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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
Opinion No. 5800 (S.C. Ct. App. Filed February 3, 2021)

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

APPELLANT

APPELLATE CASE NO. 2021-000313

APPENDIX

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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 ISSUES ON APPEAL

1.

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

2.

Whether 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?

3.

Whether the trial court erred in not enforcing its grant of a mistrial when 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?

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.

[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
Appellate Defender

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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ATTORNEY FOR APPELLANT

This 4th day of December, 2018.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of December.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of December.

~~(L.S)~~
Notary Public for South Carolina
My Commission Expires: July 26, 2028.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001296

THE STATE, ...RESPONDENT,

v.

TAPPIA DANGELO GREEN, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Any error in the admission of Detective Butler's testimony regarding his opinion of Victim's credibility is harmless error where said comments were cumulative to other, unchallenged testimony, Appellant undermined his own credibility during his testimony, and the overwhelming evidence at trial proved Appellant was guilty of his charged crimes.

II. The trial judge properly allowed the State to present evidence of Appellant's post-arrest silence because the evidence indicated Appellant was never given Miranda warnings.

III. The trial judge correctly refused to grant a mistrial because the record demonstrated Juror 280 was able to, and did, participate in jury deliberations.

STATEMENT OF THE CASE

On November 3, 2015, the Charleston County Grand Jury indicted Appellant for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. On May 22–25, 2017 Appellant proceeded to a jury trial before the Honorable Roger L. Couch. Mark Archer, Esquire, represented Appellant; Assistant Solicitors Daniel Cooper, Esquire, and Burns Wetmore, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to fifteen years' incarceration for armed robbery, fifteen years' incarceration for kidnapping, and five years' incarceration for the possession of a weapon during the commission of a violent crime, with all sentences running concurrently.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

Any error in the admission of Detective Butler's testimony regarding his opinion of Victim's credibility is harmless error where said comments were cumulative to other, unchallenged testimony, Appellant undermined his own credibility during his testimony, and the overwhelming evidence at trial proved Appellant was guilty of his charged crimes.

Appellant argues the trial judge committed reversible error by allowing Detective Butler to testify she found Keith Lee (Victim) credible, bolstering his testimony. However, this issue is not preserved for appellate review; trial counsel failed to argue Detective Butler's statements constituted bolstering to the trial judge.

Statement of Facts

In April of 2015, Victim lived in North Charleston with his then-girlfriend Karissa Aiken. Both Victim and Aiken were employed by the Hardee's restaurant located in the Mount Pleasant area. On April 14, 2015, Victim took Aiken to deposit her paycheck at a local Wells Fargo bank. He waited for her in their car until an individual, later identified as Jonathan Johnson, exited the bank and went to his vehicle, a gold PT Cruiser. He tapped on Victim's passenger-side door and asked whether Victim had jumper cables and would be willing to jump start his car. After he jump-started the PT Cruiser, Victim was about to enter his vehicle when Johnson pressed a silver revolver against his head. Johnson forced Victim into the backseat of the PT Cruiser. (R.p.116, line 23–R.p.125, line 14).

Victim discovered two more individuals were in the PT Cruiser. Appellant, who wore a black shirt and black shorts and gold plating in his mouth sat in the front passenger seat, and an unidentified man[2] in the back seat wearing a white t-shirt and black pants. Johnson drove the

[2] This man was never positively identified.

vehicle while Appellant and the unknown man pointed their guns at Victim and demanded his money and jewelry. Unsatisfied with what they received, Appellant threatened to kill Victim if he could not produce any additional loot. Johnson informed Victim he knew the latter worked at Hardee's and that he knew it was the day employees could pick up paychecks because he had just taken his own girlfriend to pick up hers. Appellant gave Victim's phone back so that the latter could call Hardee's and notify the manager he was picking up his paycheck early. The three men bound Victim's hands and feet and took him to the Hardee's in Mount Pleasant. (R.p.125, line 15–R.p.133, line 12).

Once they arrived at Hardee's, Appellant told Victim that if he signaled for help, the men would kill everyone inside the Hardee's. Appellant and the unknown man remained in the vehicle while Johnson escorted Victim into the restaurant. As they entered the restaurant, Johnson told Victim he did not want to hurt him and that he was forced to participate in the crime as part of a gang initiation. Johnson also told him that his mother worked at that same Hardee's, and that Victim and Aiken often gave the mother rides home from work. Johnson promised he would not let anyone harm Victim. (R.p.150, line 13–R.p.135, line 23).

While signing for his paycheck, Victim tried to mouth the word, "help" to his manager, but Victim was forced to cease his efforts when Johnson moved beside him. As they exited the building, Victim and Johnson heard the sirens from emergency vehicles. Appellant and the unknown man were approaching the building because they thought Victim triggered an alarm or alerted law enforcement. Appellant informed Victim the men were about to enter the building to kill Victim and everyone else inside. The men reentered the PT Cruiser, bound Victim's hands and feet, and Appellant took possession of Victim's paycheck. Shortly thereafter, the men forced Victim to cash his paycheck at a local check-cashing business. Again, they threatened to

kill everyone in the store if Victim sought help. After Victim and Johnson returned to the vehicle, Appellant took the cash and stated they needed to kill Victim because he had seen their faces. Johnson stood up for Victim, noting Victim had been completely cooperative and that Victim and Aiken look out for his mother. Appellant relented, and the men decided to drop Victim off at a local gas station. As Victim exited the PT Cruiser, he saw Aiken in the drive-through of a nearby fast-food restaurant. After the two went home, Aiken called the North Charleston Police Department to report the situation and Victim grabbed and went looking for the three men in the hopes of performing a citizen's arrest. The police intercepted Victim and convinced him to work with them. (R.p.135, line 24–R.p.147, line 21).

Officer Tracey Williams realized one of the descriptions provided by Victim matched Johnson. She left her contact information at Johnson's grandfather's house, a place he frequently stayed, and requested to speak with him. Johnson contacted Officer Williams and admitted the kidnapping and armed robbery occurred, but claimed he was also a victim and was unaware of the plan until he was forced to kidnap Victim. Johnson agreed to an official interview at the police station and showed up in the PT Cruiser used in the crime. At the station, he repeated the information from the phone conversation with Officer Williams and then-detective Alexander Kaufman. He also identified Appellant as the man in the front seat of the PT Cruiser who participated in the crime. Kaufman noted he found Victim and Aiken very credible due to their cooperation and the evidence discovered during his investigation. He further claimed it was not uncommon for victims of violent crimes to arm themselves afterwards and seek retribution. Trial counsel failed to object to any reference of Kaufman's believe in Victim's credibility until Kaufman's redirect examination. (R.p.183, line 10–R.p.194, line 5; R.p.295, line 15–R.p.334, line 18).

Detective Jennifer Butler met with Victim and Aiken in the hours following the crime. She testified the two appeared genuinely shaken up and fearful, even more so than the average violent crime victim. The solicitor asked whether, based on their perceived fear, she believed Victim's and Aiken's stories. Trial counsel objected, arguing whether Detective Butler believed their stories was irrelevant to the case. In response, the trial judge stated Detective Butler could testify as to whether she "gave credibility" to their stories. Ultimately, Detective Butler stated that their attitudes and very real fear caused her to find their stories credible. On cross-examination, Detective Butler admitted she could not say what caused Victim and Aiken to appear fearful and conceded the source of the fear could have been that they had reported a crime and implicated Johnson, a man they knew through a coworker, as a participant. (R.p.197, line 19–R.p.202, line 8; R.p.208, line 8–R.p.211, line 11).

A search of the PT Cruiser uncovered Victim's paystub, its envelope, and other documents within such as Victim's earning statement between the front driver and passenger seats of the vehicle. Six identifiable fingerprints were found on these items; five belonged to Appellant and one belonged to Johnson. A search of Johnson's phone records along with footage from the security camera at the Hardee's showed and Appellant's Facebook page showed Appellant spoke with Johnson on the phone while the latter was inside the restaurant. Appellant's Facebook page also had a picture of him with gold plating in his mouth. (R.p.212, line 21–R.p.261, line 7; R.p.335, line 22–R.p.358, line 11; State's Exhibits 31–36).

Shortly after the crime, Victim was able to identify Appellant in a photographic lineup. (R.p.147, line 22–R.p.151, line 13; R.p.280, line 21–R.p.289, line 4; State's Exhibits 37–38).

Johnson's trial testimony differed drastically from the information he provided police; notably, he claimed he could not remember any information he provided to the officers and was

drunk and when he "fabricated" the story about the armed robbery. Johnson claimed that on the day in question, he ran into Victim at the bank by happenstance when he went to cash his own check. Prior to that, he had met Victim when he and Aiken had transported his mother to and from work. After requesting Victim jump start his car, he asked him for money owed from the prior sale of drugs[3] and Victim suggested they pick up his paycheck at the Mount Pleasant Hardee's and willingly cashed his paycheck and gave it to Johnson. Appellant accompanied them throughout the experience, but no crime occurred. Johnson also claimed Appellant wore white, not black, on the day in question. (R.p.368, line 20–R.p.370, line 18; R.p.373, line 11–R.p.376, line 19; R.p.463, line 19–R.p.464, line 22).

However, Johnson's letters to the solicitor contradicted his story to police and his trial testimony. In them, he claimed he and Victim planned to meet at the bank because the latter did not want Aiken to discover his drug habit. In the second letter, Johnson claimed Victim called him and asked to be picked up. In a letter to his prior defense attorney, Johnson did not deny a crime occurred, but said Appellant did not participate and that he identified him to alleviate the pressure on himself. (R.p.370, line 19–R.p.373, line 10; R.p.376, line 20–R.p.380, line 8; R.p.386, line 14–R.p.387, line 6).

On cross-examination, Johnson vacillated between his claims that he unexpectedly saw Victim at the bank and that the men had arranged to meet. When he claimed Victim called him that morning, but could not explain why Victim's phone number failed to appear in his cell phone records. He also claimed only three people were in the vehicle at any time. Confronted with the photographs from the Hardee's, Johnson admitted a fourth person was in the vehicle, but did not know his full name, only that his initials were L.B. Johnson confusingly claimed

[3] Johnson later claimed he began selling drugs to Victim because, two to three months prior to the crime, Victim dropped Johnson's mother off at home and immediately asked him whether he sold drugs. (R.p.464, lines 5–24).

both Appellant and L.B. wore white, despite photographs to the contrary. He also alleged L.B. was using Appellant's phone that day. Johnson also claimed he did not own a gun and did not take pictures with guns; Johnson recanted after the solicitor provided photographs of Johnson posing with guns. Johnson readily admitted he knew Hardee's employees could pick up their paychecks that day because he had taken his mother to do the same that morning. Johnson could not explain why Victim abandoned his girlfriend and their vehicle at the bank. Similarly, despite claiming he had taken his mother to Hardee's earlier that day, Johnson then claimed he and Appellant had worked construction with Johnson's father all morning. (R.p.389, line 12–R.p.421, line 23).

Finally, the solicitor impeached Johnson's testimony with a video recording of his interview with police in which he admitted to the robbery, identified Appellant as a coconspirator, told officers Appellant wore an all-black outfit, and described the statements Victim made during the ordeal. Additionally, Johnson conceded he had pled guilty to his charges in the case[4] and the solicitor pointed out that during his plea hearing, Johnson agreed with the State's version of the facts. (R.p.380, lines 9–16; R.p.422, line 4–R.p.441, line 22; R.p.465, line 15–R.p.471, line 21; R.p.478, line 24–R.p.480, line 10; State's Exhibits 45–46).

Appellant testified he was with Johnson and Victim on the day in question. He claimed Johnson did not plan to meet Victim at the bank. Johnson talked to Victim about purportedly owed payment for drugs, and the men left for the Mount Pleasant Hardee's without jump starting the PT Cruiser. Appellant admitted he, not J.B., called Johnson while he was in the bank and in Hardee's. He admitted he touched Victim's paystub and its envelope after Victim cashed his paycheck. (R.p.487, line 12–R.p.449, line 16).

[4] Johnson was charged with armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (R.p.381, lines 4–18).

During cross-examination, Appellant admitted he was wearing black the day of the robbery and it was him in the photographs presented at trial. He claimed he had been drinking and smoking weed and got out of the PT Cruiser at Hardee's because he heard emergency sirens and thought there might have been a car accident on the other side of Hardee's. (R.p.499, line 24–R.p.502, line 23).

The solicitor also asked Appellant whether he had a gun that day. Appellant claimed he did not have one that day, but he owns guns because it was his constitutional right to bear arms. The trial judge found this was a misstatement due to Appellant's criminal history and the fact he is forbidden by law to own a firearm. Accordingly, he allowed the solicitor to mention Appellant has a felony conviction which prevents him from owning a gun. When the solicitor resumed his cross-examination, he questioned Appellant about this fact. Appellant noted he was forbidden by law to own a firearm but that if he decided it was important, he would disregard the law and buy one. (R.p.508, line 6–R.p.536, line 9; R.p.557, line 15–R.p.573, line 22).

Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005). A party may not argue one issue at

trial and a different issue on appeal. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000).

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

In the instant case, this issue is not preserved for appellate review. Trial counsel's only objection at trial was that it was "irrelevant whether [Detective Butler] believe[d] . . . the story." Trial counsel did not complain such testimony was bolstering or that it impacted the jury's determination of the Victim's credibility. The trial judge was not given the opportunity to rule on these bases, rendering this issue unpreserved for review by this Court. See Dickman, 341 S.C. at 295, 534 S.E.2d at 269; Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Standard of Review

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the

materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller, 399 S.C. at 171, 731 S.E.2d at 320.

Analysis

Detective Butler's contested statements were not improper bolstering because she was not qualified as an expert witness nor did she claim to reach her conclusion as to Victim's veracity based on any expert knowledge or skill. Detective Butler claimed she believed Victim based on his apparent sincerity, something the jurors were able to observe and gauge themselves. See Taylor, 404 S.C. at 514, 745 S.E.2d at 128.

The State also notes any alleged error in the admission of Detective Butler's believe in Victim's credibility is harmless given said assessments were cumulative to the assessments of another witness at trial, Kaufman. Heller, 399 S.C. at 171, 731 S.E.2d at 320. Similar to Detective Butler, Kaufman explained the witnesses gave consistent statements cooperated with the investigation and that these behaviors set Victim apart from other victims of violent crimes. However, trial counsel failed to object in any way to this testimony.

Accordingly, the trial judge did not err in admitting this portion of Dr. Butler's testimony.

II.

The trial judge properly allowed the State to present evidence of Appellant's post-arrest silence because the evidence indicated Appellant was never given Miranda warnings.

Appellant argues the trial judge erred in allowing the solicitor to question him regarding his post-arrest silence, claiming such questions constituted an improper comment on his exercise of his right against self-incrimination in violation of Doyle v. Ohio, 426 U.S. 610 (1976). Notably, this issue is unpreserved for appellate review; trial counsel failed to timely object to the initial cross-examining on the matter and further failed to move to strike these statements when his objection was sustained by the trial judge. Further, the State disagrees with the merits of Appellant's argument: the two officers who interacted with Appellant during his arrest both testified Appellant was not Mirandized at the time of his arrest and Appellant's own testimony supports this assertion. Thus, the overwhelming evidence presented to the trial judge demonstrated the solicitor's cross-examination did not constitute a Doyle violation.

Statement of Facts

When asked why he failed to tell police his side of the story, Appellant noted:

> What do you mean, why not tell the police. I was never questioned. There was, like, a warrant was issued directly for my arrest. I [] never wrote a statement; I [] never did an interview; I [] never did any of those things. This is the first time I'm [telling] this story since I was locked up.

He further explained he was not arrested until three months after the crime, at which time there was already a warrant for his arrest and no police officers questioned him. After several of these questions and responses, trial counsel objected, arguing the questions amounted to an "improper comment" on Appellant's Fifth Amendment rights. The trial judge sustained the objection. (R.p.502, line 24–R.p.506, line 9).

The following morning, the Court further discussed whether a potential Doyle violation occurred. The solicitor explained nothing in Appellant's file indicated he was Mirandized when he was arrested after the crime. Appellant claimed he was Mirandized by a bald officer, who appeared to be around thirty years old and wearing all green, outside the apartment complex where he was arrested. He claimed was not questioned, and a female officer immediately drove him to the police station in her cruiser. (R.p.540, line 1–R.p.557, line 14).

Officer Danielle Smoak, the officer who performed Appellant's arrest. She explained that after he fled from police, he hid in an apartment complex. When officers announced they were about to release a K-9 unit, he exited the building. She placed him in handcuffs and sat him in her patrol car until a transport van arrived. She explained transport officers do not Mirandize or question arrestees and that she did not Mirandize or question him about his various charges. She noted the only officer at the scene who matched the description of the man Appellant described was K-9 officer Brandon VanAusdal, who notably was bald and had a green uniform due to his position. Officer Smoak did not see any other officer Mirandize or otherwise communicate with Appellant. (R.p.598, line 11–R.p.608, line 6).

Officer VanAusdal noted he never provided Appellant with Miranda warnings; instead, he warned Appellant several times that he would release his K-9 if he did not surrender to police. Similarly, he did not witness Officer Smoak or any other officer Mirandize Appellant. As soon as Officer Smoak arrested Appellant, he returned his dog to his vehicle. (R.p.608, line 12–R.p.615, line 14).

Trial counsel moved for a mistrial, arguing the State did not prove, beyond a reasonable doubt, that no officer spoke with Appellant and Mirandized him. The solicitor countered noting the officers' testimonies demonstrated no Doyle violation occurred. The trial judge noted it was

not incumbent upon the solicitor to prove, beyond a reasonable doubt, that Appellant did not receive Miranda warnings, and that the he provided sufficient evidence to support his argument. (R.p.615, line 15–R.p.621, line 25).

Issue Preservation

Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

Pursuant to our issue preservation requirements in South Carolina, an issue must also be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so **it can be reasonably understood by the trial judge.**" (emphasis added)). Importantly, "[a] party need not use the exact name of a legal doctrine in order to preserve it[.]" State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, "it must be clear that the

argument has been presented on that ground." Id. Significantly, "[w]here an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal."). "When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); see also State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (finding a motion to strike unnecessary because the objection to the hearsay testimony was overruled).

In the instant case, Appellant's issue is unpreserved for appellate review because he both failed to timely object and to move to strike the testimony in dispute. Notably, the solicitor questioned Appellant for several minutes as to why he failed to tell police he was not involved in a crime. Appellant spoke at length about sitting in jail and not speaking to law enforcement about the crime before trial counsel objected. Because trial counsel failed to object at his first opportunity, this issue is not preserved for review. See Williams, 303 S.C. at 411, 401 S.E.2d at 169. Further, when trial counsel finally objected and it was sustained by the trial judge, trial counsel failed to request the prior testimony regarding Appellant's silence be stricken from the record. Accordingly, this issue is also unpreserved due to this failure. See Byers, 392 S.C. at 444, 710 S.E.2d at 58.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law.

State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

Ordinarily, when circumstances exist that would naturally lead a defendant to reveal a pertinent fact but the defendant fails to do so, it is proper to question the defendant about his failure to reveal the pertinent fact when an opportunity existed to do otherwise because such a failure can be probative towards issues such as fabrication and credibility. See Jenkins v. Anderson, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); see also Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (recognizing silence can be probative while noting "if the shooting was an accident, petitioner had every reason – including to clear his name and preserve evidence supporting his version of the events – to offer his account immediately following the shooting"). However, when the defendant's silence follows the giving of Miranda warnings, such silence loses its probative force due to the fact "[s]ilence in the wake of [those] warnings may be nothing more than the [defendant]'s exercise of [those] Miranda rights." Doyle, 426 U.S. at 617. Accordingly, the use of a defendant's post-Miranda silence for impeachment purposes is improper and constitutes a violation of the defendant's due process rights. Id. at 619. "The obvious purpose [of that

prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

Analysis

In the instant case, the trial judge did not abuse his discretion in finding Appellant had not been given his Miranda rights and that the solicitor could question him about his post-arrest silence. Officer Danielle Smoak, the officer who arrested Appellant, testified she was the officer how handcuffed him and took him into custody and that no one, including herself, Mirandized Appellant or attempted to question him. Officer VanAusdal, the only officer who matched Appellant's description, testified he did not Mirandize Appellant, and that the only warnings he provided was that he would release his K-9 if Appellant did not allow the officers to take him into custody. He did not observe anyone other than Officer Smoak interact with Appellant, much less Mirandize him. Appellant's own testimony further evidences this conclusion: officers never attempted to question or communicate with him during or after his arrest.

Accordingly, the trial judge did not err in finding no Doyle violation occurred and denying trial counsel's motion for a mistrial.

III.

The trial judge correctly refused to grant a mistrial because the record demonstrated Juror 280 was able to, and did, participate in jury deliberations.

Appellant argues the trial judge erred in "not enforcing its grant of a mistrial" because one of the jurors was unable to participate in deliberations. However, the trial judge never granted a mistrial in the case and merely suggested he may need to because he feared the juror would not participate in deliberations. The trial judge properly avoided granting such a motion because he discovered the juror participated in deliberations and reached the same verdict as the remaining eleven jurors.

Statement of Facts

At the conclusion of the trial judge's instructions, he discharged a juror and one of the two alternates, and the remaining jurors began deliberations. A short time later, the trial judge received information that juror number 280 (280) was not participating in deliberations. He summoned her to the courtroom and she explained she was on the third day of her period, and she had bled all the way through her clothes; she feared sitting in a chair would leave a stain on the furniture. The trial judge explained he already released the alternates but that he would be glad to let her do whatever she needed to help. She explained she would just use a towel. When the trial judge offered to release the jurors early that day, she explained it "[didn't] really matter" at that point because she had already bled through her clothes. She also refused an offer to start late the next morning, again noting it "[didn't] matter." (R.p.709, line 6–R.p.711, line 6).

After the juror returned to the jury room, the trial judge informed the parties he had called the juror into courtroom because he heard she had been crying and not participating in the discussions. Concerned she would not participate, the trial judge warned he would have to

declare a mistrial. Trial counsel requested that they merely delay deliberations until the following Monday because there was no defect in the case. The trial judge feared only more problems would arise in that scenario and asked Appellant whether he was willing to proceed with only eleven jurors. Appellant did not waive that right. The trial judge decided to bring 280 back into the courtroom for further discussions. Before he could do so, the trial judge discovered the jurors had reached a verdict in the case. (R.p.711, line 7–R.p.713, line 12).

The trial judge asked the jury foreperson whether he believed the jury had an adequate opportunity to review the evidence and reach its decision, and he responded in the affirmative. He also asked 280 whether she had been able to participate in the deliberations and adequately consider the evidence, and she too responded in the affirmative. Then, all jurors raised their hands to indicate it was the verdict they collectively reached. (R.p.713, line 15–R.p.714, line 22).

After the verdict was read, trial counsel moved for a mistrial, claiming 280 indicated she was unable to effectively participate in the deliberations. The trial judge denied the motion, noting 280 specifically stated she had participated fully in the deliberations. (R.p.717, line 12–R.p.718, line 9).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge

should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

The Constitution of South Carolina provides, "[t]he petit jury of the Circuit Court shall consist of twelve members and the number of jurors of other courts must be determined by law. S.C. Const. art. V, § 22. All jurors in any trial court must agree to a verdict in order to render the same . . ." Pursuant to Rule 14(a), SCRCrimpP, however, any time before the verdict the parties may agree in writing (with the court's approval) that a valid verdict may be returned by less than twelve jurors.

Analysis

The trial judge did not err in refusing to grant Appellant's motion for a mistrial. The record indicates 280 participated in the jury's deliberations. The complaints regarding 280's refusal to participate in discussions arose from the deliberations that occurred prior to her discussion with the trial judge. When she spoke with him on the record, she indicated she would sit on a towel and participate in discussions. The trial judge only considered granting a mistrial because he believed 280 would not participate after returning to the jury's chambers. However, before he could do so, the trial judge received word that the entire jury, including 280, had reached a verdict in the case. Both the jury foreperson and 280 confirmed the latter participated in deliberations, had adequately considered the case, and that the verdict was unanimous among the jurors. Accordingly, the record demonstrates the trial judge did not abuse his discretion in denying trial counsel's motion for a mistrial. See Inman, 395 S.C. at 565, 720 S.E.2d at 45.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 15, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001296

THE STATE, ...RESPONDENT,

v.

TAPPIA DANGELO GREEN, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

November 30, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001296

THE STATE, ...RESPONDENT,

v.

TAPPIA DANGELO GREEN, ...APPELLANT.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Final Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served this 30th day of November, 2018.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tappia Deangelo Green, Appellant.

Appellate Case No. 2017-001296

Appeal From Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5800
Heard November 7, 2019 – Filed February 3, 2021

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

HUFF, J.: Tappia Dangelo Green appeals from his convictions for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. He asserts the trial court erred in (1) allowing irrelevant testimony of a detective concerning the victim's fear, causing the detective to give the victim's story credibility, (2) allowing evidence of his post-arrest silence in violation of *Doyle v.*

Ohio,[1] and (3) not enforcing a grant of mistrial when a juror was unable to participate in deliberations due to a medical condition and asked to be relieved. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Green was tried before a jury May 22-25, 2017. The State presented evidence that: Green and two other individuals—Jonathan Johnson and a third, unknown man—kidnapped Keith Lee under gunpoint as he waited for his girlfriend who had entered a bank; they robbed him of a small amount of cash and jewelry; they drove him to his place of employment to collect his pay check; they drove him to a check cashing business; and they released him after taking his money from his paycheck. The defense's position was that Lee owed Johnson money for drugs; he voluntarily rode with the men to cash his check and turned over the money; and Lee only reported it as a crime to avoid his girlfriend's anger over him using his paycheck for drugs.

During the trial, Detective Jennifer Butler testified she interviewed Lee's girlfriend, Karissa, who identified Johnson[2] as a person she had seen while she was in the bank. Detective Butler transported Lee and Karissa home after their interviews. When asked about their emotional state during this time, she stated they both appeared "very shook'en up," they were very disturbed, they were concerned about retaliation, and they inquired about a special patrol request for their address. Detective Butler testified she detected "pretty genuine fear" and, in her experience as a detective, that was not common, and they appeared more shaken and concerned than average victims. The solicitor asked the detective if, based upon what she perceived as a very real fear, she believed their story. Defense counsel objected, stating, "He's asking her did she believe [their] story and I think that's irrelevant whether she believes it." The trial court allowed the testimony over the objection.

Green testified in his own defense, claiming Johnson stated Lee owed him money. He recounted how he, Johnson, Lee and a third person drove around smoking weed that day, indicating they went from the bank to Lee's place of employment and to a check cashing business. Green acknowledged that he was the person wearing all black as depicted on the camera at Lee's place of employment that day. Green

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[1] 426 U.S. 610 (1976).

[2] Karissa knew Johnson because she worked with Johnson's mother.

disputed that Lee was forced or threatened to do anything by him or Johnson. Explaining how he touched the check or envelope belonging to Lee, Green stated that Lee and Johnson walked into a check cashing place and, after they came out and got in the car, Lee handed him a check or an envelope that he then gave to Johnson. Green testified Lee did appear upset at one point, though, commenting that his "gal" was going to "trip."

On cross-examination, the solicitor engaged in lengthy questioning of why Green had not told this story to the police and this was the first time anyone had heard it. Defense counsel eventually objected, asserting the solicitor was improperly commenting on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection and, at the trial court's direction, the solicitor moved on to other questions. Subsequently, a concern was raised that the solicitor's line of questioning may have violated *Doyle*. After hearing arguments and listening to a proffer of evidence on the matter, the trial court determined the evidence indicated Green was not *Mirandized* [3] and, therefore, the questioning was not violative of *Doyle*. However, no further questions were elicited, nor was any argument made, on the matter before the jury.

After the jury began deliberations, Juror 280 came before the court, apparently having asked to be relieved because of a menstrual problem. The trial court explained that they could quit early that day, but she would have to return in the morning. When asked if she wanted to go home early, she declined. She further declined the trial court's invitation to start a little later the following morning, explaining such would not matter. Juror 280 returned to the jury room, and the trial 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." The trial court then stated, "I'm going to have to miss try [sic] the case." Defense counsel suggested they bring the jurors back the next week, but the trial court declined that suggestion and again stated, "I'm going to miss try [sic] the case" noting the juror was not participating, she stated it would be worse tomorrow, and she was not an effective juror. The defense declined to proceed with only eleven jurors, and the trial court stated, "Bring in the lady who's having the problem." However, before it could do so, the jury returned with a verdict.

After the trial court indicated it had been informed the jury had reached a verdict, it asked if the parties were ready to receive the verdict. Defense counsel replied that

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

the defense was ready. When the jury returned to the courtroom, the trial court addressed the foreman, noted an issue had come up during deliberations, and asked if he felt "the jury has had an adequate opportunity to review the case and has issued its decision without duress." The foreman replied affirmatively. When asked if he thought it was a fair verdict in this matter, the foreman again replied affirmatively. The trial court then addressed Juror 280 and asked if she had been able to participate in this decision, if she felt it was a fair verdict on her part, and whether she had an opportunity to adequately consider the case. Juror 280 responded affirmatively to each question. The trial court had all the jurors confirm this was their verdict. The verdict was then published, with the jury finding Green guilty on all charges. When asked if the defense had any matters to consider before releasing the jury, defense counsel stated they had none.

ISSUES

1. Whether the trial court erred by allowing irrelevant testimony by Detective Butler that Lee 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.

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

3. Whether the trial court erred in not enforcing its grant of a mistrial when Juror 280 was unable to participate in deliberations due to a medical condition and asked to be relieved, Green asked that the case be continued until the following week when the juror's medical problem would be resolved, Green 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

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v.*

Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* at 6, 545 S.E.2d at 829. On review, this court is limited to determining whether the trial court abused its discretion. *Id.* Accordingly, we do not re-evaluate the facts based upon our own view of the preponderance of the evidence. *Id.* Rather, we simply determine whether the trial court's ruling is supported by any evidence. *Id.*

"In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009). "[T]his Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 439, 676 S.E.2d at 152. "The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010).

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

LAW/ANALYSIS

I. Detective Butler's Testimony

On appeal, Green argues the trial court erred in allowing Detective Butler's testimony that she found Lee credible due to his appearing more fearful than the average victims she had come into contact with because such was "irrelevant, as it invaded the province of the jury," thereby rendering it incompetent. He contends, because credibility of Lee was a critical issue in the case, this irrelevant bolstering resulted in prejudice to him.

We agree with the State that Green's appellate argument that the testimony vouched for the credibility of Lee and invaded the jury's province is not preserved for our review. The record clearly shows defense counsel objected to admission of Detective Butler's testimony in this regard solely on the basis of relevance. *See State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (holding in order to preserve an issue for appellate review, the issue must be raised to and

ruled upon by the trial court); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); *State v. Whitten*, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007) (holding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial court and ruled upon by the court). Further, starting with its opening statement to the jury and throughout the trial, the defense presented a theory that Lee owed money to Johnson for drugs, there was no robbery but only the collection of a drug debt, Lee's story was not credible, and Lee's reason for not telling the truth was to hide the true story from the police and his girlfriend. Thus, whether Lee's story was believable was relevant. Accordingly, the record supports the trial court's determination that the evidence was relevant. *See* Rule 401, SCRE ("'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."). Whether this testimony from Detective Butler was improper because it invaded the jury's province or improperly vouched for Lee was not raised to nor ruled upon by the trial court and, therefore, is not preserved for our review.

We additionally note that one of the responding police officers, Alexander Kaufman, testified without objection that, although this was a very unusual set of circumstances, he found Lee's and Karissa's statements to be credible because they were very cooperative, they gave consistent statements, they cooperated with the investigation, they returned calls and made calls to Kaufman, it was very unusual for victims of crime to be so cooperative, and he found no reason to doubt them. He stated it did not appear Lee and Karissa were involved in any criminal, gang, or drug activity, and their credibility continued to be established throughout the investigation. Accordingly, any error in the admission of Detective Butler's testimony in this regard is harmless. *See State v. Price*, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (noting any error in admission of improper evidence is harmless when such is cumulative to other unobjected-to evidence admitted at trial); *State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122 (Ct. App. 2008) (finding, while an objection to the testimony presented by the victim was preserved, appellant failed to timely object to the similar testimony by two other witnesses and, therefore, the admission of the victim's testimony would have been harmless error as it was merely cumulative to the other that was entered into evidence without objection).

II. *Doyle*

When Green testified in his defense, his testimony supplied explanations for the State's evidence that Green's fingerprints were found on Lee's paycheck or envelope and for the video evidence of his presence. As noted, on cross-examination of Green, the solicitor thereafter engaged in lengthy questioning of why Green had not told this story to the police and why this was the first time anyone had heard it. Defense counsel eventually objected to this line of questioning, asserting the solicitor was improperly commenting on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection and the solicitor moved on to other questions. During re-cross examination of Green, an issue arose on another matter, and the trial court decided to dismiss the jury for the evening during which time the court intended to research the matter. When court resumed the next day, the trial court noted it had a conference with the attorneys in his chambers on two separate matters, including in regard to the solicitor's questioning of Green concerning his failure to offer an exculpatory statement during his almost two-year incarceration prior to trial. The trial court stated it had some concern whether the line of questioning violated *Doyle*, but noted the solicitor advised there was no record in the file to indicate Green had ever been given his *Miranda* rights. The solicitor then also indicated he had spoken with the arresting officer, who advised that Green had outstanding warrants when he was arrested, so she did not *Mirandize* or question him. Defense counsel protested that Green had informed him he was given post-arrest *Miranda* rights, and counsel sought to proffer Green's testimony on the matter. The trial court indicated it was hesitant to "try the circumstances of [Green's] arrest," but relented to a proffer after defense counsel asserted the matter was "critical to whether or not [Green was] entitled to a mistrial."

In the proffer, Green testified he was involved in a high speed chase and once he was apprehended, "this guy . . . read me my rights," and told Green he had "like eleven warrants." Green claimed this person read him his *Miranda* rights and put him in a car with a female officer who then transported Green to the county jail. He stated the female did not read him his rights, but "just basically transported me to the county jail." Green expounded that he had run into an apartment and then was sitting on some steps when officers told him to come out with his hands up. At that point, he was cuffed and one of the North Charleston Police officers said, "[H]ey, that's Tappia Green" and he was given his *Miranda* rights. Green did not know the officer's name, but described him as an approximately thirty year-old white man with a bald head, a stocky build, and wearing all green. When pressed

for a description of the person by the solicitor, Green stated, "That's why they do police body cameras. All that should be on record." He claimed the bald-headed officer asked him some questions, and he was then put into a cruiser by a man and transported to jail by a female officer.

The State thereafter proffered the testimony of arresting officer Danielle Smoak and K-9 Officer Brandon VanAusdal. Officer Smoak testified that on August 19, 2015, she was involved in a pursuit of Green, who was driving a vehicle and then fled into a building. She and her teammates surrounded the building and waited for the K-9 officer to arrive. Officer Smoak took the first position at the doorway on one side, while the K-9 officer was directly across from her on the other side. When the K-9 officer announced that he was going to release the dog, Green came out with his hands up. Officer Smoak took Green into custody as he came out the door, put him in handcuffs, and placed him in the back of her patrol car and waited for transport. They ran a records check and found Green had outstanding warrants for armed robbery, kidnapping, firearms and forgery. She did not *Mirandize* him or attempt to interrogate him. Officer Smoak stated that as soon as they found out Green had warrants, she notified the detective and "that was that." No one in her presence read Green his *Miranda* rights. When asked if the transport officer read Green his rights, Officer Smoak testified transport officers did not do that and such was not part of their protocol. Officer Smoak stated the only person present at the scene that fit the description of a stocky guy with a bald head wearing something like fatigues was K-9 Officer Brandon VanAusdal. Although she could not say with certainty that none of the other officers ever talked to Green that day, Officer Smoak testified no one usually talks to an arrested individual after she detains the person and puts them in a car. As far as she knew, no other officers except the K-9 officer had any contact with Green. Once Green was placed into Officer Smoak's patrol car, it was secured and locked such that nobody else could have entered her car to read Green his rights. When the transport officer arrived, Officer Smoak unlocked her patrol car for the officer and the transport officer took Green from Officer Smoak's car, put him in hers, and then transported him to jail.

Officer VanAusdal testified that on August 19, 2015, he was involved with taking Green into custody after he fled into an apartment building. Upon arrival, he was at the door with Officer Smoak where he deployed his K-9 and gave three K-9 warnings, indicating he was getting ready to release the dog. Officer VanAusdal denied giving *Miranda* warnings to Green, and he did not hear anyone else read Green his *Miranda* rights. After Green was taken into custody, Officer VanAusdal returned his dog to his vehicle, at which point his function in the matter was over.

When asked at what point Officer VanAusdal *would* give *Miranda* warnings, he stated he would do so if he was going to ask questions, "but if it's just a simple warrant service, handcuffs are put on, [and] he's transported." When asked if he recalled anyone else at the scene with a similar hairstyle to his, Officer VanAusdal stated he did not remember who was bald and who was not.

Following the proffer, the solicitor argued that *Doyle* does not apply if no *Miranda* warnings are given. Defense counsel moved for a mistrial, noting the incident report[4] from the night of Green's arrest indicated the event was recorded with body cameras. The trial court responded, "If that evidence is available, I'll watch it right now, but I've delayed this case today already for a whole morning on this issue." Defense counsel asserted it was incumbent on the State to prove the matter beyond a reasonable doubt. The trial court disagreed with such a burden of proof, stating it was a question of whether or not Green received *Miranda* warnings at the scene. Nonetheless, the court stated it would "probably find . . . beyond a reasonable doubt . . . that there is sufficient evidence to indicate [Green] was not *Mirandized* at that time." The court noted Court's Exhibit 3 contained a place on the form to fill out if rights were given, but it was not checked and no copy of the advisement of rights was attached. The trial court found nothing in the document indicated Green's rights had been given to him by anyone; the officers who were present at the door when he was taken into custody testified neither administered him *Miranda* rights; and the officers indicated that with warrant arrests, such rights are

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[4] The document that included the incident report was made part of the record as Court's Exhibit 3 for the proffer without objection. The report indicates that Officers Riley and Norwood, responding to a report of a possible subject wanted for a violent felony, pursued the suspect when he failed to comply with an attempted traffic stop, that the suspect jumped out of his vehicle and ran into an apartment building, a perimeter was set up with a K9 arriving for assistance, and the suspect subsequently surrendered and was taken into custody by Officer Smoak while perimeter units maintained officer safety. The report states that Officer Norwood activated his body camera and "the entire incident was captured" on his body camera, which included Officer Norwood "running in pursuit of the suspect and . . . the front view of the suspect as he walked out of the apartment and surrendered." A supplemental report by an Officer Cummins stated the officer responded to assist in the matter, stood perimeter, a K9 arrived on the scene, the suspect came out with his hands up, the suspect was detained without incident, and '[t]his incident was recorded with the department issued body worn camera."

generally not given. Accordingly, the trial court found the matter was not violative of *Doyle*, allowed the question to stand,[5] and denied Green's motion for mistrial.

On appeal, Green contends the trial court erred by allowing the evidence of his post-arrest silence in violation of *Doyle* (1) when it determined the matter hinged on whether he had been provided *Miranda* warnings but then disregarded testimony that he had been read his rights, and (2) by refusing to consider body camera recordings of the two officers on scene at the arrest based upon time considerations. He maintains the trial court's factual finding that Green had not been provided with *Miranda* warnings was an abuse of discretion because it was unsupported by the evidence. Alternatively, Green argues the trial court committed legal error in allowing the State to impeach him with his pretrial silence because there was evidence in the record from his own testimony that he had been provided with *Miranda* warnings, and our appellate courts have upheld the admission of such evidence for impeachment "only where there is **no evidence** in the record the accused had received *Miranda*." We disagree.[6]

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[5] It should be noted, although the trial court stated it would "allow the question to stand," no further testimony was elicited after the court's ruling, and the last the jury heard on the matter was that the defense's objection to the questioning was sustained.

[6] As an initial matter, we do not agree with the State's assertion that this issue is not preserved for our review. Though the solicitor asked numerous questions in this regard before an objection, defense counsel did object during this unbroken line of questioning, arguing it was an improper comment on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection at that time, but subsequently undertook to consider whether this questioning amounted to a *Doyle* violation. The trial court allowed a proffer of evidence on whether Green received *Miranda* warnings and, thereafter, ruled on the issue. The issue was raised to the trial court by Green with sufficient specificity, was raised in a timely manner, and was ruled upon by the trial court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us

In *Doyle*, the United States Supreme Court (USSC) ruled that a prosecutor may not attempt to impeach a defendant's exculpatory story—told for the first time at trial—by cross-examining him concerning any failure to have told the story after receiving *Miranda* warnings at the time of his arrest, as use of the defendant's post-arrest silence in this manner violates due process. 426 U.S. at 611. The court noted "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings" and "[i]n 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. It thus held "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

Thereafter, in *Fletcher v. Weir*, 455 U.S. 603 (1982), the USSC clarified the rule set forth in *Doyle*. In that case, Weir, who was on trial for intentional murder, took the stand in his defense and, for the first time, offered an exculpatory version of the stabbing of the victim. *Id.* The prosecutor cross-examined Weir as to why he failed to offer this exculpatory explanation when he was arrested. *Id.* at 603-04. The Sixth Circuit Court of Appeals concluded Weir was denied due process of law when the prosecutor used his post-arrest silence to impeach him. *Id.* at 604. The USSC noted, "Although it did not appear from the record that the arresting officers had immediately read respondent his *Miranda* warnings, the [Sixth Circuit Court of Appeals] concluded that a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given." *Id.* The court observed the significant difference between Weir's case and *Doyle* was "that the record [did] not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." *Id.* at 605. It then reversed the Court of Appeals, holding that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," the state does not violate a defendant's due process rights by permitting cross-examination of his post-arrest silence when a defendant takes the stand. *Id.* at 607.

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with a platform for meaningful appellate review." (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))).

In *Brecht v. Abrahamson*, the USSC stated "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest . . . or after arrest if no *Miranda* warnings are given," and "[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." 507 U.S. 619, 628 (1993).

Our courts have applied *Doyle* and its progeny to hold the Due Process Clause prohibits the prosecution from commenting on an accused's post-*Miranda* silence. Citing *Brecht*, our supreme court has held, "The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of the *Miranda* warnings, in order to impeach the defendant's testimony at trial." *State v. McIntosh*, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004). "Due process is not violated because '[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.'" *Id.* (quoting *Brecht*, 507 U.S. at 628). Additionally, our courts have found no due process violation from cross-examination on a defendant's silence for impeachment purposes when the record was devoid of evidence that the defendant received *Miranda* warnings. *See State v. Bell*, 347 S.C. 267, 271, 554 S.E.2d 435, 437 (Ct. App. 2001) (finding no due process violation when there was "no evidence in the record that Bell ever received *Miranda* warnings" and refusing to presume the warnings were given at the time of Bell's arrest); *Brown v. State*, 375 S.C. 464, 480-81, 652 S.E.2d 765, 773-74 (Ct. App. 2007) (holding, in a post-conviction relief matter, that Brown failed to meet his burden of proving the solicitor committed a *Doyle* violation and that trial counsel erred in failing to object when there was "no evidence in the record that Brown ever received the *Miranda* warnings").

A. Abuse of Discretion

First, we disagree with Green's assertion the trial court abused its discretion in determining he had not been provided with *Miranda* warnings because such finding was unsupported by the evidence. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (observing that "an abuse of discretion is a conclusion with no reasonable factual support"). Although Green testified he was given *Miranda* warnings at the scene and Officer Smoak was unable to say with certainty that no other officers ever talked to Green at the scene of his arrest, there is evidence to support the trial court's finding that Green was not *Mirandized*. In his proffer, Green claimed a white, baldheaded, male officer with a stocky build and wearing all green gave him his *Miranda* rights after he came out of the apartment building and he was cuffed.

He stated this officer put him into a police cruiser with a female officer, who then transported him to jail. The State proffered evidence from Officer Smoak that she was standing in the first position of the doorway outside the building; K-9 Officer VanAusdal was directly across from her; when Officer VanAusdal announced he was going to release his dog, Green came out with his hands up; Officer Smoak took Green into custody as he came out the door, she put him in handcuffs, and she placed him in the back of her patrol car to wait for transport; Officer Smoak did not *Mirandize* Green and no one in her presence read Green his rights; the only person present at the scene who fit the description given by Green was Officer VanAusdal; as far as she knew, no other officer at the scene had contact with Green other than Officer VanAusdal; no one usually talks to an arrested individual after she detains the person and puts him in her car; once she placed Green in her car, she secured and locked the car such that no one else could have entered the car to read Green his rights; once the transport officer arrived, she unlocked her patrol car for the female transport officer, who then removed Green from Officer Smoak's car and transported him to jail; and transport officers do not read arrestees their rights and such is not part of their protocol. The State further proffered testimony from K-9 Officer VanAusdal, who confirmed he was at the door with Officer Smoak and gave K-9 warnings to Green. Officer VanAusdal denied giving *Miranda* warnings to Green and stated he did not hear anyone else do so. Thus, the proffered testimony reflects, while Green claimed he was given *Miranda* warnings at the scene of his arrest by a male officer who then placed him into the car of a female transport officer, the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal; Officer VanAusdal fit the description of the individual Green claimed read him his rights; Officer Smoak did not give Green his *Miranda* rights and did not hear anyone else read him his rights; being in the first position, Officer Smoak placed Green in handcuffs and secured him in her locked car, which meant no one else had access to Green until the transport officer arrived; Officer Smoak unlocked her door for the female transport officer, who then took Green to jail; and Officer VanAusdal denied reading Green his *Miranda* rights. Thus, contrary evidence was submitted by Green and the State as to whether Green was read his *Miranda* rights by a male officer at the scene.

Further, though the trial court indicated a reluctance to delay the trial any further, it did not specifically refuse to consider any body camera evidence. Rather, the trial court stated, "If that evidence is available, I'll watch it right now, but I've delayed this case today already for a whole morning on this issue." Defense counsel did not, thereafter, seek to obtain any such evidence, nor did he ask the court for any

additional time to do so. Additionally, upon review of the report cited by defense counsel, there is nothing to indicate the body cameras of the perimeter officers who indicated body cameras recorded the incident would have captured any alleged giving of *Miranda* warnings to Green from Officer Smoak, K9 Officer VanAusdal, or any other officers. Rather, Officers Norwood and Cummins indicated in the report that the body cameras captured the pursuit, Green's surrender, and his placement in detention. There is nothing to indicate they would have been close enough to Green after he was taken into custody for their body cameras to capture whether he was thereafter *Mirandized*. Accordingly, we find no abuse of discretion.

B. Legal Error

We further disagree with Green's contention that the trial court committed legal error in allowing the State to impeach him with his pre-trial silence because there was evidence in the record he was provided with *Miranda* warnings. He contends our appellate courts have upheld the admission of such evidence for impeachment purposes "only [when] there is **no evidence** in the record the accused received *Miranda* [warnings]." We agree that our courts have determined no *Doyle* violation occurred when the prosecution referred to a defendant's post-arrest silence based upon the fact that there was "no evidence" the defendant received any *Miranda* warnings during the pertinent period of time. However, it does not necessarily follow that when the question of whether a defendant has been given *Miranda* warnings is in contention, *Doyle* automatically applies. We believe the question is not whether any evidence has been presented that a defendant received *Miranda* warnings when determining whether a *Doyle* violation has occurred.[7] Rather, the question is whether the trial judge, who saw and heard testimony on the matter and is in a better position to judge credibility, has the authority to make a factual determination on whether *Miranda* warnings have been given for purposes of determining a *Doyle* violation issue when contrary evidence is presented, and the standard of review to be applied to the trial court's determination in such a matter.

Research reveals no South Carolina cases—nor have we discovered any other jurisdiction's cases—addressing whether a *Doyle* violation has occurred based

[7] Were that the case, any defendant could wait until he or she testifies and then, upon being challenged for giving a story for the very first time in his testimony, automatically receive a mistrial by claiming he or she was *Mirandized*.

upon comments on an accused's silence when there is competing evidence as to whether a defendant has been administered his *Miranda* rights. Further, research reveals very little from other jurisdictions indicating whether the burden is on the defendant to show a *Doyle* violation, or whether the burden is on the State to prove *Doyle* is inapplicable. However, our sister state, Georgia, has held the burden rests on the defendant to show a *Doyle* violation has occurred.

In *Mattox v. State*, the trial court allowed the State to cross-examine the defendant with regard to her post-arrest silence over a defense objection. 395 S.E.2d 288, 289 (Ga. Ct. App. 1990). While the record before the court failed to indicate whether Mattox received any *Miranda* warnings, the court went on to address where the burden of proof rests in considering a possible *Doyle* violation. *Id.* The court noted "the determination of whether the defendant has the burden of showing a *Doyle v. Ohio* violation or the State has the burden of showing the applicability of *Fletcher v. Weir* is one of first impression in this State." *Id.* at 290. The *Mattox* court observed that the USSC in *Fletcher* reversed the lower court's grant of habeas corpus after observing the record did not indicate whether or not the defendant had received *Miranda* warnings during the period of silence immediately after his arrest. *Id.* It reasoned, had the burden been on the State to show *Doyle* was inapplicable, i.e. that the defendant had not received the *Miranda* warnings, the *Fletcher* court would have affirmed the grant of habeas corpus. *Id.* Thus, the court construed *Fletcher* "as authority for the proposition that, as a matter of constitutional law, the burden may be placed upon the defendant to show that the *Miranda* warnings were given prior to his silence that is relied upon by the State for impeachment purposes" and determined it was necessary for the defense to make a proper showing before *Doyle* would apply. *Id.* Accordingly, the court held the record showed Mattox failed to meet her burden of showing her post-arrest silence occurred after she received *Miranda* warnings. *Id.*

We are persuaded by the reasoning in *Mattox* that such burden falls upon the defendant to show a *Doyle* violation. As observed by the *Mattox* court, the USSC in *Fletcher* reversed the lower court's grant of habeas corpus, noting the record there failed to indicate the defendant received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. Had the burden been upon the State to affirmatively demonstrate *Doyle* was not applicable, the failure of the record to indicate whether or not the defendant received any *Miranda* warnings during the period of silence after his arrest would have presumably been fatal to the State meeting its burden of proof and would have resulted in affirmance of the grant of habeas corpus. Accordingly, we believe the burden is upon the

defendant to show a *Doyle* violation has occurred. *See also Lainhart v. State*, 916 N.E.2d 924, 936 (Ind. Ct. App. 2009) ("[When] a defendant asserts a *Doyle* violation, he 'ordinarily bears the burden of showing that *Miranda* warnings were given prior to the post-arrest silence used by the state for impeachment purposes.'" (quoting 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n. 47 (3rd ed. 2007))); *id.* (holding, because the court had no indication at what point the defendant was *Mirandized* for purposes of a *Doyle* and *Fletcher* analysis, the defendant failed to meet his burden of showing that he received *Miranda* warnings prior to the silence with which he was impeached and, therefore, no *Doyle* violation occurred); 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n.52 (4th ed. 2019) ("The defendant ordinarily bears the burden of showing that *Miranda* warnings were given prior to the post-arrest silence used by the state for impeachment purposes.").

Further, even assuming the burden shifted to the State to show *Doyle* was inapplicable once Green proffered evidence *Miranda* warnings were provided to him, we find no error. Given the manner in which this matter arose, the issue boiled down to a factual determination. As with other issues that arise during trial when determinations concerning competing evidence must be resolved by the trial court, this court should not reevaluate the facts based on our own view of the preponderance of the evidence but must simply determine whether the trial court's ruling is supported by any evidence.[8] As previously noted, there is evidence to

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[8] For instance, in evaluating the admissibility of a custodial defendant's statement pursuant to *Miranda*, "[t]he State bears the burden of proving the defendant was properly advised of his *Miranda* rights," as well as proving the defendant voluntarily waived his rights and freely made a statement. *State v. Hill*, 425 S.C. 374, 380, 822 S.E.2d 344, 348 (Ct. App. 2018). "If a defendant makes a custodial statement, then the trial court must not only make an inquiry into the voluntariness of the statement, but also conduct an inquiry to ensure the police complied with the mandates of *Miranda* and its progeny." *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 906-07 (Ct. App. 2002). In *State v. Davis*, 267 S.C. 456, 461, 229 S.E.2d 592, 594 (1976) our supreme court found no error in the admission of the defendant's statement—even though defendant denied that he was ever given his *Miranda* warnings—noting evidence relative to voluntariness of a confession is often in sharp conflict and the trial court must make the initial determination of its admissibility. In determining the admissibility of a defendant's statement, our courts have held "[t]he trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240,

support the trial court's finding that Green was not given *Miranda* warnings. *See Wilson*, 345 at 5-6, 545 S.E.2d at 829 (holding that in criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous); *id.* at 6, 545 S.E.2d at 829 (providing the appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence); *Halcomb*, 382 S.C. at 443, 676 S.E.2d at 154 ("In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party."); *Torres*, 390 S.C. at 625, 703 S.E.2d at 230 ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Ultimately, the matter came down to a question of fact determined by the trial court. It is well settled that rulings on admissibility of evidence involving credibility determinations are within the sound discretion of the trial court, and the appellate court should not engage in de novo review but must leave a credibility determination to the trial judge, who saw and heard the witnesses and is, therefore, in a better position to evaluate their veracity.[9] *See State v. Johnson*, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015) (noting "[c]redibility findings are treated as factual findings" and holding, in spite of

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252 (2001). Further, "[w]hen reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

[9] Notably, during the solicitor's questioning of Green before the jury regarding this being the first time he had told this story, Green stated he "was never questioned," that "a warrant was issued directly for [his] arrest," that he "never wrote a statement," and that he never "did an interview." He further stated that he was not locked up for this crime until three months after it occurred and "there was no talking,[]" [i]t was just straight, we have a warrant for your arrest, take you to county jail, that's that, deal with the courts." This testimony is in line with the State's assertion that Green was not given *Miranda* warnings at the scene because he had warrants. Additionally, at no time did Green claim during this testimony before the jury that he had been *Mirandized*, a logical explanation as to why he would not have spoken to officers about the matter. It was only in his subsequent proffer that he claimed he was *Mirandized* at the scene and was asked a couple of questions.

defendant's claim that she invoked her right to counsel such that her statement was inadmissible, the trial court's determination that defendant's testimony regarding her invocation of her right to counsel was implausible was to be given great deference, and the appellate inquiry was limited to reviewing whether the trial court's factual findings were supported by any evidence); *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (finding an appellate court is bound by the trial court's factual findings unless they are clearly erroneous, and the same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases); *State v. Tutton*, 354 S.C. 319, 325-26, 580 S.E.2d 186, 190 (Ct. App. 2003) (noting, in a case involving the issue of admissibility of other bad act evidence, "[t]he determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity"). Because there is evidence to support the trial court's finding that Green was not given *Miranda* warnings at the scene as he claimed, the solicitor's questioning concerning Green's post-arrest silence was permissible, and no due process violation occurred.

Finally, this issue comes to us based upon the denial of Green's motion for a mistrial. We note that in the jury's presence, the trial court sustained defense counsel's objection to the testimony and the solicitor moved on to other questioning as instructed by the court. Thereafter, no further evidence was elicited on the matter before the jury. Defense counsel subsequently made a motion for mistrial based upon a *Doyle* violation and testimony on the matter was proffered, but this did not occur in the presence of the jury. Thus, the last the jury heard on the matter was that defense counsel's objection had been sustained. The decision to grant or deny a mistrial is within the trial court's sound discretion, and its decision on such will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Wiley*, 387 S.C. at 495, 692 S.E.2d at 563. "The grant of a motion for a mistrial is an extreme measure which should be taken only [when] an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010) (quoting *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999)). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" *Id.* (quoting *State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000)). Given the specific difficulty facing the trial

judge, including the manner in which the issue arose, the fact that the trial court sustained defense counsel's objection to the line of questioning, the fact that the jury was never privy to the trial court's ultimate ruling that the questioning did not violate *Doyle*, and the fact that no other testimony on the matter was elicited before the jury after the trial court sustained the defense objection, we find no abuse of discretion in the trial court's denial of Green's motion for a mistrial.

III. Participation of Juror

Green contends the trial court erred in failing to enforce its grant of a mistrial when Juror 280 was unable to participate in deliberations due to a medical condition and had asked to be relieved. He argues juror illness has long been recognized by our courts as a basis for a mistrial that does not violate the prohibition against double jeopardy. Green maintains his constitutional right to a trial by a jury of twelve was violated when Juror 280's illness during deliberations resulted in a verdict by a jury composed of less than twelve participating members. He contends it was illogical to accept the jury verdict after the court ruled Juror 280 could not effectively participate in deliberations and the defense had declined to proceed with only eleven jurors.

We find Green has waived any possible error by waiting until after the verdict was announced to move for a mistrial based upon Juror 280's situation. When the trial court indicated the jury had reached a verdict, defense counsel raised no objection but confirmed the defense was ready to receive the verdict. The trial court then engaged in questioning of the foreperson and Juror 280 regarding the jurors' opportunity to deliberate and, in particular, Juror 280's ability to participate in deliberations, and confirmed all jurors agreed to the verdict reached. Defense counsel did not raise any objections or seek to further question the jury, and the verdict was then published. Defense counsel also agreed to the release of the jury after the verdict was read without posing any questions or raising any concerns about juror participation. Although Green thereafter moved for a mistrial, he did not do so until after the jury's verdict was published. Because our courts have held that one may not preserve a vice in a trial until he learns what the result will be and then, dissatisfied with the result, take advantage of the vice on appeal, we find Green has waived any alleged error. *See State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (holding the trial court did not err in denying appellant's motion for mistrial when, although defense counsel objected to the solicitor's alleged improper remarks during closing arguments, he failed to move for a mistrial until after the verdict was returned, as "[o]ne may not preserve a vice until

he learns what the result will be and then, take advantage of the error on appeal"); *State v. Burnett*, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice . . . , taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."). *See also State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (noting a party must object at the first opportunity to preserve an issue for review, and finding no error in the trail court's refusal to conduct further inquiry into possible premature jury deliberation when, prior to the jury's verdict, defense counsel discovered the allegedly premature deliberations and there was no indication on the record that the trial court was made aware of such or that the trial court was asked, prior to the verdict, to question the jurors regarding any premature deliberations).

At any rate, we find no error. Though the trial court indicated it was inclined to grant a mistrial based upon concerns that Juror 280 was not able to participate, the jury returned a verdict before the court could do so. Before accepting the verdict, the trial court inquired of the foreman and Juror 280, ensuring that the jury and Juror 280 had adequate opportunity to consider the case, the decision was reached without duress, and Juror 280 participated. *See Wiley*, 387 S.C. at 495, 692 S.E.2d at 563 (holding the decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law); *id.* ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.").

For the foregoing reasons, Green's convictions are

AFFIRMED.

WILLIAMS, J., concurs. MCDONALD, J., concurs in result only.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

Opinion No. 5800

THE STATE,

RESPONDENT,

V.

TAPPIA DEANGELO GREEN,

APPELLANT.

APPELLATE CASE NO. 2017-001296

PETITION FOR REHEARING

On February 3, 2021, this Court affirmed Appellant's conviction in *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 47). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued in Issue 2 that the trial court erred in allowing evidence of his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), where the court determined the matter hinged on whether Appellant had been provided with *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. This Court affirmed Appellant's convictions.

Counsel respectfully asserts that this Court overlooked or misapprehended critical points in issuing its decision as to Issue 2. First, Appellant asserts that this Court misapprehended testimony regarding whether Appellant was provided with *Miranda*[1] warnings.

Second, in deciding the novel issue of law of which party has the burden of proof before the State may impeach a testifying defendant with his post-arrest silence without running afoul of *Doyle*, Appellant respectfully asserts that, in holding the burden is on the defendant, this Court overlooked Rule 104(b), SCRE. That rule provides, "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Silence following the giving of *Miranda* warnings is "ordinarily so ambiguous as to have little probative value." *Fletcher v. Weir*, 455 U.S. 603, 604-05 (1982) (citing *United States v. Hale*, 422 U.S. 171 (1975)). Here, whether Appellant's post-arrest silence was relevant for impeachment purposes depended upon whether he had been provided with *Miranda* warnings. Since the State was the proponent of the impeachment evidence, it should have borne the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition.

In determining which party has the burden of proof on this novel issue, Appellant also asserts that this Court overlooked the helpful analysis of this issue laid out in *United States v. Cummiskey*, 728 F.2d 200, 206 (3d Cir. 1984). *Cumminskey* held the burden of proof was on the prosecution to show the defendant had not received *Miranda* warnings before it could impeach

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

him with his post-arrest silence, pursuant to Fed. R. Evid. 104(b). *Id*. at 206. Rule 104(b), SCRE is identical to the federal rule.

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 Lee 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 when a stranger forced him in the backseat of a PT Cruiser at gunpoint. R. 121, l. 7 – 124, l. 9. Lee said there were two other men in the PT Cruiser and he later learned that the man who approached him (the driver) was Johnathan Johnson, and that Appellant was the front passenger. 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. He alleged Appellant threatened to kill him and everyone in Hardee's if he tried to signal for help. R. 134, ll. 2-6. 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.

Shania Burden, the restaurant manager who gave Lee his check, said Lee neither acted in an unusual manner nor asked 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. 141, ll. 14-15. Lee claimed when the men 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, Lee did not call 911.

Although Johnson had 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 for the drugs, 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.

Police searched the PT Cruiser, which belonged 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 in his defense and 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, Appellant, 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. Appellant 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 nearby. R. 493, ll. 16-21.

Appellant denied having a weapon and threatening to kill anyone and he 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. Appellant said 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. The solicitor 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 the line of questioning; he protested that the State was improperly commenting on Appellant's Fifth Amendment rights. The trial court sustained the objection. R. 505, l. 6 – 506, l. 9. The court had a conference with the attorneys in chambers and then held an *in camera* hearing on whether the State's questioning of Appellant on his failure to offer an exculpatory statement prior to trial violated *Doyle v. Ohio*. R. 540, ll. 8-19. The State argued that because nothing indicated Appellant had been given his *Miranda* rights, *Doyle* was

inapplicable. R. 540, l. 19 – 23. Defense counsel argued Appellant had been given *Miranda* warnings and he was therefore entitled to a mistrial. R. 543, ll. 6-8; R. 545, ll. 3-19.

Appellant had been arrested several months after the alleged robbery for another offense—failure to stop for a blue light—and he was served warrants for this case on the same date. R. 541, ll. 4-9. Appellant 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. He said there were many officers at the scene of his arrest. "There was like 30 polices out there." R. 556, ll. 16-17; R. 546, 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 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.[2] 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

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2 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 incident reports were made part of the record. R. 615, l. 19 – 616, l. 15; R. 729 – 734. Defense counsel noted that the incident reports stated Appellant's arrest was captured on body-worn cameras. 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. No footage was produced for the court to review.

asked him to "come down to City Hall and talk about it." R. 552, ll. 9-22. Appellant said the officer told him, "You have the right to remain silent . . . anything you say can and will be hold against you in a court of law." R. 555, ll. 5-8.

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 his car and ran into a building. R. 598, ll. 21-23. Smoak was one of a team assisting those officers, and she handcuffed Appellant, putting him in her 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 she called a transport unit to take him to jail. R. 599, ll. 21-25; R. 600, ll. 19-21. When the female transport officer arrived, Smoak unlocked her patrol car door so that Appellant could be moved to the transport unit car. R. 606, ll. 6-12.

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. Smoak said,

> A Usually whenever I detain someone and put them in the car, nobody really talks to them after that.
>
> Q Usually. Can you say for certain they didn't talk to [Appellant]?
>
> A No absolutely not.

R. 602, ll. 21-25. Officer Smoak reiterated that she could not say "with absolute certainty" that another officer did not give Appellant *Miranda* warnings at the scene of his arrest. R. 607, l. 23 – 608, l. 1. Officer Smoak explained 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

was called and testified that he was a canine 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 he did not see who served warrants on Appellant for these offenses. R. 614, ll. 17-23; R. 613, ll. 20-24.

The State argued that if no *Miranda* warning is given, then *Doyle* and its progeny do not apply, and its cross-examination of Appellant did not violate Appellant's Fifth Amendment rights. R. 620, ll. 5-11. Defense counsel argued that the burden was on the State to prove Appellant had not been given *Miranda* warnings before it could question him on his post-arrest silence without running afoul of *Doyle*. R. 620, ll. 22-23; R. 618, ll. 6-7. Although the trial court did not explicitly say which party had the burden of proof, it stated, "[H]e's [Appellant] getting ready to testify that he got his *Miranda* rights, that's what I've been told. If you want to counter that testimony, that's up to you [solicitor]." R. 545, ll. 16-19.

At the conclusion of the hearing, the court found "sufficient evidence to indicate that [Appellant] was not *Mirandized* at that time." R. 621, ll. 6-8. The court stated that the incident reports did not say Appellant was read *Miranda*, and two officers present at Appellant's arrest testified they did not read him *Miranda*. R. 621, ll. 12-19. The court found the State's line of questioning did not violate *Doyle* and it denied the defense's mistrial motion. 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.

This Court found "contrary evidence was submitted by [Appellant] and the State" as to whether Appellant was read his *Miranda* rights, and therefore there was evidence to support the trial court's decision. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60). This Court wrote,

> Thus, the proffered testimony reflects, while Green claimed he was given *Miranda* warnings at the scene of his arrest by a male officer who then placed him into the car of a female transport officer, the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal; Officer VanAusdal fit the description of the individual Green claimed read him his rights; Officer Smoak did not give Green his *Miranda* rights and did not hear anyone else read him his rights; being in the first position, Officer Smoak placed Green in handcuffs and secured him in her locked car, which meant no one else had access to Green until the transport officer arrived; Officer Smoak unlocked her door for the female transport officer, who then took Green to jail; and Officer VanAusdal denied reading Green his *Miranda* rights.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 59-60).

This Court determined that as to prior South Carolina caselaw holding there was no *Doyle* violation only where no evidence appeared in the record that the accused had been provided *Miranda* warnings, "it does not necessarily follow that when the question of whether a defendant has been given *Miranda* warnings is in contention, *Doyle* automatically applies. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60-61).

> We believe the question is not whether any evidence has been presented that a defendant received *Miranda* warnings when determining whether a *Doyle* violation has occurred. Rather the

> question is whether the trial judge, who saw and heard testimony on the matter and is in a better position to judge credibility, has the authority to make a factual determination on whether *Miranda* warnings have been given for purposes of determining a *Doyle* violation issue when contrary evidence is presented, and the standard of review to be applied to the trial court's determination in such a matter.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (footnote omitted).

This Court cited *Mattox v. State*, 395 S.E.2d 288 (Ga. Ct. App. 1990), noting that Georgia "has held the burden rests on the defendant to show a *Doyle* violation has occurred." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61). In particular, this Court quoted the *Mattox* court's statement that, "the determination of whether the defendant has the burden of showing a *Doyle v. Ohio* violation or the State has the burden of showing the applicability of *Fletcher v. Weir* is one of first impression in this State." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (quoting *Mattox*, 395 S.E.2d at 290). This Court reasoned,

> As observed by the *Mattox* court, the USSC in *Fletcher* reversed the lower court's grant of habeas corpus, noting the record there failed to indicate the defendant received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. Had the burden been upon the State to affirmatively demonstrate *Doyle* was not applicable, the failure of the record to indicate whether or not the defendant received any *Miranda* warnings during the period of silence after his arrest would have presumably been fatal to the State meeting its burden of proof and would have resulted in affirmance of the grant of habeas corpus. Accordingly, we believe the burden is upon the defendant to show a *Doyle* violation has occurred.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62).

This Court also found that, "even assuming the burden shifted to the State to show *Doyle* was inapplicable once Green proffered evidence *Miranda* warnings were provided to him, we find no error." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62). "As previously noted, there is evidence to support the trial court's finding that Green was not given *Miranda* warnings." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 63).

This Court found no abuse of discretion in the trial court's denial of Appellant's mistrial motion. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 65). In its earlier discussion of South Carolina caselaw which held impeachment with pre-trial silence was only proper where there had been no evidence the accused had received *Miranda* warnings, this Court disagreed with those holdings because, "Were that the case, any defendant could wait until he or she testifies and then upon being challenged for giving a story the very first time in his testimony, automatically receive a mistrial by claiming for the first time that he or she was *Mirandized*." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61, n. 7).

Appellant respectfully asserts that this Court misapprehended testimony regarding whether Appellant was provided with *Miranda* warnings. As seen, this Court found "contrary evidence" was submitted by Appellant and the State as to whether Appellant was read his *Miranda* rights. However, Appellant's *in camera* testimony that he received *Miranda* warnings was not totally in conflict with the *in camera* testimony by Officer Smoak and Officer VanAusdal. Neither officer said that Appellant did not receive *Miranda* warnings. Officer Smoak testified that although no one typically speaks with a suspect after he has been placed in her patrol car, she "absolutely [could] not" say that no one spoke with and *Mirandized* Appellant. R.

602, ll. 21-25. Officer Smoak explained that a couple of years had passed and she had been involved "in multiple pursuits and incidents since then." R. 608, ll. 1-6.

Officer VanAusdal testified that he did not give Appellant *Miranda* warnings but said he quickly returned to his police car after Appellant was taken into custody. R. 612, l. 7 – 613, l. 13. Therefore, neither Officer Smoak nor Officer VanAusdal said that Appellant could not have been given *Miranda* warnings.

Appellant also asserts this Court's finding that "the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal" misapprehends the testimony on this matter. Smoak and VanAusdal were not certain that they were only people who had contact with Appellant. Also, only those two out of many officers were called to testify. There were at least two additional officers present (Officers Riley and Norwood per incident reports) and possibly as many as thirty officers present per Appellant's testimony.

It is a novel issue of law in South Carolina whether, in order for a prosecutor to impeach a testifying defendant with his post-arrest silence, the burden is upon the State to show that such cross-examination does not violate *Doyle v. Ohio*, or whether the burden is upon the defendant to show that such cross-examination does violate *Doyle v. Ohio*.

This case stands primarily before the backdrop of two United States Supreme Court decisions: *Doyle v. Ohio* and *Fletcher v. Weir*. *Doyle v. Ohio*, 426 U.S. at 611, held that a prosecutor may not use the post-*Miranda* silence of an accused to impeach his exculpatory story told for the first time at trial. However, 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. *Fletcher v. Weir*, 455 U.S. at 607.

Appellant respectfully asserts that, in holding the burden is on the defendant, this Court overlooked *United States v. Cummiskey*, 728 F.2d 200 (3d Cir. 1984), which, while not binding on this Court, contains an explanation of why *Mattox* (the Georgia case relied on by this Court, *supra*) incorrectly decided this issue. In *United States v. Cummiskey*, 728 F.2d at 202-03, the Third Circuit addressed whether the admission of questions and comments on the defendant's silence was in violation of *Doyle v. Ohio* such that the defendant was entitled to a mistrial. Specifically, the Third Circuit addressed whether the trial court erred when it placed the burden on the defendant to show his silence was post-*Miranda* rather than placing the burden on the prosecution to show the defendant's silence was not post-*Miranda*. *Id*. at 204.

As to the argument that, based upon a reading of *Fletcher v. Weir*, "the Supreme Court has placed on the testifying defendant the obligation to establish the giving of *Miranda* warnings," the Third Circuit explained, "*Fletcher* does not support the government's position. It only holds that an arrest alone, not accompanied by *Miranda* warnings, is insufficient to place the testifying defendant within the rule of *Doyle v. Ohio*." *Cummiskey*, 728 F.2d at 206.

The Third Circuit explained, "In that case the Sixth Circuit had declined the state's invitation to order a remand for factual findings, holding that no such remand was required because the giving of *Miranda* warnings was irrelevant as a matter of law." *Id*. "Consequently, the issue of which party bears the burden of establishing the giving (or absence) of warnings was not addressed by the Sixth Circuit, and was not before the Supreme Court." *Id*. A review of the case history of *Fletcher v. Weir* bears this out. *See Weir v. Fletcher*, 658 F.2d 1126, 1129 n. 8 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982) ("The Commonwealth argues on appeal that because the record is so unclear, we should remand for an evidentiary hearing as to when *Miranda*

warnings were given. Because we conclude that it makes no difference whether warnings were given or not, there is no need to remand.")

Counsel respectfully asserts this Court misapprehended *Fletcher v. Weir* when it relied on the Georgia Court of Appeals' erroneous reading of *Fletcher* in *Mattox v. State*, 395 S.E.2d at 288. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61).

The Third Circuit in *Cummiskey* explained that the "relevance of post-arrest silence depends entirely upon its impeaching character as an arguably prior inconsistent assertion by the action of remaining silent. *Doyle v. Ohio* holds that when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion." *Cummiskey*, 728 F.2d at 205. The *Cummiskey* court determined that under Fed. R. Evid. 104(b), "the absence of *Miranda* warnings is a typical instance of a condition of fact on the fulfillment of which relevancy of other evidence, in this case post-arrest silence, depends." *Id*.

Rule 104(b), SCRE is identical to the federal rule, and it provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." In discussing the identical federal rule, the Third Circuit explained, "Because it is the prosecutor who is attempting to establish the relevancy, for impeachment or any other purpose, of post-arrest silence, the government bears the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition." *Id*. at 205-06. Fed. R. Evid. 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *Id*. at 206.

Here, Rule 104(b), SCRE plainly contemplates that the moving party bears the burden of introducing such supporting evidence. The burden of proof lies properly with the State in this instance. *See United States v. Foster*, 995 F.2d 882, 883 (9th Cir. 1993) ("In accordance with the reasoning of the Third Circuit, we hold that the government has the burden of demonstrating that the warnings were not given"); *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 164, n. 4 (3d Cir. 2009) (recognizing that prosecution has burden of establishing defendant did not receive *Miranda* warnings prior to using his post-arrest silence for impeachment). *See generally South Dakota v. Neville*, 459 U.S. 553, 565 (1983) ("the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened").

Moreover, in this context, it is the defendant who has rights and the government that has obligations—Appellant had fundamental constitutional rights to testify in his defense and to remain silent prior to trial. U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV. *See Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (right to testify on one's own behalf at a criminal trial has sources in the Fourteenth, Sixth, and Fifth Amendments); *Doyle v. Ohio*, 426 U.S. at 619 ("the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment"). In contrast, the State had the obligation to establish the relevancy of Appellant's post-arrest silence pursuant to the evidence rules and to accord Appellant due process.

Appellant respectfully asserts that the proper holding here is as was explained by the Third Circuit in *Cummiskey*: "[W]hen a testifying defendant makes an objection to the prosecutor's cross-examination with respect to post-arrest silence, it is the prosecutor's burden, under Rule 104(b), to establish that *Miranda* warnings were not given prior to the silence relied

upon for impeachment purposes." *Cummiskey*, 728 F.2d at 206. Here, Appellant's objection placed the burden upon the State.

This Court has previously allowed impeachment with post-arrest silence only 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) (no *Doyle* violation where "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). This Court should adhere to those holdings, pursuant to which the solicitor's attempts to impeach Appellant with his silence were improper. Appellant testified that he did receive the warnings and the trial court did not find his testimony was not credible.

As to this Court's concern that an accused might provoke a mistrial by claiming he was *Mirandized* after an impeachment attempt, Appellant asserts this concern may be alleviated by an *in camera* hearing. Also, the dearth of caselaw about this issue suggests it is one which has arisen infrequently.

The trial court erred by denying Appellant's mistrial motion after the jury heard evidence of Appellant's post-arrest silence in violation of *Doyle*. "Because 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). In order for a *Doyle* violation to be harmless, the record must show "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) (citing *Chapman v. United States*, 547 F.2d 1240 (5th Cir.1977)). *See also State v. Hill,* 360 S.C. 13, 17-18, 598 S.E.2d 732, 734 (Ct. App. 2004) (mistrial should have been granted based on *Doyle* violation); *State v. Gray*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (application of *Truesdale* analysis showed *Doyle* violation was not harmless and failure to order mistrial was reversible error). Application of the *Doyle* violation error analysis laid out in *Truesdale* and *Chapman* to the case at hand demonstrates that a mistrial should have been granted. Here, there was more than a single reference to Appellant's post-*Miranda* silence. The solicitor directly tied Appellant's silence to his defense at trial and credibility was the central issue to be decided by the jury. Appellant's exculpatory story was not totally implausible and the evidence against him was not overwhelming.

The burden should have been on the State to prove that questioning Appellant on his post-arrest silence was permissible. It did not meet that burden here, since neither of the two officers it called could say that Appellant did not receive *Miranda* warnings, and since Appellant testified that he did receive those warnings. *Doyle v. Ohio*, 426 U.S. 610 (1976); Rule 104(b), SCRE. Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's convictions.

Respectfully Submitted,

s/ *Joanna K. Delany*
JOANNA K. DELANY
Appellate Defender

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAPPIA DEANGELO GREEN,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon William Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Tappia Deangelo Green, at Ridgeland Correctional Institution, 5 Correctional Road, Ridgeland, SC, 29936, this 18th day of February, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Tappia Deangelo Green, Appellant.

Appellate Case No. 2017-001296

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.

Thomas C. Young

_____ J.

H. Bruce Williams

_____ J.

Stephanie P. McDonald

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Joanna Katherine Delany, Esquire
William Frederick Schumacher, IV, Esquire
Scarlett Anne Wilson, Esquire

FILED
Mar 12 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

Opinion No. 5800 (S.C. Ct. App. Filed February 3, 2021)

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

PETITIONER

APPELLATE CASE NO. 2017-001296

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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

[2] *Doyle v. Ohio*, 476 U.S. 610 (1976).

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 12, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the trial judge's denial of Petitioner's mistrial motion, where it held that a testifying defendant had the burden to prove he received *Miranda*[3] warnings to establish a *Doyle*[4] violation rather than concluding the prosecution, as the proponent of the evidence, had the burden to show a testifying defendant did not receive *Miranda* warnings before it could permissibly use his post-arrest silence for impeachment, particularly given evidence Petitioner received the warnings?

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

[4] *Doyle v. Ohio*, 476 U.S. 610 (1976).

STATEMENT OF THE CASE

On November 3, 2015, Petitioner 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. The indictments alleged that on or about April 14, 2015, Petitioner kidnapped and robbed Keith Lee at gunpoint. R. 739 – 744.

Petitioner's case was called to trial before the Honorable Roger L. Couch and a jury, from May 22 – May 25, 2017. R. 1. Daniel Cooper and Burns Wetmore represented the State; Mark Archer represented Petitioner. R. 1. The jury returned verdicts of guilty, and Petitioner was sentenced to concurrent terms of imprisonment 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. R. 715, ll. 1-5; R. 724, l. 22 – 725, l. 8; R. 745 – 747.

On May 27, 2017, Petitioner served his notice of appeal. The Court of Appeals affirmed in *State v. Tappia Deangelo Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 47). Petitioner sought rehearing. Rehearing was denied in an order filed March 12, 2021.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred by affirming the trial judge's denial of Petitioner's mistrial motion, where it held that a testifying defendant had the burden to prove he received *Miranda*[5] warnings to establish a *Doyle*[6] violation rather than concluding the prosecution, as the proponent of the evidence, had the burden to show a testifying defendant did not receive *Miranda* warnings before it could permissibly use his post-arrest silence for impeachment, particularly given evidence Petitioner received the warnings.

Reasons to grant certiorari

This Court should grant the petition for writ of certiorari because there is a novel question of law and it directly involves substantial constitutional issues. *See* Rule 242(b)(1), SCACR; Rule 242(b)(4), SCACR.

The prosecution 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). However, if the accused was not provided with *Miranda* warnings, his silence may permissibly be used for impeachment. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Here, the Court of Appeals held that where a testifying defendant objected to the prosecution's attempts to impeach him with his post-arrest silence, the burden was on the defendant to show a *Doyle* violation occurred instead of the burden being on the prosecution to show that *Fletcher v. Weir* applied. This is a novel issue of law in South Carolina.

The "relevance of post-arrest silence depends entirely upon its impeaching character as an arguably prior inconsistent assertion by the action of remaining silent. *Doyle v. Ohio* holds

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

6 *Doyle v. Ohio*, 476 U.S. 610 (1976).

that when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion." *United States v. Cummiskey,* 728 F.2d 200, 205 (3d Cir. 1984). "Thus, the absence of *Miranda* warnings is a typical instance of a condition of fact on the fulfillment of which relevancy of other evidence, in this case post-arrest silence, depends." *Id*.

Rule 104(b), SCRE provides, "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." The Third Circuit explained that as to the similar federal rule, Fed. R. Evid. 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *Id*. at 206. Because it was the prosecution that needed to establish the relevancy of Petitioner's post-arrest silence to use it for impeachment, the burden should have been on the State, as the moving party, to introduce evidence sufficient to support a finding of the fulfillment of the condition.

Moreover, in this context, it was Petitioner who had rights and the State that had obligations—Petitioner had rights to remain silent prior to trial and to receive due process of law. U.S. CONST. amend. V; U.S. CONST. amend. XIV. In contrast, the State had the obligation to establish the relevancy of Petitioner's post-arrest silence pursuant to the evidence rules and to afford him due process.

The decision of the Court of Appeals here improperly discounted Petitioner's constitutional protections and failed to account for Rule 104, SCRE. This Court should grant the petition for writ of certiorari.

Relevant facts

The State alleged that on April 14, 2015, Keith Lee was kidnapped and robbed by three men: Jonathan Johnson, Petitioner, 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 Lee gave Johnson the money voluntarily while Petitioner 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 when a stranger forced him in the backseat of a PT Cruiser at gunpoint. R. 121, l. 7 – 124, l. 9. Lee said there were two other men in the PT Cruiser and he later learned that the man who approached him (the driver) was Johnathan Johnson, and that Petitioner was the front passenger. 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. 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 bound his hands and feet and drove to Hardee's in Mount Pleasant. R. 131, ll. 10-12. He alleged Petitioner threatened to kill him and everyone in Hardee's if he tried to signal for help. R. 134, ll. 2-6. 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. The restaurant manager who gave Lee his check said Lee neither acted in an unusual manner nor asked 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 Petitioner. R. 141, ll. 14-15. Lee claimed when the men 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, Lee did not call 911.

Although Johnson had 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 for the drugs, 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.

Police searched the PT Cruiser, which belonged to Johnson's girlfriend. R. 205, ll. 13-22. Inside, officers found an envelope and paystub belonging to Lee, and they identified the fingerprints of Johnson and Petitioner 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 Petitioner 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.

Petitioner testified in his defense and he confirmed Johnson's testimony that Lee got in the car at Wells Fargo because Lee owed Johnson money. R. 489, ll. 4-14; R. 490, ll. 1-3. Petitioner said Lee rode with them voluntarily and explained that he, Petitioner, 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. Petitioner 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. Petitioner

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 nearby. R. 493, ll. 16-21.

Petitioner denied having a weapon and threatening to kill anyone and he 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. Petitioner said Lee commented: "[D]amn, my gal is going to trip." R. 498, ll. 11-12.

On cross-examination, the solicitor challenged Petitioner: "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. The solicitor 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. Petitioner replied that he had "talked to [his] lawyer about this several times." R. 504, ll. 2-3.

Defense counsel objected to the line of questioning; he protested that the State was improperly commenting on Petitioner's Fifth Amendment rights. The trial court sustained the objection. R. 505, l. 6 – 506, l. 9. The court had a conference with the attorneys in chambers and then held an *in camera* hearing on whether the State's questioning of Petitioner on his failure to offer an exculpatory statement prior to trial violated *Doyle v. Ohio*. R. 540, ll. 8-19. The State argued that because nothing indicated Petitioner had been given his *Miranda* rights, *Doyle* was inapplicable. R. 540, l. 19 – 23. Defense counsel argued Petitioner had been given *Miranda* warnings and he was therefore entitled to a mistrial. R. 543, ll. 6-8; R. 545, ll. 3-19.

Petitioner had been arrested several months after the alleged kidnapping and robbery for another offense—failure to stop for a blue light—and he was served warrants for this case on the same date. R. 541, ll. 4-9. Petitioner 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. He said there were many officers at the scene of his arrest. "There was like 30 polices out there." R. 556, ll. 16-17; R. 546, ll. 15-16. Petitioner 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 robbery from North Charleston Police Department, some bad checks and failure to stop for a blue light." R. 546, ll. 18-21. Petitioner said: "He read me my *Miranda* rights and he put me in the car with this female officer who transported me to 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 Petitioner about the officer's appearance; Petitioner described the man as bald with a stocky build and green uniform, and he suggested the court check the officer's body camera.[7] R. 551, ll. 12-16. Petitioner 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. Petitioner said the

[7] Defense counsel noted the incident reports from Petitioner's arrest for failure to stop for a blue light said Petitioner 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 incident reports were made part of the record. R. 615, l. 19 – 616, l. 15; R. 729 – 734. Defense counsel noted that the incident reports stated Petitioner's arrest was captured on body-worn cameras. 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. However, no footage was produced for the court to review.

officer told him, "You have the right to remain silent . . . anything you say can and will be hold against you in a court of law." R. 555, ll. 5-8.

The court heard testimony from two police officers at the hearing. Officer Danielle Smoak said two of her coworkers were pursuing Petitioner when he got out of his car and ran into a building. R. 598, ll. 21-23. Smoak was one of a team assisting those officers, and she handcuffed Petitioner and put him in her 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 Petitioner *Miranda* warnings, but she called a transport unit to take him to jail. R. 599, ll. 21-25; R. 600, ll. 19-21. When the female transport officer arrived, Smoak unlocked her patrol car door so that Petitioner could be moved to the transport unit car. R. 606, ll. 6-12.

Smoak testified Officers Riley and Norwood chased Petitioner for failure to stop for a blue light, and she was not certain whether they talked to Petitioner. R. 602, ll. 7-14; R. 602, l. 23 – 603, l. 5. Smoak said,

> A. Usually whenever I detain someone and put them in the car, nobody really talks to them after that.
>
> Q. Usually. Can you say for certain they didn't talk to [Petitioner]?
>
> A. No absolutely not.

R. 602, ll. 21-25. Officer Smoak reiterated that she could not say "with absolute certainty" that another officer did not give Petitioner *Miranda* warnings at the scene of his arrest. R. 607, l. 23 – 608, l. 1. Officer Smoak explained 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 was called and testified that he was a canine officer called out to assist, and he said that he did

not give Petitioner *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 he did not see who served warrants on Petitioner for these offenses. R. 614, ll. 17-23; R. 613, ll. 20-24.

The State argued that if no *Miranda* warning is given, then *Doyle* and its progeny do not apply, and its cross-examination of Petitioner did not violate Petitioner's Fifth Amendment rights. R. 620, ll. 5-11. Defense counsel argued that the burden was on the State to prove Petitioner had not been given *Miranda* warnings before it could question him on his post-arrest silence without running afoul of *Doyle*. R. 620, ll. 22-23; R. 618, ll. 6-7. Although the trial court did not explicitly announce which party had the burden of proof, the judge had earlier stated, "[H]e's [Petitioner] getting ready to testify that he got his *Miranda* rights, that's what I've been told. If you want to counter that testimony, that's up to you [solicitor]." R. 545, ll. 16-19.

At the conclusion of the hearing, the court found "sufficient evidence to indicate that [Petitioner] was not *Mirandized* at that time." R. 621, ll. 6-8. The court stated that the incident reports did not say Petitioner was read *Miranda*, and two officers present at Petitioner's arrest testified they did not read him *Miranda*. R. 621, ll. 12-19. The court found the State's line of questioning did not violate *Doyle* and it denied the defense's mistrial motion. 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 [Petitioner]." 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 Petitioner lacked credibility because he did not talk to the police. R. 625, l. 24 – 626, l. 2.

The Court of Appeals found "contrary evidence was submitted by [Petitioner] and the State" as to whether Petitioner was read his *Miranda* rights, and therefore concluded there was evidence to support the trial court's decision. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60). The Court of Appeals wrote,

> Thus, the proffered testimony reflects, while Green claimed he was given *Miranda* warnings at the scene of his arrest by a male officer who then placed him into the car of a female transport officer, the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal; Officer VanAusdal fit the description of the individual Green claimed read him his rights; Officer Smoak did not give Green his *Miranda* rights and did not hear anyone else read him his rights; being in the first position, Officer Smoak placed Green in handcuffs and secured him in her locked car, which meant no one else had access to Green until the transport officer arrived; Officer Smoak unlocked her door for the female transport officer, who then took Green to jail; and Officer VanAusdal denied reading Green his *Miranda* rights.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 59-60).

The Court of Appeals determined that as to prior South Carolina cases holding there was no *Doyle* violation only where no evidence appeared in the record that the accused had been provided *Miranda* warnings, "it does not necessarily follow that when the question of whether a defendant has been given *Miranda* warnings is in contention, *Doyle* automatically applies." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60-61).

> We believe the question is not whether any evidence has been presented that a defendant received *Miranda* warnings when determining whether a *Doyle* violation has occurred. Rather the question is whether the trial judge, who saw and heard testimony on the matter and is in a better position to judge credibility, has the authority to make a factual determination on whether *Miranda* warnings have been given for purposes of determining a *Doyle*

> violation issue when contrary evidence is presented, and the standard of review to be applied to the trial court's determination in such a matter.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (footnote omitted).

The Court of Appeals cited *Mattox v. State*, 395 S.E.2d 288 (Ga. Ct. App. 1990), noting that Georgia "has held the burden rests on the defendant to show a *Doyle* violation has occurred." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61). In particular, the Court of Appeals quoted the *Mattox* court's statement that, "the determination of whether the defendant has the burden of showing a *Doyle v. Ohio* violation or the State has the burden of showing the applicability of *Fletcher v. Weir* is one of first impression in this State." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (quoting *Mattox*, 395 S.E.2d at 290). The Court of Appeals concluded,

> As observed by the *Mattox* court, the USSC in *Fletcher* reversed the lower court's grant of habeas corpus, noting the record there failed to indicate the defendant received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. Had the burden been upon the State to affirmatively demonstrate *Doyle* was not applicable, the failure of the record to indicate whether or not the defendant received any *Miranda* warnings during the period of silence after his arrest would have presumably been fatal to the State meeting its burden of proof and would have resulted in affirmance of the grant of habeas corpus. Accordingly, we believe the burden is upon the defendant to show a *Doyle* violation has occurred.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62).

The Court of Appeals also found that, "even assuming the burden shifted to the State to show *Doyle* was inapplicable once Green proffered evidence *Miranda* warnings were provided to

him, we find no error." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62). "As previously noted, there is evidence to support the trial court's finding that Green was not given *Miranda* warnings." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 63).

The Court of Appeals found no abuse of discretion in the trial court's denial of Petitioner's mistrial motion. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 65). In its earlier discussion of South Carolina caselaw which held impeachment with pre-trial silence was only proper where there had been no evidence the accused had received *Miranda* warnings, the Court of Appeals disagreed with those holdings because, "Were that the case, any defendant could wait until he or she testifies and then upon being challenged for giving a story the very first time in his testimony, automatically receive a mistrial by claiming for the first time that he or she was *Mirandized*." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61, n. 7).

Discussion

Silence in the wake of *Miranda* warnings may be nothing more than an accused's exercise of his rights. "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." *Doyle v. Ohio*, 426 U.S. at 617-18. However, a state court may permit cross-examination about post-arrest silence if the testifying defendant did not receive the assurances contained in *Miranda*. *Fletcher v. Weir*, 455 U.S. at 607.

The Third Circuit determined that under Fed. R. Evid. 104(b), "the absence of *Miranda* warnings is a typical instance of a condition of fact on the fulfillment of which relevancy of other evidence, in this case post-arrest silence, depends." *United States v. Cummiskey*, 728 F.2d at 205.

Fed. R. Evid. 104(b) provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."

Rule 104(b), SCRE is similar to the federal rule, and it provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." In discussing Fed. R. Evid. 104(b), the Third Circuit explained, "Because it is the prosecutor who is attempting to establish the relevancy, for impeachment or any other purpose, of post-arrest silence, the government bears the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition." *Id*. at 205-06. Fed. R. Evid. 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *Id*. at 206. Here, under Rule 104(b), SCRE, the moving party bears the burden of introducing such supporting evidence. As proponent of impeachment evidence, the burden should lie with the State to show a defendant's silence is relevant (because it was not preceded by *Miranda* warnings) under Rule 104(b), SCRE.

Placing the burden on the State is also in keeping with the State's role in a criminal case. In this context, it is the defendant who has rights and the government that has obligations—Petitioner had constitutional rights to remain silent prior to trial and to receive due process of law. U.S. CONST. amend. V; U.S. CONST. amend. XIV. *See Doyle v. Ohio*, 426 U.S. at 619 ("the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment"). In contrast, the State had the obligation to establish the admissibility of Petitioner's post-arrest silence pursuant to the evidence rules and to afford Petitioner due process. And *see generally South*

Dakota v. Neville, 459 U.S. 553, 565 (1983) ("the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened").

Moreover, the State is tasked with establishing admissibility in other, similar circumstances. For example, pursuant to *Jackson v. Denno*, 378 U.S. 368, 395 (1964), the State has the burden to establish the voluntariness of a confession outside the presence of the jury before the confession may be admitted into evidence. Pursuant to *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the State has the burden to establish an out-of-court identification was not unnecessarily suggestive out of the presence of the jury before evidence of such may be admitted.

An *in camera* hearing prior to the defendant's testimony on the admissibility of his silence for impeachment would also alleviate a concern identified by the Court of Appeals—that an accused might provoke a mistrial by claiming he was *Mirandized* after an impeachment attempt. However, the dearth of caselaw about this issue suggests it is one which has arisen infrequently.

The Court of Appeals' reliance on the Georgia court's parsing of *Fletcher v Weir* in *Mattox*, *supra*, was misplaced. As to the argument that, based upon a reading of *Fletcher v. Weir*, "the Supreme Court has placed on the testifying defendant the obligation to establish the giving of *Miranda* warnings," the Third Circuit explained, "*Fletcher* does not support the government's position. It only holds that an arrest alone, not accompanied by *Miranda* warnings, is insufficient to place the testifying defendant within the rule of *Doyle v. Ohio*." *Cummiskey*, 728 F.2d at 206.

The Third Circuit explained, "In that case the Sixth Circuit had declined the state's invitation to order a remand for factual findings, holding that no such remand was required because the giving of *Miranda* warnings was irrelevant as a matter of law." *Id*. "Consequently,

the issue of which party bears the burden of establishing the giving (or absence) of warnings was not addressed by the Sixth Circuit, and was not before the Supreme Court." *Id*. *See Weir v. Fletcher,* 658 F.2d 1126, 1129 n. 8 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982) ("The Commonwealth argues on appeal that because the record is so unclear, we should remand for an evidentiary hearing as to when *Miranda* warnings were given. Because we conclude that it makes no difference whether warnings were given or not, there is no need to remand.") The Court of Appeals misapprehended *Fletcher v. Weir* when it relied on the Georgia Court of Appeals' overly expansive interpretation of that case in *Mattox v. State*, 395 S.E.2d at 288. *See State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61).

Few jurisdictions have considered this question, but both the Third and the Ninth Circuits have held that the burden of proof lies properly with the prosecution in this instance. *See United States v. Foster*, 995 F.2d 882, 883 (9th Cir. 1993) ("In accordance with the reasoning of the Third Circuit, we hold that the government has the burden of demonstrating that the warnings were not given"); *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 164, n. 4 (3d Cir. 2009) (recognizing that prosecution has burden of establishing defendant did not receive *Miranda* warnings prior to using his post-arrest silence for impeachment).

As the Third Circuit explained in *Cummiskey*, "[W]hen a testifying defendant makes an objection to the prosecutor's cross-examination with respect to post-arrest silence, it is the prosecutor's burden, under Rule 104(b), to establish that *Miranda* warnings were not given prior to the silence relied upon for impeachment purposes." *Cummiskey,* 728 F.2d at 206. The State did not meet its burden here, since there was evidence that Petitioner had been *Mirandized* (Petitioner's testimony) and neither of the State's witnesses (two officers out of a number of

officers at the scene) could say that Petitioner was not read his rights by another police officer. Prior appellate decisions in this state have allowed impeachment with post-arrest silence only when there was no evidence in the record that an accused received *Miranda* warnings. *See Brown v. State*, 375 S.C. 464, 480-481, 652 S.E.2d 765, 773-774 (Ct. App. 2007) (no *Doyle* violation where "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). Pursuant to the reasoning of those cases, the solicitor's attempt to impeach Petitioner with his silence here was improper since Petitioner testified he did receive the warnings and the trial court did not find that his testimony was not credible.

The solicitor violated *Doyle* when he improperly called the jury's attention to Petitioner's silence in the wake of *Miranda* warnings. In *Greer v. Miller*, 483 U.S. 756, 764 (1987), the United States Supreme Court found no *Doyle* violation where the trial court "did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained." Although the court sustained the objection here, there was a *Doyle* violation because multiple questions were asked about Petitioner's silence, the solicitor touched on it in closing by implication, and the jury was not instructed to disregard questions to which an objection was sustained. *See Greer v. Miller*, 483 U.S. at 767 (Stevens, J., concurring) (concluding "that the rule of the *Doyle* case was violated when the prosecutor called the jury's attention to respondent's silence").

"Because 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). In order for a *Doyle* violation to be harmless, the record must show "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) (overruled on other grounds by *Truesdale v. Aiken*, 480 U.S. 527, 527, 107 (1987)) (citing *Chapman v. United States*, 547 F.2d 1240 (5th Cir. 1977)); *accord State v. McIntosh*, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004).

Application of the *Doyle* violation error analysis laid out in *Truesdale* and *Chapman* to the case at hand demonstrates that a mistrial should have been granted. There was more than a single reference to Petitioner's silence. The solicitor repeatedly questioned Petitioner about his post-arrest silence and directly tied Petitioner's silence to his defense at trial. "So this story about you having a little bit to drink, riding around in the car, why not tell the police back in 2015? . . . Why not speak to law enforcement when you got arrested? . . . now we're having this brand new story that you've had two years to come up with." R. 502, l. 24 – 505, l. 1. Credibility was the central issue to be decided by the jury, as the solicitor admitted in closing argument. "[W]hat this case is going to come down to is who you believe." R. 624, ll. 7-8. Petitioner's exculpatory story was not totally implausible and the evidence against him was not overwhelming—Petitioner's version of what happened and the complainant's version of what happened were both compatible with the evidence.

The error was not harmless. *Truesdale*, 285 S.C. at 18–19, 328 S.E.2d at 56. *See also State v. Hill*, 360 S.C. 13, 17-18, 598 S.E.2d 732, 734 (Ct. App. 2004) (mistrial should have been granted based on *Doyle* violation where solicitor made multiple references to Hill's silence and directly tied Hill's silence to his defense); *State v. Gray*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (*Doyle* violation was not harmless and failure to order mistrial was reversible error where trial hinged on credibility of Gray and the alleged victim).

The trial court improperly denied Petitioner's mistrial motion. The Court of Appeals' decision here was inconsistent with Petitioner's constitutional protections and with the evidence rules. U.S. CONST. amend. V; U.S. CONST. amend. XIV; *Doyle v. Ohio*, 426 U.S. 610 (1976); Rule 104(b), SCRE.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2021.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5800 (S.C. Ct. App. filed February 3, 2021)

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

PETITIONER

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in this case has been served on William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Tappia Dangelo Green, #340000, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 25th day of March, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2021-000313

THE STATE, ...RESPONDENT,

v.

TAPPIA DEANGELO GREEN, ... PETITIONER.

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE PRESENTED

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's mistrial motion because the record indicated Petitioner was never given Miranda warnings.

STATEMENT OF THE CASE

On November 3, 2015, the Charleston County Grand Jury indicted Petitioner for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. On May 22–25, 2017, Petitioner proceeded to a jury trial before the Honorable Roger L. Couch. Mark Archer, Esquire, represented Petitioner; Assistant Solicitors Daniel Cooper, Esquire, and Burns Wetmore, Esquire, represented the State. The jury found Petitioner guilty as charged. The trial judge sentenced Petitioner to fifteen years' incarceration for armed robbery, fifteen years' incarceration for kidnapping, and five years' incarceration for the possession of a weapon during the commission of a violent crime, with all sentences running concurrently.

Petitioner appealed his convictions and sentence. On February 3, 2021, the South Carolina Court of Appeals affirmed petitioner's convictions and sentence in a published opinion. See State v. Green, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021). Thereafter, Petitioner filed a petition for rehearing which was denied on March 12, 2021. On March 25, 2021, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return, filed on behalf of the State, follows.

STATEMENT OF FACTS

In April of 2015, Victim lived in North Charleston with his then-girlfriend Karissa Aiken. Both Victim and Aiken were employed by the Hardee's restaurant located in the Mount Pleasant area. On April 14, 2015, Victim took Aiken to deposit her paycheck at a local Wells Fargo bank. He waited for her in their car until an individual, later identified as Jonathan Johnson, exited the bank and went to his vehicle, a gold PT Cruiser. Johnson tapped on Victim's passenger-side door and asked whether Victim had jumper cables and would be willing to jump start his car. After Victim jump-started the PT Cruiser, he was about to enter his vehicle when Johnson pressed a silver revolver against his head. Johnson forced Victim into the backseat of the PT Cruiser. (R.p.116, line 23–R.p.125, line 14).

Victim discovered two more individuals were in the PT Cruiser. Petitioner, who wore a black shirt and black shorts and gold plating in his mouth, sat in the front passenger seat, and an unidentified man[1] was in the back seat wearing a white t-shirt and black pants. Johnson drove the vehicle while Petitioner and the unknown man pointed their guns at Victim and demanded his money and jewelry. Unsatisfied with what they received, Petitioner threatened to kill Victim if he could not produce any additional loot. Johnson informed Victim he knew the latter worked at Hardee's and that he knew it was the day employees could pick up paychecks because he had just taken his own girlfriend to pick up hers. Petitioner gave Victim's phone back so that the latter could call Hardee's and notify the manager he was picking up his paycheck early. The three men bound Victim's hands and feet and took him to the Hardee's in Mount Pleasant. (R.p.125, line 15–R.p.133, line 12).

[1] This man was never positively identified.

Once they arrived at Hardee's, Petitioner told Victim that if he signaled for help, the men would kill everyone inside the Hardee's. Petitioner and the unknown man remained in the vehicle while Johnson escorted Victim into the restaurant. As they entered the restaurant, Johnson told Victim he did not want to hurt him and that he was forced to participate in the crime as part of a gang initiation. Johnson also told him that his mother worked at that same Hardee's, and that Victim and Aiken often gave the mother rides home from work. Johnson promised he would not let anyone harm Victim. (R.p.150, line 13–R.p.135, line 23).

While signing for his paycheck, Victim tried to mouth the word, "help" to his manager, but Victim was forced to cease his efforts when Johnson moved beside him. As they exited the building, Victim and Johnson heard the sirens from emergency vehicles and saw Petitioner and the unknown man walking towards them because they assumed Victim had triggered an alarm or alerted law enforcement. Petitioner informed Victim the men were about to enter the building to kill Victim and everyone else inside. The men reentered the PT Cruiser, bound Victim's hands and feet, and Petitioner took possession of Victim's paycheck. Shortly thereafter, the men forced Victim to cash his paycheck at a local check-cashing business. Again, they threatened to kill everyone in the store if Victim sought help. After Victim and Johnson returned to the vehicle, Petitioner took the cash and stated they needed to kill Victim because he had seen their faces. Johnson stood up for Victim, noting Victim had been completely cooperative and that Victim and Aiken look out for his mother. Petitioner relented, and the men decided to drop Victim off at a local gas station. As Victim exited the PT Cruiser, he saw Aiken in the drive-through of a nearby fast-food restaurant. After the two went home, Aiken called the North Charleston Police Department to report the situation, and Victim grabbed a gun and went looking for the three men

in the hopes of performing a citizen's arrest. The police intercepted Victim and convinced him to work with them. (R.p.135, line 24–R.p.147, line 21).

Officer Tracey Williams realized one of the descriptions provided by Victim matched Johnson. She left her contact information at Johnson's grandfather's house, a place he frequently stayed, and requested to speak with him. Johnson contacted Officer Williams and admitted the kidnapping and armed robbery occurred, but claimed he was also a victim and was unaware of the plan until he was forced to kidnap Victim. Johnson agreed to an official interview at the police station and showed up in the PT Cruiser used in the crime. At the station, he repeated the information from the phone conversation with Officer Williams and then-detective Alexander Kaufman. He also identified Petitioner as the man in the front seat of the PT Cruiser who participated in the crime. Kaufman noted he found Victim and Aiken very credible due to their cooperation and the evidence discovered during his investigation. He further claimed it was not uncommon for victims of violent crimes to arm themselves afterwards and seek retribution. Trial counsel failed to object to any remarks concerning Kaufman's belief in Victim's credibility until Kaufman's redirect examination. (R.p.183, line 10–R.p.194, line 5; R.p.295, line 15–R.p.334, line 18).

Detective Jennifer Butler met with Victim and Aiken in the hours following the crime. She testified the two appeared genuinely shaken up and fearful, even more so than the average violent crime victim. The solicitor asked whether, based on their perceived fear, she believed Victim's and Aiken's stories. Trial counsel objected, arguing whether Detective Butler believed their stories was irrelevant to the case. In response, the trial judge stated Detective Butler could testify as to whether she "gave credibility" to their stories. Ultimately, Detective Butler stated that their attitudes and very real fear caused her to find their stories credible. On cross-

examination, Detective Butler admitted she could not say what caused Victim and Aiken to appear fearful and conceded the source of the fear could have been that they had reported a crime and implicated Johnson, a man they knew through a coworker, as a participant. (R.p.197, line 19–R.p.202, line 8; R.p.208, line 8–R.p.211, line 11).

A search of the PT Cruiser uncovered Victim's paystub, its envelope, and other documents such as Victim's earning statement between the front driver and passenger seats of the vehicle. Six identifiable fingerprints were found on these items; five belonged to Petitioner and one belonged to Johnson. Johnson's phone records, footage from the security camera at the Hardee's, and Petitioner's Facebook page showed Petitioner spoke with Johnson on the phone while the latter was inside the restaurant. Petitioner's Facebook page also had a picture of him with gold plating in his mouth. (R.p.212, line 21–R.p.261, line 7; R.p.335, line 22–R.p.358, line 11; State's Exhibits 31–36).

Shortly after the crime, Victim was able to identify Petitioner as one of the kidnappers in a photographic lineup. (R.p.147, line 22–R.p.151, line 13; R.p.280, line 21–R.p.289, line 4; State's Exhibits 37–38).

Johnson's trial testimony differed drastically from the information he provided police; notably, he claimed he could not remember any information he provided to the officers and was drunk when he "fabricated" the story about the armed robbery. Johnson claimed that on the day in question, he ran into Victim at the bank by happenstance when he went to cash his own check. Prior to that, he had met Victim when he and Aiken had transported his mother to and from work. After requesting Victim jump start his car, he asked him for money owed from the prior

sale of drugs[2] and Victim suggested they pick up his paycheck at the Mount Pleasant Hardee's and willingly cashed his paycheck and gave it to Johnson. Petitioner accompanied them throughout the experience, but no crime occurred. Johnson also claimed Petitioner wore white, not black, on the day in question. (R.p.368, line 20–R.p.370, line 18; R.p.373, line 11–R.p.376, line 19; R.p.463, line 19–R.p.464, line 22).

However, Johnson's letters to the solicitor contradicted his story to police and his trial testimony. In them, he claimed he and Victim planned to meet at the bank because the latter did not want Aiken to discover his drug habit. In the second letter, Johnson claimed Victim called him and asked to be picked up. In a letter to his prior defense attorney, Johnson did not deny a crime occurred, but said Petitioner did not participate and he only identified Petitioner as being involved to alleviate the pressure on himself. (R.p.370, line 19–R.p.373, line 10; R.p.376, line 20–R.p.380, line 8; R.p.386, line 14–R.p.387, line 6).

On cross-examination, Johnson vacillated between his claims that he unexpectedly saw Victim at the bank and that the men had arranged to meet. He claimed Victim called him that morning but he could not explain why Victim's phone number failed to appear in his cell phone records. He also claimed only three people were in the vehicle at any time. However, when confronted with the photographs from the Hardee's, Johnson admitted a fourth person was in the vehicle, but claimed he only knew that individual by his initials, L.B. Johnson confusingly claimed both Petitioner and L.B. wore white, despite photographs to the contrary. He also alleged L.B. was using Petitioner's phone that day. Johnson also claimed he did not own a gun and did not take pictures with guns; however, once again, Johnson recanted after the solicitor

[2] Johnson later claimed he began selling drugs to Victim because, two to three months prior to the crime, Victim dropped Johnson's mother off at home and immediately asked him whether he sold drugs. (R.p.464, lines 5–24).

provided photographs of Johnson posing with guns. Johnson readily admitted he knew Hardee's employees could pick up their paychecks that day because he had taken his mother to do the same that morning. Johnson could not explain why Victim abandoned his girlfriend and their vehicle at the bank. Similarly, despite claiming he had taken his mother to Hardee's earlier that day, Johnson then claimed he and Petitioner had worked construction with Johnson's father all morning. (R.p.389, line 12–R.p.421, line 23).

Finally, the solicitor impeached Johnson's testimony with a video recording of his interview with police in which he admitted to the robbery, identified Petitioner as a coconspirator, told officers Petitioner wore an all-black outfit, and described the statements Victim made during the ordeal. Additionally, Johnson conceded he had pled guilty to his charges in the case[3] and the solicitor pointed out that during his plea hearing, Johnson agreed with the State's version of the facts. (R.p.380, lines 9–16; R.p.422, line 4–R.p.441, line 22; R.p.465, line 15–R.p.471, line 21; R.p.478, line 24–R.p.480, line 10; State's Exhibits 45–46).

Petitioner testified he was with Johnson and Victim on the day in question. He claimed Johnson did not plan to meet Victim at the bank. Johnson talked to Victim about purportedly owed payment for drugs, and the men left for the Mount Pleasant Hardee's without jump starting the PT Cruiser. Petitioner admitted he, not L.B., called Johnson while he was in the bank and in Hardee's. He admitted he touched Victim's paystub and its envelope after Victim cashed his paycheck. (R.p.487, line 12–R.p.449, line 16).

During cross-examination, Petitioner admitted he was wearing black the day of the robbery and it was him in the photographs presented at trial. He claimed he had been drinking

[3] Johnson was charged with armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (R.p.381, lines 4–18).

and smoking weed and got out of the PT Cruiser at Hardee's because he heard emergency sirens and thought there might have been a car accident on the other side of Hardee's. (R.p.499, line 24–R.p.502, line 23).

The solicitor also asked Petitioner whether he had a gun that day. Petitioner claimed he did not have one that day, but he owns guns because it was his constitutional right to bear arms. The trial judge found this was a misstatement due to Petitioner's criminal history and the fact he is forbidden by law to own a firearm. Accordingly, the judge allowed the solicitor to mention Petitioner has a felony conviction which prevents him from owning a gun. When the solicitor resumed his cross-examination, he questioned Petitioner about this fact. Petitioner noted he was forbidden by law to own a firearm but that if he decided it was important, he would disregard the law and buy one. (R.p.508, line 6–R.p.536, line 9; R.p.557, line 15–R.p.573, line 22).

When asked why he failed to tell police his side of the story, Petitioner noted:

> What do you mean, why not tell the police. **I was never questioned. There was, like, a warrant was issued directly for my arrest. I [] never wrote a statement; I [] never did an interview; I [] never did any of those things.** This is the first time I'm [telling] this story since I was locked up.
>
> ...
>
> I didn't get locked up until three months later after this crime and **there was no talking. It was just straight, we have a warrant for your arrest, take you to county jail, that's that, deal with it with the courts.** You know how police do.

(emphasis added). After several questions and responses on the subject, trial counsel objected, arguing the questions amounted to an "improper comment" on Petitioner's Fifth Amendment rights. The trial judge sustained the objection. (R.p.502, line 24–R.p.506, line 9).

The following morning, the Court further discussed whether a potential Doyle violation occurred. The solicitor explained nothing in Petitioner's file indicated he was Mirandized when

he was arrested after the crime. Petitioner claimed he was Mirandized by a bald officer, who appeared to be around thirty years old and wearing all green, outside the apartment complex where he was arrested. He claimed he was not questioned, and a female officer immediately drove him to the police station in her cruiser. (R.p.540, line 1–R.p.557, line 14).

Officer Danielle Smoak, the officer who performed Petitioner's arrest, explained that after Petitioner fled from police, he hid in an apartment complex. When officers announced they were about to release a K-9 unit, he exited the building. She placed him in handcuffs and sat him in her patrol car until a transport van arrived. She explained transport officers do not Mirandize or question arrestees and that she did not Mirandize or question him about his various charges. She noted the only officer at the scene who matched the description of the man Petitioner described was K-9 officer Brandon VanAusdal, who notably was bald and had a green uniform due to his position. Officer Smoak did not see any other officer Mirandize or otherwise communicate with Petitioner. (R.p.598, line 11–R.p.608, line 6).

Officer VanAusdal noted he never provided Petitioner with Miranda warnings; instead, he warned Petitioner several times that he would release his K-9 if he did not surrender to police. Similarly, he did not witness Officer Smoak or any other officer Mirandize Petitioner. As soon as Officer Smoak arrested Petitioner, he returned his dog to his vehicle. (R.p.608, line 12–R.p.615, line 14).

Trial counsel moved for a mistrial, arguing the State did not prove, beyond a reasonable doubt, that no officer spoke with Petitioner and Mirandized him. The solicitor countered, noting the officers' testimonies demonstrated no Doyle violation occurred. The trial judge noted it was not incumbent upon the solicitor to prove, beyond a reasonable doubt, that Petitioner did not

receive Miranda warnings, and that trial counsel provided insufficient evidence to support his argument. (R.p.615, line 15–R.p.621, line 25).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

REASONS AGAINST GRANTING CERTIORARI

Rule 242(b), SCACR states that a writ of certiorari is not a "matter of right," but should be granted only where special and important reasons merit this Court's review. In the instant case, certiorari is not appropriate in this case for two critical reasons. First, the issue as described in the petition is not the same one raised to the Court of Appeals. At trial, Petitioner argued a mistrial was appropriate because the State failed to prove, beyond a reasonable doubt, that he was not Mirandized. (R.p.615, line 15–R.p.621, line 25). On appeal, Petitioner's argument was the trial judge erred in his ruling because there was conflicting evidence in the record as to whether he was Mirandized, rendering impeachment with his pre-trial silence improper. See, e.g., (Br. of Appellant p.14) ("The appellate courts of South Carolina have allowed impeachment with post-arrest silence when there is **no evidence** in the record than an accused received Miranda warnings"; "The court's factual finding that [Petitioner] had not been provided with Miranda warnings was an abuse of discretion, as it was unsupported by the evidence. [Petitioner] testified that he was read Miranda warnings by a bald officer who recognized him."); (Br. of Appellant, p.15) ("Alternatively, [Petitioner] asserts that it was legal error for the court to allow the [S]tate to impeach [Petitioner] with his pre-trial silence where there was evidence in the record that he had been provided with Miranda warnings."). Now, Petitioner argues the Court of Appeals erred in finding it was his burden to prove he was not Mirandized after his arrest. See (Petition for Writ of Certiorari, p.15) (claiming "the State had the obligation to establish the admissibility of Petitioner's post-arrest silence pursuant to the evidence rules and to afford Petitioner due process.") Stated succinctly, Petitioner's argument has changed from initially arguing the State has the burden of proving he was not Mirandized to, on appeal, claiming reference to post-arrest silence is error unless a record is completely devoid of any evidence suggesting a defendant was Mirandized, and evolving to his third interpretation of the

issue, mirroring his initial argument to the trial judge. Accordingly, because Petitioner has changed his argument throughout the appellate process, it is improper for a meritorious review by this Court. See, e.g., State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.")

The second reason certiorari is improper in this case is related to the first ground: the petition does not challenge all of the grounds upon which the Court of Appeals affirmed Petitioner's convictions. Petitioner argues the Court of Appeals erred in finding he had the burden of proving he **was** Mirandized instead of finding the State had the burden of proving Petitioner **was not** Mirandized. However, Petitioner ignores that the Court of Appeals found that, whether the burden belonged to him or the State, the trial judge acted within his discretion in finding Petitioner was not given Miranda warnings. Green, 432 S.C. at ____, 845 S.E.2d at 638–39. Because Petitioner failed to address this alternative ground for affirmation, it is the law of the case and certiorari is inappropriate. See Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[S]hould the appealing party fail to raise all of the grounds upon which a court's decision was based, those unappealed findings—whether correct or not—become the law of the case."); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 809 (Ct. App. 2011) (finding unappealed alternate ruling was the law of the case).

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's mistrial motion because the evidence presented by the parties indicated Petitioner was not Mirandized and thus no Doyle violations occurred at trial.

Petitioner argues the Court of Appeals erred in affirming the trial judge's denial of his mistrial motion, claiming both courts erred in finding he had the burden of proving Miranda warnings were not given before he could establish a Doyle violation occurred. The State disagrees with this allegation of error.

Issue Preservation

As an initial matter, the State notes this issue was inappropriate for a review on its merits by the Court of Appeals and now this Court because it was not properly preserved[4] for appellate review. Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647

[4] In its opinion, the Court of Appeals found the issue was preserved for review because trial counsel "did object during this unbroken line of questioning," and the trial judge sustained the objection at that time before holding in camera proceedings to determine whether the questioning amounted to a Doyle violation. Green, 432 S.C. at ____ n.6, 854 S.E.2d at 634–35, n.6. In reaching this conclusion, the Court of Appeals ignored the specific portions of the State's argument as explained in this return.

(Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

Pursuant to our issue preservation requirements in South Carolina, an issue must also be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error **so it can be reasonably understood by the trial judge.**" (emphasis added)). Importantly, "[a] party need not use the exact name of a legal doctrine in order to preserve it[.]" State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, "it must be clear that the argument has been presented on that ground." Id. Significantly, "[w]here an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal."). "When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); see also State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (finding a motion to strike unnecessary because the objection to the hearsay testimony was overruled).

In the instant case, Petitioner's issue is unpreserved for appellate review because he both failed to timely object and to move to strike the testimony in dispute. Notably, the solicitor questioned Petitioner for several minutes as to why he failed to tell police he was not involved in

a crime. Petitioner spoke at length about sitting in jail and not speaking to law enforcement about the crime before trial counsel objected. Because trial counsel failed to object at his first opportunity, this issue is not preserved for review. See Williams, 303 S.C. at 411, 401 S.E.2d at 169.

Further, when trial counsel finally objected and it was sustained by the trial judge, counsel failed to request the prior testimony regarding Petitioner's silence be stricken from the record. This is problematic for Petitioner because he is arguing the trial judge committed error in refusing to grant a mistrial over testimony he failed to request be stricken from the record. Accordingly, this issue is also unpreserved due to this failure. See Byers, 392 S.C. at 444, 710 S.E.2d at 58.

Doyle

As to the merits of Petitioner's argument, he argues the trial judge erred primarily because of the Third Circuit's opinion in United States v. Cummiskey,[5] 745 F.2d 278 (3d Cir. 1984), in which that court found it was the prosecution's burden to prove Miranda warnings were not given before a defendant could be impeached with post-arrest silence. It based this conclusion on its own analysis of the case history of Fletcher v. Weir, 455 U.S. 603 (1982), and its belief that both the Sixth Circuit and the United States Supreme Court (USSC) had failed to address the question as to which party had the burden of proving/disproving Miranda compliance. Citing these "failures," the Cummiskey court interpreted Fed. R. Evid. 104(b) [6] to

[5] Petitioner also cites to Gov't of Virgin Islands v. Davis, 561 F.3d 159 (3d Cir. 2009), and State v. Foster, 995 F.2d 882 (9th Cir. 1993), to support his argument. However, both courts reached this conclusion only by strictly adopting Cumminskey. See Davis, 561 F.3d at 164, n.4; Foster, 995 F.2d at 883. Accordingly, the State will focus its efforts on Cumminskey and its analysis.

[6] Fed. R. Evid. 104(b) states: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."

place the burden on the prosecution. However, as explained in the Court of Appeals' decision, there are compelling reasons why the Cummiskey court's opinion is an incorrect application of Fletcher. In Mattox v. State, 395 S.E.2d 288 (Ga. Ct. App. 1990), Georgia's Court of Appeals observed Cummiskey was predicated on the Federal Rules of Evidence and the incorrect conclusion that Fletcher failed to indicate which party had the burden of establishing the existence of Miranda warnings. The court also observed that in Fletcher, the USSC observed the record did **not** indicate whether that defendant had been Mirandized during the relevant period of time yet it still reversed the lower court's grant of a writ of habeas corpus; if the burden had been on the State of proving Miranda warnings were not given, the absence of the evidence in the record should have resulted in the USSC's affirmance of the writ. Id. at 64–65.

This interpretation of Fletcher is not new to South Carolina. In both Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (Ct. App. 2007), and State v. Bell, 347 S.C. 267, 554 S.E.2d 437 (Ct. App. 2001), the Court of Appeals found that, because there was no evidence in the record that the defendants received Miranda warnings, no Doyle violations occurred. Brown, 375 S.C. at 480–81, 652 S.E.2d at 773–74; Bell, 347 S.C. at 271, 554 S.E.2d at 437. If those courts believed it was the State's burden to prove no Miranda warnings were given, then both defendants would have prevailed in their cases.

Further, contrary to the Third Circuit's assumption, the Sixth Circuit understood Fletcher placed the burden upon defendants. In Weir v. Wilson, 744 F.2d 532 (6th Cir. 1984), Weir, the same defendant who sought a writ of habeas corpus in Fletcher v. Weir, filed a second petition for a writ of habeas corpus. Following its denial, he appealed the decision to the Sixth Circuit which found:

> [I]t is enough for our purposes here to observe that the prosecutor's cross-examination was not shown to have extended to any silence which occurred after

> the Miranda warnings were administered. We believe that in the present posture of the law, **it is necessary that the defense make such a showing** before Doyle . . . comes into play.

Wilson, 744 F.2d at 535 (emphasis added). Thus, the Sixth Circuit determined that it should be the defendant's burden to prove Miranda warnings were not given before a Doyle violation can be established. Notably, Weir petitioned for certiorari to the USSC, but the court denied his petition. Weir v. Wilson, 469 U.S. 1223 (1985).

South Carolina, the Sixth Circuit and Georgia are not alone in finding the burden is placed on the defense. Numerous courts have found the same. See Lainhart v. State, 916 N.E.2d 924, 936 (Ind. Ct. App. 2009); State v. Cummings, 779 S.W.2d 10, 12 (Mo. App. 1989); Royal v. State, 761 P.2d 497, 500–01 (Okl. Cr. 1988); State v. McGinnis, 320 S.E.2d 297, 300 (N.C. App. 1984); also 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n.52 (4th ed. 2019) ("The defendant ordinarily bears the burden of showing that Miranda warnings were given prior to the post-arrest silence used by the state for impeachment purposes.").

Evidence at Trial

Petitioner fails to acknowledge the Court of Appeals found, regardless of which party had the burden of proving the existence of Miranda warnings, the evidence presented at trial supported the trial judge's finding under either scenario. Petitioner himself initially testified the police never attempted to speak with him or otherwise solicit information about his charges: Petitioner even claimed there was "no talking" during his arrest. (R.p.502, line 24–R.p.506, line 9). Suspiciously, it was only after trial counsel's objection and the start of a new day of trial before Petitioner claimed he was Mirandized. When Petitioner was asked who Mirandized him, he could only recall that it was a bald officer approximately thirty years' old and wearing all green. In response, the State called Officer Danielle Smoak, the officer who performed the

arrest, to discuss the events that occurred. She explained Petitioner fled from police and hid in an apartment complex until officers announced they would release a K-9. When Petitioner exited the building, Petitioner was placed in cuffs and placed in a vehicle. Officer Smoak did not witness any officers Mirandize Petitioner and she identified K-9 officer Brandon VanAudal as the only officer matching Petitioner's description at the scene. Officer VanAusdal testified and noted he never Mirandized Petitioner and his only communication with him was to announce that he would release his K-9 if Petitioner did not surrender. Officer VanAusdal did not arrest Petitioner and instead returned his dog to his vehicle. Thus, considering the totality of the evidence, the trial judge acted within his discretion, under either standard, in finding Petitioner was not Mirandized. See State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.").

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 26, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2021-000313

THE STATE, ...RESPONDENT,

v.

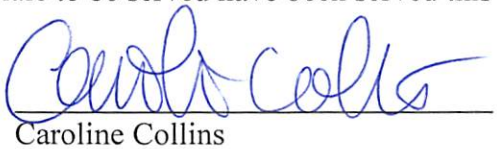
TAPPIA DEANGELO GREEN, ... PETITIONER.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by email to the address listed in AIS for:

Joanna K. Delany, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 26th day of April, 2021.



Caroline Collins
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The Supreme Court of South Carolina

The State, Respondent,

v.

Tappia Deangelo Green, Petitioner.

Appellate Case No. 2021-000313

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file ten (10) copies of the Appendix and ten (10) copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina

March 15, 2022

cc:
Joanna Katherine Delany, Esquire
Alan McCrory Wilson, Esquire
William Frederick Schumacher, IV, Esquire
Scarlett Anne Wilson, Esquire
The Honorable Jenny Abbott Kitchings