STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT

APPELLATE CASE NO. 2012-213216

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 12, 2012, Appellant Gregory Allan Ivery was indicted by the Greenville County Grand Jury for (1) distribution of crack cocaine in violation of S.C. CODE ANN. § 44-53-375; and (2) distribution of crack cocaine within ½ mile of a school or park in violation of § 44-53-445. R.*.

A trial was held before the Honorable William Seals and a jury on October 11, 2012. Tr. 1. Ivery was represented by Ernest Hamilton, and the State was represented by Assistant Solicitor Lauren Davis Price. Id.

After informing the court that it could not reach a decision with "eleven guilty, one not guilty," the Trial Court gave an Allen[1] charge, after which the jury returned a verdict of guilty on both counts. Tr. 141, l. 6 – 145, l. 4. The Trial Court sentenced Ivery to (1) twenty-three years as a third offender for distribution of crack cocaine; and (2) ten years concurrent on the proximity to a school or park charge. Tr. 150, ll. 10-14.

Ivery timely filed and served his Notice of Appeal on October 18, 2012.

[1] Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

I. The Trial Court erred in admitting a video recording of the alleged drug transaction where the State failed to properly authenticate the video when it did not present any witness at trial who could testify that the video accurately depicted the alleged drug transaction.

At trial, Detective Charles Keith Cothran testified that an individual named James Grant signed an agreement to work as a confidential informant with the Greenville City Police Department. Tr. 48, l. 5 – 49, l. 25. Grant asked if there was anything he could do for the police department because he had been charged with shoplifting and therefore, he decided to become a confidential informant in an effort to try to get assistance with his shoplifting charge. Tr. 61, ll. 14-21; 73, ll. 3-10.

Grant informed Detective Cothran that he could purchase crack cocaine from an individual named Greg Ivery. Tr. 48, ll. 9-14. Detective Cothran told Grant to arrange a deal for June 30, 2011 and to come to the police department that day. Tr. 50, ll. 2-4.

On June 30, 2011, Detective Cothran testified that Grant arrived around 11:40 a.m. and he equipped Grant with a hidden audio and video recording device. Tr. 51, l. 7 – 53, l. 17. Detective Cothran also said that Grant explained the he was going to buy $140 worth of crack cocaine from Ivery, and Detective Cothran accordingly gave Grant $140 of police funds for the purpose of purchasing crack cocaine from Ivery. Tr. 53, ll. 19-24.

Detective Cothran then said that he and other detectives got in their vehicles, Grant got in his own vehicle, and Grant then followed the officers to the deal location which was purportedly Ivery's residence. Tr. 54, l. 23 – 55, l. 9.

Detective Cothran testified that initially Ivery was not home, but they waited a little while and Ivery arrived. Grant then allegedly told Ivery he wanted to purchase $140 worth of crack and gave Ivery the $140 worth of police funds. Ivery then allegedly went inside

the home to retrieve the crack cocaine and brought it to Grant. Grant then left and returned to the police department. Tr. 55, l. 14 – 56, l. 1.

Detective Cothran did not physically see or observe any of the alleged drug transaction. Tr. 56, ll. 2-4.

At trial, the State moved to admit the video recording of the alleged drug transaction into evidence and publish it to the jury. Tr. 66, l. 21 – 67, l. 7; State's Ex. 4 (video). Ivery's counsel objected on the ground that Detective Cothran could not authenticate the video because he was not in the video and did not observe the events that occurred in the video. Tr. 67, ll. 9-13. The Trial Court overruled Ivery's objection and the video was admitted into evidence and played for the jury in open court. Tr. 67, ll. 14-22. Ivery renewed his objection to the admissibility of the video recording at the close of the State's case because Detective Cothran could not verify that the video was an accurate portrayal of the alleged transaction. Tr. 108, ll. 14-21.

The Trial Court erred in admitting the video recording of the alleged drug transaction into evidence because the State did not lay a proper foundation for its admissibility. South Carolina Rule of Evidence 901(a) requires "authentication or identification as a condition precedent to" the admissibility of evidence. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE.

Rule 901(b)(1) provides that authentication can be accomplished by testimony from someone familiar with and with knowledge of the contents of the document or recording. Authentication can therefore be accomplished through someone with knowledge of the events depicted on a videotape. See State v. Campbell, 259 S.C. 339, 344, 191 S.E.2d 770,

773 (1972) ("Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved.")

The State presented no witness at trial who could testify that the video accurately depicted the alleged drug transaction. Detective Cothran conceded he did not observe the alleged transaction. Tr. 56, ll. 2-4. While Detective Cothran testified that he could hear the conversation during the alleged transaction, he never verified at trial that it was Ivery's voice on the audio. Id.; cf. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 626-27 (Ct. App. 2003) (finding the State properly authenticated taped telephone conversation between victim and defendant where victim had known defendant for over ten years and recognized his voice during the conversation).

At trial, Grant denied ever purchasing any crack from Ivery and denied that it was him appearing in the video recording. Grant further denied circling Ivery's picture in a subsequent photo line-up. Tr. 88, l. 9 – 89, l. 19; 92, ll. 18 – 21. Therefore, the State presented no witness who could testify that the video recording accurately represented the events that occurred during the alleged drug transaction.

Courts from other jurisdictions have allowed the admission of a video recording of a drug transaction where the prosecution made a proper foundation for admission through the testimony of someone who witnessed the occurrence videotaped. See United States v. Rivera-Maldonado, 194 F.3d 224, 236-37 (1st Cir. 1999) (finding admission of drug transaction videotapes proper where agent who had actually videotaped the crime scenes testified that "each daily video accurately reflected what he had observed as it was being taped"); United States v. Medina-Herrera, 606 F.2d 770, 774 (7th Cir. 1979) (finding "proper foundation for the admission of tapes was made through the testimony of agents

who witnessed the defendant's actions and made the tapes"); Trull v. State, 811 So.2d 243, 246 (Miss. Ct. App. 2000) (holding videotape of the drug transfer was properly authenticated where the agent testified that he "was present when the events on the videotape transpired, and that the video was an accurate depiction of the events as they transpired that day.").

Where the State did not offer the testimony of anyone who witnessed the alleged drug transaction between Grant and Ivery, the Trial Court improperly admitted the video recording where the State failed to make a proper foundation for its admission. The Trial Court committed an error of law by admitting a videotape without a proper foundation, and this Court should reverse the Trial Court's ruling on the admissibility of this evidence where the Trial Court abused its discretion. See State v. Lee, 399 S.C. 521, 526-27, 732 S.E.2d 225, 228 (Ct. App. 2012) (providing appellate standard of review for trial court's ruling on the admission of evidence).

The Trial Court's improper admission of the video recording was not harmless where there was a reasonable probability that the jury's verdict was influenced by the challenged evidence." Lee, 339 S.C. at 527, 732 S.E.2d at 228. Here, the State heavily relied on the videotape to identify Ivery as the individual who allegedly sold drugs to Grant. In the State's opening statement, the solicitor informed the jury that the entire drug transaction was recorded on video and let the jury know that they would be able to view the video. Tr. 35, ll. 9-12.

During trial, Detective Cothran could only identify Ivery as the person who allegedly sold the drugs by watching the video since he did not observe the transaction firsthand. Tr. 68, ll. 12-19.

During the State's closing, the solicitor also highlighted the video, repeatedly reminding the jury that they saw the entire video of the transaction and that they could watch the video again if they needed to. Tr. 115, ll. 24-25; 116, ll. 9-12; 116, l. 24 – 117, l. 1.

During their deliberations, the jury asked to view the video of the transaction again and the video was replayed for them. Tr. 140, l. 22 – 141, l. 1.

Without the video recording, the State's identification of Ivery as the one who sold drugs to Grant would have rested primarily on Grant's pre-trial identification of Ivery, a witness who then declined to identify Ivery at trial as the seller and who denied ever circling Ivery's picture in a photo line-up. Tr. 88, l. 9 – 89, l. 19; 92, ll. 18-21. Although it was a jury determination as to the credibility of Grant, the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Accordingly, it was error for the Trial Court to have admitted the video recording into evidence, and Ivery is entitled to a new trial.

II. The Allen charge given by the Trial Court was unconstitutionally coercive where (1) it was improperly directed to the sole juror voting not guilty; and (2) the Trial Court strongly urged the jury to return a verdict by apprising the jury of the time, expense and effort that would be incurred if the case had to be retried.

During jury deliberations, the jury sent a note back to the court which stated, "We can not reach a decision. Eleven guilty, one not guilty, the juror voting not guilty will not . . . change their vote under any circumstances." Tr. 141, ll. 6-9. The Trial Court decided to give an Allen[2] charge over the objection of Ivery's defense counsel who stated that he would "accept that juror's opinion." Tr. 141, ll. 10-18.

The Trial Court's gave the following Allen charge to the jury:

> Ladies and gentlemen of the jury, I'm going to give you one more charge and then we'll go from there. Members of the jury, 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 even more difficult. In most case[s], absolute certainty can not be reached or expected.
>
> However, you have a duty to make every reasonable effort to reach a 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 why you feel that way, discuss your differences.
>
> Although the verdict of your jury must be unanimous, every one of you has a right to your own opinion. The verdict that 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 opinion and visa versa. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness and impartiality.
>
> You must lay aside all outside matters and re-examine the questions before you based on the law and evidence in this case.
>
> I want you to understand if you can not agree on a verdict in this case, we're just going to have to come back on[e] week with another jury pool, select another jury of 12 people and one alternate. Judge is going to have to be here to try the case. Lawyers are going to have to be up here and try the case

[2] Allen v. United States, 164 U.S. 492 (1896).

> again, the bailiffs will have to be here, law clerk will have to be here; all of that time, all of that effort, all of those expenses associated with trying this case again, and I don't see how another group of 12 people will do a better job than the 12 of you.
>
> So I would ask that you go back in your jury room, just re-examine your beliefs, think about what you're going, respect each other's opinion and try to make a decision within a reasonable amount of time.

Tr. 141, l. 20 – 143, l. 9.

The jury returned that same evening with a verdict of guilty for distribution of crack cocaine and guilty for distribution of crack cocaine in proximity to a school or park. Tr. 144, l. 23 – 145, l. 4.

Ivery's defense counsel argued that with respect to the Allen charge, the jury was "coerced into reaching a verdict." Tr. 147, ll. 4-6.

"'Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances.'" Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)). This State's Supreme Court has explained:

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (internal citations omitted).

In Tucker, the South Carolina Supreme Court adopted the standard set by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the Supreme Court considered, among other

things, the following factors:

> (1) the charge did not speak specifically to the minority juror(s);
>
> (2) the judge did not include in his charge any language such as "You have got to reach a decision in this case;" [and]
>
> (3) there was no inquiry into the jury's numerical division, which is generally coercive.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Applying the above factors, the Supreme Court found the Allen charge given in Tucker was unconstitutionally coercive. Specifically, the court concluded (1) viewed as a whole, the jury charge was directed to the minority juror where the trial court knew there was only one holdout juror; (2) while the trial court did not use mandatory language such as "You must return a verdict," Tucker's jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the Allen charge. Tucker, 346 S.C. at 492-94, 552 S.E.2d at 717-18.

The Allen charge given by the Trial Court in this case was similarly coercive. While the Trial Court informed the "majority [to] consider the minority's position and visa versa," the charge as a whole was nevertheless directed to the minority juror when the Trial Court knew that there was only one juror who was voting not guilty and who, according to the rest of the jurors, would not "change their vote under any circumstances." Tr. 141, ll. 6-10. In its charge, the Trial Court asked for a re-evaluation of "your position for reasonableness, correctness and impartiality," and further instructed that "[y]ou must lay aside all outside matters and re-examine the questions before you

based on the law and evidence in this case." Tr. 142, ll. 13-19. In the conclusion of its charge, the Trial Court again asked for a "re-examin[ation of] your beliefs." Tr. 143, l. 7.

Clearly when the trial judge knew that there was only one holdout juror, language directing a re-evaluation and re-examination of your position was aimed at the minority juror. This is very much like the charge in the Tucker case, which also did not specifically reference the minority juror but commanded the jurors to "tell the other jurors how you feel about the case and why you think as you do" and reminded the jurors that "[i]t becomes each of your duties to exchange views with the other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have." Tucker, 346 S.C. at 493; 552 S.E.2d at 717.

The Supreme Court found the Allen charge given in the Tucker case coercive and aimed at the minority juror where the trial judge knew that there was only one holdout juror. Id. The Allen charge given by the Trial Court in this case is likewise coercive where the Trial Court directed its charge to the lone minority juror voting not guilty. Cf. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 324 (2002) (finding Allen charge was not coercive where petitioner failed to present any evidence that showed the minority wished to acquit); State v. Jones, 320 S.C. 555, 558-59, 466 S.E.2d 733, 734-35 (Ct. App. 1996) (determining Allen charge was not coercive where trial judge knew numerical alignment of the jury but not how the jury was aligned concerning guilt or innocence).

In addition, while the Trial Court here did not use mandatory language such as "You must return a verdict," the Trial Court nevertheless used language strongly urging the jury to return a verdict, reminding them of the time, expense and effort that would occur if the case had to be retried because of the jury's failure to reach a unanimous

verdict. Tr. 142, l. 20 – 143, l. 5; Tucker, 346 S.C. at 493, 552 S.E.2d at 717 (finding Allen charge coercive where jury was told of importance of uniramous verdict).

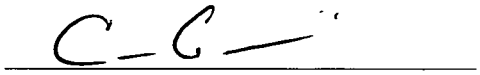
Finally, while the jury volunteered its numerical division and alignment on guilt to the Trial Court, the Trial Court failed to instruct the jury not to state its division in the future should it be deadlocked again. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

Accordingly, the Allen charge given by the Trial Court under the totality of the circumstances was unconstitutionally coercive, and Ivery is entitled to a new trial. Tucker at 494, 552 S.E.2d at 718.

CONCLUSION

Based upon the foregoing arguments, Appellant Gregory Allan Ivery requests this Court to reverse his convictions and remand for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
William H. Seals, Jr., Circuit Court Judge

THE STATE,

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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 indictments dated June 12, 2012; and

(2) Trial Transcript of trial held October 11, 2012 (designated pages only): 1-2; 35; 48-56; 61; 66-68; 73; 88-89; 92; 108; 115-117; 140-145; 147; and 150; and

(3) State's Exhibit 4 (video recording).

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

August 7th, 2013

Carmen V. Ganjehsani
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Gregory Allan Ivery, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 7th day of August, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.