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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
The Honorable Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2024-002196

THE STATE,

Respondent,

v.

TIMOTHY DARREN SHERARD,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err in giving an Allen charge.
2. The State concedes that 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.

STATEMENT OF THE CASE

Timothy Sherard (“Appellant”) was indicted by a McCormick County Grand Jury for first degree criminal sexual conduct, taking of hostages by an inmate, and possession of a weapon during the commission of a violent crime. Appellant proceeded to trial before the Honorable Debra R. McCaslin and a jury from December 9-13, 2024. The jury convicted Appellant as indicted. Judge McCaslin sentenced Appellant to concurrent terms of life imprisonment for CSC first and taking hostages by an inmate, pursuant to the recidivist statute. Appellant was also sentenced to a concurrent term of five years’ imprisonment for possession of a weapon during the commission of a violent crime.

This appeal follows.

STATEMENT OF FACTS

On September 20, 2023, at approximately 2:00 pm, Yolanda Turner, the Associate Warden of McCormick Correctional Institute, heard a distress call on the radio from a woman saying “help.” (Tr. 110). A wellness check was called where all units checked in to see where the distress call came from. (Tr. 112). There was a response from every unit except the education building where Charity Jackson (Victim) was located. (Tr. 113). An emergency response team was dispatched. (Tr. 113).

Lieutenant Willie Hill arrived first at the inmate bathroom where he could hear distress calls from inside the bathroom. (Tr. 201). He attempted to get the door open, but was met with resistance. (Tr. 201-202). He eventually was able to push the door open a bit and was able to see Victim backed up against the sink naked and Timothy Sherard (Appellant) in the bathroom. (Tr. 201-204). Captain Patricia Moss also arrived on scene and testified that she saw Victim leaning over the sink and Appellant behind her. (Tr. 218). The door was eventually forced open and Appellant was taken out of the bathroom and detained. (Tr. 230).

Victim testified that she was working as the education law library officer and Appellant approached her and asked her for toilet paper for the inmate bathroom located near her office. (Tr. 153). After giving Appellant the toilet paper, Victim went to the other bathroom herself and when she returned to the office Appellant grabbed her from behind and dragged her into the inmate bathroom. (Tr. 155). After getting her into the bathroom, there was a tussle and Appellant showed Victim a shank and said if she screamed, he would kill her. (Tr. 156-159). Appellant then made her take her clothes off, perform oral sex, and then lay on the ground so he could penetrate her, with him ultimately ejaculating on her stomach. (Tr. 160-161). Helen Middleton, a Sexual Assault Nurse Examiner, testified to the several injuries found on Victim’s body. (Tr. 293-315). The State

also presented evidence from a DNA testing and analysis expert, to confirm Appellant's DNA profile was consistent with the profile developed from evidence collected from Victim's body. (Tr. 364-368).

The jury began its deliberations at 10:42 am 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, 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). The jury continued to deliberate until 7:00 pm, when they were released for the day. (Tr. 439).

The next morning, the jury continued to deliberate. At 9:11 am, 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's and Victim's fingernails. (Tr. 442, Court's Exhibit 16). Again, the trial court told the jury they had heard all of the evidence. (Tr. 443). Shortly before 10:06 am, 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, Court's Exhibit 17). The trial court provided the defense and the State with copies of the Allen¹ charge that it intended to read to the jury. (Tr. 444).

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.

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

(Tr. 445). The jury reentered the room at 10:21 am, 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 efforts 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 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. 445-447). The jury resumed deliberations at 10:25 am.

Shortly before 11:45am, the jury informed the trial court that it had reached a verdict. (Tr. 447). The verdict was guilty on all counts. (Tr. 448). The trial court sentenced Appellant to life

imprisonment for CSC First and taking hostages by an inmate. (Tr. 459). The trial court also sentenced Appellant to five years' imprisonment for possession of a weapon during a violent crime. Appellant did not object to the sentence. (Tr. 459).

ARGUMENT

Standard of Review

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, 368-369 (2022). “However, in 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)). “Importantly, ‘whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances.’” Id. (Citing Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)).

Argument

I. The trial court did not err by giving an Allen charge.

Appellant argues the trial court erred by giving a coercive Allen charge. This argument lacks merit because the charge given was not coercive.

“The trial court has several ways to respond to a deadlocked jury, including delivering an Allen charge. In fact, the trial judge has a duty to urge the jury – without pressuring or coercing them – to reach a verdict.” State v. Taylor, 427 S.C. 208, 212-213, 829 S.E.2d 723, 726 (2019). “South Carolina approves the use of a modified Allen charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority.” Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015). “No set definition of coercion has emerged; instead, we detect its presence by viewing the charge

in context and in light of four factors: (1) whether the charge speaks ‘specifically to minority jurors’; (2) whether the charge includes ‘you must return a verdict’ type language; (3) whether there was an ‘inquiry into the jury’s numerical division,’ which is generally coercive; and (4) whether the time between the charge was given and when the jury returned a verdict demonstrates coercion.” Taylor, at 214-215, 829 S.E.2d at 727. “Like most multi-factor constructs, the Tucker² test does not tell us the relative weight each factor carries, nor is the list of factors exclusive.” Id. “The Fourth Circuit has observed that if the original Allen charge were ‘stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held, it might readily be construed by the minority of the jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict.’” Id. at 219, 829 S.E.2d at 729 (citing United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961). See also Smalls v. Batista, 191 F.3d 272, 279 (2d Cir. 1999). (“[A] necessary component of any Allen-type charge requires the trial judge to admonish the jurors not to surrender their own conscientiously held beliefs.”).

Here, unlike in Taylor, the Allen charge was not coercive. In Taylor, this Court found that the charge was coercive for multiple reasons. First, in regards to the second Tucker factor, this Court found that because the charge instructed the jurors “its important that you come to a decision in this case,” and “you should come to a decision in this matter,” that this skirted close to the language found coercive in Jenkins v. United States³. This Court further stated “there is a glaring

² Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001).

³ Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059 (1965) (reversing and remanding case for a new trial because the charge told the jury “[y]ou have got to reach a decision in this case”).

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 at 215, 829 S.E.2d at 727. Here, the trial judge instructed the jury "However, you have a duty to make every reasonable effort to reach a unanimous verdict." (Tr. 445-446). The second issue this court found with the Allen charge in Taylor regarded the third Tucker factor. "The third Tucker factor asks whether there has been any inquiry into the numerical division of the jury. A trial court cannot, of course, ask the jury to reveal its decision." Id. at 216, 829 S.E.2d at 728. In Taylor, the judge knew they stood 10-2 in favor of conviction and this court focused on whether the information was unprompted or the judge asked for it. Id. This court said it is not coercive to give an Allen charge simply because the jury volunteers how it is split, but the trial court's knowledge of the split is relevant. Id. See United States v. Vanvliet, 542 F.3D 259, 268 (1st Cir. 2008) ("Instead, the district court's knowledge of the numerical division of jurors...might create a coercive situation if circumstances suggest that minority or 'holdout' jurors likely would infer that the court is directing the Allen charge specifically at them, and implying that they should vote with the majority to get the case settled expeditiously."). Even if the jury division is known there are times where an Allen charge is not considered coercive. Here, the jury division was not known at all.

Also in Taylor, this court's biggest concern about the charge given in that case was what it did not say. "[I]t did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion." Id. at 218 829 S.E.2d at 729. In the case at bar, the trial judge not only told the jury not to give up their firmly held beliefs just to be in agreement with their fellow jurors, but also made it known that it was okay for them not to come to an agreement. This court also noted that, in Taylor, the trial judge overemphasized the cost and expense of a

retrial. Id. This jury charge not only did not mention cost of a retrial at all but focused more on the competency of the jury and that the evidence would not be any clearer or a jury more competent than the one currently seated. This Allen charge was short, straightforward and was not the least bit coercive and therefore the trial judge did not err in giving the Allen charge.

II. The State concedes that 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.

Pursuant South Carolina law a defendant who is 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 principle crime.” S.C. Code Ann § 16-23-490(A)(2015). However, the “five-year sentence does not apply in cases where... a life sentence without parole is imposed for the violent crime.” S.C. Code Ann. §16-23-490 (A).

Here, Appellant was sentenced to life for two of his convictions and also sentenced to five years for possession of a weapon during the commission of a violent crime. Accordingly, pursuant to South Carolina law, the five-year sentence was improper, and, based on our Supreme Court’s decision in State v. Plumer⁴, it should be vacated on appeal.

⁴ State v. Plumer, 439 S.C. 346, 887 S.E.2d 134 (2023).

CONCLUSION

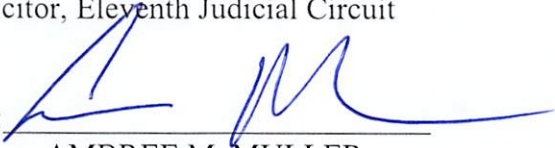
For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed. However, the State agrees the concurrent five-year sentence for possession of a weapon during the commission of a violent crime should be vacated.

Respectfully submitted,

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