STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

Appellate Case No. 2023-000544

The Honorable Eugene C. Griffith, Circuit Court Judge

Kareem Lamell Wallace,

Appellant,

vs.

The State of South Carolina,

Appellee.

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant respectfully submits this reply brief addressing Respondent's arguments as to issues I and II.

ARGUMENTS

I. The trial court should have granted Mr. Wallace's motion for a mistrial on the unlawful neglect charge as the court's improper deliverance of two *Allen* charges resulted in coercion of the jury to render a verdict.

Respondent argues that the trial court's rendering of the *Allen* charge after the jury deadlocked on the unlawful neglect was not improper. Specifically, Respondent notes that the *Allen* charges were given on two different indictments and therefore, any argument of coercion or prejudice made by Mr. Wallace is meritless because the trial court did not stack them on one particular indictment. Resp. Br. 7-9. Such an argument ignores *the effect of the two charges on the same jury*, regardless of the fact that an *Allen* charge was made for both the great bodily injury charge and the unlawful neglect charge as separate offenses (emphasis added).

Petitioner does not contend that the trial court did not have a duty to urge the jury to reach a verdict in the case of a deadlock. *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100,103 (Ct. App. 2004). However, "[i]t is universally recognized that genuine inability of the jury to reach a unanimous verdict constitutes a manifest necessity for the declaration of a mistrial." *Id.* (citing 21 Am. Jur.2d *Criminal Law* §402 (2003)). In fact, the inability of a jury to reach a verdict "remains the prototypical example of manifest necessity." *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (internal quotations omitted). *Allen* charges may be used to encourage an "indecisive jury", but the judicial urges towards a verdict cannot be coercive. *Id.* (citing *State v. Williams*, 344 S.C. 260, 263-64, 543 S.E.2d 260, 262 (Ct. App. 2001). "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, 491, 552 S.E.2d 712, 716 (2001) (quoting *Lowenfield v. Phelps*, 484 U.S. 231 (1988)). The South Carolina Supreme Court has adopted the "very fact intensive" *Lowenfield* test "in determining whether a given charge in unconstitutionally coercive." *Tucker*, 346 S.C. at 491. In deciding if an *Allen* charge is unconstitutional, the Court will consider:

(1) Did the charge speak specifically to minority jurors?

(2) The presence of "[y]ou must return a verdict" type language.

(3) Did the Court inquire into the jury's numerical division?

(4) The timing of the verdict after the *Allen* charge was given.

Id. at 492-494.

Important to note for Mr. Wallace's case, is that if a jury deadlocks twice, the trial judge is able to "diplomatically discuss whether further deliberations could be beneficial" and the jury can consent to further deliberations or consent to discontinue deliberations "either expressly or impliedly, by its response to the trial judge's comments." *Buff v. South Carolina Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000). *See also* S.C. Code Ann. §14-7-1330 (1976). Demands by the trial judge for further deliberations "after clear indication of second deadlock" is considered coercive. *Robinson*, 360 S.C. at 194 (citing *State v. Simon*, 126 S.C. 437, 120 S.E. 230 (1923)). Obtaining a jury's consent after a second deadlock is "intended to 'prevent forced verdicts, and to prevent undue severity of jury service.'" *State v. Barnes*, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (quoting *State v. Freely*, 105 S.C. 243, 89 S.E. 643 (1916)).

The crux of the issue in this case is that two *Allen* charges were given, and it is irrelevant that the charges were given on separate indictments. The jury was deadlocked on the great bodily injury charge and the foreperson initially indicated they had a unanimous verdict on the unlawful neglect charge. However, when polled, one juror indicated that the verdict was in fact not unanimous. Instead of properly granting Mr. Wallace's motion for a mistrial at this point, the trial court instead heaped the pressure on the jury by giving a second *Allen* charge. Even though the trial court and State consider this second charge to be "slim", it was still given, indicating to the jury that they in fact had to reach a verdict. Resp. Br. 8-9.

In regard to the *Lowenfield* test, the situation in Mr. Wallace's case undoubtedly fails for its coercion. First, the second *Allen* charge given did in fact single out the minority juror who changed his mind at polling. The Court asked the jury to deliberate after this individual juror suddenly turned a unanimous verdict into a non-unanimous verdict. It is not a hard logical leap to consider that the fact that the court was again instructing the jury to further deliberate instituted pressure on the minority juror to reach another result. Second, while the court did not specifically state "you must return a verdict", the amalgamation of the *Allen* instructions proclaimed to the jury that they in fact did need to return a unanimous verdict. What is key to this factor is that two *Allen* charges were given to the same jury, notwithstanding their presence on separate indictments. It is not hard to infer that a jury would feel like *they had to reach a verdict* if the judge addressed them for a second time and sent them back for further deliberations. (emphasis added). Third, the juror who revealed his inability to reach a verdict at polling denoted to the court that it was an 11-1 split and as such, he was the minority juror. Finally, the jury came back within twenty minutes of the second *Allen* charge. Tr. 330. Our Supreme Court has found even a period of time of an hour and a half to

be "relatively short "in the context of a coercive *Allen* charge, so the existence of only twenty minutes between the second Allen charge and the verdict weighs in favor of coercion. *Tucker*, 346 S.C. at 494.

The trial court improperly gave a second *Allen* charge and as a result, the verdict for the unlawful neglect charge was tainted. The trial court should have granted a mistrial on the unlawful neglect charge. Mr. Wallace respectfully asks this Court to grant him a new trial as to the issue.

II. The trial court should have directed a verdict of not guilty on the unlawful neglect charge as the State's evidence only raised a mere suspicion that Mr. Wallace committed the crime.

Respondent argues that the trial judge correctly denied Mr. Wallace's directed verdict motion on the unlawful neglect charge as there was sufficient evidence for the case to be submitted to a jury. Respondent overstates the nature of the evidence, and even in the light most favorable to the State, such evidence fails to raise more than a mere suspicion that Mr. Wallace committed the crime, and therefore, failed to meet the standard of adequate evidence to send to a jury.

While Respondent is correct that this Court must examine the evidence in the light most favorable to the State, evidence that only presents a mere suspicion an individual has committed the crime cannot withstand a directed verdict motion. "Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt*." State v. Bostick*, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (citing *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances who do not amount to proof." *Cherry*, 361 S.C. at 594 (citing *State v. Lollis*, 343 S.C. 580, 541, S.E.2d 254 (2001)).

Pertinent to this argument, and what Respondent does not address, is the implications of an entirely circumstantial case, like the one against Mr. Wallace. "When a motion for a direct[ed] verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the lower court is concerned with the existence or nonexistence of evidence, not with its weight." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). That being said, "[t]he lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." *Id*. Appellant does not contend that circumstantial evidence cannot be used by a jury to determine guilt. However, in order for the circumstantial evidence to properly reach the jury for deliberation, the circumstantial evidence must be substantial. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). Evidence is not substantial or sufficient if it only "establishe[s] a probability of guilt arising from a doctrine of chances that the fact charged is likely to be true." *State v. Manis*, 214 S.C. 99, 101, 51 S.E.2d 370, 371 (1949), vacated in part on other grounds, *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 275 (1989).

This Court and our Supreme Court have vacated convictions based on lack of substantial circumstance evidence being presented, finding that the trial judge erred in not granting a motion for directed verdict. *See State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)(Supreme Court found defendant was entitled to directed verdict on murder charge due to lack of evidence and rejected State's contention that defendant's lack of alibi was probative evidence); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000) (Supreme Court affirmed Court of Appeals granting of a directed verdict on a burglary charge despite defendant's fingerprint being present at scene of the crime); *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004) (Supreme Court affirmed Court of Appeals' finding that circumstantial evidence was insufficient to support conviction despite

Defendant's fingerprint being found in victim's car and victim's car being located at defendant's father's house after the murder); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) (Supreme Court held that the State presented insufficient evidence for the case to be submitted to the jury despite victim's personal effects being found in the burn pit of Defendant's family home.).

In the case of Mr. Wallace, the evidence presented in the light most favorable to the State, only displays that the Victim was injured and that Mr. Wallace was with her before those injuries were discovered. Expert witnesses for the State opined to the nature of the injuries, but failed to narrow down the time when the Victim was injured to the time period she was alone with Mr. Wallace. Investigators also failed to actually examine the child. Mr. Wallace stated he picked the Victim up by the arm, but this still fails to amount to proof that he indeed committed unlawful neglect against the Victim. With such a wide time period in which Victim could have been injured, several other individuals should have also been considered. The State presented facts, that even when adduced together, only implicated a mere suspicion that Mr. Wallace was guilty and relied on the chance that because he was with her before she was taken to the hospital, he must have been the one to injure her. Such inferences are not proof and fail to rise to the level of substantial circumstantial evidence. As such, this case should not have been submitted to the jury and the trial judge failed to grant Mr. Wallace's motion for a directed verdict on the unlawful neglect charge.

Therefore, Mr. Wallace respectfully asks this Court to vacate his conviction as to the unlawful neglect charge.

CONCLUSION

Respectfully, with respect to Argument I, this Court should reverse and remand for a new trial. With respect to Argument II, this Court should vacate Appellant's conviction and sentence.

April 12, 2024

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CERTIFICATE OF SERVICE

I certify that I have provided a copy of the Initial Reply Brief of Appellant on Ambree M. Muller of the S.C. Attorney General's Office via email on this date, April 12, 2024.

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April 12, 2024.