STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2012-213216

THE STATE,

Respondent,

vs.

GREGORY ALLAN IVERY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly admitted an audio-visual recording of a confidential informant's narcotics transaction with Appellant after the State authenticated the recording by presenting the testimony of an officer who installed recording equipment on the confidential informant, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, and confirmed that the recording was a true and accurate depiction of the transaction that he heard occur.

II.

Any issue with the trial judge's presentation of an Allen charge to the jury was not properly preserved for appellate review because defense counsel did not contemporaneously object to the charge during trial and, instead, specifically stated that he had no objection after the charge was presented to the jury. However, regardless of any issue preservation concerns, the trial judge's supplemental instructions were not improper or unconstitutionally coercive because the instructions correctly encouraged the jury to make every reasonable effort to reach a verdict while even-handedly instructing the jurors in both the minority and majority to consider one another's opinions in addition to the own without surrendering their own beliefs simply to reach an agreement.

STATEMENT OF THE CASE

In September of 2011, Appellant Gregory Allan Ivery was arrested for distributing crack cocaine following a narcotics investigation involving the assistance of a confidential informant. In June of 2012, the Greenville County grand jury indicted Appellant for one count of distribution of crack cocaine and one count of distribution of crack cocaine within one-half mile of a school or park. On October 11, 2012, a jury trial was commenced in the Greenville County court of general sessions with the Honorable William H. Seals, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-three years for distribution of crack cocaine and ten years for distribution of crack cocaine within one-half mile of a school or park. Subsequently, Appellant timely filed a notice of appeal.

STATEMENT OF FACTS

In June of 2011, James Grant offered to begin working as a confidential informant for the Greenville Police Department after he was charged with shoplifting. (Tr. pp. 48-49; p. 61). In response to Grant's offer, Detective Charles Cothran, a detective in the vice and narcotics unit of the Greenville Police Department, advised Grant that he could not promise him anything but would talk to the solicitor about any assistance Grant provided to the police department. (Tr. p. 47; p. 49; p. 61). Grant then signed an agreement to the work as a confidential informant and began providing Detective Cothran with information about narcotics activity in the community. (Tr. pp. 48-49).

Later that month, Grant advised Detective Cothran that he could purchase crack cocaine from an individual known as "Red," who was subsequently identified as Appellant Gregory Allan Ivery, and Detective Cothran instructed Grant to attempt to arrange a narcotics transaction with Appellant. (Tr. p. 48; p. 50). Thereafter, on June 30, 2011, Grant reported to Detective Cothran's office and advised the officer that he had successfully arranged to purchase $140 worth of crack cocaine from Appellant at Appellant's residence. (Tr. pp. 50-51; p. 53; p. 55). Detective Cothran then searched Grant to make sure he was not in possession of any contraband while Detective Russell Irvin of the Greenville Police Department searched Grant's vehicle. (Tr. p. 39; p. 42; pp. 51-53). After no contraband was found, Detective Cothran equipped Grant with a hidden audio and video recording device and provided him with $140 in law enforcement funds. (Tr. p. 42; pp. 51-53). The three men then drove to a location near Appellant's residence,

and the officers waited there as Grant continued on to the residence in his own vehicle.[1] (Tr. pp. 42-43; pp. 54-55).

Once Grant arrived at Appellant's residence, he waited for Appellant to arrive while the officers continued to monitor him by using a listening device. (Tr. p. 42; p. 55). Shortly thereafter, Appellant arrived at his residence, and Grant gave him the law enforcement funds he had received from Detective Cothran. (Tr. p. 55). In exchange, Appellant gave Grant a small plastic bag he had retrieved from his residence that contained 1.79 grams of crack cocaine. (Tr. p. 55; p. 99; p. 101). Grant then left Appellant's residence, and the officers followed him back to their office. (Tr. p. 56).

Upon arriving back at the office, Grant gave Detective Cothran the crack cocaine he had purchased from Appellant, and Detective Cothran removed the recording device from Grant before transferring the recording of the transaction to his computer and to a D.V.D. (Tr. p. 56). Detective Cothran then asked Grant to identify the seller of the crack cocaine from a photographic lineup, and Grant identified Appellant as the person who sold him the crack cocaine without any hesitation. (Tr. pp. 57-59).

Subsequently, Appellant was arrested and indicted for distribution of crack cocaine and distribution of crack cocaine within one-half mile of a school or park, and he proceeded to trial. (Tr. pp. 3-4; Indictments). During trial, Detective Irvin and Detective Cothran testified about their roles in the narcotics investigation, with both officers confirming that they monitored Grant's transaction with Appellant as it took place over a listening device. (Tr. pp. 40-43; pp. 50-56). Additionally, Detective Cothran noted that he secured an audio-visual recording of the transaction from the recording device

[1] During trial, Detective Cothran confirmed that he was familiar with the area where the transaction occurred based on his patrol experience. (Tr. p. 64). He further confirmed that Appellant's residence was located approximately one-eighth of a mile away from a community center. (Tr. p. 64).

equipped to Grant prior to the transaction and indicated that the recording equipment was working properly at that time. (Tr. pp. 63-66). Furthermore, he confirmed that he reviewed the recording of the narcotics transaction recovered from the device, that Appellant was visible in the recording, and that it was a fair and accurate depiction of Grant's transaction with Appellant. (Tr. pp. 65-67).

Following Detective Cothran's testimony, the solicitor moved for the recording to be admitted into evidence, and defense counsel objected. (Tr. p. 67). In support of that objection, defense counsel asserted: "He's saying that – he's not authenticating what he saw in the video as to him being there. He looked at it but he wasn't the one in the video. How can he authenticate something that he was not there to see?" (Tr. p. 67). The trial judge then overruled the objection, and the recording was admitted and played for the jury. (Tr. p. 67). After the recording was played for the jury, Detective Cothran again confirmed that the recording truly and accurately depicted the transaction that occurred on June 30, 2011, and he noted that a telephone conversation he had with Grant was depicted in the recording. (Tr. pp. 67-68).

Subsequently, Grant testified for the State and noted he was currently incarcerated while serving a thirty-two month sentence for shoplifting. (Tr. p. 84; p. 90). Grant then went on to confirm his signature was on the photographic line-up form from which Appellant's photograph was identified but denied circling anything, signing anything, purchasing anything from anyone, appearing in any recording, or receiving any money to purchase crack cocaine. (Tr. pp. 88-89). As his testimony continued, he further asserted that he was not going to be the solicitor's "do boy." (Tr. p. 91).

Thereafter, James Armstrong, an analyst in the Greenville County crime lab and an expert in chemical drugs, testified about his analysis of the substance secured in

Appellant's case. (Tr. p. 99; p. 102). Armstrong confirmed that the substance was 1.79 grams of crack cocaine, and the crack cocaine was admitted into evidence without objection. (Tr. pp. 100-101). Detective Cothran was then recalled to the witness stand, and he testified that he retrieved the crack cocaine from Grant after the narcotics transactions while further noting that Grant gave a signed statement in which he admitted that he purchased crack cocaine from Appellant before turning it over to the officer. (Tr. p. 104; p. 106).

Subsequently, the State rested its case, defense counsel moved for a directed verdict, and the motion was denied. (Tr. pp. 107-108). Defense counsel then renewed his objection to the admission of the recording of the narcotics transaction, asserting:

> The other matter is the showing of the video that was not sufficiently validated by the officer. He wasn't in the video and therefore he couldn't verify that it was accurate on everything that was shown in it. He said he saw it and it looked like it happened or something so we object to the evidence of the video in this case.

(Tr. p. 108). Once again, the trial judge denied the motion. (Tr. p. 108). The trial judge then instructed the jury on the applicable law, and the jury began its deliberations. (Tr. pp. 129-140).

Thereafter, while waiting for the jury's decision, the trial judge received a note indicating that the jurors had not been able to reach a verdict, that eleven jurors were voting for a guilty verdict while one juror was not, and that the juror voting not guilty would not change their vote under any circumstances. (Tr. p. 141). In response to the note, the trial judge indicated he intended to give the jury an Allen[2] charge, and the solicitor agreed with the trial judge's decision to give the supplemental charge while

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

defense counsel responded: "Your Honor, with the hour being as it is, I will accept that juror's opinion." (Tr. p. 141). The trial judge then instructed the jury as follows:

> 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 cases, 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 position and [vice] 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 that 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 again, the bailiffs will have to be here, law clerk will have to be here; all of that, 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 doing, respect each other's opinion and try to make a decision within a reasonable amount of time. Thank you very much. You may proceed.

(Tr. pp. 141-143). Following the supplemental charge, the jury returned to the jury room to continue its deliberations, and the trial judge inquired of the parties if there were any objections to his instructions. (Tr. p. 143). In response, both the solicitor and defense counsel affirmatively stated that they had no objections. (Tr. p. 143).

Subsequently, the jury reached a verdict, unanimously convicting Appellant of distribution of crack cocaine and distribution of crack cocaine within one-half mile of a

school or park.[3] (Tr. pp. 143-145). Following the verdict, defense counsel renewed his previous motions while making "a new motion that the jury had got into a hard situation and [was] possibly coerced into reaching a verdict[,]" and the trial judge denied those motions. (Tr. p. 147). Thereafter, during the ensuing sentencing hearing, Appellant candidly apologized to the trial judge, stating:

> I want to apologize to the Court for even being here. Ain't much I can say about that. If I had to do it all over again, I'd do it entirely different. Now, I got a chance to look at my life and try to make the best of it. I'm not trying to run away from anything, I'm going to face my responsibility from anything I go to do. I want to apologize for putting you through what I put you through an it ain't much I can say. I'm sorry and ask for forgiveness.

(Tr. pp. 149-150). The trial judge then sentenced Appellant to an aggregate term of imprisonment of twenty-three years. (Tr. p. 150).

[3] After the jury reached its verdict, the trial judge individually polled the jurors, and each of the jurors confirmed that they returned verdicts of guilty. (Tr. pp. 145-146).

ARGUMENT

I.

The trial judge properly admitted an audio-visual recording of a confidential informant's narcotics transaction with Appellant after the State authenticated the recording by presenting the testimony of an officer who installed recording equipment on the confidential informant, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, and confirmed that the recording was a true and accurate depiction of the transaction that he heard occur.

Appellant contends the trial judge abused his discretion in admitting the audio-visual recording of Grant's narcotics transaction with Appellant. In support of that contention, Appellant maintains that the recording was not properly authenticated because the State failed to offer the testimony of anyone who actually visually observed the transaction take place. However, such testimony was **not** required in order for the recording to be properly authenticated. Instead, in order for the recording to be authenticated, the State was required to introduce sufficient evidence to support a finding that the recording was what it was purported to be, and the State satisfied that threshold requirement by introducing the testimony of the officer who installed the recording equipment on Grant, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, and confirmed the recording was a true and accurate depiction of the transaction that he heard occur. Because the officer's testimony confirmed that the recording was exactly what it was purported to be, the trial judge did not abuse his broad discretion in finding the recording had been authenticated and in admitting it into evidence during trial. Accordingly, Appellant's convictions should be affirmed.

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32

(1980). On appeal, appellate courts give "great deference" to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Moreover, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In general, evidence must be authenticated before it can be admitted. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). In order for evidence to be authenticated, the party offering the evidence must establish that the evidence is what it is claimed to be. Id.; see Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). That requirement can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge that the matter is what it is purported to be. Rule 901(b)(1), SCRE. Significantly, direct proof is **not** required in order to authenticate

a particular piece of evidence, and, instead, evidence can be authenticated through indirect or circumstantial evidence. Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973). Once the threshold requirement of authentication has been met, the evidence can then properly be admitted during trial. State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 282 (1987).

In the case sub judice, the trial judge did not abuse his broad discretion in admitting the recording of the narcotics transaction because the testimony of Detective Cothran sufficiently established that the recording was a true and accurate depiction of the transaction. Critically, although Detective Cothran did not personally **see** the transaction as it was taking place, Detective Cothran **heard** the transaction as it was occurring through the use of a listening device. Because Detective Cothran heard the entire transaction as it was taking place, he had direct, personal knowledge of the events that occurred during the transaction and was able to confirm that the audio and video recording of the transaction was a true and accurate representation of what he had heard. Cf. Aragon, 354 S.C. at 336, 579 S.E.2d at 627 (finding an audio recording of a telephone conversation was properly authenticated and admitted where a person who heard the conversation testified that the recording fairly and accurately represented the conversation). Specifically, Detective Cothran testified during trial that he installed audio and video recording equipment on Grant, the recording equipment was functioning properly at the time, he monitored and heard the transaction as it occurred by using a listening device, he was familiar with the area where the transaction occurred based on his patrol experience, and the recording of the transaction offered into evidence was a true and accurate depiction of Grant's transaction with Appellant. Cf. Crutcher v. State, 68 So. 3d 724, 733 (Miss. Ct. App. 2011) (holding a videotape of a narcotics transaction

was sufficiently authenticated despite the fact that the officers involved in the investigation were not physically present when the transaction took place where testimony was presented establishing that officers installed recording equipment on a confidential informant prior to the narcotics transaction, the officers were familiar with scene where the transaction occurred, and the officers heard the transaction as it occurred by using a listening device); Brooks v. Commonwealth, 15 Va. App. 407, 410-411, 424 S.E.2d 566, 569 (Va. Ct. App. 1992) (finding a videotape of a narcotics transaction was properly authenticated despite the fact that no officers actually observed the transaction occur where testimony was presented establishing that the tape accurately reflected the events that officers listening to the transaction heard and the tape included an on-screen display of the passage of time in seconds). Notably, Detective Cothran was even able to confirm that a telephone conversation he personally had with Grant during the narcotics investigation was depicted in the recording. Under those circumstances, the trial judge did not abuse his discretion in admitting the recording of Grant's transaction with Appellant even though Detective Cothran only heard the events depicted in the recording. See Rule 901(b), SCRE (containing a non-exhaustive list of ways in which evidence can properly be authenticated, including through the testimony of a witness with knowledge that a matter is what it is claimed to be); see also Winburn, 261 S.C. at 576-577, 201 S.E.2d at 376 (instructing that evidence can be authenticated by indirect or circumstantial evidence). Accordingly, Appellant's convictions should be affirmed.

II.

Any issue with the trial judge's presentation of an Allen charge to the jury was not properly preserved for appellate review because defense counsel did not contemporaneously object to the charge during trial and, instead, specifically stated that he had no objection after the charge was presented to the jury. However, regardless of any issue preservation concerns, the trial judge's supplemental instructions were not improper or unconstitutionally coercive because the instructions correctly encouraged the jury to make every reasonable effort to reach a verdict while even-handedly instructing the jurors in both the minority and majority to consider one another's opinions in addition to the own without surrendering their own beliefs simply to reach an agreement.

Appellant contends the trial judge committed reversible error in presenting an Allen charge to the jury after receiving a note indicating that the jurors had been unable to reach a unanimous verdict. In support of that contention, Appellant maintains that the trial judge's supplemental instructions were unconstitutionally coercive due to the facts that the instructions were allegedly directed at the lone minority juror, the trial judge was aware of the numerical division of the jury, and the trial judge discussed the costs that would be incurred if the case had to be retried. Initially, any issue with the trial judge's decision to give an Allen charge in Appellant's case was not preserved for appellate review because defense counsel did not object to the charge during trial and, instead, specifically informed the trial judge that he had no objection to the charge after it was given. However, even if the issue had somehow been preserved for appellate review, the trial judge's supplemental instructions to the jury, which conveyed to the jurors the importance of reaching a unanimous decision if possible and which asked both the minority and majority jurors to respectfully and carefully consider one another's opinions without surrendering their own opinions simply to reach an agreement, were entirely proper after the jurors indicated to the trial judge that they had been unable to agree upon a verdict in Appellant's case. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error **during trial** in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late."). "It is axiomatic that an issue cannot be raised for the first time in a post-trial

motion." Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

In the case at bar, any issue with the trial judge's presentation of the Allen charge was not properly preserved for appellate review. Significantly, after the trial judge received the note from the jury and indicated that he intended to give an Allen charge in response, defense counsel indicated he would "accept [the minority] juror's opinion" but raised no objection to the trial judge's proposal.[4] Even more significantly, after the trial judge presented the Allen charge to the jury, defense counsel affirmatively stated that he had no objection to the charge. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding that Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge that he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."). As no contemporaneous objection was raised to the trial judge's supplemental instructions during trial, any issue with the instructions was waived and cannot now be considered on appeal. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."); see also State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) ("The

[4] On appeal, Appellant contends that the Allen charge was given over his objection. (App. Br. p. 10). Notwithstanding the fact that defense counsel specifically confirmed he had no objection to the charge after it was given, defense counsel's characterization of his post-trial challenge to the Allen charge as a "new motion" refutes Appellant's appellate claim that an objection had been raised to the charge earlier during trial. (Tr. p. 143; p. 147).

rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review.").

Notably, defense counsel's first and only objection to the Allen charge was raised **after** the jury returned with a verdict. See Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 371, 42 S.E.2d 705, 706 (1947) (not reviewing an issue on appeal where the issue was not raised at the time the allegedly objectionable argument was made but, instead, was raised for the first time in a motion for new trial made after the jury issued its verdict). However, pursuant to South Carolina's issue preservation rules, defense counsel was not permitted to wait and see if the trial resulted in an outcome favorable to Appellant and then raise an objection to the charge if and when the desired outcome did not come to fruition. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."); see also State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he

contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."). Accordingly, for the foregoing reasons, any issue with the trial judge's Allen charge is not properly preserved for appellate review and cannot now be appropriately raised or addressed on appeal. See State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."). Appellant's convictions should be affirmed.

B. Propriety of the Trial Judge's Supplemental Jury Instructions

In order for the judicial process to properly function, it is important for cases to reach a final resolution at some point. See Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1910) ("It is important that the trial of causes should be ended."). As a result, trial judges have a duty to urge juries to agree upon a verdict. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). However, trial judges are not permitted to coerce juries into doing so. See State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974) ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); State v. Ayers, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct. App. 1985) ("The trial judge has a duty to urge the jury to agree on a verdict, so long as he is not coercive.").

"The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). In giving the supplemental charge to the jury, a trial judge is permitted to encourage the jury to reach a

verdict in a number of ways, including by advising the jurors in the majority and minority to consider each other views, by asking the jurors to give deference to one another's opinions, by instructing the jurors to try to reach a decision if they are capable of doing so, and by explaining the high societal costs associated with the retrial of a case to the jury. See Allen v. United States, 164 U.S. 492, 501 (1896) (finding no error in a supplemental charge to a deadlocked jury instructing that absolute certainty cannot be expected, that the verdict must be the verdict of each juror and not mere acquiescence in the views of the others, that they should examine the case with candor and give proper deference and regard to one another's opinions, that they had a duty to decide the case if they could conscientiously do so, that they should listen to each other with a disposition to be convinced, and that they should consider the position of jurors holding a differing opinion); see also Nickles, 74 S.C. at 141-142, 54 S.E. at 268 (finding a supplemental jury charge to a deadlocked jury in which the trial judge instructed the jury that the expenses associated with trying the case were a "very strong reason" that the jury ought to get together and agree upon a verdict was not coercive or erroneous). Significantly, the presentation of such a supplemental charge "has long been sanctioned[,]" and, by doing so, a trial judge is merely discharging his duty to the public. Lowenfield v. Phelps, 484 U.S. 231, 237 (1988); see Nickles, 74 S.C. at 142, 54 S.E. at 268 ("A circuit judge is but discharging his duty to the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.").

In reviewing a trial judge's jury instructions, an appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). In particular, when reviewing an Allen charge to determine if the charge was unconstitutionally coercive, the appellate

court must judge the charge in the proper context and under the totality of the circumstances. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002). Factors that may be considered include: (1) whether the charge was specifically directed at minority jurors; (2) whether the charge included any mandatory language about the necessity to return a verdict; (3) whether the trial judge made any inquiries into the jury's numerical division; and (4) how long the jury's deliberations lasted. Tucker v. Catoe, 346 S.C. 483, 493-494, 552 S.E.2d 712, 717-718 (2001). Significantly though, it is not coercive for the trial judge to instruct the jury that every juror has a right to their own opinion, that no juror needs to surrender their opinion merely to reach an agreement, or that the failure to reach a verdict will result in additional costs. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-576 (1995) ("It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense, or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement." (footnotes omitted)); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ("It is not coercive to charge that failure to reach a verdict will require a new trial at additional expense."). Moreover, an Allen charge is not coercive merely because the trial judge knows the numerical division of the jurors before giving the charge. State v. Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 263 (Ct. App. 2001). Ultimately, reversal is not warranted as long as the trial judge's jury instructions as a whole are substantially correct and are not coercive. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996) ("We have carefully reviewed the entire charge and, taken as a whole, do not find it coercive.").

In Appellant's case, the trial judge did not err in presenting an Allen charge to the jury, and his supplemental instructions were not unconstitutionally coercive in any way. Specifically, after learning that the jury had been unable to agree upon a verdict, the trial judge instructed the jury – without objection – that an agreement is not always easy to reach, that absolute certainty cannot be reached or expected in most cases, that the jurors had a duty to make every **reasonable** effort to reach a verdict, that they should listen to one another's opinions and discuss their differences, that they each had a right to their own opinion and should not give up that opinion merely to be in agreement with the others, that both the majority and minority should carefully and respectfully consider each other's positions and re-evaluate their own opinions, and that additional expenses would be incurred if they were unable to reach a decision. When considered as a whole and in the proper context, those supplemental instructions were even-handedly delivered to both the minority and majority jurors, did not convey to the jury that reaching a verdict was mandatory, and constituted a correct statement of the law. Cf. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 323-324 (2002) ("The entire charge shows the trial judge adequately and correctly told the jurors they should listen to what the other side had to say; to be open to change one's mind; and to not change one's mind if it would do violence to one's conscience. The charge was neutral in its direction, not impermissibly aimed at the minority, instead suggesting members of each side examine their own position in light of the other view's position."). As a result, the trial judge committed no error in fulfilling his duty to encourage the jury to reach a verdict in Appellant's case. See State v. Middleton, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951) (instructing that a trial judge has the duty "to admonish the jury as to the desirability and importance of

trying to reconcile their differences and agreeing upon a verdict" when a jury is unable to agree).

In challenging the propriety of the trial judge's Allen charge on appeal, Appellant raises several contentions as to why the charge was allegedly coercive – none of which were raised to the trial judge. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). In particular, Appellant maintains that the charge was impermissibly coercive because it was allegedly directed at the lone minority juror, the trial judge was aware of the numerical division of the jury before issuing the charge, and the jury was informed that additional expenses would be incurred if it could not reach a verdict. However, contrary to Appellant's contentions, the trial judge did **not** direct the Allen charge at the minority juror, and no portion of the charge could reasonably be construed as being directed at any particular juror or position. Instead, through his supplemental instructions, the trial judge even-handedly asked both the minority and majority jurors to consider each other's positions along with their own while specifically instructing them that they were **not** to surrender their own beliefs simply to be in agreement with the others. See State v. Hughes, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999) ("[T]he charge specifically instructs the majority to give 'equal consideration to the views of the minority.' Taken as a whole, this charge is an even-handed admonition to both the minority and majority jurors."); see also Hale, 284 S.C. at 355, 326 S.E.2d at 423 ("In the course of the charge, the judge specifically stated that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement. Taken as a whole, the supplemental charge was not coercive."). Likewise, although the trial judge knew of the numerical division of the jury, he personally made **no** attempt to determine that information and did not reference the jury's

numerical division in his supplemental instructions. As a result, the trial judge did not err in giving the Allen charge under the circumstances. See State v. Williams, 386 S.C. 503, 510, 690 S.E.2d 62, 65 (2010) (holding the trial judge did **not** err by not declaring a mistrial and, instead, giving an Allen charge after the deadlocked jury revealed a numerical breakdown of the division between the jurors); Williams, 344 S.C. at 264, 543 S.E.2d at 263 ("[I]t is not necessarily coercive to give an Allen charge even though the jury reports it is deadlocked eleven to one."); see also United States v. Brokemond, 959 F.3d 206, 209 (11th Cir. 1992) ("Inquiry made by the court regarding the numerical split of a divided jury is grounds for reversal. However, no such judicial inquiry was made here; the numerical split was disclosed to the judge by the foreperson without any solicitation by the judge. **Unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial.**" (citations omitted and emphasis added)). Finally, the trial judge's decision to discuss the costs associated with the retrial of the case was a proper step to advise the jury of its responsibilities and simply reinforced to the jurors that it was important for them to make every reasonable effort come to an agreement if one could feasibly be reached. See Pauling, 322 S.C. at 99, 470 S.E.2d at 109 ("It is not coercion to charge that the failure to reach a verdict will require a new trial at additional expense."); Singleton, 319 S.C. at 316, 460 S.E.2d at 575-576 ("It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense, or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement." (footnotes omitted)). Accordingly, under the circumstances of Appellant's case, the trial judge committed no error in presenting an Allen charge to the jury, and Appellant's contentions to the contrary are wholly without merit. Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 23, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2012-213216

THE STATE,

Respondent,

vs.

GREGORY ALLAN IVERY,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Trial Transcript, Pages 1, 3-4, 29-92, 99-109, and 129-150;

(2) Indictments;

(3) Sentencing Sheets; and

(4) State's Ex. # 4 (Video).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 23rd day of December, 2013.

ANGELA S. BENNETT
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ALAN WILSON
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December 23, 2013

Carmen V. Ganjehsani, Esquire
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RE: State v. Gregory Allan Ivery – Appellate Case No. 2012-213216

Dear Ms. Ganjehsani:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services