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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY DARREN SHERARD,

APPELLANT

APPELLATE CASE NO. 2024-002196

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred by giving a coercive *Allen*[1] charge?

II. Whether the trial court erred by sentencing Appellant for possession of a weapon during the commission of a violent crime when it had already sentenced Appellant to life imprisonment on other charges?

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

STATEMENT OF THE CASE

At its May 2024 term, the McCormick County grand jury indicted Appellant for criminal sexual conduct in the first degree (CSC First), taking of hostages by an inmate, and possession of a weapon during the commission of a violent crime. R.*(Indictments). The case was tried from December 9-13, 2024, before the Honorable Debra R. McCaslin and a jury. Tr. 1. Jason S. Chehoski represented Appellant; Susan Mayes and Whitney T. Young represented the state. Tr. 1. The jury convicted Appellant as indicted. Tr. 448. Judge McCaslin sentenced Appellant to concurrent terms of life imprisonment for CSC First and taking hostages by inmate, pursuant to the recidivist statute. Tr. 459. Judge McCaslin sentenced Appellant to a concurrent term of five (5) years' imprisonment for possession of a weapon during the commission of a violent crime. Tr. 459.

This appeal follows.

STATEMENT OF FACTS

On September 20, 2023, Appellant and Correctional Officer C.J., hereinafter referred to as "Complainant," were found in a bathroom at the McCormick Correctional Institution, both undressed. Tr. 201, ll. 22-25; 206, ll. 7-9. The state charged Appellant with CSC First, taking hostages by inmate, and possession of a weapon during a violent crime. R.*(Indictments). Appellant's defense at trial was consent. The state sought life sentences for both CSC First and taking hostages by inmate pursuant to S.C. Code Ann. § 17-25-45. Tr. 74.

Complainant was working as the education law library officer. Tr. 109, ll. 3-4. She testified that Appellant approached her office and asked her for toilet paper to use the inmate bathroom near her office. Tr. 153, ll. 17-24. After giving him the toilet paper, she went to the bathroom herself. While walking back to her office, Appellant grabbed her from behind and dragged her into the inmate bathroom. Tr. 155, ll. 17-19. Complainant fell to the ground, at which time Appellant showed her a "shank." Tr. 156, ll. 16-18.[2] He told her that if she screamed, he would kill her. Tr. 159, ll. 16-18. Appellant then ordered Complainant to undress and perform sex acts. Tr. 160, ll. 2-9, 16-23. At some point during this encounter, Complainant managed to grab her radio and broadcast a brief request for help. Tr. 161, ll. 8-11. At another point, Complainant and Appellant struggled, she managed to get the shank away from him, and she used it to stab him a couple of times. Tr. 162, ll. 20-25. In response to her radio message, the "response team" came to the bathroom, but Appellant blocked the door with his body. Tr. 166, ll. 17-19.

Captain Particia Moss testified that she was one of the first to arrive at the bathroom. When she got there, she saw Complainant leaning over the sink and Appellant behind her. Tr.

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[2] A "shank" is a "homemade sharp instrumental weapon." Tr. 130, ll. 14-15.

218, ll. 16-17.[3] Helen Middleton, a sexual assault nurse examiner, testified that Complainant had several injuries about her body. Tr. 293-315. She found no visible injuries during her vaginal examination of Complainant. Tr. 328, l. 23. The state also presented evidence from a DNA testing and analysis expert to confirm that Appellant's DNA was found on Complainant's body. Tr. 364, ll. 6-9; 365, ll. 8-12; 368, ll. 7-8. The state and Appellant stipulated that Appellant was an inmate at McCormick Correctional Institution. Tr. 375, l. 22 – 376, l. 2.

The jury began its deliberations at 10:42 a.m. on December 12, 2024. Tr. 432. Less than an hour later, the jury sent a note to the trial court, asking: "Can we know why he was in jail and how long he had left?" Tr. 432, ll. 9-10; R. *(Court's Exhibit 4). The trial court responded: "You have all the information that you need to consider. It was presented to you from this witness stand and from this courtroom." Tr. 433, ll. 9-11. Defense counsel also asked the trial court to instruct the jury that they could not consider why he was in custody. Tr. 433, l. 20 – 434, l. 1. This request was denied. Tr. 434, ll. 9-11. The jury continued to deliberate until 7:00 p.m., when they were released for the day. Tr. 439.

The next morning, the jury continued to deliberate.[4] At 9:11 a.m., they sent another note to the trial court to ask three fact-based questions: (1) whether Appellant had sustained injuries; (2) whether the shank itself had been tested for DNA; and (3) whether DNA had been taken from under Appellant and Complainant's fingernails. Tr. 442, ll. 2-6.; R. * (Court's Exhibit 16). Again, the trial court told the jury they had heard all of the evidence, to no objection. Tr. 443.

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3 The contradiction between Appellant being behind Complainant and blocking the door with his body was pointed out by defense counsel. *See, e.g.,* Tr. 207, ll. 13-15.

4 It is not clear from the transcript when the jury resumed its deliberations the next day, but on the previous day, the trial court ordered them to return at 8:45 a.m. Tr. 440, ll. 4-5 ("I want you back in the courthouse at a quarter until 9:00 in your jury room.").

Shortly before 10:06 a.m.,[5] the jury sent another note to the trial court, which read: "We believe we are at an impasse for the case. We have jurors that will not change their view." Tr. 444, ll. 12-15; R. * (Court's Exhibit 17). The trial court provided the defense and the state with copies of the *Allen*[6] charge that it intended to read to the jury. Tr. 444, ll. 15-16. Defense counsel objected, stating:

> Your honor, again, it looks like from what I can tell, it doesn't look as coercive as other charges I've seen, but I think just the very nature of an *Allen* charge is coercive. So...I have it noted for the record that the Defense sees this *Allen* charge as coercive.

Tr. 445, ll. 4-9. The jury reentered the courtroom at 10:21 a.m., and the trial court gave them the following charge:

> Ladies and gentlemen, 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 even 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 why you feel that way. Discuss your differences with open minds. Although the verdict of the jury must be unanimous, every one of you has a 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

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5 The transcript is unclear about when the following note was sent by the jury. The transcript only states that the trial court went off the record at 9:18 a.m., after the jury sent its previous note and does not contain a timestamp for when the jury sent the next note. Tr. 443-44. The transcript indicates that the trial court read the note to the attorneys, and then an off-the-record bench conference occurred from 10:06 a.m. until 10:19 a.m. Tr. 443-44.

6 *Allen v. United States*, 164 U.S. 492 (1896).

> 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 now sit. 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. I therefore ask you to return to your deliberations.

Tr. 445, l. 19 – 447, l. 7. The jury resumed deliberations at 10:25 a.m.

Shortly before 11:45 a.m., the jury informed the trial court that it had reached a verdict. Tr. 447, ll. 13-15. The verdict was guilty on all counts. Tr. 448. The trial court sentenced Appellant to life imprisonment for CSC First and taking hostages by inmate. Tr. 459. The trial court also sentenced Appellant to five (5) years' imprisonment for possession of a weapon during a violent crime. Tr. 459. Appellant did not object to the sentence.

STANDARD OF REVIEW

Issue I: Generally, when reviewing jury charges, this Court would consider the charge as a whole and in light of the evidence and issues at trial. *State v. Rampey*, 438 S.C. 519, 524, 885 S.E.2d 366, 368-69 (2022). "However, an *Allen* charge, due to its potential for coercion, must be viewed with a more heightened scrutiny than a general jury charge." *Id.* (citing *State v. Taylor*, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019)). A coercive *Allen* charge appears to be *per se* reversible and not subject to any sort of harmless error review. *See Rampey*, 438 S.C. at 531, 885 S.E.2d at 372 (holding that polling the jury after the verdict to confirm none of the jurors were coerced by an *Allen* charge does not "cure" a defective charge).

Issue II: The trial court has broad discretion when sentencing a defendant within statutory limits. *State v. Sidell*, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). However, the trial court abuses that discretion when its ruling is based on an error of law. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

ARGUMENTS

I. <u>The trial court erred by giving a coercive *Allen* charge.</u>

After deliberating for nearly ten (10) hours, the jury was unable to reach a verdict. However, a mere eighty (80) minutes after being read an *Allen* charge, the jury returned unanimous guilty verdicts on all three charges, despite the case lacking any relevant physical evidence that the minority jurors could have reviewed. The passage of time before and after the *Allen* charge and the nature of the evidence presented in this case demonstrate that the *Allen* charge was coercive. This Court should reverse.

"Although labelled the dynamite charge because of its proven ability to blast a verdict out of a jury otherwise unable to agree, the label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care." *State v. Taylor*, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) (internal quotation marks and citation omitted) (*quoting United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972)).

"A trial judge has the duty to urge, but not coerce, a jury to reach a verdict. An *Allen* charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views." *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002); *see also, Taylor*, 427 S.C. at 214, 829 S.E.2d at 727 (trial judge may "urge jurors to reach a verdict but must do so in a way that does not coerce them, eroding their independence and impartiality"); *Showers v. State*, 407 So.2d 169, 171 (Ala. 1981) ("It is quite clear that...a trial judge may urge a jury to resume deliberations and

cultivate a spirit of harmony so as to reach a verdict, as long as the court does not suggest which way the verdict should be returned and no duress or coercion is used.").

In determining whether an *Allen* charge was coercive, this Court reviews the charge in light of four factors: (1) whether the charge is aimed at the jurors in the voting minority; (2) whether the charge "includes 'you must return a verdict' type language;" (3) whether there is "an inquiry into the jury's numerical division," which is generally coercive; and (4) whether the amount of time between the charge and the verdict is indicative of coercion. *Taylor*, 427 S.C. at 214-15, 829 S.E.2d at 727; *accord, Tucker v. Catoe*, 346 S.C. 483, 492-95, 552 S.E.2d 712, 717-18 (2001) (*per curiam*). These *Tucker* factors are non-exclusive, and the case law does not assign any particular weight to any of the four factors. *Taylor*, 427 S.C. at 215, 829 S.E.2d at 727. This Court has also placed weight on other factors not enumerated in *Tucker*, such as whether the charge included language telling the jury not to surrender their firmly held convictions or whether the charge overemphasizes the costs associated with retrial. *Taylor*, 427 S.C. at 218-19, 829 S.E.2d at 729. In any event, the analysis this Court must perform in all *Allen* charge cases is "very fact intensive." *Tucker*, 346 S.C. at 491, 552 S.E.2d at 716. For that reason, other jurisdictions consider less concrete factors, such as whether there is "any other indicia of coerciveness." *United States v. Berger*, 473 F.3d 1080, 1090 (9th Cir. 2007).[7]

The first *Tucker* factor, whether the charge was aimed at members in the voting minority, must be considered "in the context and setting it was given," rather than "in the abstract." *Taylor*, 427 S.C. at 216, 829 S.E.2d at 728. In cases where the trial court is aware of the jury's numerical

[7] *See also, United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987) (the court should consider: "(1) the content of the challenged instruction, (2) the length of the period of deliberations following the *Allen* charge, (3) the total time of deliberation, and (4) any indicia in the record of coercion or pressure upon the jury.") (*quoting United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980)).

split, this factor is often considered in conjunction with the third factor. *See id.* (a trial court knowing the numerical split bears on the coercion analysis, "for a jury laboring under such knowledge might interpret the trial court's comments as aimed at the minority"); *Brewster v. Hetzel*, 913 F.3d 1042, 1054-55 (11th Cir. 2019). In cases where the trial court did not know the numerical split, it becomes even more important to analyze the charge in context.

The second *Tucker* factor is whether the trial court instructed the jury in language suggesting they "must" reach a verdict. Instructions to the jury that it must render a verdict can be coercive in their own right. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) (finding an *Allen* charge which instructed the jury "[y]ou have got to reach a decision in this case" was unduly coercive and reversible error). For this reason, the South Carolina Supreme Court has cautioned trial courts against using language such as "with the *hope* that you can arrive at a verdict," since jurors are "not required to reach a verdict;" thus, "the language could potentially be construed as being coercive." *State v. Williams*, 386 S.C. 503, 515 n.7, 690 S.E.2d 62, 68 n.7 (2010). To be sure, there is a "glaring difference between the trial court's obligation to tell jurors they have a duty to *attempt* to reach a unanimous verdict and telling them they 'should come to a decision.'" *Taylor*, 427 S.C. at 215, 829 S.E.2d at 727 (emphasis in original). The power gradient between the trial judge and jurors is quite steep; jurors, who look to the trial judge for guidance, could interpret even seemingly benign remarks as meaning "the trial judge believes the result is obvious, or at least capable of unanimous agreement." *Id.* at 216, 829 S.E.2d at 728 (*citing Quercia v. United States*, 289 U.S. 466, 470 (1933)). Even when the trial court ends its *Allen* charge with a phrase such as "I ask you to return to your jury room and *attempt* to come to a verdict," this fact will not "save" a charge also containing language that could be coercive. *See, e.g., State v. Rampey*, 438 S.C. 519, 526-27, 885 S.E.2d 366, 369-70 (2022) (emphasis added)

(holding *Allen* charge that ended in "attempt to come to a verdict" was still coercive because, *inter alia*, the trial court overemphasized "the considerable resources involved" in a trial).

The third *Tucker* factor is whether the trial court knew the jury's numerical division. In this case, the trial court was not privy to this information.

"The fourth *Tucker* factor in determining whether an *Allen* charge is unconstitutionally coercive is whether the time between the charge and the verdict demonstrates coercion. This factor is notoriously difficult to apply without indulging in speculation given the secrecy of jury deliberations." *Id.* In *Taylor*, the Court of Appeals found that a jury going from 10-2, 8-4, and 11-1 splits to unanimous conviction two-and-a-half hours after an *Allen* charge weighed in favor of finding the charge was coercive, holding that amount of time "does not dispel the likelihood of coercion." *Id.* at 217-18, 829 S.E.2d at 728-29.

For the reasons that follow, the *Allen* charge in this case was unduly coercive. Appellant is entitled to a new trial.

A. The trial court strayed too close to disfavored "you must reach a verdict" language.

The trial court's instruction to the jury, while not outright stating they were obligated to reach a verdict, did not effectively walk the tightrope between permissible "you have a duty to *attempt* to come to a decision language" and disfavored "you *must* return a verdict language." For these reasons, the *Allen* charge was unduly coercive.

The trial court instructed the jury that it had a "duty to make every reasonable effort to reach a unanimous verdict." This came immediately after the trial court instructed the jury that "In most cases, absolute certainty cannot be reached or expected." The combination of these two instructions could give the not-guilty, holdout jurors the impression that the trial court believed they were behaving unreasonably. Even a seemingly "benign remark" such as this one "could be

interpreted by a rational juror that the trial judge believes the result is obvious…." *Taylor*, 427 S.C. at 216, 829 S.E.2d at 728. A rational juror who had wanted to vote not guilty could interpret the trial court's remarks as implying anyone not wanting to convict was being obtuse—after all, "*absolute certainty* cannot be reached or expected."[8]

It is also relevant that this charge came approximately ten hours into deliberation, after the jury had already gone home for the night and returned once, and after it had asked several questions of the trial court. Despite this, the jury was told of the significant burdens that would befall the parties if they were unable to reach a verdict[9] and were *not* told how much longer the trial court expected them to deliberate. *Cf. Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000) ("suggestions or threats that the jury would be kept until unanimity is reached" is indicative of coercion). Further, informing the jury "of the importance of a unanimous verdict" is not necessarily a neutral factor in the *Allen* analysis; by contrast, when considered with the remaining circumstances, it can weigh in favor of coercion. *See Tucker*, 346 S.C. at 493, 552 S.E.2d at 717 ("While no such mandatory language was used here, Petitioner's jury *was told of*

[8] The words "absolute certainty certainly could not be expected" appeared in the original *Allen* charge. *Allen*, 164 U.S. at 501. However, as this Court has recognized, the original *Allen* charge has been "tinkered with" to the point that the charge upheld in *Allen* would likely not be upheld under *Allen*'s progeny. *See Taylor*, 427 S.C. at 213-14, 829 S.E.2d at 726 (*citing United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (noting original *Allen* charge "approaches ultimate permissible limits") (parenthetical in *Taylor*)); *see also* George C. Thomas, III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, WILL. & MAR. BILL. OF RTS. J. 893, 909-916 (2007) (acknowledging that most federal circuit courts and most states have disapproved of the original *Allen* language). Telling a jury that "absolute certainty cannot be reached" can have the effect of diluting the reasonable doubt standard. *Cf. United States v. Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973) ("the charge might move some jurors to forget the prosecution's heavy burden of proof and the defendant's fundamental presumption of innocence.").

[9] Tr. 446, ll. 19-25.

the importance of a unanimous verdict" (emphasis added)). A reasonable juror in this case would wonder how much longer he would be forced to deliberate.

Here, after ten hours of deliberation, and after sending several notes to the trial court, the jury—who probably thought they had done their best—told the trial court that they were at "an impasse" and some jurors "*will not change their view.*" In response, the trial court told them they had a "duty" to "make *every reasonable effort*" to reach a unanimous verdict, that absolute certainty could not be expected, and that a mistrial would be cumbersome and inconvenient for all parties involved. This language is far too close for comfort to the "you must reach a verdict" language that has been consistently condemned by this state's courts. *See, e.g., Williams*, 386 S.C. at 515 n.7, 690 S.E.2d at 68 n.7 (cautioning trial courts against even using the language "with the *hope* that you can arrive at a verdict," (emphasis added)); *cf. Lowenfield v. Phillips*, 484 U.S. 231, 250 (1988) (Marshall, J., dissenting) ("In [another case] we rejected a claim of jury coercion by relying on the court's statement to the jurors that if 'they could not conscientiously and freely agree upon a verdict they would be discharged....' In the decided absence of such an instruction, the possibility of coercion runs much stronger.") (*quoting Hyde v. United States*, 225 U.S. 347, 382 (1912)).

Accordingly, the trial court's *Allen* charge was coercive. This Court should reverse.

B. The amount of time between the *Allen* charge and verdict is indicative of coercion.

Prior to the *Allen* charge, the jury deliberated for nearly ten hours. The time the jury left the courtroom after the *Allen* charge to when the trial judge resumed the bench to announce the jury had a verdict was a mere eighty minutes. The disparity between these times is so great and the deliberation time after the *Allen* charge so short as to be indicative of coercion. Further, there was no relevant physical evidence for the holdout jurors to review, and this case was entirely

about whether the jury believed the testimony of one witness. The combination of these factors is indicative of coercion.

It is difficult to perform the coercion analysis based on the passage of time "without indulging into the secrecy of jury deliberations." *Taylor*, 427 S.C. at 217, 829 S.E.2d at 728. There is no bright-line rule for what amount of time is sufficient. *Compare id.* (two-and-a-half-hour period between *Allen* charge and verdict insufficient to "dispel the likelihood of coercion), *with Williams*, 368 S.C. at 515, 690 S.E.2d at 68 (three hours and forty-five minutes was sufficient). However, comparing the present case with similar cases shows that the passage of time between the *Allen* charge and the verdict is highly indicative of coercion.

In *Taylor*, the jury deliberated for seven hours and twenty minutes before informing the trial court they were at an impasse, which led the trial court to release them for the day. 427 S.C. at 211, 829 S.E.2d at 725. The next morning, the trial court gave the jury an *Allen* charge. *Id.* Two-and-a-half hours later, the jury returned a guilty verdict. *Id.* This Court held that passage of time "[did] not dispel the likelihood of coercion." *Id.* at 217, 829 S.E.2d at 728.

While the *Taylor* court found that the two-and-a-half-hour interval did "not *dispel* the likelihood of coercion," *id.* at 217, 829 S.E.2d at 728, other courts have found that shorter periods not only fail to dispel coercion, they are indicative of coercion. For example, in *Lowenfield v. Phillips,* the United States Supreme Court held that an interval of thirty minutes "suggests the possibility of coercion." 484 U.S. at 240. And in *Tucker*, our Supreme Court held that an interval of one-and-a-half hours "weigh[ed] in favor of a finding of coercion." 346 S.C. at 494, 552 S.E.2d at 718. In another case, our Supreme Court found that an interval of seventy-

seven minutes weighed in favor of a finding of coercion. *State v. Rampey*, 438 S.C. 519, 527, 885 S.E.2d 366, 370 (2022).[10]

Here, the difference between the intervals before and after the *Allen* charge strongly suggest coercion. Like in *Taylor*, the jury deliberated late into the afternoon on the first day of deliberations and was sent home. In fact, the jury in this case deliberated for an hour longer on the first day, and at least an hour longer on the second day, than the jury in *Taylor*. Unlike the *Taylor* jury, however, the jury in this case returned a verdict only eighty minutes after the *Allen* charge.[11] The interval between the *Allen* charge and the verdict in this case is significantly closer to thirty minutes, *see Lowenfield*, 484 U.S. at 240 (thirty-minute interval suggested coercion), than two-and-a-half hours, *see Taylor*, 427 S.C. at 217, 829 S.E.2d at 728 (two-and-a-half-hour interval did not dispel coercion).

Further, this case was not complex, but the jury needed ten hours of deliberation and sent the trial court several notes. In this way, this case is a near-perfect analogue to another sex case, *Rampey*, where our Supreme Court held:

> Essentially, despite Rampey's contention that the evidence was complex, this matter presented a credibility contest between

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[10] *See also, United States v. Burgos*, 55 F.3d 933, 940 n.7 (4th Cir. 1995) ("[J]urors met for approximately four hours prior to the *Allen* charge, received the next day off, and then deliberated for approximately two hours before reaching a verdict. In light of our concerns with the *Allen* charge, we are not prepared to find that the additional *two hours* of deliberation were enough to offset the coercive nature of the charge."); *Workman v. State*, 412 S.C. 128, 711 S.E.2d 636 (2015) (*Allen* charge coercive when, *inter alia*, the jury deliberated for approximately two hours after the charge, for a total of six).

[11] It must be noted that eighty minutes is a conservative estimate. Eighty minutes is the time between when the jury left the courtroom after the *Allen* charge and when the *trial court* informed the attorneys that the jury had a verdict. Tr. 447. The eighty minutes number does *not* include the amount of time it took the jury to inform the bailiff of their verdict, the bailiff to inform the trial court, the trial court to tell the attorneys to return to the courtroom, the attorneys to get to the courtroom, and the trial court to resume the bench. The real timeline to verdict is likely far shorter.

> Victim and the defense's theory of the case, which was that Victim concocted this story to enable her to move to her grandmother's home. It is clear the jury struggled to reach a decision here, as evidenced by its request to see the transcript of Victim's and the doctor's testimonies in addition to asking a question about whether minors are given a lie-detector test.

438 S.C. at 528, 885 S.E.2d at 370-71. The present case is also a mere "credibility contest." To reach a verdict, the jury only needed to decide whether it believed Complainant, who alleged Appellant raped her, or whether it believed the defense theory—that the sex was consensual and Complainant concocted the lie to avoid criminal liability for having sex with an inmate. While there were pieces of evidence introduced at trial, such as DNA, that could be seen as complex, those pieces of evidence were not truly relevant to the ultimate issue. The jury was not debating how many septillion times more likely it was that Appellant's DNA was found on Complainant's body than not. Appellant conceded that he had sex with her.

Despite the simplicity of the case, the jury struggled to reach a verdict, which indicates that jurors had serious doubts about Complainant's story. It deliberated for more than nine hours before receiving the *Allen* charge and had asked several questions of the trial court. However, "less than [two] hours after the *Allen* charge, the jury transformed from a body significantly divided on [three] serious felony charges...into one united by complete unanimity." *See Taylor*, 427 S.C. at 218, 829 S.E.2d at 728. The speed at which the jury was at an "impasse," with "jurors [(plural)] that *will not* change their view," into a jury that was unanimous on three different serious felony counts is highly indicative of coercion.

Accordingly, the trial court gave a coercive *Allen* charge to the jury. Appellant is entitled to a new trial.

II. <u>The trial court erred by imposing a sentence for possession of a weapon during the commission of a violent crime when it had already imposed a life sentence.</u>

The five-year sentence required by S.C. Code Ann. § 16-23-490(A) expressly does not apply when the person sentenced is also sentenced to life imprisonment. The trial court's sentence to that effect should be vacated.

A person convicted of possession of a weapon during the commission of a violent crime faces a mandatory five-year sentence "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490(A). The "five-year sentence does *not* apply," however, "where…a life sentence without parole is imposed for the violent crime." *Id.* (emphasis added). It is well settled that the sentence imposed by the trial court in this case is an unlawful sentence. *State v. Plumer*, 439 S.C. 346, 350, 887 S.E.2d 134, 137 (2023). Further, although the sentence was not objected to, this Court is empowered to correct the sentence anyway. *Id.* ("it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus"); *State v. Sledge*, 428 S.C. 40, 59-60, 832 S.E.2d 633, 644 (Ct. App. 2019) (vacating five-year sentence for possession of a weapon during a violent crime despite no objection from trial defense attorney).

For these reasons, this Court should vacate the five-year sentence imposed for possession of a weapon during the commission of a violent crime.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be reversed, and this case should be remanded for a new trial. In the alternative, Appellant's five-year sentence for possession of a weapon during the commission of a violent crime should be vacated.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2026.