STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE THIGPEN, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **Appellant's issue regarding the Datamaster-related evidence is not preserved for appellate review where Appellant challenged only the admission of the Datamaster test result below; where defense counsel stated he was not objecting to the admission of the Datamaster video; and where Appellant did not object to any other Datamaster-related evidence. In any event, the trial judge did not err by allowing the Datamaster video and evidence relating to the Datamaster test because the Datamaster test result was in fact admissible, and, regardless, S.C. Code § 56-5-2950 (J) clearly contemplates exclusion of only the test result. Finally, even assuming error, such error could not have prejudiced Appellant where Appellant's blood test result of .218 was properly allowed into evidence and where Appellant admitted throughout the trial, including during his own testimony, that he was intoxicated on the night of the incident.**

II. **Appellant's issue regarding the voluntariness of his confession is not preserved for appellate review where Appellant made a different argument for suppression below. In any event, the trial judge properly admitted Appellant's confession, which was made around 6:00 pm, where the evidence reflected that, although Appellant had become intoxicated the night before, he had stopped drinking in the early morning hours, and where the officers' testimony and the audio recording of Appellant's statement indicated that Appellant had sobered up significantly and that he understood his rights and gave his statement freely and voluntarily.**

STATEMENT OF THE CASE

Appellant was indicted in Kershaw County for felony driving under the influence, death resulting, and leaving the scene of an accident. On March 19-23, 2012, Appellant proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury. The jury found Appellant guilty of both charges, and Judge Cooper sentenced Appellant to ten years for each charge with the sentences to run concurrently. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

On June 19, 2009, Appellant got off work around 11:30 pm. (R. p. 764-73). After coming home to feed his dog, he headed out for a night of partying. (R. p. 764-78). He first went to Brixx, a pizza place where his friend Melvin worked. (R. p. 774). At Brixx, Appellant had three beers. (R. p. 774). After telling Melvin to give him a call if he wanted to shoot pool later that night, Appellant left and drove to another bar called Friends. (R. p. 774-75). There he met up with two acquaintances, Tina and Leon. (R. p. 775-77). Appellant had three or four more beers at Friends, and also had at least two liquor shots. (R. p. 775). After hanging out for a while, Appellant and his associates went to a private bar called Track Side. (R. p. 775-78). At Track Side, Appellant had several more drinks. (R. p. 776-80; p. 801-802). At some point while there, Appellant got into a fight with a man named B.J. (R. p. 739-44; p. 775-78). Shortly thereafter, Appellant and Melvin left the bar. (R. p. 778-80). After stopping by a gas station so that Melvin could pick up Icehouse beer, Appellant and Melvin headed to Appellant's house so that they could both sleep off the alcohol. (R. p. 780; p. 816-17). They never made it.

Appellant's Jeep was found in the woods the next morning between a quarter mile and a half mile from Appellant's home. (R. p. 202; p. 209-212; p. 396). The Jeep had veered off the left side of the road, struck a bridge, and crashed into a tree. (R. p. 267-71; p. 576; p. 599). Melvin was still seat-belted-in to the front passenger seat. (R. p. 218; p. 283). He had died in the crash. (R. p. 648-52). The collision had basically crushed the passenger compartment, but the driver compartment was pretty much intact. (R. p. 439; p. 529; p. 601-608). The keys to the Jeep were still in the ignition. (R. p. 217).

Appellant was nowhere to be found on the collision scene, although subsequent forensic tests revealed that Appellant's DNA was on the driver's side headliner and on the driver's side airbag. (R. p. 224; p. 284; p. 549-55).

After learning that the vehicle belonged to Appellant, officers drove the short distance to his home to investigate. (R. p. 212-13). Upon arrival, officers noticed that Appellant's front door appeared to have been kicked in. (R. p. 215). After officers knocked on the door for a while and were just about to leave, Appellant opened the door. (R. p. 213; p. 284). He was wearing a towel and appeared to have just taken a shower. (R. p. 212-14). Officers immediately recognized the smell of alcohol on Appellant, and observed that his speech was slightly slurred and that he appeared to be intoxicated. (R. p. 214; p. 289). Officers also noticed that Appellant had various injuries consistent with having been in a car accident, had tiny shards of glass in his hair and beard, and also had airbag marks on one of his arms. (R. p. 214; p. 261-64; p. 287-88; p. 294; p. 330; p. 340; p. 426; p. 450-51). Tiny shards of glass were found in the clothing he was wearing the night before.[1] (R. p. 371; p. 420-23).

Before speaking with Appellant, Officer Slaten read him his Miranda rights. (R. p. 214). Appellant agreed to speak with the officers but denied having any involvement with the collision of his Jeep. (R. p. 215-17; p. 235; p. 292-94). Appellant stated that he had not been driving that morning and had left his keys with a friend. (R. p. 216). He explained that he had to break into his house early that morning because he didn't have his keys. (R. p. 216). When asked the friend's name with whom he left his keys, Appellant claimed he had in fact given his keys to a stranger. (R. p. 216-17).

[1] The Jeep's windshield shattered as a result of the collision, and glass was strewn all over the vehicle. (R. p. 421, lines 2-8).

Believing they had probable cause to believe Appellant had committed felony driving under the influence, officers arrested Appellant. (R. p. 293-94; p. 355). Appellant was Mirandized again in the patrol car. (R. p. 330-32). Trooper McKenzie then took Appellant to the hospital, where his blood was collected at 12:40 pm. (R. p. 332-35). The subsequent test of the blood revealed that Appellant had a blood alcohol concentration of .218. (R. p. 671). Appellant was then taken to the Datamaster room at the Kershaw County Detention Center. (R. p. 336). During the twenty-minute waiting period, Appellant had some discussions with the officers and continued to deny involvement in the collision. (R. p. 336-41). The breath test, which was completed at 2:05 pm, indicated that Appellant's blood alcohol level was .19. (R. p. 78, lines 16-17; p. 106-107).

Later that afternoon, after Appellant had sobered up a great deal, Appellant was interviewed in a classroom at the police station. (R. p. 112-16; p. 127-31; p. 320, lines 7-13; p. 434-35). The interview was audiotaped. (R. p. 434). Sergeant Coats read Appellant his Miranda rights again before speaking with him. (R. p. 434-35). Initially, Appellant continued to deny his involvement in the collision. (R. p. 437). However, he eventually confessed that he had been the driver of the Jeep at the time of the crash. (See State's Exhibit 135, Audio Recording; see R. p. 321-22; p. 448-49). Appellant told officers that after the wreck, he checked Melvin for a pulse and could not find one, then got scared and went home. (R. p. 114; p. 322). Appellant also stated that he took full responsibility for what happened and told officers that he wished he had died instead of Melvin. (R. p. 114; p. 806-807).

At trial, Appellant claimed that his confession was given under pressure and was false. (See R. p. 790-92). Appellant admitted at trial that he was intoxicated on the night in question, but denied that he had been in the Jeep at the time of the collision. (See R. p. 771-87). Appellant claimed that Melvin was driving his Jeep after they left Track Side bar and that once they reached Appellant's house, Melvin said he needed to borrow the car. (R. p. 780). According to Appellant's trial testimony, that was the last time Appellant saw Melvin. (R. p. 780-81). Appellant indicated he had no idea who was driving his car at the time of the collision and did not know how Melvin came to be seat-belted in the passenger seat. (See R. p. 786-87). He also indicated that his injuries must have come from his fight at the bar or from wrestling with his large dog. (R. p. 776-77; p. 781-83; p. 794-95). However, he was unable to explain the glass shards in his clothes or the airbag mark on his arm. (R. p. 795-99). The jury ultimately rejected Appellant's trial story and convicted him of felony driving under the influence and leaving the scene of an accident. (R. p. 941).

I. **Appellant's issue regarding the Datamaster-related evidence is not preserved for appellate review where Appellant challenged only the admission of the Datamaster test result below; where defense counsel stated he was not objecting to the admission of the Datamaster video; and where Appellant did not object to any other Datamaster-related evidence. In any event, the trial judge did not err by allowing the Datamaster video and evidence relating to the Datamaster test because the Datamaster test result was in fact admissible, and, regardless, S.C. Code § 56-5-2950 (J) clearly contemplates exclusion of only the test result. Finally, even assuming error, such error could not have prejudiced Appellant where Appellant's blood test result of .218 was properly allowed into evidence and where Appellant admitted throughout the trial, including during his own testimony, that he was intoxicated on the night of the incident.**

Relevant Facts

Appellant was arrested at 11:29 am on June 20, 2009. (R. p. 334, lines 21-25). Appellant's blood was collected at 12:40 pm that day. (R. p. 335, lines 1-7). The subsequent blood test indicated that Appellant's blood alcohol concentration was .218. (R. p. 671). Officers commenced the twenty-minute waiting period for a Datamaster breath test at 1:42 pm, and the test was completed at 2:05 pm. (R. p. 106-107; p. 338-39). The Datamaster test result revealed a blood alcohol concentration of .19. (R. p. 78, lines 16-17).

Prior to commencement of trial, defense counsel made a motion to suppress the Datamaster breath test results because the test was completed more than two hours after Appellant's arrest in violation of S.C. Code § 56-5-2950. (R. p. 72, line 17 – p. 73, line 10). However, defense counsel's motion to suppress was limited to the test results; in fact, he specifically stated he was objecting only to the Datamaster "reading," and was not objecting to the Datamaster video. (See R. p. 72-83; see p. 81, lines 10-12; see also p. 134, lines 20-22). The trial judge later issued a ruling granting defense counsel's motion to suppress the test result, but he agreed the State could use the video as long as it was

redacted or stopped before the test result was revealed. (R. p. 154-56). The trial judge also stated that the State would be permitted to ask the toxicology expert a hypothetical question including facts that a Datamaster test is given to a person and the resulting blood alcohol level is less than the person's blood alcohol level indicated by a blood test. (R. p. 156, lines 18-24). Defense counsel had no objections. (R. p. 156-57). When the State introduced the Datamaster video into evidence, defense counsel indicated that he did not object as long as the video was in redacted form. (R. p. 336, line 23 – p. 337, line 9). Counsel also did not object to any of the subsequent testimony regarding the Datamaster process and did not object to the hypothetical question posed to the toxicology expert. (R. p. 337-42; p. 375-76; p. 679-80).

Issue Preservation

Appellant now argues that the trial judge improperly allowed the introduction of evidence and testimony regarding the Datamaster process after finding that the Datamaster test was given to Appellant outside of the two-hour time frame prescribed by S.C. Code § 56-5-2950. However, as illustrated by the facts set forth above, this issue is not preserved for appellate review because below, Appellant challenged only the admission of the Datamaster test result and did not challenge the admission of the related evidence. Indeed, defense counsel specifically stated he was not objecting to the Datamaster video, and he never objected to any other Datamaster-related evidence. Accordingly, the issue raised on appeal is not preserved for review. See, e.g., State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), *cert. denied*, 530 U.S. 1209 (2000) (holding that an issue is not preserved for appellate consideration where the appellant conceded the issue at trial); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760,

767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (a party cannot argue one ground for an objection at trial and an alternative ground on appeal); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (a losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred; imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). Based upon the foregoing, the issue should be dismissed on error preservation grounds.

Discussion

Assuming the issue was properly preserved, the trial judge did not err by allowing the Datamaster video and other related evidence into evidence. S.C. Code Ann. § 56-5-2950 (A) states, in pertinent part, as follows: "A breath sample taken for testing must be collected within two hours of the arrest." Section (J) of that statute states, in pertinent part, that "[t]he failure to follow any of [the SLED] policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure." S.C. Code § 56-5-2950 (J).

Initially, it is the State's position that the Datamaster test – commenced only thirteen minutes after the two hour time period elapsed – was in fact admissible because there is nothing to indicate that the failure to follow the two-hour rule "materially affected the accuracy or reliability of the test results or the fairness of the testing procedure."[2] S.C. Code § 56-5-2950 (J).

Regardless, the statute is clear that only the "test results" are to be excluded if the judge finds a violation of section (A) of the statute. S.C. Code § 56-5-2950 (J). See, e.g., State v. Frey, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005) ("With any question regarding statutory construction and application, the court must always look first to the legislative intent as determined from the plain language of the statute.") (citations omitted); State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2000) (the text of a statute provides the best evidence of the legislative intent or will; if a statute's language is "plain, unambiguous, and conveys a clear meaning," statutory construction rules are not needed and a court has no right to impose a different meaning) (citations omitted). The language of the statute indicates that the legislature's primary concern was that a Datamaster test administered too long after the arrest could, under certain circumstances, compromise the accuracy and reliability of the test results. See S.C. Code 56-5-2950 (A) & (J); cf. State v. Frey, 362 S.C. 511, 518, 608 S.E.2d 874, 878 (Ct. App. 2005) (pointing out that the statutory mandate requiring that a blood sample be obtained by a trained medical professional is "inextricably connected to the accuracy and reliability of the

[2] The solicitor started to make this argument below; however, inasmuch as the State also had Appellant's blood test result, he did not press the issue. (R. p. 83, lines 10-14; see also p. 72-83; p. 153-57). The judge did not ultimately make a ruling in this regard as he was required to do before ruling the test result inadmissible. (See R. p. 153-57). See S.C. Code § 56-5-2950 (J) (the failure to follow the provisions of the statute "shall result in the exclusion from evidence of any test results, ***if*** the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure ***and*** the court trial judge or hearing officer ***rules specifically*** as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure").

blood test results"). However, this concern is not implicated by admission of other evidence relating to the Datamaster testing, such as the video of the test, which may contain highly relevant evidence including statements made by the suspect. Significantly, Appellant cites no authority in support of his position that the statute requires exclusion of something more than just the test result. In the State's view, if the legislature had intended that the Datamaster video and any other related evidence also be excluded, it would have said so plainly in the statute. Accordingly, we submit the trial judge committed no error by permitting the introduction of the Datamaster video and related testimony.

Lack of Prejudice to Appellant

Even assuming the trial judge committed error, the error could not have prejudiced Appellant under the circumstances of this case. First, Appellant's blood was taken at 12:40 pm on the same day as the Datamaster test, and the test result of .218 was properly admitted - without objection - at trial. (See R. p. 80, lines 10-11; p. 335, lines 1-7; p. 658-59; p. 670-71). Second, Appellant admitted from the beginning of trial that he was under the influence of alcohol and had a "high blood alcohol" on the night in question. (R. p. 199, lines 18-24). During the defense case, Appellant testified that he got "drunk" that night after drinking nine drinks at two bars plus several more drinks at another bar. (R. p. 773-76; p. 818-19). Appellant's other witnesses corroborated that he was intoxicated that night. (See R. p. 717-21; p. 731-34; p. 739-42; p. 760-63). Indeed, Appellant's defense was not that he was unimpaired that night; instead, his defense was that he was not driving the vehicle at the time of the collision. (See R. p. 199-200; p. 779-81; p. 888-93).

Appellant contends in his brief that he was prejudiced by the allegedly erroneous admission of the Datamaster testimony because it revealed he was "obviously intoxicated." (Brief of Appellant, p. 9). However, because there was there was absolutely overwhelming evidence - from both the State and the defense - that Appellant was intoxicated that night, Appellant could not possibly have suffered prejudice from the admission of the challenged evidence. (See R. p. 80, lines 10-11; p. 199, lines 18-24; p. 214; p. 289; p. 322; p. 329-33; p. 335, lines 1-7; p. 451; p. 658-59; p. 670-71; p. 717-21; p. 731-34; p. 739-42; p. 760-63; 773-76; p. 818-19). See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (reversal is not required unless appellant is prejudiced by the error); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result); State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence."). Therefore, Appellant's convictions should be affirmed.

II. Appellant's issue regarding the voluntariness of his confession is not preserved for appellate review where Appellant made a different argument for suppression below. In any event, the trial judge properly admitted Appellant's confession, which was made around 6:00 pm, where the evidence reflected that, although Appellant had become intoxicated the night before, he had stopped drinking in the early morning hours, and where the officers' testimony and the audio recording of Appellant's statement indicated that Appellant had sobered up significantly and that he understood his rights and gave his statement freely and voluntarily.

Relevant Facts

Prior to trial, defense counsel requested a Jackson v. Denno hearing, arguing that the statement Appellant gave during the 5:20 pm interview was involuntary because the Miranda rights that Appellant was given immediately prior to that interview were

incomplete in that they failed to include a statement advising Appellant that he could stop the questioning at any time. (See R. p. 85, line 23 – p. 91, line 8). Counsel contended that this omission violated State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), *aff'd as modified,* 333 S.C. 426, 510 S.E.2d 714 (1998).[3] Defense counsel asserted that, at the time the first Miranda warnings were given around 11:30 am, Appellant was too intoxicated to understand his rights; however, he acknowledged that "there are a lot of cases that say that the defendant must be almost knocked out to give an involuntary statement." (R. p. 89, lines 1-20). Therefore, he argued, the initial Miranda warnings could not control, and the subsequent, allegedly deficient Miranda warnings given before the 5:20 pm interview, were not sufficient to inform Appellant that he could stop the questioning at any time. (R. p. 88-90). Defense counsel acknowledged that there were no promises or threats made to Appellant. (R. p. 90, lines 12-17).

The following facts were developed through the State's witnesses at the pre-trial Jackson v. Denno hearing. Officers arrived at Appellant's house between 11:00 am and 12:00 pm on June 20, 2009, to investigate the collision. (R. p. 93-95; p. 104). Appellant had the odor of alcoholic beverage about his person and appeared to be intoxicated. (R. p. 94, lines 12-18). Officer Slaten read Appellant his Miranda rights on the porch before speaking with him. (R. p. 94-95). Appellant said he understood his rights, did not appear confused, and the police did not threaten or coerce him. (R. p. 95-97; p. 130). Appellant agreed to talk to police and he denied any involvement in the collision. (R. p. 98; p. 130).

[3] Notably, the South Carolina Supreme Court rejected such an argument in State v. Cannon, 260 S.C. 537, 543, 197 S.E.2d 678, 680 (1973), and the South Carolina Court of Appeals more recently rejected such an argument in State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012).

After determining that there was probable cause to arrest Appellant for felony DUI, Trooper McKenzie took Appellant into custody and placed him in his patrol car. (R. p. 102). The trooper Mirandized Appellant again in the patrol car. (R. p. 102-103). Trooper McKenzie stated that Appellant appeared to be under the influence when he spoke to him. (R. p. 105, lines 2-6). Appellant continued to deny any involvement in the collision. (R. p. 105, lines 10-14).

Sergeant Coats, a member of the M.A.I.T. team, was called out to investigate the collision that day. (R. p. 109). After visiting the scene, he went to the jail to interview Appellant. (R. p. 110). Sergeant Coats issued Appellant his Miranda warnings before beginning the interview. (R. p. 110-11). The entire interview, which began at 5:20 pm and lasted approximately one hour and twenty minutes, was audio recorded. (R. p. 110-11; p. 113). Sergeant Borowski, who was also present at the interview, testified that, although he had observed Appellant in an intoxicated state before noon that day, Appellant had "sobered up a lot" by the time of the 5:20 pm interview. (R. p. 127-28; p. 131, lines 7-8). He testified that Appellant had a "pretty good improvement" to his condition by that time. (R. p. 131, lines 5-7). Sergeant Borowski also testified that Appellant understood what was going on at the time of the interview. (R. p. 127-29). Sergeant Coats agreed, stating that Appellant was not threatened and that he had no reason to believe Appellant was not acting of his own free will and accord. (R. p. 114-15). Sergeant Coats also testified that Appellant could track the conversation they were having, was cognizant of what was going on, and understood everything that was said to him. (R. p. 116). Appellant provided rational answers to questions, made arguments on his own behalf, and made corrections if incorrect information was relayed to him. (R. p.

112; p. 116; p. 130). During the interview, Appellant provided an itinerary of his activities the night before the collision and ultimately admitted that he had been driving the car at the time of the collision. (R. p. 114). He stated that he checked for the victim's pulse after the collision and found none. (R. p. 114, lines 9-10). Appellant also stated that he "took full responsibility" for the collision. (R. p. 128, lines 19-21).

Following the pre-trial testimony of the four law enforcement officers, defense counsel stated he had no witnesses to present for the defense. (R. p. 133, lines 7-9). Counsel then reiterated his argument pursuant to State v. Kennedy. (See R. p. 133-35). As a part of this argument, he acknowledged that Appellant, at the time of the 5:20 pm interview, was "understanding, his composition steadily improved, pretty good improvement from the beginning to the confinement when he is giving his statement and when he is at the detention center." (R. p. 133, lines 13-16). Counsel argued that, since Appellant was "most cognizant of his rights" by the time of the 5:20 interview, he should have been given a complete Miranda warning. (R. p. 133, lines 17-22; p. 138-39). Defense counsel further acknowledged that the 5:20 interview was "clearly a different scenario" than the one earlier that day, and that it is clear that there is a "marked difference in the way [Appellant] speaks and the way he answers those officers" at the 5:20 interview. (R. p. 134, lines 8-11; p. 135, lines 6-11). Counsel also stated that Appellant's "blood alcohol has gone down" and that his "ability to comprehend has gone up." (R. p. 134, lines 14-15). Counsel also asserted that Appellant was promised leniency and help and told that he was facing up to fifty years in prison. (R. p. 135, lines 12-24).

The trial judge ultimately denied Appellant's motion to suppress, finding that the Miranda warnings given to Appellant before the 5:20 pm interview were appropriate. (See R. p. 136-46). Significantly, the trial judge pointed out that he had listened to the tape of Appellant's interview and did not find that Appellant's will was overborne or that his capacity for self-determination was critically impaired. (R. p. 137, lines 7-12). Subsequently, during trial, evidence regarding Appellant's confession, including the audiotape of the interview, was admitted over defense counsel's objection. (See R. p. 321-22; p. 428-30; p. 433-34). Following his motion for directed verdict, defense counsel "renewed" his motion to suppress the confession. (See R. p. 700-709). After some discussion, the trial judge again denied the motion, pointing out that the confession was already in evidence and before the jury. (R. p. 709, lines 8-17). The trial judge later revisited the issue during the jury charge conference and reaffirmed his prior ruling with respect to State v. Kennedy. (See R. p. 824-30).

Issue Preservation

Appellant argues on appeal that his confession in the 5:20 pm interview was not voluntary because the totality of the circumstances shows he was intoxicated at the time of the statement. (See Brief of Appellant, p. 11-13). This argument is not preserved for appellate review. Below, Appellant made an argument regarding State v. Kennedy and the insufficiency of the Miranda rights preceding the 5:20 pm interview. (See R. p. 85-91; p. 133-46). Appellant never argued that Appellant was too intoxicated to give a voluntary confession in the 5:20 pm interview. In fact, defense counsel effectively conceded that Appellant was sober enough to give a voluntary statement by that point. (See R. p. 89, lines 1-20; p. 133-34). Accordingly, the issue raised on appeal is not

properly before this Court. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (appellant's argument that his statements were not trustworthy or reliable because he was highly intoxicated at the time they were made was not preserved for appellate review because appellant raised a different argument below and the issue on appeal was not raised to the trial judge); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (a party cannot argue one ground for an objection at trial and an alternative ground on appeal); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), *cert. denied*, 530 U.S. 1209 (2000) (holding that an issue is not preserved for appellate consideration where the appellant conceded the issue at trial); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, this issue should be dismissed on error preservation grounds.

Discussion

A defendant's statement must be made voluntarily because if a defendant's "will is overborne and his capacity for self-determination critically impaired," use of the resulting involuntary statement offends due process. State v. Kennedy, 325 S.C. 295, 305, 479 S.E.2d 838, 843 (Ct. App. 2002). "The test for determining the admissibility of a statement taken in compliance with Miranda is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (citation omitted). Before admitting an alleged statement of a defendant, the trial court must examine the totality of the circumstances and determine whether the State has proven by a preponderance of the evidence that the statement was given voluntarily. State v. Miller, 375 S.C. 370, 383, 652 S.E.2d 444,

450 (2007) (citations omitted). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not reevaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." Id. at 378-79, 652 S.E.2d at 448 (citation omitted). The conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law. State v. Kennedy, 325 S.C. at 305, 479 S.E.2d at 843.

Appellant argues on appeal that his confession was not voluntary because he was intoxicated at the time he gave the statement. (See Brief of Appellant, p. 11-13). Even assuming the issue was preserved, the trial judge did not err in admitting Appellant's confession because there was evidence supporting that Appellant's statement was not rendered involuntary due to intoxication. As defense counsel appeared to recognize below (see R. p. 89, lines 1-20), "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). "Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. In that vein, "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, 'goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence.'" Id. (citations omitted).

In this case, as discussed above, there was evidence presented supporting that Appellant's confession was given freely and voluntarily and with a full understanding of

rights, notwithstanding that Appellant had been drinking the night before. Importantly, the confession was given around 6:00 pm, and Appellant had stopped drinking early that morning around 5:30 am. (R. p. 320, lines 12-17; p. 436-50; p. 778, lines 23-24). The testimony of the officers - and the recording of the statement itself - supported that Appellant had sobered up. (See R. p. 112-116; p. 127-31; p. 320, lines 7-13; see State's Exhibit 135, Audio Recording). This evidence also supported that Appellant fully understood his rights, understood what he was doing, and freely and voluntarily gave his confession. (See R. p. 112-116; p. 127-31; p. 320, lines 7-13; see State's Exhibit 135, Audio Recording). Significantly, the trial judge, after listening to the recording of Appellant's statement, concluded that Appellant's will was not overborne and that his capacity for self-determination was not critically impaired.[4] (R. p. 137, lines 7-12). See State v. Kennedy, 325 S.C. at 305, 479 S.E.2d at 843. Appellant's argument that he could not make a voluntary statement because his ability to drive would have been impaired is without support in the record or in the law. (See Brief of Appellant, p. 12). See State v. Saxon, 261 S.C. at 529, 201 S.E.2d at 117. Accordingly, the trial judge properly admitted Appellant's confession, and his ruling should be upheld. See State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976) (the evidence regarding the defendant's intoxicated condition at the time he made a statement to police "presented a factual situation which the judge determined unfavorably to the defendant. We cannot say

[4] Notably, Appellant did not testify at the Jackson v. Denno hearing. (See R. p. 133, lines 7-9). Therefore, the officers' testimony regarding Appellant's condition was unrefuted at the time the trial judge ruled the confession admissible and at the time the confession was admitted into evidence at trial. See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer's statements, the circuit court was free to accept the officer's version of events in making its voluntariness determination); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney's questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers' version of events).

that he erred."); see also State v. White, 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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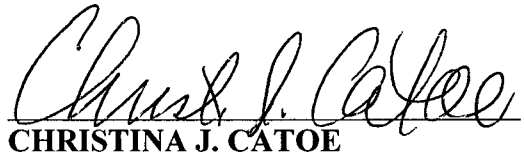

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ATTORNEYS FOR RESPONDENT

March 3, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE THIGPEN, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Tommy A. Thomas**, Post Office Box 88, Irmo, South Carolina 29063, this **3rd** day of **March, 2014.**

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SWORN to before me this 3rd day of March, 2014.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014