of an involuntary manslaughter instruction to the jury."); *State v. Patrick*, 289 S.C. 301, 305-06, 345 S.E.2d 481, 483-84 (1986) (stating the appellant's testimony that "the victim, apparently thinking that the appellant was going to shoot him, grabbed

the end of the barrel causing the gun to fire . . . constituted a sufficient ground for submitting the possible verdict of involuntary manslaughter to the jury"). However, we are compelled to affirm Johnson's conviction pursuant to *State v. Rivera*, 389 S.C. 399, 699 S.E.2d 157 (2010), a more recent decision from the Supreme Court of South Carolina.

In *Rivera*, the Supreme Court, reversing this court's unpublished opinion,⁴ agreed with the State that "[Rivera's] brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm[;] thus[,] he was not entitled to a charge on involuntary manslaughter." *Id.* at 403, 699 S.E.2d at 159; *see also State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011) (finding no evidence to support a finding that the defendant was "lawfully armed in self-defense at the time the fatal shot occurred" so as to be entitled to an involuntary manslaughter charge and noting, among other reasons to support this conclusion, that the defendant was "pursu[ing] [a] drug deal while armed with a loaded gun" and "brandished the gun and used it to pistol-whip Victim"); *State v. Gibson*, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) ("[R]egardless of whether [a murder defendant] was lawfully armed in self-defense, the essence of the involuntary manslaughter is the involuntary nature of the killing."). In the present case, although prior acrimonious dealings with the victim may have explained Johnson's decision to keep a gun on her person, the only reasonable inference from the evidence in the record is that Johnson approached the vehicle in which the victim was sitting and used her gun to pistol-whip the victim. There was no evidence that would support a finding that Johnson struck the victim in response to aggressive acts by the victim or the victim's companions; therefore, Johnson was not entitled to an involuntary manslaughter charge. *See Rivera*, 389 S.C. at 404, 699 S.E.2d at 159 (defining involuntary manslaughter as either "(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").

AFFIRMED.

HUFF, SHORT and THOMAS, JJ., concur.

⁴ *State v. Rivera*, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008).



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 22, 2016

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

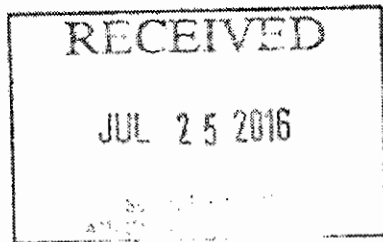
REMITTITUR

Re: The State v. Brittany Johnson
Lower Court Case No. 2008GS2603648
Appellate Case No. 2011-185926

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The exhibit being returned is: State's Exhibit #4 (DVD). Please sign attached copy of this letter and return to acknowledge receipt of this item.



Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Breen Richard Stevens, Esquire
Brendan Jackson McDonald, Esquire
Donald J. Zelenka, Esquire
Jimmy A. Richardson, II, Esquire
Benjamin John Tripp, Esquire
Robert Michael Dudek, Esquire

Receipt Acknowledgement:

Name _____

Date _____

Name: _____

Please print

Appellate Case No. 2011-185926

FORM 5

15CH

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Horry)JOHNSON, BRITTANY A. 344910)

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEATH CORRECTIONAL INSTITUTION
GREENWOOD, S.C. 29649
2. Name and location of Court which imposed sentence HORRY COUNTY
GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-26-03648 MURDER
 - (b) —

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) FEBRUARY 11, 2011 MANDATORY 30 YRS, NON-PAROLABLE
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. CONVICTION REVERSED AND REMANDED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. JUNE 26, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ADMISSION OF STATEMENT MADE TO POLICE AT TRIAL
- (b) REFUSING TO GRANT A MISTRIAL
- (c) REFUSING TO SUBMIT CHARGE OF INVOLUNTARY (SEE BACK OF PAGE)
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE INFORMATION PROVIDED IN RESPONSE TO #10 ABOVE.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Remand BACK TO APPELLS COURT
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. S.C. SUPREME COURT (AUGUST 20, 2015)
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. COURT OF APPEALS CONFIRMED CONVICTION
- ii. —
- iii. —
- iv. —

(d) the date of each such disposition:

- i. MARCH 1, 2016
- ii. —
- iii. —
- iv. —

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. —
- ii. —
- iii. —
- iv. —

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES (COURT OF APPEALS)

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. ALL OF THE GROUNDS SET FORTH IN RESPONSE #10
- ii. —
- iii. —

(b) the proceedings in which each ground was raised:

- i. STATE PETITIONED FOR A REHEARING
- ii. PETITIONER PETITIONED FOR CASE TO BE REMANDED
- iii. —

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. JAMES GALTMORE; Horry County Public Defender
P.O. Box 1666, Conway, S.C. 29526
- ii. RONALD HAZZARD OF GEORGETOWN, S.C.; Horry County
PUBLIC DEFENDER P.O. Box 1666; Conway, S.C. 29526
- iii. BREEN STEVENS; SCCID 1330 LADY ST Suite 401
BENJAMIN JOHN TRIPP; SCCID 1330 LADY ST COLA, S.C.
29201

(b) the proceedings at which each such attorney represented you:

- i. ARRAIGNMENT AND PLEA
- ii. TRIAL AND SENTENCING
- iii. Appeal

19. State clearly the relief you seek in filing this application:

RECONSIDERATION OF VERDICT, LENGTH OF SENTENCE, AND/OR
ULTIMATE DISMISSAL AND RELEASE FROM CUSTODY OF S.C.
DEPT OF CORRECTIONS.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Horry)

116 6535
 VERIFICATION

I, BRITTANY ALEXIS JOHNSON, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Brittany Johnson

SWORN to and subscribed before me this 29th

day of September, 2016

Dandra S. Hill (L.S.)
 Notary Public

My Commission Expires Jan. 8, 2023

2016 OCT 11 PM 1:56

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

16

6535

I, BRITTANY ALEXIS JOHNSON, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Brittany Johnson
Applicant

SWORN or affirmed to and subscribed before me this

29th day of September, 2016.

Danah K. Hall
Notary Public

My Commission Expires:

Jan. 4, 2023

2016 OCT 11 PM 1:56

10.

C. . . . MANSLAUGHTER TO JURY

d. REFUSAL TO CHARGE JURY ON SELF-DEFENSE.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Brittany A. Johnson,	)	Case No.: 2016-CP-26-06535
S.C.D.C. No. 344910,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION TO DISMISS
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2017 MAR -7 11:4:15
Horry County, SC
CLERK OF COURT

In response to the application for post-conviction relief filed by Brittany A. Johnson (Applicant) on October 11, 2016, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2008 term of the Horry County Grand Jury for murder (2008-GS-26-03648). As summarized in Respondent's appellate filings:

"[On June 24, 2008, Monica Burroughs ("Victim") was discussing designer sunglasses with her friend, Teresa Cox, and stepsister, Joanne Davis, while sitting in Cox' 1999 Jeep Grand Cherokee outside of Victim's residence.] The conversation then shifted, when both Cox and Davis observed [Applicant] approaching the Grand Cherokee on the passenger side.

Cox, who believed [Applicant] was armed with a knife, and Davis, who recognized [Applicant] was armed with a gun, watched as [Applicant] attacked victim with the gun as if she were pistol-whipping her. Reacting to the attack, Victim . . . blocked [Applicant's] blows while simultaneously trying to defend herself and get out of the car. 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 [Applicant], when they heard a shot. Next, Cox and Davis observed Victim running away from the Cherokee. According to both women, [Applicant] then began screaming "I told you I was

going to get you, bitch” which she repeated four to five times before she ran away. After Johnson left, both Cox and Davis ran to Victim who was in the bushes beside her residence. According to both women, Victim, who was unarmed, had been shot in the chest and was bleeding profusely. She asked both women why she had been shot.

State v. Johnson, Brief of Petitioner 2-4 (citations omitted). Burroughs died from her injuries.

Id. Applicant was apprehended by the United States Marshals Service in Darlington County on July 2, 2008. Id.

Ronald Hazzard, Esquire, represented Applicant, and Scott A. Graustein, of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. Applicant proceeded to trial on February 7, 2011, before the Honorable Edward B. Cottingham and a jury. The jury began its deliberations on February 9, 2011. The jury found Applicant guilty as indicted on February 11, 2011. Judge Cottingham sentenced Applicant to imprisonment for a term of 30 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Breen Richard Stevens, Esquire, of the Office of Appellate Defense. Brendan J. McDonald, of the South Carolina Attorney General’s Office, represented the State. Four questions were presented to the Court of Appeals:

- 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.

State v. Johnson, Initial Brief of Respondent at vi. The parties proceeded to oral arguments on May 14, 2013. By unpublished opinion decided June 26, 2013, the South Carolina Court of Appeals reversed Applicant's conviction and remanded the case on the first question;¹ the Court of Appeals declined to address the remaining issues. State v. Johnson, Op. No. 2013-UP-288 (S.C.Ct.App. filed June 26, 2013). Respondent petitioned for rehearing, which was denied by order filed August 22, 2013.

Respondent petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated September 11, 2014. Respondent raised three questions to the Supreme Court:

- I. Whether the appellate panel erred in reversing the trial court's ruling in a Jackson v. Denno, 378 U.S. 368 (1964) hearing where the trial court determined, as a factual matter, that Johnson's testimony during the Denno hearing, specifically her testimony that she allegedly invoked her right to counsel was "simply not plausible" especially since the trial court was not required to accept Johnson's testimony as true under state law.
- II. Even assuming Johnson's testimony from the Jackson v. Denno, 378 U.S. 368 (1964) hearing is true, whether the appellate panel erred in reversing the trial court's ruling where Johnson was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel.
- III. Whether the appellate panel erred when it failed to determine whether Johnson had shown she was prejudiced as required by the standard of review,

¹ The Court did not elaborate upon its reasoning, but found the trial court erred in admitting Johnson's inculpatory statement to police, citing "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 during a Jackson v. Denno 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), and State v. Wannamaker, 346 S.C. 493, 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.").

especially since multiple eyewitnesses saw Johnson shoot Victim and Johnson admitted to shooting Victim in her testimony at trial.

State v. Johnson, Brief of Petitioner at viii. The parties proceeded to oral arguments on March 4, 2015. By unanimous opinion decided August 19, 2015, the Supreme Court reversed the decision of the Court of Appeals, finding that “[b]ecause the trial court found [Applicant’s] testimony that she actually invoked her right to counsel was ‘simply not plausible’—or lacked credibility—[Applicant] cannot satisfy the first prong of inquiry.” State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 372 (2015).

On August 20, 2015, Applicant filed a motion to remand the matter to the Court of Appeals on grounds that the appellate court did not rule on three of the four issues she raised. The Supreme Court granted the motion by order dated November 6, 2015. On remand, without further argument or briefing, the Court of Appeals affirmed Applicant’s conviction by unpublished opinion, holding:

1. We affirm the trial court’s refusal to declare a mistrial based on [Applicant’s] allegation that the jury engaged in premature deliberations. . . . There was no reason to believe the jurors had engaged in deliberations. . . .
2. We hold the trial court correctly denied [Applicant’s] request to instruct the jury on self-defense. There was no evidence in the record to support a finding that [Applicant] was without fault in bringing about the difficulty. . . .
3. Finally, we affirm the denial of [Applicant’s] request to charge involuntary manslaughter and reject her argument that she was entitled to this charge because of evidence that she was lawfully armed in self-defense and the victim’s death occurred as the result of an accidental discharge of her gun when the two struggled over it.

State v. Johnson, Op. No. 2016-UP-353 (S.C.Ct.App. filed July 6, 2016). The Remittitur was issued on July 22, 2016.

II.

In her post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. "Admission of statement made to police at trial"
2. "Refusing to grant a mistrial"
3. "Refusing to submit charges of involuntary manslaughter"
4. "Refusal to charge jury on self-defense"

Applicant requests relief as follows:

- "Reconsideration of verdict, length of sentence, and/or ultimate dismissal and release from custody of S.C. Dept. of Corrections."

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

The application should be dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Applicant alleges the same four grounds as were raised on appeal. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoc v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegations were raised at trial and thereafter on appeal. Applicant makes no other allegations of error. Therefore, the application should be dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

IV.

Respondent denies each allegation not expressly admitted, qualified, or explained.

[Conclusion and signature on following page]

V.

WHEREFORE, Respondent moves to summarily dismiss the application because it fails to state a claim upon which relief can be granted.

Respectfully submitted,

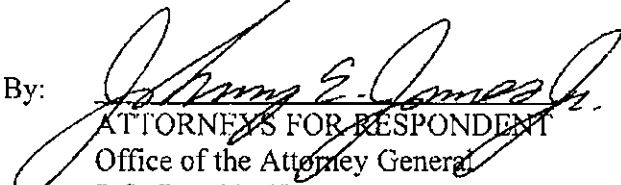
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

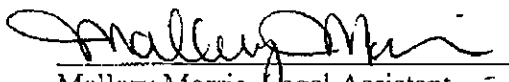
3 Aug., 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2016-CP-26-6535
BRITTANY A. JOHNSON, #344910,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402

DATED this 3rd day of August, 2017.


 Mallory Morris, Legal Assistant
 For Respondent

2017 AUG -7 PM 4:15
 U.S. MAIL
 CHARLESTON, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2016-CP-26-06536

BRITTANY A. JOHNSON,)

Applicant,)

Transcript of Record

vs.)

MARCH 26, 2019

STATE OF SOUTH CAROLINA,)

Respondent.)

B E F O R E:

Honorable William H. Seals, Jr.
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

James K. Falk, Esquire
Attorney for Applicant

Lindsey A. McCallister, Esquire
Attorney for State

Sallie Beth Todd
Circuit Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
RONALD HAZZARD				
By Mr. Falk	6			
By Ms. McAllister		21		
BRITTANY JOHNSON				
By Mr. Falk	28			

Certificate of Court Reporter				34

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
(THERE WERE NO EXHIBITS MARKED DURING THIS HEARING.)				

1 **THE COURT:** The State will call your case.

2 **MS. MCCALLISTER:** Thank you, Your Honor. Brittany
3 Johnson versus the State of South Carolina, 2016-CP-26-06535.
4 Your Honor, Ms. Johnson was indicted in September of 2008 by
5 the Horry County Grand Jury for one count of murder. She was
6 represented on those charges by Ronald Hazzard and the case
7 was prosecuted by Scott Graustein of the 15th Circuit
8 Solicitor's Office. Ms. Johnson proceeded to trial on
9 February 7th, 2011 before The Honorable Edward B. Cottingham
10 and a jury.

11 The jury began its' deliberations on February 9th, 2011
12 and she was found guilty as indicted on February 11th, 2011.
13 Judge Cottingham then sentenced Ms. Johnson to imprisonment
14 for a term of 30 years. She filed a timely notice of appeal
15 and a direct appeal was perfected by Breen Richard Stevens,
16 who was then of the South Carolina Commission on Indigent
17 Defense, Office of Appellant Defense. Four questions were
18 presented to the Court of Appeals involving whether the trial
19 court correctly ruled in the Jackson v. Denno hearing that Ms.
20 Johnson's invocation of her right to counsel was not
21 plausible; whether the trial court abused its' discretion in
22 denying counsel's motion for a mistrial based on alleged
23 premature deliberations; whether the trial court abused its'
24 discretion in failing to charge the jury with self-defense;
25 and whether the trial court abused its' discretion in failing

1 to charge the jury regarding involuntary manslaughter.

2 Oral arguments were held on May 14th, 2013 and the South
3 Carolina Court of Appeals reversed the conviction and remanded
4 on the first question by opinion decided June 26th, 2013. The
5 State petitioned for rehearing, which was denied August 22nd,
6 2013 and then petitioned the Supreme Court of South Carolina
7 for a Writ of Certiorari, which was granted on September 11th,
8 2014. The parties again proceeded to oral arguments in the
9 Supreme Court on March 4th, 2015 and by opinion decided August
10 19th, 2015, the Supreme Court reversed the decision of the
11 Court of Appeals.

12 Ms. Johnson then filed a motion to remand the matter to
13 the Court of Appeals because they did not rule on the three
14 other issues. On remand without further argument or briefing,
15 the Court of Appeals affirmed her conviction by an unpublished
16 opinion filed July 6th, 2016 and the remittitur was issued on
17 July 22nd, 2016. Ms. Johnson then timely filed this
18 application for post-conviction relief on October 11th, 2016.
19 She is represented by Mr. Jim Falk and both Ms. Johnson and
20 Mr. Falk are present in the courtroom today.

21 Your Honor, initially the State filed a return and a
22 motion to dismiss arguing that the grounds in the application
23 were issues for direct appeal and that it did not state a
24 claim that was appropriate in post-conviction relief. Mr.
25 Falk then amended the PCR application in November of 2018

1 raising three issues; that there was evidence introduced at
2 trial that would reduce, mitigate, excuse or justify the
3 homicide and therefore, trial counsel was ineffective for
4 failing to object to the inferred malice charge; that trial
5 counsel provided ineffective assistance by not objecting to
6 seek the truth language included in the Court's jury charge
7 and that trial counsel provided ineffective assistance by
8 failing to interview a man named Joseph Gagum, who would have
9 testified to the victim's role in escalating the hostilities
10 between her and Ms. Johnson. And so, those are the three
11 issues that the State is prepared to go forward on today.

12 **THE COURT:** All right.

13 **MS. MCCALLISTER:** And at this time, I will turn it over
14 to Mr. Falk.

15 **THE COURT:** All right. Mr. Falk?

16 **MR. FALK:** Thank you, Your Honor.

17 **THE COURT:** Yes, sir.

18 **MR. FALK:** I do think that the issue that we're going to
19 focus on is the Belcher type case issue. This case was --
20 went to trial in 2011. So, that's two years after Belcher and
21 I believe that's the issue that we're going to rely on most
22 heavily, but I want to not ---

23 **THE COURT:** I understand.

24 **MR. FALK:** --- disregard the other two issues that I
25 raised. At this time, we'd like to call Mr. Hazzard to the

1 stand.

2 THE COURT: All right.

3 REPORTER'S NOTE: (Mr. Hazzard sworn by the clerk).

4 RONALD WILLIAM HAZZARD, HAVING
5 BEEN SWORN TESTIFIES AS FOLLOWS:

6 CLERK: Please have a seat and state your name for the
7 Court?

8 MR. HAZZARD: Yes, ma'am. Ronald William Hazzard.
9 Hazzard is spelled H-A-Z-Z-A-R-D.

10 DIRECT EXAMINATION OF RONALD WILLIAM HAZZARD BY MR. FALK:

11 Q: Hello, Mr. Hazzard.

12 A: Good morning, sir.

13 Q: Good morning. I was reading back over the transcript
14 last night and at some point, there was a discussion that you
15 had because you had to know the witness was subpoenaed to go
16 to court that day; did you not?

17 A: Yes, sir, a gentleman by the name of Joseph Gagum, I
18 believe.

19 Q: And I spelled it G-A-G-H-U-M, but they spelled it a
20 different way in the transcript. Do you know how it's
21 supposed to be?

22 A: In the transcript I believe it's misspelled, because they
23 have it G-A-G-U-N, but the -- knowing the folks in Conway like
24 I do over the better part of 30 years, I'm pretty sure his
25 name is Gagum, G-A-G-U-M.

1 Q: Okay. And can you tell me why was he on your witness
2 list?

3 A: I do not recall where the information came from, but in
4 reviewing the transcript, there's no question that we were of
5 the belief that Mr. Gagum would testify that Ms. Cox, Ms.
6 Davis and the decedent, Ms. Burroughs, were sitting in the
7 parking lot on that day with the intention of jumping Ms.
8 Johnson.

9 Q: Okay. And again, just to sort of briefly how the
10 shooting occurred here; the car pulls up and another car pulls
11 up and the doors open, four people get outside of the car and
12 that's the victim and Ms. Davis and Ms. Cox?

13 A: No, a lot different than that. This incident occurred
14 June of 2008. The bad blood, such as it was, between Ms.
15 Johnson and the decedent, Ms. Burroughs, went back more than a
16 year prior to that. They were involved in a love triangle. A
17 gentleman by the name of Franklin Pyatt was living with Ms.
18 Burroughs, but he was also having relations with Ms. Johnson,
19 who at the time, when it started, I believe was 16 years old.
20 Ms. Burroughs apparently had an issue with that. There had
21 been incidents back and forth that Ms. Johnson testified to at
22 trial, between her and Ms. Burroughs. And I believe either in
23 November or December of 2007, Ms. Johnson had testified that
24 Ms. Burroughs had brandished a gun and that subsequent to
25 that, Ms. Johnson began carrying a gun for the purpose of

1 self-defense.

2 The testimony regarding what happened on the day of the
3 incident was that Ms. Davis went over, woke Ms. Burroughs up
4 at 1:14 P.M. They lived right across the street from each
5 other in the Huckabee Heights projects, right across the
6 parking lot from each other. That sometime subsequent to
7 that, between 1:14 P.M. and 2:14 P.M., Teresa Cox -- Teresa
8 Cox-Dozier in the transcript, had called and said that she was
9 going to stop by. She comes by and then the three of them,
10 according to Ms. Davis and Ms. Dozier's testimony, the three
11 of them sit in her car out in front of Ms. Burroughs
12 apartment. Their testimony was that, and when I say their, I
13 mean Ms. Davis and Ms. Dozier, was that while they're sitting
14 out in the car on this June, late June day, Ms. Johnson comes
15 up, begins to attempt to pistol whip Ms. Burroughs. Ms.
16 Burroughs jumps out of the car, the other two women jump out
17 of the car, there was some kind of struggle, then a gun
18 discharges and Ms. Burroughs is fatally injured.

19 Another witness, Ms. Skipper, Tameka Skipper, her
20 testimony is different. Her testimony was that she was -- she
21 saw Brittany Johnson going down the sidewalk heading towards
22 Ms. Davis' apartment, because Ms. Davis was again, the
23 neighborhood bootlegger. And as Ms. Johnson is walking, the
24 car doors fly open, four people jump out, they surround Ms.
25 Johnson, there's a struggle and then a gun discharges.

1 Q: Okay.

2 A: So, no, a car just didn't pull up and people jump out.

3 Q: I think I was referring to the way Ms. Skipper described
4 it as break lights coming on and four doors opening up and the
5 women all jumped out.

6 A: Yes, sir.

7 Q: Now, what was Mr. Gagum going to testify to on this; what
8 was your understanding, I mean why you had him on the witness
9 list -- on your witness list?

10 A: My understanding was that he was going to testify that
11 Teresa Cox-Dozier had made a statement in his presence that
12 was different from what she told the police.

13 Q: And why did you decide not to call him as a witness?

14 A: I do not have an independent recollection of my
15 interaction with Mr. Gagum that day. Based on the transcript,
16 I know that he was on the witness list, he had been
17 subpoenaed, he did appear. Then when it was time for him to
18 testify, he wasn't there. We called Brittany out of order as
19 a result, that by the time Brittany's direct and cross
20 examination were complete, Mr. Gagum had reappeared. There
21 was, I believe, a break. I spoke with Mr. Gagum, possibly I
22 and my investigator spoke with Mr. Gagum and subsequent to
23 that, I told the Court that we did not wish for him to
24 testify. But I do not recall what my discussion with him was.

25 Q: Okay. I think this might have come up in the hearing

1 yesterday. At some point during the closing comments but --
2 and so Judge Cottingham kind of does different procedures when
3 he is charging the jury; is that correct?

4 A: Yes, sir.

5 Q: He likes -- it's his preference to read his charge first
6 and let counsel make their arguments and then he may clean up
7 some stuff at the end; is that right?

8 A: Unfortunately, yes, sir.

9 Q: Okay. One of the -- so, on page 402 of the transcript,
10 lines 22 to 25, there is the language about seeking the truth.

11 A: Court's indulgence, Your Honor.

12 THE COURT: Yes, sir.

13 BY MR. FALK:

14 A: I've got the record on appeal on my Ipad, it is going to
15 take me a little while to get to 402.

16 Q: Let me see if I can help you on that page. On the record
17 on appeal, it would be 374?

18 A: Thank you, sir.

19 Q: Can I hand you up a copy of the trial transcript?

20 A: Sure. And it's 402 in the trial transcript?

21 Q: 402 at the bottom of the page.

22 A: Yes, sir.

23 Q: And did you consider objecting to that language as it
24 being burden-shifting?

25 A: At that time, I cannot say I did, sir.

1 Q: Okay. Another -- this is sort of an aside, I guess.
2 When I was reading through it last night, you had asked for a
3 King instruction and I believe you were probably -- because
4 this was a case with multiple -- there was a lessor included
5 offense?

6 A: Yes, sir.

7 Q: I just wanted -- and so, the judge did not charge King
8 when he did it the first go around. Then you objected or you
9 brought that to his attention, and he agreed. If you could
10 look at page 451 of the transcript, lines 12 through 17.

11 A: Yes, sir.

12 Q: Is that kind of what you were looking for?

13 A: Kind of.

14 Q: You know, when you look in the books, they talked about a
15 King charge. It's, you know, if you don't -- if you agree
16 with that, you don't have to -- and you got to go with the
17 other one.

18 A: Yes, sir, I probably should have -- I don't recall
19 whether I gave him the actual language from King and King's
20 Progeny. If I did, I should have objected based on the way
21 that he said what he said. But I guess at that point, I was
22 just so happy to get anything. I don't know.

23 Q: All right. Let me go -- let me sort of take you back to
24 some of your testimony. Already when you're sort of setting
25 the stage for what was going on in this case. So, there was

1 testimony going back over a year of some ill will between the
2 victim, Ms. Burroughs, and Ms. Johnson; is that correct?

3 A: Yes, sir.

4 Q: And -- and you had talked about the love triangle that
5 was going on?

6 A: Yes, sir.

7 Q: And some threats that Ms. Burroughs made and at one point
8 she brandished a -- a gun; is that correct?

9 A: Yes, sir. There were verbal -- based on the testimony,
10 there were verbal threats, there was a physical altercation,
11 there was the brandishing of a gun by Ms. Burroughs and what I
12 was trying to paint the picture and get across, was the
13 apparent, inevitable escalation, and in a way of trying to set
14 up a self-defense claim.

15 Q: If I could just call your attention any you have the
16 transcript up there, it's page 341, line 17 through 19? 341.

17 A: Yes, sir.

18 Q: That's the language that you're talking about; is that
19 correct?

20 A: Yes, sir, with regard to Ms. Burroughs apparently telling
21 Ms. Johnson, you know, stay away from Putty, Franklin, the
22 boyfriend and then her reaching into the purse and showing a
23 gun in her purse. Ms. Burroughs showing a gun in her purse.

24 Q: And that's on Ms. Johnson's direct testimony?

25 A: Yes, sir.

1 Q: And then there's also an area that I don't think the
2 judge let you get too far into and that was that there was
3 actually a fight between Putty and Ms. Johnson; wasn't that
4 true?

5 A: There was -- there were several fights between Putty and
6 Ms. Johnson. There was at least one fight that involved
7 Putty, Ms. Johnson and Ms. Burroughs, where it was basically
8 two on one.

9 Q: And this was again prior to the June 24th date, right?

10 A: Yes, sir.

11 Q: Okay. And that's what she's talking about in her
12 testimony, maybe on 346, line 2, because she had a specific
13 memory of why that -- what that particular date was?

14 A: She's obviously -- on page 346 starting at line 2, she
15 was obviously talking about -- she being Brittany, is
16 obviously talking about a physical altercation between she and
17 Putty, Putty Pyatt.

18 Q: Okay.

19 A: I am not sure whether she's talking about one at that
20 point that involves her, Putty Pyatt and Monica Burroughs.

21 Q: Well, was she trying to assert that Burroughs was sort of
22 threatening Putty to have this fight with her?

23 A: By my recollection and reading the transcript, it went
24 both ways. According to Brittany's testimony, there were
25 times when Ms. Burroughs wanted Mr. Pyatt to physically harm

1 Ms. Johnson and there were times when Mr. Pyatt would set her
2 up, call her over to the house, and then have Ms. Burroughs
3 there and say, you know, beat her ass. You know, pardon my
4 French. So, it went both ways, from my recollection.

5 Q: Let's go back to Skipper testimony. Ms., what was her
6 first name?

7 A: Tameka Skipper.

8 Q: Tameka Skipper. What was her testimony as far as how
9 everybody met on the 24th?

10 A: Tameka Skipper testified that on the early afternoon of
11 the 24th, she came home. I'm not sure where she'd been, but
12 she came home, and Brittany and Brittany's son were sitting on
13 her porch. That she opened the door, let Brittany and her son
14 come in. She subsequently said that she wanted to go get
15 something to eat and walk to Subway. She and another woman by
16 the name of Iesha, left. She gave Brittany her -- the key to
17 her home and said we'll be back. Brittany had gone out across
18 the parking lot and was talking to a group of people. She
19 then came back. Tameka and Iesha left. When Tameka and Iesha
20 returned a short time later, the door was locked. Apparently,
21 Brittany and her son were asleep, because Tameka had to beat
22 on the door to get into her house. Brittany woke up, opened
23 the door for her. Brittany then said, I'm going to go down to
24 Joann Davis', down to the bootleggers and I want to get like a
25 Philly blunt, because she had some marijuana. Brittany was

1 really big in self-medication for reasons we tried to make
2 obvious in the trial. That she was walking to Ms. Davis'
3 place; Ms. Davis' place was basically directly across from the
4 victim, Monica Burroughs, apartment and that Tameka saw the
5 '99 Grand Cherokee that had Ms. Cox, Ms. Davis and the
6 decedent, Ms. Burroughs in it and apparently a fourth person
7 by the name of Liz, who I had never heard of before the day of
8 the trial. Nobody had ever heard of her. That the car was
9 backing up. When Brittany came closer, brake lights go on,
10 the car stops according to Tameka Skipper, all four doors fly
11 open; four people jump out; they converge on Brittany; there
12 is then an altercation; then a gunshot.

13 Q: That's -- if you look on page 289, really that page and
14 going through 290?

15 A: Yes, sir.

16 Q: There's one thing I wasn't sure what she was talking
17 about and maybe you might can recall, looking at 289, let's go
18 to line 3. When you came out, were you looking for Brittany
19 and the answer was I glanced, you know, just sort of just
20 glanced; uh-huh (affirmative response). So what caught your
21 eye and caused you to look in that direction; because I seen
22 Brittany there and I seen the car backing out and I seen the
23 brake lights and then the door flew open. Okay. So, you know
24 what I'm saying, that kind of put me on edge right there. So,
25 what did you interpret her to mean, putting her on edge?

1 **A:** That she and everybody else in the projects knew what the
2 issues that Ms. Burroughs had with Ms. Johnson. That the
3 escalation of those issues from Ms. Burroughs side ramped up
4 once it became common knowledge that Brittany had become
5 pregnant at some point within the preceding three months with
6 Franklin "Putty" Pyatt's child.

7 **Q:** And then on the next page, she talks about she's running
8 towards that group of girls; is that correct?

9 **A:** You mean she being Ms. Skipper?

10 **Q:** Ms. Skipper, yes?

11 **A:** Yes, sir.

12 **Q:** And what was the -- did you figure out were they going to
13 assist Ms. Johnson?

14 **A:** Well, yes, sir, at some point, I believe Ms. Skipper
15 testified that her reason for running towards this was that
16 whatever was between Monica, Monica, Ms. Burroughs, and
17 Brittany was between them, but she wasn't going to let these
18 other three women jump on and pile on her and attack her.

19 **Q:** Now, Ms. Davis was one of the State's witnesses; is that
20 correct?

21 **A:** Yes, sir.

22 **Q:** If you could look at her testimony on page 187, lines 13
23 through 16?

24 **A:** Yes, sir.

25 **Q:** So, there she's saying that Ms. Burroughs and Ms. Johnson

1 are hand to hand?

2 A: Yes, sir.

3 Q: And what -- what did you -- what did that mean, that the
4 jury could conclude from that?

5 A: I'm not sure what the jury concluded. The point I was
6 trying to get across was that this wasn't an execution; that
7 this was a fight and there was possibly or more likely an
8 accidental discharge of the gun; trying to get away from the
9 concept of intent and malice. I tried to point out by the --
10 by the recorded statements, that Ms. Cox-Davis, Teresa Cox-
11 Davis, or Teresa Cox-Dozier and Joann Davis had given to the
12 police immediately after the incident, when they both said
13 that they did not believe it was intentional. I was trying to
14 get that across.

15 Q: Because then Ms. Davis, this is the State's witness again
16 on the bottom of page 189, she's saying that they're tussling,
17 and they're hand to hand?

18 A: Yes, sir, line 23 and 24, yes, sir, on page 189.

19 Q: Now on cross examination, you were asking Ms. Davis and I
20 guess you were challenging her with the statement she had
21 given to the police and I'm on page 201, lines 21 through 25?

22 A: Yes, sir.

23 Q: Okay. And that is more -- this is, Ms. Davis was one of
24 the women in the car; is that the same Ms. Davis?

25 A: Yes, sir, that's Joann Davis. That's the bootlegger that

1 Brittany was going to go see, who lived directly across the
2 street from Ms. Burroughs, who unbeknownst apparently to
3 Brittany, Ms. Davis was already in the car with Ms. Burroughs
4 and Ms. Cox-Dozier.

5 Q: And it was her testimony that she didn't think Ms.
6 Johnson, and she's a witness to this and she's testifying that
7 she didn't think Ms. Johnson came over there to shoot Ms.
8 Burroughs; is that right?

9 A: Yes, sir, that's what she told the police.

10 Q: Did Ms. Dozier have a similar view of the facts as far as
11 there were a close hand to hand or ---

12 A: Now, that I don't recall. It's definitely in the
13 transcript as far as what she told the police, because there
14 was a definite demarcation between what they told the police
15 immediately after and what they, they being Ms. Cox-Dozier and
16 Ms. Davis, testified to. But as I recall, Ms. Cox-Dozier was
17 the driver of the car; she was the person who had driven over
18 there, parked in front of Ms. Burroughs place. They are all
19 sitting in the car. She said, I believe, that however the
20 struggle between Ms. Burroughs and Brittany began, that she
21 didn't think that Brittany even knew that she had shot her.
22 She thought possibly that Brittany thought that she had fired
23 the gun in the air, if I remember correctly. One of them said
24 that, either Ms. Dozier or Ms. Davis. I think it was Ms.
25 Dozier.

1 Q: So, you would agree that there was plenty of testimony by
2 the State's witnesses or the State's witnesses brought out by
3 your cross examination and by Ms. Johnson that there was some
4 pre-existing ill will and malice or ill will between Ms.
5 Burroughs and Ms. Johnson prior to the shooting?

6 A: Yes, sir.

7 Q: And that's -- and you would agree that that might be the
8 type of evidence that would tend to reduce, mitigate or excuse
9 or somehow justify the homicide at some level?

10 A: Yes, sir.

11 Q: Okay. And You would agree that on page 405, lines 12
12 through 23, the Court gave the inferred malice charge?

13 A: Court's indulgence, Your Honor?

14 THE COURT: Uh-huh (affirmative response).

15 BY MR. FALK:

16 A: Yes, sir, that is correct.

17 Q: Okay. And there was no -- I couldn't really tell how
18 much of a charge conference went on ahead of time. Did you
19 know that he was going to charge inferred malice?

20 A: I do not recall.

21 Q: Okay. But you did not object to the charge?

22 A: No, sir. Looking back at the transcript, I failed to
23 object and looking back at it, I clearly should have objected,
24 in my opinion.

25 Q: So, that wasn't a strategy decision then was it?

1 A: No, sir.

2 Q: Maybe should have done it kind of thing?

3 A: Yes, sir.

4 Q: I'm almost done here. I'm looking at page 361 of your
5 direct examination of Ms. Johnson.

6 A: Yes, sir.

7 Q: Okay. You had asked her whether or not she intentionally
8 caused the death of Monica Burroughs; is that correct?

9 A: Yes, sir.

10 Q: Okay. And the judge put the brakes on it?

11 A: Yeah, he definitely put the brakes on. Not only -- and I
12 still to this day, I'm not the world's greatest trial
13 attorney, but I still to this day don't know how you ask
14 somebody what their intention was without asking them what was
15 your intention? And not only did he stop me from asking her
16 what was her intention with the gun, he then told the jury
17 that you've been violating the rules for the last 30 minutes,
18 which I probably should have objected to that statement having
19 been made to the jury, but, yes, sir, to answer your question.

20 Q: Were you in a position that you could have possibly
21 proffered that testimony?

22 A: Yes, sir, I should have proffered that testimony to
23 protect the record and I don't see in the transcript that I
24 did that.

25 Q: Okay. One moment please. I have no further questions.

1 **THE COURT:** All right.

2 **CROSS EXAMINATION OF RONALD WILLIAM HAZZARD BY MS.**

3 **MCCALLISTER:**

4 **Q:** Mr. Hazzard, you've summarized a little bit of the
5 testimony that was given by the various witnesses; Ms. Cox-
6 Dozier, Ms. Davis and Ms. Skipper?

7 **A:** Yes, ma'am.

8 **Q:** And you said, I believe, on your direct examination that
9 there was a difference between what they testified to at trial
10 and what was in their statements to the police; is that
11 correct?

12 **A:** Yes, ma'am.

13 **Q:** Okay. And you used their statements to the police to
14 impeach their testimony at trial, correct?

15 **A:** I gave it my best shot, yes, ma'am.

16 **Q:** Okay. And at trial though, Ms. Cox-Dozier and Ms. Davis
17 testified -- well, I think there were two main things that
18 were different. They testified that while there was a hand to
19 hand struggle, the shot wasn't fired until Ms. Johnson and Ms.
20 Burroughs got some separation, correct?

21 **A:** To me, the whole thing was confusing and kind of
22 contradictory; both between the prior statement and the
23 statement at trial, between their two statements of how it
24 happened at trial, between direct and cross examination. The
25 transcript will speak for itself on that, but yes, there was

1 definitely some testimony that there had been some separation
2 and then the shot was fired and then there was testimony that
3 there wasn't so much separation and that they were struggling
4 over the gun. So ---

5 Q: Okay.. And then there was also testimony from Ms. Cox-
6 Dozier and Ms. Davis that after she shot, Ms. Johnson yelled,
7 I told you I would get you, right, multiple -- she yelled that
8 multiple times?

9 A: Four to five times, yes, ma'am.

10 Q: And then there was also testimony about the fact that Ms.
11 Johnson then fled the scene and fled the area, correct?

12 A: Yes, ma'am.

13 Q: And she wasn't apprehended that day; it was a week or so
14 later, correct?

15 A: Approximately nine days later in Darlington, South
16 Carolina.

17 Q: Okay. And she was arrested by the U.S. Marshalls,
18 correct?

19 A: That is my understanding, yes, ma'am.

20 Q: So, there was testimony at trial, which if the jury
21 believed it, that she had yelled out that she -- I told you I
22 was going to get you and then she fled from the scene and she
23 admitted that she didn't come back and say what happened, even
24 though her momma wanted her to, correct?

25 A: Yes, ma'am.

1 Q: Okay. And I believe there was also -- the testimony that
2 Ms. Burroughs had kind of brandished a gun or shown a gun to
3 Ms. Johnson, that came from Ms. Johnson herself, correct?

4 A: Yes, ma'am.

5 Q: There was no testimony from independent witnesses that
6 Ms. Burroughs had -- had pointed a gun at Ms. Johnson at some
7 point?

8 A: No, ma'am.

9 Q: Okay. And I think you testified that Mr. Gagum, is that
10 how you say it, Gagum?

11 A: Gagum.

12 Q: Mr. Gagum, he was on your witness list and you kind of
13 had a little bit of an issue of tracking him down on the
14 actual day of trial, but you were able to get him there and
15 you could have called him as a witness, correct?

16 A: In reviewing the transcript it appears that's what
17 occurred. In reviewing the transcript, I told the Court that
18 Mr. Gagum had been there that -- earlier that day, but when it
19 was time for him to testify, I turned around, because all of
20 the witnesses were sequestered, so when whoever was assisting
21 me went to get him, he was gone when it was time for him to
22 testify. I brought that to the Court's attention. Ms.
23 Johnson was called out of order. Apparently by the time her
24 testimony was complete, Mr. Gagum was there. I believe there
25 was a break that was taken. Based on the transcript and

1 again, I do not have an independent recollection, but
2 apparently, I spoke with Mr. Gagum and subsequent to speaking
3 with him, chose not to call him. Perhaps I should have put
4 him up, because the whole issue was this. Again, he was going
5 to contradict what Teresa Cox-Dozier had said.

6 Q: Right.

7 A: And so the Court had some issue regarding that and the
8 limits to his testimony in that regard. I probably should
9 have put him on the stand and proffered his testimony to see
10 what he was going to say.

11 Q: Do you recall, if you look at page 380 of the transcript,
12 do you recall telling the Court that he was -- you had found --
13 -- you had located him again and you had spoken to him and that
14 he did not have the information that you were led to believe
15 he had?

16 A: Something in that regard, yes, ma'am.

17 Q: Okay. So, you assessed that situation at the time,
18 decided that he didn't have what you thought he had and so
19 that's why you chose not to call him?

20 A: Yes, ma'am.

21 Q: Okay. Okay. Just to kind of come back to this issue.
22 The testimony -- the two sides obviously had difference --
23 different versions of how the shot came and how this
24 altercation got started on the day of the shooting, correct?

25 A: Yes, ma'am.

1 Q: Okay. And Ms. Johnson's versions and Ms. Skipper's
2 version was this version about the Jeep backing up and the
3 doors flying open and this group of women jumps out and heads
4 towards Ms. Johnson?

5 A: That would be Skipper's version, unfortunately for us Ms.
6 Johnson did not have an independent recollection of exactly
7 how it went down.

8 Q: Okay.

9 A: Which hurt us a lot.

10 Q: Okay. So, you did put Ms. Johnson on the stand to
11 testify to her version of events, correct?

12 A: Yes, ma'am.

13 Q: And the version that she gave was not as detailed or as -
14 - she couldn't -- she said that she couldn't remember a lot of
15 this incident, correct?

16 A: She remembered walking towards the bootlegger's
17 apartment; she remembers Ms. Davis, who had at that point is
18 across the street in front of Ms. Burroughs' apartment calling
19 her name and she, I think, remembered all of the women getting
20 out of the car and coming towards her perhaps. She does --
21 she indicated or testified at trial she did not remember
22 anything past that.

23 Q: Okay. And her testimony at trial though was that she
24 remembered pulling the trigger?

25 A: I don't recall that. I recall on cross examination her

1 saying that she told the police that because that's what
2 everyone said that she did.

3 Q: Okay. Okay. So, she testified at trial though, I know I
4 pulled the trigger?

5 A: Correct, and she said that I know I pulled the trigger
6 because that's what everyone says I did, yes.

7 Q: Okay. And then on page 365, she said I was -- you asked
8 her how do you know that and you said, I mean, she said, I
9 mean I was just standing there. I saw her in front of me with
10 a shot going off.

11 A: What line is that, ma'am?

12 Q: That is line -- starting on line 2 on page 365?

13 A: Yes, ma'am.

14 Q: Okay. And then you asked her what did she do next and
15 she says that she paused for a second and then she ran,
16 correct?

17 A: Yes, ma'am.

18 Q: Okay. So, essentially there were kind of two different
19 versions of what happened that the jury had to decide which
20 one they believed, correct; they either believed Ms. Johnson
21 and Ms. Skipper about the story about Ms. Johnson just walking
22 down the street to the bootlegger or they believed Ms. Cox-
23 Dozier and Ms. Davis that they were sitting in the car with
24 Ms. Burroughs and Ms. Johnson just appeared and started
25 hitting Ms. Burroughs with the -- pistol whipping her and then

1 shot, correct?

2 **A:** Well, really the jury didn't have any choice because if
3 they had believed what Ms. Skipper and Ms. Johnson said
4 happened, then I would think they would have looked at it more
5 in the lines of self-defense.

6 **Q:** --Okay.

7 **A:** And they didn't have that option.

8 **Q:** Okay.

9 **A:** The options they had, as I recall, were murder, voluntary
10 manslaughter and accident and they -- they reached the verdict
11 that they reached.

12 **Q:** Okay. So, they -- they reached a verdict of murder,
13 which indicates at least that they believed the testimony of
14 Ms. Cox-Dozier and Ms. Davis, correct; that this was an
15 unprovoked attack while they were sitting in the car?

16 **A:** I assume so, yes, ma'am.

17 **Q:** Okay. I think that's all the questions I have at this
18 time.

19 **THE COURT:** All right. Anything further?

20 **MR. FALK:** One moment, Your Honor.

21 **THE COURT:** All right.

22 **MR. FALK:** No redirect.

23 **THE COURT:** All right. You may step down.

24 **MR. HAZZARD:** Thank you, Your Honor.

25 **THE COURT:** Call your next witness?

1 **MR. FALK:** I call Ms. Johnson to the stand.

2 **REPORTER'S NOTE:** (Brittany Johnson sworn by the clerk).

3 **BRITTANY JOHNSON, HAVING BEEN**
4 **SWORN TESTIFIES AS FOLLOWS:**

5 **CLERK:** Please have a seat and state your name for the
6 Court.

7 **MS. JOHNSON:** Brittany Johnson.

8 **DIRECT EXAMINATION OF BRITTANY JOHNSON BY MR. FALK:**

9 **Q:** Ms. Johnson, at some point during the trial, Mr. Hazzard
10 asked you, did you intentionally cause the death of Monica
11 Burroughs; do you remember that?

12 **A:** Yes, sir.

13 **Q:** And you weren't allowed to answer that question. So, if
14 you were to answer it right now, what would you say?

15 **MS. MCCALLISTER:** Your Honor, I'm going to object.

16 **THE COURT:** Come on up here real quick, if you don't
17 mind.

18 **REPORTER'S NOTE:** (Bench conference with counsel).

19 **BY MR. FALK:**

20 **Q:** I'm going to withdraw that question.

21 **THE COURT:** All right.

22 **BY MR. FALK:**

23 **Q:** When you left your house that day, what were you doing?
24 Were you going to look for -- Mr. Hazzard testified that you
25 were going across the street to look for -- that the lady was

1 a bootlegger; is that correct?

2 A: Yes, sir.

3 Q: And -- and who was the lady that was the bootlegger?

4 A: Actually, it wasn't -- Joann Davis wasn't the bootlegger.
5 Tameka Skipper said that I wasn't going there. There was a
6 bootlegger next door to her.

7 Q: Okay. So, there's -- I think there's testimony that
8 there were kind of three of them in that area, right? And so,
9 you were going across the street because you were going to try
10 and buy a cigar; is that correct?

11 A: Yes.

12 Q: Okay. And then at some point, you saw Ms. Burroughs'
13 car; is that correct?

14 A: Teresa's car.

15 Q: The car that was Ms. Burroughs was in, excuse me?

16 A: Uh-huh (affirmative response).

17 Q: Whose car was it?

18 A: Teresa.

19 Q: And at some time prior to that, you testified at trial
20 that you -- that she was brandishing -- that Ms. Burroughs
21 brandished a gun in front of you; is that correct?

22 A: Yes.

23 Q: And ---

24 MS. MCCALLISTER: Your Honor, I'm sorry, I just, I let
25 some of his testimony go with Mr. Hazzard, because I think

1 about that allegation about the charge that needed to be put
2 on the record, but I'm not sure where we're going with this
3 testimony or what allegation that it goes to. At this point,
4 if we're just going to rehash the trial testimony, I think we
5 have the transcript and we've already done that with Mr.
6 Hazzard.

7 **MR. FALK:** That's fine, Your Honor. I have no further
8 questions for this witness.

9 **THE COURT:** All right. Thank you. State?

10 **MS. MCCALLISTER:** Your Honor, I don't believe I have any
11 questions.

12 **THE COURT:** All right. You may step down. Thank you.
13 Call your next witness.

14 **MR. FALK:** I have no further witnesses.

15 **THE COURT:** All right. Any witnesses from the State?

16 **MS. MCCALLISTER:** No, Your Honor.

17 **THE COURT:** All right. Anything you want to tell me
18 before we conclude?

19 **MR. FALK:** Yes, Your Honor, I think that this is a case
20 that it's not a matter of what -- for the point that we're
21 arguing here about whether or not the Belcher charge or
22 whether or not the presumed malice charge was proper, it's not
23 a question, you know, of weighing the evidence, what evidence
24 is more compelling; it's the issue and really the existence of
25 evidence. That there was testimony by not only Ms. Johnson,

1 but also by the defendant's witness, Ms. Skipper, showing that
2 there was an altercation or that she had felt threatened. She
3 got to a car, all of a sudden four women jump out of the car
4 and they're surrounding her. Ms. Skipper was sort of coming
5 over there to render aid, because she knew that something was
6 going on.

7 You also heard testimony and it wasn't their testimony at
8 trial, but it certainly was their testimony that they gave to
-9 the police earlier that there was a hand to hand combat or
10 hand to hand altercation and that the two people were
11 tussling. And it would be our position that that is
12 sufficient under Belcher to show some type of mitigating,
13 justifying, prior existing ill will that would say that you
14 could not infer malice from the use of the fact that she had
15 the pistol in her hand. I mean the difference between
16 voluntary and murder is malice and I think the jury was not
17 instructed properly on what basis they could find malice.

18 **THE COURT:** All right. Let me hear from the State?

19 **MS. MCCALLISTER:** Thank you, Your Honor. Your Honor, in
20 terms of sort of the first part of that, I think the state is
21 in agreement that there was -- there was evidence in this case
22 of that tending to mitigate. The judge gave the voluntary
23 manslaughter charge, so the implied malice charge was not
24 proper under Belcher. The State agrees with that.

25 However, in PCR, you have to show deficiency and

1 prejudice and so, in determining prejudice in this situation,
2 I would point the Court to Gibson v. State, which is 416 S.C.
3 260. In that case, the Court said, in determining whether
4 petitioner was prejudiced by trial counsel's deficient
5 performance, the Court must decide whether the erroneous
6 malice instruction contributed to the verdict based on all the
7 evidence presented to the jury. The Court must weigh the
8 significance of the presumption to the jury against the other
9 evidence of malice considered by the jury without the
10 erroneous malice charge. And -- and so, essentially look to
11 see whether there was other evidence of malice other than the
12 use of a deadly weapon. And in this case, Your Honor, I think
13 a review of the trial record shows that there was significant
14 evidence of malice other than the use of the deadly weapon.
15 There was -- there was this history of conflict between Ms.
16 Johnson and the victim and if the testimony of the State's
17 witnesses was believed, then this was a unprovoked attack,
18 where Ms. Johnson just sort of surprised them while they were
19 sitting in the car, kind of appeared out of nowhere, started
20 hitting the victim, pistol whipping the victim, and then shot
21 her. And then after shooting her yelled out, I told you I was
22 going to get you bitch four to five times before running away.
23 She did not turn herself in; she did not stick around; she ran
24 away; she was apprehended in another county by the U.S.
25 Marshalls. So, I think there is evidence of malice other than

1 the use of the deadly weapon. And so, to the extent that
2 there was no prejudice by that erroneous instruction. And so,
3 for those reasons, the State would ask this Court to deny the
4 application.

5 **THE COURT:** All right. I'll take it under advisement and
6 let you know something this week.

7 **MR. FALK:** Thank you, Your Honor.

8 **THE COURT:** Thank you.

9 (COURT ADJOURNED)

10

11

12

Johnson vs State

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2016-CP-26-06535

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Brittany A. Johnson versus The State held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on March 26, 2019.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Sallie Beth Todd; CVR

Official Reporter

March 25, 2020.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Brittany A. Johnson, #344910,	)	C.A. No. 2016-CP-26-6535
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Brittany A. Johnson (Applicant) on October 11, 2016. Respondent made its Return on August 3, 2017, moving to dismiss the application for failing to state a claim. Applicant, through counsel, then filed an amended application on November 14, 2018. An evidentiary hearing into the matter was convened on March 26, 2019, at the Horry County Courthouse before the undersigned. James K. Falk represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

At the hearing, Applicant and Ronald W. Hazzard, Applicant's trial counsel, was called to testify. This Court also had before it a copy of the records of the Horry County Clerk of Court, Applicant's appellate records, records from the South Carolina Department of Corrections, the application and amendments, Respondent's Return, and the trial transcript.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September

2008 term of the Horry County Grand Jury for murder (2008-GS-26-03648). As summarized in Respondent's appellate filings, the facts adduced at trial were as follows:

[On June 24, 2008, Monica Burroughs (Burroughs) was discussing designer sunglasses with her friend, Teresa Cox, and stepsister, Joanne Davis, while sitting in Cox' 1999 Jeep Grand Cherokee outside of Burroughs's residence.] The conversation then shifted, when both Cox and Davis observed [Applicant] approaching the Grand Cherokee on the passenger side.

Cox, who believed [Applicant] was armed with a knife, and Davis, who recognized [Applicant] was armed with a gun, watched as [Applicant] attacked Burroughs with the gun as if she were pistol-whipping her. Reacting to the attack, Burroughs . . . blocked [Applicant's] blows while simultaneously trying to defend herself and get out of the car. Meanwhile, in response, both Cox and Davis jumped out of the Grand Cherokee and were attempting to run around the vehicle to help Burroughs, who was already separated from [Applicant], when they heard a shot. Next, Cox and Davis observed Burroughs running away from the Cherokee. According to both women, [Applicant] then began screaming "I told you I was going to get you, bitch" which she repeated four to five times before she ran away. After [Applicant] left, both Cox and Davis ran to Burroughs who was in the bushes beside her residence. According to both women, Burroughs, who was unarmed, had been shot in the chest and was bleeding profusely. She asked both women why she had been shot.

Burroughs died from her injuries. Applicant was apprehended by the United States Marshals Service in Darlington County on July 2, 2008.

Ronald Hazzard (Counsel) represented Applicant, and Scott A. Graustein, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial on February 7, 2011, before the Honorable Edward B. Cottingham and a jury. The jury began its deliberations on February 9, 2011. The jury found Applicant guilty as indicted on February 11, 2011. Judge Cottingham sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by Breen Richard Stevens, Esquire, of the South Carolina Commission on Indigent Defense – Appellate

Defense Division. Brendan J. McDonald, of the South Carolina Attorney General's Office, represented the State. Four questions were presented to the Court of Appeals:

- I. Whether the trial court's credibility determination was clearly erroneous where [Applicant's] testimony during the Jackson v. Denno¹ 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 [Applicant], 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 [Applicant] 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.

The parties proceeded to oral arguments on May 14, 2013. By unpublished opinion decided June 26, 2013, the South Carolina Court of Appeals reversed Applicant's conviction and remanded the case on the first question;² the Court of Appeals declined to address the remaining

¹ 378 U.S. 368 (1964).

² The Court did not elaborate upon its reasoning, but found the trial court erred in admitting Johnson's inculpatory statement to police, citing "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 during a Jackson v. Denno 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), and 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.")"

issues. State v. Johnson, Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). Respondent petitioned for rehearing, which was denied by order filed August 22, 2013.

Respondent then petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated September 11, 2014. Respondent raised three questions to the Supreme Court:

- I. Whether the appellate panel erred in reversing the trial court's ruling in a Jackson v. Denno, 378 U.S. 368 (1964), hearing where the trial court determined, as a factual matter, that [Applicant's] testimony during the Denno hearing, specifically her testimony that she allegedly invoked her right to counsel was "simply not plausible" especially since the trial court was not required to accept Johnson's testimony as true under state law.
- II. Even assuming [Applicant's] testimony from the Jackson v. Denno, 378 U.S. 368 (1964), hearing is true, whether the appellate panel erred in reversing the trial court's ruling where [Applicant] was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel.
- III. Whether the appellate panel erred when it failed to determine whether [Applicant] had shown she was prejudiced as required by the standard of review, especially since multiple eyewitnesses saw [Applicant] shoot [Burroughs], and [Applicant] admitted to shooting [Burroughs] in her testimony at trial.

The parties again proceeded to oral arguments on March 4, 2015. By unanimous opinion decided August 19, 2015, the Supreme Court reversed the decision of the Court of Appeals, finding that "[b]ecause the trial court found [Applicant's] testimony that she actually invoked her right to counsel was 'simply not plausible'—or lacked credibility—[Applicant] cannot satisfy the first prong of inquiry." State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 372 (2015).

On August 20, 2015, Applicant filed a motion to remand the matter to the Court of Appeals on grounds that the appellate court did not rule on three of the four issues she raised. The Supreme Court granted the motion by order dated November 6, 2015. On remand, without further argument or briefing, the Court of Appeals affirmed Applicant's conviction on the merits of the remaining

issues by unpublished opinion. State v. Johnson, Op. No. 2016-UP-353 (S.C. Ct. App. filed July 6, 2016). The Remittitur was issued on July 22, 2016.

ALLEGATIONS

In her original application for post-conviction relief, Applicant alleged she is being held in custody unlawfully for the following reasons:

1. "Admission of statement made to police at trial"
2. "Refusing to grant a mistrial"
3. "Refusing to submit charges of involuntary manslaughter"
4. "Refusal to charge jury on self-defense."

In her amended application filed, through counsel, on November 14, 2018, Applicant additionally alleged:

1. "There was evidence introduced at trial that would 'reduce, mitigate, justify, or excuse the homicide,' [and] therefore, trial counsel provided ineffective assistance of counsel by failing to object to the inferred malice charge found at p. 405, l. 12-23. As this issue was not preserved for appeal, it could not have been raised on direct appeal."
2. "Trial counsel provided ineffective assistance of counsel by not objecting to the 'seek the truth' language included in the Court's charge at p. 402, l. 22-25."
3. "Trial counsel provided ineffective [assistance of counsel] by failing to interview Joseph Gagum who could have testified to the victim's role in escalating the hostilities between her and Applicant."

At the evidentiary hearing, counsel indicated Applicant wished to proceed solely on the allegations contained in her amended application. Therefore, to the extent the allegations outlined in Applicant's original application constitute separate issues for relief, this Court finds those allegations are voluntarily waived and abandoned. As such, those allegations are hereby denied and dismissed with prejudice.

SUMMARY OF TESTIMONY

Counsel testified Joseph Gagum was on the defense witness list because Counsel believed Gagum would testify Cox, Davis, and Borroughs were in the parking lot to "jump" Applicant.

Counsel testified there was a history of bad blood between Borroughs and Applicant due to a love triangle involving both women and a man named Franklin Pyatt. Counsel explained there was a history of confrontation going back to November 2007, including threats and previous physical altercations.

Counsel explained the witness at trial testified Davis woke up Borroughs around 1:15 p.m. on the day of the incident, and sometime later, Cox came by. All three women sat talking in Cox's Jeep in front of Borroughs' apartment when Applicant came up and attacked Borroughs. The witnesses testified Borroughs jumped out of the car and struggled with Applicant before Borroughs was shot and killed. Another witness testified she saw Applicant heading in the direction of Borroughs' apartment because Applicant was looking for Davis, who was the neighborhood bootlegger. The witness recalled seeing four people exit the Jeep and surround Applicant before hearing a shot. Counsel explained he believed Gagum could testify Cox made different statements to him than what she told the police. Counsel stated he had no independent recollection of why Gagum did not ultimately testify, but the transcript reflects Counsel subpoenaed Gagum, Gagum was not initially present at trial, and the trial court recessed to allow Counsel time to speak to Gagum; Counsel then informed the court he would not call Gagum to testify.

Counsel explained Judge Cottingham's practice is to give an initial jury charge, allow each side to present their closing argument, and then to "clean up" with additional instructions. Counsel testified he did not object to the "seek the truth" language in the jury charge because he did not think to do so. Counsel also testified he did not object to the implied malice instruction, although in hindsight he should have, and his failure to do so was not due to any particular strategic decision.

Counsel testified the defense was happy to receive any kind of mitigating instruction, such as the manslaughter charge. Counsel explained his strategy was to present a defense of self-defense by showing there was an inevitable escalation of hostilities between Applicant and Burroughs, and there was testimony at trial regarding verbal threats and physical altercations between the two. Counsel noted Applicant testified Burroughs had previously shown her a gun Burroughs' carried in her purse. Counsel also explained one witness testified "everyone in the projects" knew about the issues between Applicant and Burroughs because of the love triangle with Pyatt. That witness described seeing Applicant walk down the street past Burroughs' apartment towards the bootlegger's house when the Jeep with Burroughs, Cox, Davis, and another woman inside backed up, and the four women surrounded Applicant. The witness described seeing the four women converge on Applicant, then hearing a shot.

Counsel testified, furthermore, the testimony given by Davis at trial was different than her original statement, particularly in the critical respect that, at trial, Davis testified there was separation between Applicant and Burroughs when Applicant fired the shot. Counsel explained he tried to point out these discrepancies in cross-examination, including the fact that Davis's original statement seemed to indicate she did not think the shooting was intentional. However, the trial judge would not allow Counsel to ask that question directly.

Counsel agreed there was evidence of an unprovoked attack if the jury believed Cox and Davis's testimony as they testified Applicant and Burroughs had stopped fighting hand-to-hand and had separated from each other when Applicant fired the shot. Counsel also noted there was evidence Applicant yelled, "I told you I was gonna get you, bitch" at Burroughs four or five times after the shot, and Applicant then fled the scene and was apprehended days later in another county.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges she received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove she was prejudiced by Counsel's performance in any way. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

1. Failure to object to implied malice jury instruction when evidence was presented tending to mitigate, justify, or excuse the homicide

Applicant alleges Counsel was constitutionally ineffective for failing to object to the trial court's instruction that the jury could infer malice from Applicant's use of a deadly weapon in the commission of the crime. This Court agrees Counsel was deficient in failing to object to this instruction because the trial court charged the lesser-included offense of voluntary manslaughter. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (holding jury charges instructing malice may be inferred from the use of a deadly weapon are improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide). However, this Court finds Applicant failed to prove she was prejudiced by Counsel's failure to object because there was substantial evidence from which the jury could find malice other than Applicant's use of a deadly weapon. Therefore, the Court finds this allegation should be denied and dismissed with prejudice.

In this case, in addition to instructing the jury that malice may be implied from the defendant's use of a deadly weapon in the commission of the crime, he also explained express malice and set forth two additional bases on which the jury could find implied malice:

Malice is said to be expressed when there is manifested a violent, deliberate intention unlawfully to take away the life of another human.

Malice may be implied where one intentionally and deliberately does an unlawful act which he or she then knows to be wrong and in violation of her duty to another.

Malice may be implied when no excuse or legal provocation for the killing appears and when the circumstances attending the killing show an abandoned heart, a heart fatally bent upon mischief.

Tr. pp. 404-05.

"In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009); see also In re Winship, 397 U.S. 358 (1970) (holding the Due Process Clause mandates that the government prove every element of the charged offense beyond a reasonable doubt). Most significantly, in this case, the evidence at trial showed Applicant went looking for Burroughs the day before the shooting and stood outside Burroughs' house waving her gun and yelling at Burroughs to "come on out and eat the bullets." Tr. p. 370. The next day Applicant initiated an unprovoked attack on Burroughs and screamed, "I told you I was gonna get you, bitch" at Burroughs four or five times immediately after firing the fatal shot. Tr. pp. 193, 226-28. Additionally, Applicant fled the scene and was apprehended days later by the U.S. Marshals' in another county. Tr. pp. 194, 229, 359.

The fact Applicant had a gun and shot Burroughs was not a contested issue at trial, and the State did not argue the jury should find implied malice from the use of the gun. Rather, the record

reflects the State argued the evidence of malice was found in Applicant's own statements – "Come on out and eat the bullets" and then, "I told you I was gonna get you, bitch." Tr. pp. 370, 446-50. This Court finds these two statements were sufficient evidence by which the jury could find the existence of expressed malice, beyond a reasonable doubt. Accordingly, due to the significant evidence of malice other than Applicant's use of deadly weapon, this Court finds there is no reasonable probability the erroneous jury instruction contributed to the jury's verdict, and therefore, Applicant was not prejudiced by Counsel's failure to object to it.³

Because Applicant has failed to meet her burden of proving prejudice, this allegation is hereby denied and dismissed.

2. Failure to object to "seek the truth" jury instruction

Applicant alleges Counsel was constitutionally ineffective because he did not object to the trial court's jury charge to "seek the truth." Tr. p. 402. Again, the Court finds this instruction was improper, and Counsel was deficient for failing to object. However, Applicant failed to prove she was prejudiced by this instruction, and therefore, this Court finds the allegation should be denied and dismissed.

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v.

³ This Court is aware of the recent South Carolina Supreme Court decision holding trial courts should not instruct the jury that use of deadly weapon may give rise to implied malice under any circumstances because it is an improper comment on the facts. State v. Burdette, 427 S.C. 490, 404-05, 832 S.E.2d 575, 583 (2019). However, the law at the time of Applicant's trial in 2011 prohibited the giving of the instruction only in cases in which evidence was presented tending to mitigate, reduce, or justify the homicide. Belcher, 385 S.C. at 612, 685 S.E.2d at 810. Thus, the issue is whether the inclusion of the erroneous instruction in that circumstance would have been deemed a harmless error on appeal at the time, had it been preserved.

Aleksy, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). In Aleksy, the Supreme Court examined the use of “seek the truth” language in the context of a reasonable doubt instruction and concluded the instruction was harmless because it did not appear in the reasonable doubt or circumstantial evidence portion of the jury charge, but rather in the witness credibility portion. Id.

The instruction appears in the same context in Applicant’s case. At the conclusion of the trial court’s charge on the jury’s role “as the sole judge of the credibility, meaning reliability, of the witnesses” in the case, the court stated the jury had one objective, “to seek the truth *regardless of from what witness that testimony may have been derived.*” Tr. pp. 401-02 (emphasis added). The trial court later explained in detail the State’s burden of proving Applicant’s guilt beyond a reasonable doubt, and Applicant has not challenged that portion of the jury instructions, nor does this Court find any fault with that section of the charge. Accordingly, “the instruction as a whole properly conveyed the law to the jury, and there is not a reasonable likelihood the jury applied the judge’s instructions to convict [Applicant] on less than proof beyond a reasonable doubt.” Id. at 29, 538 S.E.2d 253.

Because Applicant has failed to prove the improper instruction caused the jury to dilute the standard of proof and reach its verdict in a way that violates the Constitution, she was not prejudiced by Counsel’s failure to object to the instruction. This allegation is denied and dismissed.

3. Failure to call witness

Finally, Applicant alleges Counsel was ineffective for failing to call a witness, Joseph Gagum, at trial. However, in order to support a claim that trial counsel was ineffective for failing to interview or call a witness, “a PCR applicant must produce the [witness] at the PCR hearing or otherwise introduce the [witness’s] testimony in a manner consistent with the rules of evidence.”

Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). "The applicant's mere speculation about what the [witness's] testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. As Applicant failed to present the testimony of Gagum at the evidentiary hearing, this Court finds she has not met her burden of proving Counsel was constitutionally ineffective as to this issue. This allegation is therefore denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant relief. While Counsel was deficient in failing to object to the "seek the truth" and implied malice jury instructions, Applicant was not prejudiced by those deficiencies. Further, Applicant failed to meet her burden of proving deficiency or prejudice regarding the allegation Counsel failed to call a helpful defense witness. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge
Fifteenth Judicial Circuit

December 5, 2019

RECEIVED
JAN 03 2020
S.C. SUPREME COURT

WITNESSES

Det. J.G. King Conway Police Department

ARREST WARRANT NUMBER

I216048

CDR: 0116 16-03-0010, 0020

DOA: 7/3/2008

ACTION OF GRAND JURY

TRUE BILL

James Wilburn
Foreperson of Grand Jury
Date: SEP 25 2008

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-26- *3648*

The State of South Carolina

County of Horry

Scott Graustein

08H03016

COURT OF GENERAL SESSIONS

SEPTEMBER, 2008 TERM

THE STATE

vs.

Brittany Alexis Johnson

/F

Conway, SC 29526

ATTORNEY: Galmore, James Cullen

Indictment for

MURDER

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on SEPTEMBER 25, 2008, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That **Brittany Alexis Johnson** did in Horry County, on or about June 24, 2008, willfully, feloniously, and intentionally kill the victim, Monica Burroughs, with malice aforethought, either express or implied, by means of **SHOOTING VICTIM IN UPPER TORSO AREA WITH A HANDGUN**, and the victim did die as a proximate result thereof on or about JUNE 24, 2008 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Horry
 STATE VS.
Brittany Alexis Johnson

AKA:

Race: Sex: F Age: 19DOB: SS#: Address: City, State, Zip: Conway, SC 29526DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder (C-30) - Lifein violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☒ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Graustein, Scott A.SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$	
§ 56-5-2995 (DUI Assessment)	\$12	\$	
§ 56-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.9 (Public Def/Prob)	\$500	\$	
§ 14-1-212 (Law Enforce. Funding)	\$25	\$	25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$	
§ 50-21-114(BUI Breath Test Fee)	\$50	\$	
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$	
3% to County (if paid in installments)		\$	3.90
TOTAL		\$	133.90

Clerk of Court/ Deputy Clerk Melanie Huggins-WardCourt Reporter: Linda McCall

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS2603648A/W#: 1216048Date of Offense: 6/24/2008S.C. Code §: 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSPTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Condition Discharge. -§-33-450(C) requires
\$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel.
§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge Judge Code: 2041Sentence Date: 2/11/2011