THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-GS-23-03835

State of South Carolina,

Respondent,

v.

Bryan Keith Byrd,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The instant appeal stems from Appellant's conviction for first-degree burglary. The facts are well-detailed in the briefs of Appellant and Respondent. The sole issue on appeal is whether the trial court abused its discretion in admitting testimony regarding Appellant's alleged confession. Respondent contends that the issue is not preserved for appeal and, assuming *arguendo* that it is preserved, the trial court committed no error as no coercive police action OR interrogation caused the confession. These points are addressed in turn.

ARGUMENTS

I. APPELLANT'S ARGUMENT IS PROPERLY PRESERVED FOR APPELLATE REVIEW

As noted by Respondent, Appellant's trial counsel raised the issue regarding the confession pre-trial, moving that evidence regarding the alleged confession be excluded. The trial judge denied the motion to exclude and allowed the statement into evidence, holding that "there was a voluntary statem ent and that it was a spontaneous utterance by the defendant and not elicited in any way by a government act or so." (Tr. 35, ll. 4-11). Appellant's trial counsel did not renew his objection during the trial. Respondent contends that this failure to renew the objection is fatal to Appellant's argument on appeal.

It is true that *generally*, a motion *in limine* is not a final determination and a contemporaneous objection must be made when the evidence is introduced during the trial. See State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (S.C. 2009). However, an exception to the general rule exists where a ruling on the motion *in limine* is made immediately prior to the introduction of the evidence in question. Id. at 156, 679 S.E.2d at 175. In the case at hand, the prosecution referenced the confession is his opening statement. (Tr. 71). No useful purpose

would have been served by trial counsel renewing his objection to the use of the confession at that point. Therefore, this issue is preserved for review.

II. THE ACTIONS OF THE RESPONDING OFFICER CONSTITUTED "COERVICE ACTION" WHICH, COMBINED WITH THE TOTALITY OF THE CIRCUMSTANCES, WARRANTS EXCLUSION OF APPELLANT'S ALLEGED CONFESSION

Respondent contends that even if the issue is preserved for appeal, the trial court committed no error as the confession "was made voluntarily and not in response to any interrogation from the officer or any other coercive actions on the part of the officer. (Respondent's Brief p. 8). However, as set forth below, the actions of Officer James Metcalf in twice firing his Taser into Appellant plainly constitute coercive action which, when combined with Appellant's physical and mental condition, rendered the alleged confession involuntary.

As noted in Appellant's brief, the Due Process Clause of the Fourteenth Amendment mandates that an accused's confession is not admissible at trial unless it was voluntarily made. See State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780-1781, 12 L. Ed. 2d 908, 915 (1964). The test for voluntariness is "'whether a defendant's will was overborne' by the circumstances surrounding the given confession.'" See Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Stated another way, the court must consider whether the confession "was knowingly, intelligently, and voluntarily given under the totality of the circumstances." See State v. Compton, 366 S.C. 617, 680, 623 S.E.2d 661, 666 (Ct. App. 2005).

In its brief, Respondent notes: "Importantly . . . in order for a criminal defendants statement to be found to be involuntary, the defendant's statement must have been the product of some coercive law enforcement activity or state action." (Resp. Brief p. 14). In support of this point, Respondent cites to the opinion of the Supreme Court of the United States in Colorado v.

Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L. Ed. 2d 473 (1986). Respondent then argues that the trial court did not err in allowing the confession "because the evidence and testimony presented during the pre-trial hearing and during trial established that Appellant's incriminating statement was not elicited by any questioning, prompting, or coercive action on the part of Officer Metcalf." (Resp. Brief p. 15).

It simply cannot be said that Appellant's confession was not elicited by any coercive action on the part of the officer. It is undisputed that Appellant made his confession only after Officer Metcalf discharged his Taser into Appellant not once, but twice. (Tr. p. 28, ll. 9-16; Tr. p. 206, ll. 13-23). This occurred after Appellant was seriously beaten by Berry Butler and James Rector, including being struck in the head with a tire iron, and was bleeding profusely. (Tr. p. 15, ll. 7-10).

The actions of the officer were certainly coercive actions causally related to the alleged confession and present a factual scenario very different from that considered by the Court in Connelly. There, the Court addressed a confession given when the defendant "approached [a police officer] and, without any prompting, stated that he had murdered someone and wanted to talk about it." See Connelly, 497 U.S. at 160, 107 S.Ct. at 581, 93 L. Ed. 2d at 479. That case centered on the question of whether the defendant's mental state, "by itself and apart from its relation to official coercion" was sufficient to warrant the exclusion of testimony. See id. at 164, 107 S.Ct. 520, 93 L. Ed. 2d at 482. In the case at hand, Appellant does not contend that his mental condition alone is grounds for exclusion. While Appellant does contend that his statement was not voluntary due to his physical and mental condition at the time the statement was made, the cause of his condition was Officer Metcalf's action in twice discharging his Taser

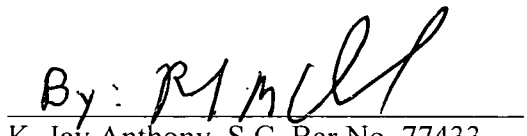
into Appellant. Whether Officer Metcalf *intended* his actions to be coercive is immaterial. All requisites are satisfied as Appellant's will was overborne due to the actions of Officer Metcalf.

Case law is clear that an accused's confession is not admissible at trial for any purpose unless it was voluntarily made. See Von Dohlen, 322 S.C. at 243, 471 S.E.2d at 694 (1996). It cannot be said that Appellant's alleged confession, given immediately after being shot with a Taser twice by the responding officer, in conjunction with Appellant's condition at the time, was "knowingly, intelligently, and voluntarily given . . . ." See State v. Compton, 366 S.C. at 680, 623 S.E.2d at 666 (Ct. App. 2005).

CONCLUSION

Considering the totality of the circumstances, the trial court abused its discretion in finding that the State had satisfied its burden of showing the Appellant's alleged confession to be voluntary. Moreover, Appellant was prejudiced by the admission of testimony regarding the alleged confession. Consequently, Appellant respectfully requests that the Court vacate Appellant's conviction and remand for a new trial.

Respectfully submitted,

By: 

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Greenville, South Carolina
May 12th, 2014

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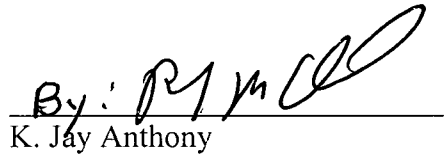
CERTIFICATE OF SERVICE

I, Robert M. Dudek, counsel for Appellant, certify that I have served the written Reply Brief of Appellant on Respondent, State of South Carolina, by depositing three copies of same in the United States mail, postage prepaid, addressed to Mark R. farthing, at the Office of the Attorney General of the State of South Carolina, P.O. Box 11549, Columbia, S.C. 29211.

This 12th day of May, 2014.

By: 

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