STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD MICKENS,

APPELLANT

APPELLATE CASE NO. 2022-000473

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Cases

South Carolina Cases

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in giving the jury a coercive Allen v. United States, 164 U.S. 492 (1896), charge?

STATEMENT OF THE CASE

Appellant was indicted in Lexington County for murder and a weapons charge. On April 4, 2022, appellant was tried before the Honorable Debra R. McCaslin and a jury. R. 1. Robert McNair and Luke Pincelli represented the State. R. 1. Justin Kata represented appellant. R. 1. The jury convicted appellant on both counts. R. 484, l. 2 – 14. Judge McCaslin sentenced appellant to life imprisonment for murder and five years' imprisonment on the weapons charge. R. 499, l. 2 – 5. This appeal follows.

STANDARD OF REVIEW

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." State v. Logan, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) citing State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." Id. "A jury charge that is substantially correct and covers the law does not require reversal." Id. (internal quotations omitted).

ARGUMENT

The trial court erred in giving the jury a coercive Allen v. United States, 164 U.S. 492 (1896), charge.

Both the State and the defense centered their case around a theory of mistaken identity. The State's theory was that appellant shot the decedent, Donte Doyle, after mistaking him for Jac'quel Sumter ("Sumter"), his intended target. R. 92, l. 16 – 96, l. 18. Appellant allegedly sent threatening videos to Sumter in the hours before the shooting. R. 307, l. 10 – 312, l. 6. Sumter gave the videos to the police. R. 307, l. 10 – 312, l. 6. State's Ex. 42.

In the videos, appellant is wearing a bucket hat. State's Ex. 42. A witness at the scene identified the hat in the video as the hat she saw the shooter wearing. R. 203, l. 1 – 205, l. 16. The witness did not remember the exact hat during her testimony. R. 203, l. 1 – 205, l. 16. She said that any description she gave the police would have been true and accurate. R. 208, l. 6 – 21. The officer said she identified the hat worn by appellant in the video. R. 312, l. 12 – 314, l. 18.

The defense contended that the witnesses were mistaken. R. 431, l. 17 – 95, l. 6. One of the witnesses at the scene only knew appellant from Facebook. R. 213, l. 17 – 220, l. 12. She did not see the shooting, only heard the shots. R. 213, l. 17 – 220, l. 12. She never met appellant in real life. R. 220, l. 9 – 14. The witness testimony was sufficiently suspect that appellant asked for and received from the trial judge a jury charge on false and mistaken identification from United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) cited in State v. Jones, 344 S.C. 48, 59-60, 543 S.E.2d 541, 547 (2001). R. 446, l. 24 – 110, l. 18.

Appellant's trial began on a Monday. R. 1. The jury began deliberations at 1:37 PM on Thursday afternoon. R. 455, l. 8 – 9. The jury asked to re-hear the testimony of the witnesses at

the scene and was brought back into the courtroom at 2:54 PM. R. 455, l. 10 – 122, l. 5. The jury asked to hear two more witnesses at 6:06 PM. R. 465, l. 5 – 23.

At approximately 8:15 PM, the jury sent this note: "We're divided, not able to come to a conclusion as of now. Some are adamant they will not be changing their view. How much time do we have to further deliberate, and is there a possibility to try and reach a definite conclusion tomorrow." R. 469, l. 9 – 17. The judge and the parties agreed to send the jury home for the night with deliberations to resume the next morning. R. 469, l. 16 – 133, l. 14.

The next morning, Friday, the jury began deliberating at 8:28 AM. R. 474, l. 17. At 10:03 AM, the jury sent a note asking for assistance in playing a video. R. 474, l. 18 – 21. At 11:52 AM, Judge McCaslin sent the jury to lunch. R. 476, l. 9 – 341, l. 9. The jury resumed deliberations at 1:20 PM. R. 477, l. 10.

At 2:11 PM, the jury sent another note indicating deadlock: "We have made progress, but we are still split. No sign of hope of further progress. How do we proceed and/or what is the next step?" R. 477, l. 11 – 13. Judge McCaslin said, "I need to bring them in and give them the Allen charge. R. 477, l. 16 – 17.

Appellant objected. R. 477, l. 19 – 342, l. 5. Defense counsel stressed the jury's note indicated there was no hope. R. 477, l. 19 – 342, l. 5. He argued that the Allen charge "run the risk of focusing on the minority jurors." R. 477, l. 19 – 342, l. 5.

Judge McCaslin initially agreed that the jury was "saying they're deadlocked," quoting their note that ho hope of further progress existed. R. 477, l. 22-23. The solicitor stated his queasiness at giving an Allen charge, stating, "I don't know whether an Allen charge would be helpful at this point or whether we should just declare a mistrial and do this thing again with another jury." R. 479, l. 21 – 24. The solicitor ultimately stated he would leave it to the judge's

discretion and the court said she felt she had to give the charge. R. 479, l. 25 – 344, l. 7. When the jury was brought back into the courtroom, Judge McCaslin charged them:

> I received your note that you made some progress, but y'all are still split, no sign or hope of further progress.
>
> Let me tell you this: You have stated that you have been unable to agree on a verdict in this case. As I instructed you earlier, the verdict of the jury must be unanimous. When a matter is in dispute, it isn't always easy for even two people to agree. So when 12 people must agree, it becomes more difficult.
>
> In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors, tell each other how you feel and you feel that way, discuss your differences with open minds.
>
> Although the verdict of the jury must be unanimous, every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the result of your own convictions, and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors.
>
> The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and evidence in this case.
>
> If you do not agree on a verdict in this case, I must declare a mistrial. In that case, it does not mean anybody wins. It just means that, at some future time, I will try this case with some other jury sitting where you sit now. The same participants will come, and the same lawyers will ask basically the same questions and get basically the same answers, and we will go through the whole process again.
>
> You were selected in the same manner and from the same source as any future jury will be, and there is no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious and competent jurors than you or that more or clearer evidence will be produced on one side or the other. Therefore, I'm going to ask you to return to your room to deliberate.

R. 480, l. 13 – 482, l. 13.

The jury left the courtroom at 2:25 PM after the Allen charge. R. 482, l. 18. Two hours later, at 4:29 PM, the jury returned with a guilty verdict. R. 483, l. 1 – 484, l. 14.

Giving the Allen charge was error and improperly coerced the verdict. See State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). "The trial judge has the duty to urge the jury to reach a verdict, but he may not coerce it." Id. at 99, 470 S.E.2d at 108-09. In Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), the Court held the charge coercive because it unduly emphasized that the jury should reach a verdict, was directed at the minority, and the jury returned a verdict shortly after the charge. Id. The Tucker charge was held coercive even though the trial judge told the jurors not to violate their individual consciences.

The Allen charge is called the "dynamite" charge in part because it can blast a verdict out of a deadlocked jury. State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019). Allen charges in South Carolina "must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority." Id. Taylor set out four factors courts examine to determine whether an Allen charge is coercive: (1) whether it speaks to the minority; (2) whether it contains mandatory language about returning a verdict; (3) if there was an inquiry into the jury's numerical division; and (4) the time between the charge and the verdict. Id.

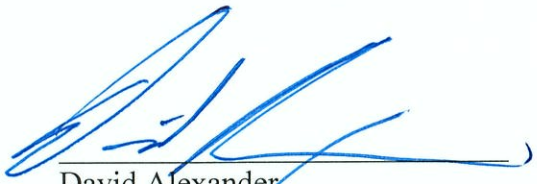
While the judge did not know the numerical split, it can be assumed that jurors who wanted a verdict of not guilty were in the minority because a guilty verdict was returned. While Judge McCaslin's charge did not contain any language telling the jurors they "must" come to a verdict, it repeatedly stressed that a verdict "must be unanimous," and did not tell the jury that a deadlocked vote is sometimes the result of the government's high burden of proof. Finally, the two hour deliberations after the charge is a small portion of time when compared to the overall

length of the deliberations—twelve hours before the Allen charge and two after. The time indicates coercion.

In this mistaken identity case, the proper end was a hung jury. Without the Allen charge, the State could not have met its burden of proof to twelve jurors. Even the solicitor mused that the Allen charge might be a bad idea. This Court should reverse and remand for a new trial

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Leonard Mickens states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Debra R. Mccaslin, which was held on April 4-8, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Leonard Mickens.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2023.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s)
(2) Sentencing Sheets
(3) Trial Transcript Dated April 4-6 and 8, 2022
(4) Trial Transcript Dated April 7, 2022
(5) State's Exhibit #42

I certify that this designation contains no matter which is irrelevant to this appeal.

David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 12th day of June, 2023.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

David Alexander
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ATTORNEY FOR APPELLANT

This 12th day of June, 2023.