STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

APPELLANT

APPELLATE CASE NO. 2017-001296

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 3, 2015, Appellant was indicted by a Charleston County Grand Jury for the offenses of armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. R. 739 – 744. His case was called to trial before the Honorable Roger L. Couch and a jury, May 22 – May 25, 2017. R. 1. Daniel Cooper and Burns Wetmore represented the state; Mark Archer represented Appellant. R. 1.

The jury returned verdicts of guilty, and Judge Couch sentenced Appellant to incarceration for terms of fifteen years for armed robbery, fifteen years for kidnapping, and five years for possession of a weapon during the commission of a violent crime, with sentences to run concurrently. R. 745 – 747.

This appeal follows.

ARGUMENT

1.

The trial court erred by allowing irrelevant testimony by Detective Butler that the alleged victim was purportedly more fearful than the average victim, causing the detective to believe his story and give it credibility, when the case turned on credibility.

Standard of review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Bryant,* 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Relevant facts

The state alleged that on April 14, 2015, Keith Lee was kidnapped and robbed by three men: Jonathan Johnson, Appellant, and an unidentified third man. R. 105, l. 13 – 107, l. 6. The defense advanced the theory that Lee owed Johnson money for drugs, and gave Johnson the money voluntarily while Appellant was present. R. 113, l. 12 – 114, l. 13. The defense posited Lee lied about being robbed to avoid his girlfriend's anger that his paycheck was used to pay for drugs. R. 656, ll. 14-25.

Lee claimed he was in the parking lot at Wells Fargo in North Charleston waiting for his girlfriend when a stranger in a gold PT Cruiser asked for a jump. R. 121, l. 7 – 122, l. 24. Lee helped jump the battery, but alleged the stranger forced him in the backseat of the PT Cruiser at gunpoint. R. 124, ll. 6-9. Lee said there were two other men in the car and he later learned that

the man who approached him (the driver) was Johnathan Johnson, and that Appellant was the front passenger.[1] R. 127, ll. 1-6.

Lee claimed the men demanded money and jewelry from him at gunpoint. R. 128, ll. 19-21; R. 128, ll. 23-24. Strangely, Lee alleged that although he did not know the men, Johnson said: "I know you work at Hardee's," and suggested they pick up his paycheck from Hardee's. R. 129, l. 25 – 130, l. 2. Lee claimed the men tied him up and drove to Hardee's in Mount Pleasant. R. 131, ll. 10-12. Lee alleged Appellant threatened to kill him and everyone in Hardee's if he tried to signal for help. R. 134, ll. 2-6.

Lee contended at trial that while they were driving to Mount Pleasant, Johnson stuck a gun out of the window and fired a shot. R. 131, ll. 21 – 24. However, he never made this claim to the North Charleston Police Department. R. 319, l. 22 – 320, l. 9. Therefore, police did not perform gunshot residue testing on Johnson, or on the PT Cruiser. R. 320, ll. 9-22.

Lee claimed Johnson took him into Hardee's armed with a pistol, where Lee picked up and signed for his paycheck. R. 134, ll. 2-3; R. 136, ll. 2-3. Lee alleged that on the way in, Johnson promised to protect him because Johnson's mother worked there. R. 135, ll. 2-10. Shania Burden, the restaurant manager who gave Lee his check, said Lee did not act unusually or ask her to push a panic button that he knew existed. R. 584, l. 14 – 586, l. 22.

Lee alleged the men tied him up again as they left Hardee's, and drove back across the Mount Pleasant Bridge to Ace Check Cashing in North Charleston, where Lee cashed his check. R. 139, ll. 14-17; R. 140, ll. 2-7. Lee said that after cashing the check, he returned to the car and gave the envelope to the unidentified third man in the back seat, who passed it to Appellant. R.

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[1] Police showed Lee lineups containing photographs of Appellant and of Johnson. R. 283, l. 13 – 286, l. 23. Despite allegedly having more interaction with Johnson, Lee did not pick Johnson out of a lineup, although he picked out Appellant. R. 326, ll. 18-19; R. 284, l. 24 – 285, l. 10.

141, ll. 14-15. Lee claimed when they stopped the car by a gas station he happened to see his girlfriend in the drive-through lane of a nearby fried chicken restaurant. R. 142, ll. 22-25. Lee alleged the men then released him and he got in his girlfriend's car. R. 144, ll. 5-7. Notably, he did not call 911.[2]

Although Johnson pleaded guilty, he was called as a defense witness and said Lee was not kidnapped or robbed. R. 369, ll. 23; R. 380, ll. 9-11. Johnson said that he previously sold Lee drugs, Lee owed him money, and when Johnson saw Lee at Wells Fargo he asked Lee for the money. R. 369, ll. 10-13; R. 369, ll. 14-15. Lee told him he needed to get his paycheck, so Johnson took him to pick up and cash his check, and Lee gave him the money. R. 369, ll. 16-19.

Detective Jennifer Butler of the North Charleston Police Department had seven years' experience in law enforcement. R. 197, ll. 1-2; R. 198, ll. 12-13. Butler interviewed Lee's girlfriend, and drove Lee and his girlfriend home from the police department. R. 200, ll. 7-11. The solicitor questioned Butler about the pair's emotions, asking if Butler detected what she "considered to be pretty genuine fear?" R. 200, l. 16 – 201, l. 1. Butler replied that she had, and that in her experience as a crimes against persons detective, that was uncommon. R. 201, ll. 2-5.

The solicitor asked: "Based on what you perceived as a very real fear, did you believe their story?" and Butler testified that she did. R. 201, ll. 9-11. Defense counsel objected, saying: "he's asking her did she believe their story and I think that's irrelevant whether she believes it that she heard the story." R. 201, ll. 12-18. The court ruled: "Well, she can state whether or not

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[2] Lee's girlfriend did not believe that he had been robbed until they got home and Lee got out a gun, saying he was going to look for the men. R. 144, ll. 12-25. At that point, Lee's girlfriend called the police and said Lee was walking down the highway with a firearm. R. 145, ll. 2-5. Lee was quickly surrounded by fifteen to seventeen police officers with guns drawn telling him to drop his weapon. R. 146, ll. 7-13. When police officers retrieved his gun, Lee claimed that he had been robbed. R. 146, ll. 13-19.

she gave credibility or not, so I'm going to let her testify as to how she viewed it. You may proceed." R. 201, ll. 19-21. Butler continued, asserting she had met with a lot of victims, and the victim in this case was "visibly shaken up compared to most people just having [a] very nonchalant attitude." R. 201, l. 23 – 202, l. 5. She said the alleged victim's fear caused her to give his story credibility.

Q. And their attitude, the fear, caused you to give their story credibility, is that correct?

A. Yes, sir.

R. 202, ll. 6-8.

In closing argument, the solicitor remarked that the case hinged on credibility, saying the jury's determination was "going to come down to who you believe was telling the truth and who you believe wasn't." R. 625, ll. 4-5. The solicitor said that although the police initially found parts of Lee's story "strange" and "suspicious," "through the course of talking to him . . . they believed him." R. 626, ll. 6-13.

Discussion

Rule 401, SCRE provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, SCRE provides: "[e]vidence which is not relevant is not admissible."

"Any evidence that assists in getting at the truth of the issue is relevant, unless, because of some legal rule, it is incompetent." *State v. Petit*, 144 S.C. 452, 142 S.E. 725, 731 (1928). "The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269

S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). A jury must make its own assessment on the credibility of witnesses. *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002). Generally, a witness is not allowed to testify that another witness is telling the truth. *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145 (1988); *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

Butler's testimony that she found the victim credible due to appearing more fearful than average victims she had come into contact with was irrelevant, as it invaded the province of the jury, rendering it incompetent. Because credibility of the alleged victim was a critical issue in the case given the strange factual scenario, this irrelevant bolstering resulted in prejudice to Appellant. *See State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (improper pitting resulted in unfair prejudice requiring reversal when credibility was a critical issue in case). Detective Butler's testimony prejudiced Appellant as she vouched for the credibility of a key state's witness—the alleged victim and the only witness—who claimed at trial that Appellant's actions were criminal.

2.

The trial court erred by allowing evidence of Appellant's post-arrest silence in violation of *Doyle v. Ohio*, where the court determined the matter hinged on whether Appellant had been provided *Miranda* warnings, then disregarded testimony Appellant had been read *Miranda*, and refused to hear and consider body camera recordings from two officers on scene at Appellant's arrest given time considerations.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only. This Court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (internal citations omitted). The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Bryant,* 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Relevant facts

Police searched the gold PT Cruiser belonging to Johnson's girlfriend. R. 205, ll. 13-22. Inside, officers found an envelope and paystub belonging to Lee, and identified the fingerprints of Johnson and Appellant on the stub. R. 216, 25 – 216, l. 12; R. 250, ll. 8-12. The state introduced phone records and security footage from the Hardee's parking lot that showed Appellant outside the PT Cruiser phoning Johnson while Johnson and Lee were in the restaurant. R. 306, ll. 5-18; R. 339, l. 24 – 341, l. 15.

Appellant testified he and Johnson got off work doing construction and were drinking. R. 488, l. 14 – 489, l. 3. Appellant confirmed Johnson's testimony that Lee got in the car at Wells

Fargo because he owed Johnson money. R. 489, ll. 4-14; R. 490, ll. 1-3. Appellant said Lee rode with them voluntarily, and explained that he touched the check stub when Lee handed it to him to give to Johnson. R. 490, ll. 5-21; R. 491, ll. 13-15; R. 495, l. 23 – 496, l. 9. Appellant said he phoned Johnson while Johnson was in Hardee's because it was hot and he wondered what was taking so long. R. 500, l. 13 – 501, l. 1. He explained that he got out of the car at Hardee's to see what was going on because it appeared a car accident had occurred. R. 493, ll. 16-21.

Appellant denied having a weapon or threatening to kill anyone, and said no one in the car pointed a gun at Lee. R. 497, ll. 1-22; R. 497, ll. 21-25. He noted Lee did seem upset at some point during the drive, expressing that his girlfriend was going to be angry with him. R. 498, ll. 1-4. Lee commented: "[D]amn, my gal is going to trip." R. 498, ll. 11-12.

On cross-examination, the solicitor challenged Appellant: "So this story you have about having a little bit to drink, riding around in the car, why not tell the police back in 2015?" R. 502, l. 24 – 503, l. 1. "Why not speak to law enforcement when you got arrested?" R. 504, ll. 10-11. The solicitor remarked: "now we're having this brand new story that you've had two years to come up with." R. 504, l. 22 – 505, l. 1. He asked: "instead of trying to get a hold of somebody while you were sitting in jail two years and say, hey, that's not what happened, you wanted to sit in jail for two years to come to trial?" R. 503, ll. 22-25. Appellant replied that he had "talked to [his] lawyer about this several times." R. 504, ll. 2-3.

Defense counsel objected to this line of questioning, protesting that the state was improperly commenting on Appellant's Fifth Amendment rights. R. 505, l. 6-24. Defense counsel argued: "[I]t's his absolute constitutional right not to talk to the police, and it's an improper comment on his Fifth Amendment right," and the court sustained the objection. R. 506, ll. 1-9.

The court had a conference with the attorneys in chambers to discuss whether the state's questioning of Appellant on his failure to offer an exculpatory statement prior to trial violated *Doyle v. Ohio*.[3] R. 540, ll. 8-19. The state argued that because nothing indicated Appellant had been given his *Miranda* rights,[4] *Doyle* was inapplicable. R. 540, l. 19 – 23.

Appellant was served warrants for this case when he was arrested on August 19, 2015, for failure to stop for a blue light. R. 541, ll. 4-9. The solicitor said he spoke with Danielle Smoak, who he believed to be the arresting officer, and Smoak told him she did not read Appellant *Miranda* warnings. R. 540, l. 23 – 541, l. 19. Defense counsel argued: "I don't think we know that he was not *Mirandized* at that time," and noted the court had not heard from "the officer who stopped him for the blue light." R. 541, ll. 21-22; R. 542, ll. 3-4. Defense counsel argued Appellant said he was read his *Miranda* rights. R. 543, ll. 6-8.

The court determined it would hold a hearing in camera on whether Appellant was given *Miranda* warnings, and defense counsel said: "[I]f that's critical to whether or not he's entitled to a mistrial, I think we need to put evidence up on it." R. 545, ll. 3-19.

Appellant was sworn, and testified in camera that when he was arrested for failure to stop for a blue light, he was told of the outstanding warrants for this case. R. 545, l. 21 – 546, l. 18. There were multiple officers at the scene. R. 556, ll. 16-17; R. 547, ll. 15-16. Appellant testified that an officer, a "guy I don't know his name he ask me – he read me my rights." R. 546, ll. 17-18. "He told me I got warrants for arm[ed] robbery from North Charleston Police Department, some bad checks and failure to stop for a blue light." R. 546, ll. 18-21. Appellant said: "He read me my *Miranda* rights and he put me in the car with this female officer who transported me to

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[3] *Doyle v. Ohio*, 426 U.S. 610 (1976).

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

the North Charleston county jail." R. 546, ll. 21-23. "I definitely was read my *Miranda* rights and he ask me did I want to come down to City Hall." R. 547, ll. 10-13.

The solicitor questioned Appellant about the officer's appearance; Appellant described the man as bald with a stocky build and green uniform, **and he suggested the court check the officer's body camera** (which would corroborate his testimony), **as it should be recorded**. R. 551, ll. 12-16. Appellant testified that the bald officer said: "[H]ey that's Tappia Green. You got several warrants from our department," read him *Miranda*, and asked him to "come down to City Hall and talk about it." R. 552, ll. 9-22.

The court heard testimony from two police officers at the hearing. Officer Danielle Smoak said two of her coworkers were pursuing Appellant when he got out of the vehicle and ran into a building. R. 598, ll. 21-23. Smoak was one of a team assisting the officers, and handcuffed Appellant, putting him in a police car when he came out of the building. R. 598, ll. 23-25; R. 599, ll. 6-8. Officer Smoak said she did not read Appellant *Miranda* warnings, but called a transport unit to take him to jail. R. 599, ll. 21-25; R. 600, ll. 19-21.

Smoak testified Officers Riley and Norwood chased Appellant for failure to stop for a blue light, and she was not certain whether they talked to Appellant. R. 602, ll. 7-14; R. 602, l. 23 – 603, l. 5. Officer Smoak said she could not be sure that no other officers talked to Appellant, explaining that a couple of years had passed and she had been involved "in multiple pursuits and incidents since then." R. 608, ll. 1-6.

When asked if she could recall an officer who was bald and wearing green present, Smoak offered that Brandon VanAusdal fit the description. R. 601, ll. 4-16. Officer VanAusdal testified at the hearing that he was a K-9 officer called in to assist, and that he did not give Appellant *Miranda* warnings. R. 611, l. 19 – 612, l. 3. VanAusdal did not remember "who's bald

and who's not" among the officers that responded, and did not see who served warrants on Appellant for this case. R. 614, ll. 17-23; R. 613, ll. 20-24.

Defense counsel noted the incident reports from Appellant's arrest for failure to stop for a blue light said Appellant was served with outstanding warrants for the case at hand before being taken to the detention center. R. 617, l. 1-10; R. 732. The state argued that if no *Miranda* warning is given, then *Doyle* and its progeny do not apply, and its line of cross-examination of Appellant did not violate Appellant's Fifth Amendment rights. R. 620, ll. 5-11.

Defense counsel thought the prejudice was so extreme he moved for a mistrial, and asked to have the incident reports made part of the record. R. 615, l. 19 – 616, l. 15; R. 729 – 734. He also said: "we haven't heard everything on this issue," noting that "on the last page of the report [it] says that the incident was recorded with the department issued body camera and determine to give him his warnings." R. 618, ll. 1-2; R. 620, ll. 14-17. The court responded: "If that evidence is available, I'll watch it right now, but I've delayed this case today for a whole morning on this issue. The issue arose yesterday." R. 620, ll. 18-21. Archer argued it was incumbent on the state to prove Appellant had not been given *Miranda* warnings. R. 620, ll. 22-23.

Court's Exhibit #3 includes incident reports and supplemental reports regarding the failure to stop for a blue light that were prepared by Officers Jerrid Riley and Patrick Norwood, and state Appellant was served with outstanding warrants from the North Charleston Police Department for kidnapping, armed robbery, possession of a weapon during a violent crime, and forgery, and was transported to the detention center. R. 732. Court's Exhibit #3 states that "the entire incident was captured on the Body Camera of Pfc. Norwood," and: "This incident was recorded with the department issued body worn camera" of MPO Cummins. R. 733 – 734. None of these officers testified, nor were the recordings reviewed by the court.

The court found "sufficient evidence to indicate that [Appellant] was not *Mirandized* at that time." R. 621, ll. 6-8. The judge said Court's Exhibit #3 did not state that Appellant was read *Miranda*, and that two officers present at his arrest (Smoak and VanAusdal) testified they did not read him *Miranda*. R. 621, ll. 12-19. The court allowed the state's line of questioning, finding it did not violate *Doyle*, and denied the defense's motion for a mistrial. R. 621, ll. 21-23.

In closing argument, the solicitor said: "what this case is going to come down to is who you believe. Not whether you believe me or Mr. Archer, whether you believe Keith Lee, Johnathan Johnson or [Appellant]." R. 624, ll. 7-10. "[I]t's going to come down to who you believe was telling the truth and who you believe wasn't." R. 625, ll. 4-5. The solicitor also told the jury Lee had credibility because "he's told the same story to you. He's told the same story to the North Charleston Police Department," implying Appellant lacked credibility because he did not talk to the police. R. 625, l. 24 – 626, l. 2.

Discussion

A prosecutor may not use the post-*Miranda* silence of an accused to impeach his exculpatory story told for the first time at trial. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). In *Doyle*, the United States Supreme Court reasoned that silence in the wake of *Miranda* warnings may be nothing more than an accused's exercise of his rights. *Id.* at 617. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618.

However, in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), the United States Supreme Court clarified that when an accused has not received the assurances contained in *Miranda* warnings, a state court may permit cross-examination about post-arrest silence if the accused

takes the stand. The Court concluded the significant difference between *Fletcher* and *Doyle* was that the record in *Fletcher* did not indicate the defendant received *Miranda* warnings. *Id.* at 605.

The appellate courts of South Carolina have allowed impeachment with post-arrest silence when there is **no evidence** in the record that an accused received *Miranda* warnings. *Brown v. State*, 375 S.C. 464, 480-481, 652 S.E.2d 765, 773-774 (2007) ("In the case at bar, there is no evidence in the record that Brown ever received *Miranda* warnings"); *State v. Bell*, 347 S.C. 267, 271, 554 S.E.2d 437 (Ct. App. 2001) (no due process violation where there is no evidence in the record the defendant ever received *Miranda* warnings).

Other states addressing this issue have found no *Doyle* violation where the record is devoid of evidence the accused was provided *Miranda* warnings. *State v. Leecan*, 504 A.2d 480, 485 (Conn. 1986) (absence of any indication in the record that the silence of a defendant had been preceded by a *Miranda* warning rendered *Doyle* inapplicable); *Caprino v. Com.*, 670 S.E.2d 36, 39 (Va. Ct. App. 2008) (absence of any evidence demonstrating that defendant's silence was in response to *Miranda* warnings precludes the application of the *Doyle* due process doctrine).

The court's factual finding that Appellant had not been provided with *Miranda* warnings was an abuse of discretion, as it was unsupported by the evidence. Appellant testified that he was read *Miranda* warnings by a bald officer who recognized him. Officer Danielle Smoak said she did not read Appellant *Miranda* warnings, but was only one of a team of officers who assisted Officers Riley and Norwood, and she could not say whether they or other officers read Appellant *Miranda* warnings. Officer Brandon VanAusdal said he did not give Appellant *Miranda* warnings, but was only there to assist other officers. Officer VanAusdal could not remember if other bald officers were present.

The court did not make credibility findings as to the testimony of Appellant or the officers. The court did not hear from Officers Riley or Norwood, the authors of the incident reports that reflect the warrants for this case were served on Appellant. The court refused to hear and consider body camera recordings from Officers Norwood and Cummins, citing time considerations.

The court's disregard of Appellant's testimony that he had been read *Miranda* and its refusal to consider body camera footage was an abuse of discretion, where it only heard from two officers out of many officers at the scene, and they could not say whether Appellant was provided *Miranda* by other officers.

Alternatively, Appellant asserts that it was legal error for the court to allow the state to impeach Appellant with his pre-trial silence where there was evidence in the record that he had been provided with *Miranda* warnings. The appellate courts of this state have upheld the admission of such evidence for impeachment only where there is **no evidence** in the record the accused had received *Miranda*. Here, after determining the matter turned on whether Appellant received *Miranda* warnings, the court was provided with evidence Appellant had been read *Miranda* rights because he testified to such.

Moreover, the court refused to consider the body camera recordings, although the recordings may have contained indisputable evidence on the matter. The court's refusal to listen to the recordings was an abuse of discretion. *See State v. King*, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29 (2017) (court's refusal to listen to recorded phone conversation before submitting it to jury was abuse of discretion); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (abuse of discretion to refuse to exercise discretionary authority when it is warranted).

The Fourth Circuit Court of Appeals noted that "[b]ecause the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980). The Supreme Court of South Carolina has evaluated error in the *Doyle* violation context, approving the Fifth Circuit's analysis in *Chapman v. United States*.

> In *Chapman v. United States*, 547 F.2d 1240 (5th Cir.1977), *cert. denied*, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393, the Court harmonized decisions holding *Doyle* violations to be reversible error with those holding such violations to be harmless error beyond a reasonable doubt. In order for a violation to constitute harmless error, *Chapman* requires a trial record which establishes the following: that the reference to silence be a single reference; that the single reference never be repeated or alluded to in either the trial or in jury argument; that the prosecutor does not directly tie the defendant's silence to his exculpatory story; that the exculpatory story be totally implausible, transparently frivolous; and that evidence of guilt be overwhelming.

State v. Truesdale, 285 S.C. 13, 18–19, 328 S.E.2d 53, 56 (1984).

In *State v. McIntosh*, 358 S.C. 432, 438-40, 595 S.E.2d 484, 487-88 (2004), the defendant testified that he had an alibi, being in New York at the time of the murder. The solicitor questioned him at length on his failure to present this alibi defense to the police when he was arrested and given *Miranda* warnings. The South Carolina Supreme Court determined the *Doyle* violation in *McIntosh* was not harmless, reasoning that the solicitor tied McIntosh's silence directly to his alibi defense at trial by questioning why this was the first time he had told this story in the two and half years since his arrest. *Id.* at 447, 595 S.E.2d at 492.

The Court reasoned McIntosh's story was not entirely implausible, and that the evidence against him was not overwhelming. *Id.* at 447-448, 595 S.E.2d at 492. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt

was overwhelming." *Id.* (internal quotations omitted) (quoting *State v. Pickens*, 320 S.C. 528, 530-31, 466 S.E.2d 364, 366 (1996)).

In *State v. Hill,* 360 S.C. 13, 15-16, 598 S.E.2d 732, 733 (Ct. App. 2004), Hill was provided *Miranda* warnings and remained silent until he testified to acting in self-defense at trial. The solicitor cross-examined Hill on why he did not explain this to police upon arrest; defense counsel objected and moved for a mistrial. *Id.* The court allowed the questioning to continue, and Hill responded that he had talked to his attorney about the case. *Id.* This Court reversed, performing the analysis laid out in *Truesdale*, *McIntosh*, and *Chapman*, concluding the *Doyle* violation was not harmless and noting the state directly tied Hill's silence to his defense. *Id.* at 17-18, 598 S.E.2d at 734.

In *Pickens*, 320 S.C. at 530, 466 S.E.2d at 365, the solicitor commented on the defendant's silence in violation of *Doyle*. Although the solicitor made only a single impermissible reference to Pickens' silence, the South Carolina Supreme Court reversed, reasoning that Pickens' "exculpatory story of self-defense was not totally implausible and the evidence of guilt was not overwhelming." *Id.* The Court noted only one witness unequivocally said that Pickens fired any shots, and several witnesses testified to facts supporting self-defense, and determined this record did not establish overwhelming evidence of guilt. *Id.*

In *State v. Gray*, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991), Gray was accused of assault with intent to commit criminal sexual conduct. Gray testified he went to the alleged victim's house to give her boyfriend a ride, they talked for a while, and she began screaming and accusing him of rape for no reason. *Id.* at 483-84, 405 S.E.2d at 420. The solicitor cross-examined the defendant on his failure to disclose this story to the police when he was arrested and given *Miranda* warnings; the defense objected and moved for a mistrial. *Id.* at 484, 405

S.E.2d at 420-21. This Court reversed, as the trial hinged on the credibility of Gray and the alleged victim, noting "the solicitor recognized credibility was a central issue when he asked the jury in his closing argument 'Who do you believe? Who do you think was telling the truth?'" *Id.* at 485, 405 S.E.2d at 421.

Application of the *Doyle* violation error analysis laid out in *Truesdale*, *McIntosh*, and *Chapman* to the case at hand demonstrates Appellant was prejudiced by the solicitor's references to Appellant's post-arrest silence. Here, there was more than a single reference to Appellant's post-*Miranda* silence. The solicitor asked: "Why not speak to law enforcement when you got arrested?" The state impeached Appellant with "this brand new story that you've had two years to come up with." The solicitor asked why Appellant sat in jail for two years instead of contacting the police with his defense. The solicitor directly tied Appellant's silence to his defense at trial with this line of questioning.

The solicitor recognized that credibility was a central issue when he argued in closing the jury had to decide whether it believed Appellant's story or that of the alleged victim. The solicitor argued that Lee was credible because he had spoken to police, and his story at trial was the same.

Appellant's exculpatory story at trial was not totally implausible. Appellant said he was with Johnson when Johnson saw Lee. He confirmed Lee owed Johnson money, and explained that his fingerprints were on Lee's check stub because Lee handed him the stub and money and he passed it to Johnson. Appellant remembered that Lee said his girlfriend would be upset with him, presumably because his wages were spent on drugs. Appellant said he phoned Johnson while Johnson was in Hardee's because it was hot and he felt they were taking too long, and

clarified that he got out of the car at Hardee's because it appeared a wreck had occurred and he wanted to see what happened.

The evidence against Appellant was not overwhelming. Other than Lee's testimony, the evidence was circumstantial, and the testimony of Appellant contradicted the testimony of Lee. The state acknowledged that North Charleston Police investigators found some of Lee's behavior suspicious. Lee did not act in an unusual manner when he picked up his check. Lee claimed he just happened to be released by his captors at the same location where his girlfriend was purchasing chicken. He did not call 911 to report the alleged incident. While Lee alleged at trial that Johnson fired a gun from the car window, he never made this claim to police. The case hinged on credibility.

The court erred by allowing evidence of Appellant's post-arrest silence in violation of *Doyle v. Ohio*, ignoring evidence Appellant had been advised of his *Miranda* rights.

3.

The trial court erred in not enforcing its grant of a mistrial where Juror #280 was unable to participate in deliberations due to a medical condition and asked to be relieved, Appellant asked that the case be continued until the following week when the juror's medical problem would be resolved, Appellant refused to waive his right to twelve jurors, the court stated it was declaring a mistrial because Juror #280 could not effectively participate in deliberations, and then the jury returned with a verdict.

Standard of review

"The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999) (citing *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S. 1277 (1997); *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989)). "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Id.* at 13, 515 S.E.2d at 514 (citing *Wasson*).

Relevant facts

The trial began on Monday, May 22, 2017. A jury was selected and two alternates were chosen. R. 29 – 39. On Tuesday, Juror #309 asked to be excused, explaining that she had a 2:00 p.m. appointment with her loan officer on Friday. R. 727; R. 92, ll. 10-15. The court spoke with Juror #309 and suggested she rearrange her appointment. R. 93, ll. 16-17. At the beginning of proceedings on Thursday, the court received a note from Juror 280, saying that she had a 6:00 p.m. event that evening. R. 728.

Also on Thursday, the court noted it would probably need to relieve a juror who was protected from service on Friday during jury qualifications. The judge said: "I think it's more

than likely that they will go over until tomorrow with their deliberations. So I'm going to go ahead and release [Juror #298] at that time rather than run the risk of miss trying the case." R. 670, l. 22 – 671, l. 1.

The jury was charged and the court noted it was within an hour of breaking for the day; since Juror #298 had been excused from service on Friday, the court removed him.[5] R. 703 l. 24 – 704, l. 3. The judge said he was aware a juror had an event at 6:00 and told the jury: "My intention is for deliberations to go until five. If a verdict has not been reached, we'll break and come back in the morning." R. 704, ll. 19-22.

The jury received the case to begin deliberations at 4:15 p.m. R. 707, ll. 15-16. The court briefly recessed, and came back on the record with Juror #280 entering the courtroom. R. 709, ll. 15-17. The court stated: "Ma'am I can quit early today, but I can't release you all together. You have to come back in the morning. I've already released all the alternates, I don't have any other choice. Do you want to go home early today?" R. 709, ll. 18-22. The juror responded: "It won't matter because tomorrow is the worse day. I got it every 21 days. I don't know what to do. And I don't even leave the house on day two or three because it's so bad. It just happen two days ago." R. 709, l. 23 – R. 710, l. 1. The juror continued that she was unable to sit down: "I can't even sit in a chair because I'm going to leave a mark, so it's all the way through, so I really don't know what you want me to do." R. 710, ll. 4-6.

After Juror #280 returned to the jury room, the court stated: "This juror that was in here, she's not participating with discussions. She's just back there crying. She says it's going to be worse tomorrow." R. 711, ll. 8-10. The court continued: "She's having her period. Apparently she's menopausal, so it's something she doesn't even go out she says on days two and three. You

[5] One of the alternates, Juror #334, was seated on the jury and the court released the remaining alternate and the excused juror. R. 704, ll. 5-18; R. 707, ll. 17-19; R. 735.

heard what she said?" R. 711, ll. 13-16. The court continued: "I'm going to have to miss try the case." R. 711, ll. 18-19. "We're back to a mistrial." R. 711, l. 22.

Defense counsel responded by asking that the jury be allowed to come back the next week to deliberate given the unusual situation. R. 711, ll. 23-25. The court replied: "**I'm going to miss try the case.** If I try to bring that jury back next week after this experience, it's going to be one mess after another mess." R. 712, l. 1-4 (emphasis added). The court continued, "I wish she had told me before I had released—She didn't and now she's back there not participating. And it's going to be worse tomorrow she says. So she's not an effective juror." R. 712, ll. 4-8.

After a pause, the court said it wanted to put on the record that it had "a juror who is having a problem with her—she's having her period. Apparently, [it's] a very emotional thing for her. She's asked to be relieved. She's apparently not being an effective juror at this point in time." R. 712, ll. 10-15.

The court continued: "I inquired of the defense if they were wanting me to proceed with 11 jurors since I have released the alternates at this time. I'll ask the defense do you wish for me to proceed with 11 jurors?" R. 712, ll. 15-18. Defense counsel replied: "My client says he does not wish to proceed with 11." R. 712, ll. 19-20. The court asked: "So he will not waive the constitutional right?" R. 712, ll. 21-22. The defense answered: "He will not waive that right." R. 712, l. 23.

The court said: "All right. Bring in the lady who's having the problem," but learned the jury had returned a verdict. R. 712, l. 24 – 178, l. 3. The jury entered to the courtroom with a verdict at 4:53 p.m. R. 713, ll. 13-14. The judge asked Juror #280: "Have you been able to participate in this decision?" She responded: "Yes." R. 714, ll. 6-9. The judge asked Juror #280 if she felt this was a fair verdict on her part and if she had an opportunity to adequately consider

the case, to which she replied that she had.[6] R. 714, ll. 9-15. The verdicts were published. R. 715, ll. 1-6.

Defense counsel said: "We had a juror who was brought out here because she wanted to be released." R. 717, ll. 12-13. Archer continued: "And I think Your Honor had concluded that she was not in a condition to participate." R. 717, ll. 15-16. Defense counsel stated: "I would make a motion for mistrial based on the fact she appeared to be unable to effectively participate in deliberation." R. 718, ll. 1-3. The court denied the motion, saying that "I inquired of her specifically in the courtroom as to whether or not she was able to participate fully in the verdict and if it was her verdict and she indicated that it was." R. 718, ll. 4-8.

Discussion

An accused's Sixth Amendment right to a jury trial is fundamental, and applies to state criminal trials via the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). "[T]he right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." *Id.* at 154.

However, the states may determine "the particular number of the body that makes up the jury." *Williams v. Florida*, 399 U.S. 78, 100 (1970). In South Carolina, an accused tried in General Sessions Court has the constitutional right to trial by a jury of twelve persons. "[T]he petit jury of the Circuit Court shall consist of twelve members," and "[a]ll jurors must agree to a verdict in order to render the same." S.C. Const. art. V, § 22.[7]

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[6] The jury foreman agreed the jury had issued its decision without duress. R. 713, ll. 19-23.

[7] Rule 14(a), SCRCrimP, provides that while a jury shall be composed of twelve members, if the parties agree in writing with the approval of the court, a valid verdict may be returned by a jury of less than twelve if the court finds it necessary to excuse one or more jurors.

Juror illness has long been recognized by the South Carolina Supreme Court and at common law as a basis for mistrial that does not violate the prohibition against double jeopardy. "The consent of the prisoner, and the illness, or death of a juryman, would appear, according to Chitty, to be the only causes, which would, in the English courts, authorize the discharge of the jury without agreeing upon a verdict, and remanding the prisoner for a second trial." *State v. McKee*, 17 S.C.L. 651, 653 (S.C. App. L. & Eq. 1830). *State v. Bilton*, 156 S.C. 324, 153 S.E. 269, 275 (1930) (manifest necessity for the discharge of the jury has been recognized for the following causes: consent of the prisoner; illness of one of the jury, the prisoner, or the court; absence of one of the jurymen; the impossibility of their agreeing on a verdict).

In *State v. Scruggs*, 20 S.E. 720 (N.C. 1894), the Supreme Court of North Carolina found that in a murder trial, it is the duty of the judge to declare a mistrial when one of the jurors is unable from illness to continue with the case. In *Scruggs*, a juror "declared that he had been attacked by sickness; that he could not sit on the case as a juror by reason of his illness; and that it was necessary that he be excused." *Id.* The Court noted the trial judge examined him at length on his physical condition, before releasing him and declaring a mistrial when the state refused to proceed with eleven jurors or allow another juror be called in his place. *Id.* The Court stated that "upon the facts found, it was the duty of his honor to direct a mistrial, and hold the prisoner." *Id.* at 721.

The Mississippi Supreme Court has addressed the duty of a trial judge to declare a mistrial when a juror became mentally ill during the trial. In *Dennis v. State*, 50 So. 499, 500 (Miss. 1909), a juror "became insane during the progress of the trial;" the defendant "moved the court to declare a mistrial, discharge the jury, and give him a trial de novo, which motion was overruled." The trial court discharged the insane juror and substituted another juror in his place

for the remainder of the trial, but the new juror had not heard earlier testimony. *Id.* The Mississippi Supreme Court reversed, based on the common-law rule that if a juror becomes incapacitated by death or illness in a felony trial, "the proper course to pursue is to declare a mistrial and begin de novo." *Id.* (internal quotations omitted) (quoting *West v. State*, 28 South. 430 (1900)).

Appellant's constitutional right to trial by a jury of twelve was violated when the illness of Juror #280 during deliberations resulted in a verdict by a jury composed of less than twelve participating members. Juror #280 asked the court to be relieved due to menstrual problems and stated she was unable to sit. The record reflects the judge determined Juror #280 was "not participating with discussions," was "back there crying," and was "not an effective juror."[8]

The case hinged on witness credibility. Indeed, the judge said: "I think it's more than likely that [the jury] will go over until tomorrow with their deliberations." The jury did not receive the case until 4:15 p.m., and Juror #280 quickly asked to be relieved, after already having heard the judge say he was releasing the jury for the day at 5:00 p.m.

It was illogical to accept the verdict of the jury after the judge ruled Juror #280 could not effectively participate in deliberations, and the defense refused to proceed with eleven jurors.

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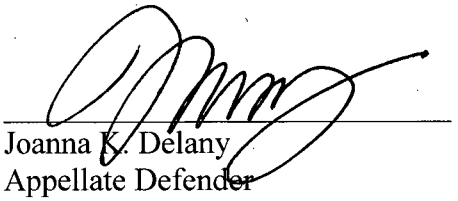
[8] Women affected by dysmenorrhea (painful menses) "experience sharp, intermittent spasm of pain usually concentrated in the supra-pubic area. Pain may radiate to the back of the legs or the lower back. Systemic symptoms of nausea, vomiting, diarrhea, fatigue, mild fever and headache or lightheadedness are fairly common." Amita Singh et al., *Prevalence and severity of dysmenorrhea: A problem related to menstruation, among first and second year female medical students*, Indian J. Physiol. Pharmacol. 52 (4): 389–397 (2008).

CONCLUSION

For the foregoing reasons, Appellant's convictions should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.



Joanna K. Delany
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ATTORNEY FOR APPELLANT

This 4th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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