

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 18 2014

Certiorari to Greenville County
William H. Seals, Jr., Circuit Court Judge

S.C. Supreme Court

Opinion No. 2014-UP-265 (S.C. Ct. App. filed 6/30/2014)
11-GS-23-09810 & 09811.

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

PETITIONER

APPENDIX

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734- 3727

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185
(864) 467-8282

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
COURT OF APPEALS OPINION NO.2014- UP- 265 (Filed June 30, 2014)	1
PETITION FOR REHEARING	3
ORDER DENYING PETITION FOR REHEARING	11

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Gregory Allan Ivery, Appellant.

Appellate Case No. 2012-213216

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

Unpublished Opinion No. 2014-UP-265
Heard June 5, 2014 – Filed June 30, 2014

AFFIRMED

Appellate Defender Carmen V. Ganjehsani, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville, for Respondent.

PER CURIAM: Gregory Allan Ivery appeals his convictions on charges of
distribution of crack cocaine and distribution of crack cocaine within one-half mile
of a school or park, arguing (1) the trial court erred in admitting a video recording

of the alleged drug transaction and (2) the trial court gave an unconstitutionally coercive *Allen* charge.¹ We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the admission of the video recording: 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."); Rule 901(b), SCRE (including "[t]estimony that a matter is what it is claimed to be" and "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker" as acceptable methods of authentication); *Wright v. Pub. Sav. Life Ins. Co.*, 262 S.C. 285, 290-91, 204 S.E.2d 57, 60 (1974) (applying the rule that the admission or exclusion of evidence is in the trial court's discretion to a finding by the trial court that certain evidence was sufficiently authenticated); *Winburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 576-77, 201 S.E.2d 372, 376 (1973) ("Authenticity of documentary evidence may be shown, so as to render it admissible in evidence, by indirect or circumstantial evidence.").

2. As to Ivery's argument that the *Allen* charge was unconstitutionally coercive: *Green v. State*, 351 S.C. 184, 195, 569 S.E.2d 318, 323-24 (2002) (holding an *Allen* charge similar to the charge at issue here was not directed to minority voters or otherwise coercive); *State v. King*, 334 S.C. 504, 509-10, 514 S.E.2d 578, 581 (1999) (holding the appellant waived review of his complaint about certain activity that occurred during his trial because he failed to make an appropriate objection when the allegedly offensive activity occurred, instead waiting until after the jury delivered its verdict to object); *State v. Hicks*, 330 S.C. 207, 217, 499 S.E.2d 209, 214 (1998) ("A contemporaneous objection is necessary to preserve errors for direct appellate review. . . ."); *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996) ("It is not coercion to charge that the failure to reach a verdict will require a new trial at additional expense.").

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Opinion No. 2014-UP-265 (S.C. Court of Appeals filed June 30, 2014)

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT.

APPELLATE CASE NO. 2012-213216

PETITION FOR REHEARING

The Appellant, Gregory Allan Ivery, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-265 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On June 30, 2014, this Court filed its unpublished opinion affirming Appellant's convictions for distribution of crack cocaine and the related proximity charge. In his appeal, Appellant argued that the Trial court erred in admitting a video recording of the alleged drug transaction where the State failed to properly authenticate the video recording when the State did not present any witness at trial who could testify that the video recording accurately depicted the alleged drug transaction.

In its Opinion, this Court first cited to Rule 901(a), SCRE which provides that the “requirement of authentication 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.” Appellant contends that Detective Cothran’s testimony was not sufficient to support a finding that the video in question was what he claimed it to be. Detective Cothran did not physically see or observe any of the alleged drug transaction and therefore he could not satisfy the requirements of authentication. R. 32, ll. 2-4.

This Court also cited to Rule 901(b) which provides examples of authentication or identification conforming with the requirements of Rule 901. This Court cited to the following examples: a witness provides “[t]estimony that a matter is what it is claimed to be” and “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.”

First, as mentioned above, Detective Cothran could not provide testimony that the matter is what it claimed to be since he did not physically see or observe any of the alleged drug transaction. Second, while Detective Cothran testified that he could hear the conversation during the alleged transaction, he never verified at trial that it was Appellant’s voice on the audio. R. 32, ll. 2-4. There was also no testimony that Detective Cothran was familiar with Appellant’s voice. Cf. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 626-27 (Ct. App. 2003) (finding the State properly authenticated taped telephone conversation between victim and defendant where victim had known defendant for over ten years and recognized his voice during the conversation).

At trial, the alleged informant denied ever purchasing any crack from Appellant and denied that it was him appearing in the video recording. The alleged informant further denied circling Appellant's picture in a subsequent photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18 – 21. The alleged informant's testimony was essential to authentication of the video recording because upon a review of the recording, one cannot even see any handover of the alleged drugs. The alleged informant's testimony would have been necessary to describe exactly what is happening in the video and to confirm that the person seen on the video was in fact Appellant. [State's Exhibit 4 – Video Recording (on file with court)]. When the alleged informant denied ever purchasing the drugs from Appellant or appearing on the video, the State therefore could not present any witness who could testify that the video recording accurately represented the events that occurred during the alleged drug transaction.

Courts from other jurisdictions have allowed the admission of a video recording of a drug transaction where the prosecution made a proper foundation for admission through the testimony of someone who witnessed the occurrence videotaped. See United States v. Rivera-Maldonado, 194 F.3d 224, 236-37 (1st Cir. 1999) (finding admission of drug transaction videotapes proper where agent who had actually videotaped the crime scenes testified that "each daily video accurately reflected what he had observed as it was being taped"); United States v. Medina-Herrera, 606 F.2d 770, 774 (7th Cir. 1979) (finding "proper foundation for the admission of tapes was made through the testimony of agents who witnessed the defendant's actions and made the tapes"); Trull v. State, 811 So.2d 243, 246 (Miss. Ct. App. 2000) (holding videotape of the drug transfer was properly authenticated where the agent testified that he "was present when the events on the

videotape transpired, and that the video was an accurate depiction of the events as they transpired that day.”).

Two cases relied upon by the State in its Respondent’s Brief are distinguishable from the facts of this case. In Crutcher v. State, 68 So.3d 724 (Miss. Ct. App. 2011), the court found that the State sufficiently authenticated a videotape of a drug sale as to render the evidence admissible. In Crutcher, however, the informant testified at trial and confirmed that there was a drug transaction. Id. at 727. In Appellant’s case, the alleged informant denied that he was involved in any drug transaction with Appellant.

In Brooks v. Commonwealth, 424 S.E.2d 566 (Vir. Ct. App. 1992), the court held that a videotape of a drug transaction was admissible even though the officers testifying did not actually observe the transaction taking place and even though the informant did not testify. The drug transaction was videotaped while several officers monitored the informant’s body mike. One detective did, however, actually observe the defendant walking up and down the street in the area both before and after the drug purchase. Another detective who was monitoring the body mike recognized the distinctive voice of the defendant with whom the detective had numerous prior contacts. Another detective who had come into contact with the defendant on at least fifty previous occasions also identified the voice and laugh of defendant. Finally, another detective also recognized the defendant’s voice. Id. at 568-69. In Appellant’s trial, there was no testimony that Detective Cothran was familiar with Appellant’s voice and could identify Appellant’s voice on the video recording.

If the courts do not require that video recordings be authenticated by someone who observed the events on the video or who is at least familiar with the voices on the video, then essentially anyone who watches the video recording can authenticate it.

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

The Trial Court's improper admission of the video recording was not harmless where there was a reasonable probability that the jury's verdict was influenced by the challenged evidence." Lee, 399 S.C. at 527, 732 S.E.2d at 228. Here, the State heavily relied on the videotape to identify Appellant as the individual who allegedly sold drugs to the alleged informant. In the State's opening statement, the solicitor informed the jury that the entire drug transaction was recorded on video and let the jury know that they would be able to view the video. R. 11, ll. 9-12.

During trial, Detective Cothran could only identify Appellant as the person who allegedly sold the drugs by watching the video since he did not observe the transaction firsthand. R. 44, ll. 12-19.

During the State's closing, the solicitor also highlighted the video, repeatedly reminding the jury that they saw the entire video of the transaction and that they could watch the video again if they needed to. R. 80, ll. 24-25; 81, ll. 9-12; 81, l. 24 – 82, l. 1.

During their deliberations, the jury asked to view the video of the transaction again and the video was replayed for them. R. 94, l. 22 – 95, l. 1.

Without the video recording, the State's identification of Appellant as the one who sold drugs to the alleged informant would have rested primarily on the alleged informant's pre-trial identification of Appellant, a witness who then declined to identify Appellant at trial as the seller and who denied ever circling Appellant's picture in a photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18-21. Although it was a jury determination as to the credibility of the alleged informant, the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Therefore, it was error as a matter of law for the Trial Court to have admitted the video recording into evidence, and Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Gregory Allan Ivery respectfully requests that the Opinion of the Court of Appeals be withdrawn, his convictions be reversed, and the case remanded to the trial court for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 15th day of July, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Opinion No. 2014-UP-265 (S.C. Court of Appeals filed June 30, 2014)

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT.

APPELLATE CASE NO. 2012-213216

CERTIFICATE OF SERVICE

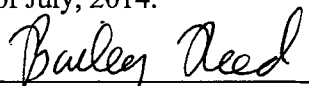
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Mr. Gregory Allan Ivery, #131131, Lieber Correctional Institution, 136 Wilborn Avenue, Ridgeville, SC 29472, this 15th day of July, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

The State, Respondent,

v.

Gregory Allan Ivery, Appellant.

Appellate Case No. 2012-213216

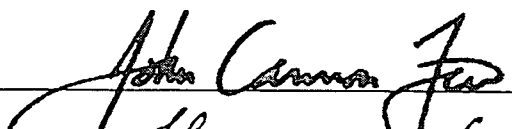
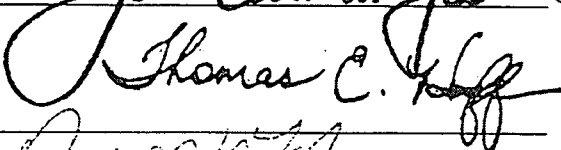
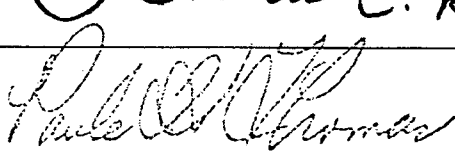
RECEIVED

AUG 20 2014

SC OFFICE OF
APPELLATE DEFENSE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Carmen Vaughn Ganjehsani, Esquire
 Mark Reynolds Farthing, Esquire

FILED

August 20, 2014

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT

APPELLATE CASE NO. 2012-213216

RECORD ON APPEAL

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Appellant

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

(803) 734-3727

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185
(864) 467-8282

Attorneys for Respondent

INDEX

INDEX.....	i
TRIAL TRANSCRIPT (dated October 11, 2012).....	1
PRELIMINARY REMARKS TO THE JURY BY THE COURT	6
OPENING STATEMENT BY MS. PRICE	9
OPENING STATEMENT BY MR. HAMILTON.....	12
TESTIMONY	
RUSSELL IRVIN	
Direct examination by Ms. Price	15
Cross-examination by Mr. Hamilton	20
Redirect examination by Ms. Price.....	21
CHARLES KEITH COTHRAN	
Direct examination by Ms. Price	23
DEFENSE'S MOTION OBJECTING TO ADMISSIBILITY OF VIDEO.....	43
TESTIMONY	
CHARLES KEITH COTHRAN	
Continued direct examination by Ms. Price	43
Cross-examination by Mr. Hamilton	46
Redirect examination by Ms. Price.....	57
Recross examination by Mr. Hamilton.....	59
JAMES GRANT	
Direct examination by Ms. Price	60
Cross-examination by Mr. Hamilton	68
JAMES WILLIAM ARMSTRONG	
Direct examination by Ms. Price	69
Cross-examination by Mr. Hamilton	73
RECALL OF CHARLES KEITH COTHRAN	
Direct examination by Ms. Price	74
Cross-examination by Mr. Hamilton	77

RENEWAL OF MOTION REGARDING INADMISSIBILITY OF VIDEO	78
CLOSING ARGUMENT BY MS. PRICE.....	80
CLOSING ARGUMENT BY MR. HAMILTON	83
CHARGE ON THE LAW.....	83
ALLEN'S CHARGE	95
VERDICT	98
SENTENCING	104
INDICTMENTS AND SENTENCE SHEETS	105
CERTIFICATE OF COUNSEL.....	111

THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:

STATE'S EXHIBIT #4 (VIDEO RECORDING)

1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS
2 COUNTY OF GREENVILLE) 2011-GS-23-9810, 9811

3)
4 State of South Carolina) TRANSCRIPT OF RECORD

5)
6 -vs-)

7 Gregory Allan Ivery)

8 October 11, 2012
9 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE WILLIAM SEALS, Judge.

12 A P P E A R A N C E S

13 LAUREN DAVIS PRICE, Esquire
14 Assistant Solicitor
Attorney for the State

15 ERNIE HAMILTON, Esquire
16 Attorney for Defendant

17 CAROLINE HISKELL
18 Thirteenth Circuit Court Reporter
19
20
21
22
23
24
25

I N D E X

WITNESS	DR	CR	RED	REC
Russell Irvin	39	44		
Charles Cothran	47	70	81	83
James Grant	84	92		
Kara Bennick	93			
James Armstrong	99	103		
Carles Cothran (recalled)	104			

E X H I B I T S

STATE'S EXHIBIT	ID	IN EVD
1 Affidavit	105	105
2 Photo Line-up	105	105
3 (Not Admitted)	---	---
4 Video	67	67
5 Drug	101	101
6 Statement	106	106
7 (Not Admitted)	---	---
8 (Not Admitted)	---	---
9 P&E Documents	96	96
10 P&E Documents	96	96
11 Document	98	98

State versus Ivery

P R O C E E D I N G S

THE COURT: Solicitor, call your next case.

MS. PRICE: Thank you, Your Honor. This the
State versus Gregory Allan Ivery.

THE COURT: Members of the jury panel, you
have been qualified to serve as jurors this week.
However, at this point in time, I need to make sure that
you are qualified to serve on a particular case. In that
regard, I'm going to need to ask you certain questions and
remember that you are under oath. You need to respond if
any of these questions apply to you. And also for your
convenience, if you would like to answer a question up
here instead of out there, I have no problem with that,
but I need you to respond one way or the other.

In this particular case, the State of South
Carolina alleges that Gregory Allan Ivery did in
Greenville County on or about the 30th day of June, 2011
distribute, dispense, deliver or aid and abet or conspire
to deliver to distribute dispense or deliver to an uncover
operative a quantity of cocaine base, crack cocaine, a
controlled substance such distribution in violation of our
laws.

Furthermore, the State of South Carolina
alleges that Gregory Allan Ivery did in Greenville County
on or about the 30th day of June 2011 distribute a

State versus Ivery

1 quantity of cocaine base, crack cocaine, a controlled
2 substance by being within one half mile proximity of
3 Nickeltown Community Center. This also being in violation
4 of the laws of this state.

5 Now, in this regard, has any member of the
6 jury panel heard anything about this case, read anything
7 about this case, talked to anybody that knows anything
8 about this case? If you have any knowledge, no matter how
9 insignificant to you about this case, I need for you to
10 stand.

11 (No response.)

12 No one stood.

13 Would the defendant, Mr. Gregory Allan Ivery
14 please stand and face the jury panel?

15 Thank you, very much, you may be seated.

16 Is there any member of the jury panel related
17 by blood or marriage or has a close personal or social
18 relationship with the defendant, Mr. Gregory Ivery in this
19 case? If so, please stand.

20 (No response.)

21 No one stood.

22 Solicitor, would you please stand and face
23 the jury panel and introduce yourself.

24 MS. PRICE: Good afternoon, my name is ---
25 Price. I'm with the Greenville County Solicitor's Office.

State versus Ivery

1 find it reliable.

2 MS. PRICE: Thank you, Your Honor.

3 THE COURT: Any other pretrial matters from
4 the State or the defense?

5 MS. PRICE: Nothing from the State.

6 MR. HAMILTON: Your Honor, your finding is
7 that this can be presented without it being verified by
8 the person who identified this?

9 THE COURT: I made my ruling based on the
10 evidence and the testimony and the photographs presented
11 to me at this hearing.

12 MR. HAMILTON: And she can present this
13 evidence ---

14 THE COURT: Through that man right there.
15 All I'm saying is it is reliable. It's not unduly
16 suggestive by any means. Now how the jury takes it is up
17 to them. Whether they believe it or not -- you will
18 certainly be given all the cross-examination that you
19 need. Other than that, it's coming in for what it is.

20 Do you have any pretrial matters?

21 MR. HAMILTON: No, Your Honor.

22 (Whereupon, there was lunch recess.)

23 THE COURT: Bring in the jury.

24 (Jury enters the courtroom.)

25 Ladies and gentlemen of the jury panel, we

State versus Ivery

1 are getting ready to start this case but before we do we
2 are going to talk to you informally to give you what I
3 call a little bit of back pocket knowledge, a little
4 information up front that you can put in your back pocket
5 while you're sitting on the jury in this trial.

6 At the end of this trial, however, I will
7 give you the charge on the law in great detail. I will
8 read it to you in detail at that time, but for now, I want
9 to go over a few minor things.

10 The first thing I want to go over is that the
11 defendant is innocent until proven guilty. He doesn't
12 have to prove anything. The burden of proof is on the
13 State of South Carolina to prove the defendant guilty
14 beyond a reasonable doubt in regards to these charges.
15 Furthermore, you may ask yourselves what is your role,
16 what is my role? You are the judge of the fact and I am
17 the judge of the law. In that regard and what that means
18 is that you determine what the facts of this case are and
19 nobody else. It's not my turf, the turf of the lawyers or
20 anybody in the audience. Only you determine what the
21 facts of the case are.

22 You may ask yourself, how do I do that? What
23 you do is you look at the evidence. Evidence is made up
24 of two things, it's made up of the witnesses that come
25 over here and are sworn in, hand on the Bible, raise your

State versus Ivery

1 right hand and swear to tell the truth and nothing but the
2 truth. You listen to all the witnesses. And you will
3 also look at any documents submitted into the record as
4 evidence. That could be pictures, it could be weapons, it
5 could be drugs, it could be balloons, posters, anything
6 like that submitted into the record as evidence.

7 In regard to the witnesses, I'm going to tell
8 you one thing right off the bat. It is your job to judge
9 their credibility and their believability. You believe,
10 if you like, all that a witness tells you. If you like,
11 you can believe nothing a witness tells you. You can
12 believe part of what a witness tells you. You can believe
13 one witness against many or many against one. That is
14 your job and your job alone.

15 I am the judge of the law. I have a two role
16 function. One is to make sure this defendant gets a fair
17 trial. I don't know them. I'm going to rule based on the
18 law as I see it and give them a fair trial. And, two, as
19 judge of the law I'm going to charge you on the law
20 applicable to this case. In that regard, I want you to
21 understand that you have to accept that law as I charge it
22 to you. In other words, if you have any preconceived
23 ideas as to what you think the law is or what the law
24 ought to be and it doesn't agree with what I tell you the
25 law is, you have to abandon those preconceptions and you

State versus Ivery

1 have to accept the law as I give it to.

2 Only when I tell you to begin deliberations
3 will you take the facts as you find them, the law as I
4 give it to you, put the two together and arrive at a
5 verdict there from.

6 Another thing I want to tell you is what the
7 lawyers tell you is not evidence. They are advocates for
8 their clients, spokesperson for their clients. Evidence
9 is any documents that are admitted into the record or
10 witnesses that come over here and testify.

11 Another thing I want to tell you like I told
12 you before you went into the jury room at no point in time
13 during this trial until I tell you to do you begin your
14 deliberations in any manner whatsoever. It's very
15 important that you hear everything the State has to say
16 and everything they have to present. It's very important
17 that you then hear from the defense and everything they
18 have to present.

19 It's equally important that you hear from me.
20 You're going to need all of this before you start your
21 deliberations to make a determination. So when you go
22 back into your jury room if you'd like to talk about the
23 Clemson game, Carolina game, introduce yourselves, your
24 family, or anything you want to talk about but this case
25 until I specifically tell you to begin your deliberations.

State versus Ivery

1 Furthermore, if we don't finish today and you
2 go home tonight, don't go out to the scene, don't try to
3 visit the scene, don't try to interview witnesses, don't
4 get on the computer and Google anybody's name. You need
5 to get everything you need right here in this courtroom
6 and nowhere else, that way I can make sure you're getting
7 it properly like you should according to the law.

8 For the most part, you just need to sit back
9 and relax and listen to it as it comes to you. If at any
10 point in time you need a break, need something to eat,
11 something to drink, something comes up, you just need to
12 let me know or let a bailiff know and at the appropriate
13 time I'll try to stop and make sure you're taken care of.

14 Everybody ready.

15 I call on the State.

16 MS. PRICE: Thank you, Your Honor, may it
17 please the Court.

18 Ladies and gentlemen of the jury, my name is
19 Lauren Price and I'm a prosecutor with the Thirteenth
20 Circuit Solicitor's Office here in Greenville County.
21 It's my job to prosecute persons charged with violating
22 the laws of our State.

23 Seated with me here today is Detective
24 Cothran with the Greenville County Police Department and
25 my personal investigator Ms. Kelly O'Donnell. They are

State versus Ivery

1 going to be seated with me throughout the trial.

2 I thank you all for being here today. Now,
3 you all have lives outside of this courtroom and it's late
4 in the week, but I appreciate you taking time out of your
5 lives to assist us with this case today. It's an
6 important case. It's important to the State. It's
7 important to this defendant and I hope it's important to
8 you today as well.

9 I'm happy to tell you that we believe it will
10 be a very brief case and I will try to keep things as
11 brief as possible in the interest of your time.

12 Ladies and gentlemen, as the State it's my
13 job to prove the charges against this defendant beyond a
14 reasonable doubt. A reasonable doubt is simply a doubt
15 which would cause a reasonable person to hesitate to act.
16 It doesn't mean beyond all doubt. It simply means that
17 you are firmly convinced.

18 Ladies and gentlemen, you've already heard
19 and you'll hear again that this defendant, Gregory Ivery,
20 is charged with possession with intent to distribute crack
21 cocaine. I think everyone is probably familiar with what
22 crack cocaine is and in our State it is considered an
23 illegal narcotic drug.

24 You're going to hear that on June 30 of 2011
25 detectives with Greenville County Police Department relies

State versus Ivery

1 on the assistance of a confidential informant to conduct a
2 controlled drug transaction at this defendant's residence
3 on Bigby Street in Greenville County.

4 You're going to hear that that confidential
5 informant was provided with \$140 in government funds; that
6 he went to the defendant's residence and then he purchased
7 what later lab tested positive as 1.7 grams of cocaine
8 base, which is known as crack cocaine.

9 You're going to hear that this confidential
10 informant was wired at the time, that all of this was
11 recorded on video and audio at the time, and you'll have
12 an opportunity to view that. You'll also see and hear
13 from the detective and you'll hear that the informant
14 identified this defendant in a photo line-up, and that the
15 transaction was recorded on an affidavit by the
16 confidential informant.

17 Now, we're going to prove this charge to you
18 against the defendant today through the use of witness
19 testimony, the use of law enforcement testimony, and the
20 presentation of physical evidence.

21 After the presentation of all of the evidence
22 today, I submit to you that you will be firmly convinced
23 of this defendant's guilt and you won't hesitate to act in
24 finding his guilty.

25 I said it would be brief and I believe it's a

State versus Ivery

1 pretty straight forward case. Thank you for your time and
2 your attention.

3 THE COURT: Thank you. Mr. Hamilton.

4 MR. HAMILTON: May it please the Court.

5 THE COURT: Thank you.

6 MR. HAMILTON: Madam Prosecutor.

7 MS. PRICE: Yes, sir.

8 MR. HAMILTON: Ladies and gentlemen of the
9 jury, again, my name is Ernie Hamilton. I'm going to
10 thank you for the service that you are about to perform
11 and I agree with the prosecutor that this is an important
12 case particularly important to my client, Gregory Ivery.

13 He's here alone. The State has expert
14 witnesses and lab specialists and all this evidence, we're
15 here asking you and as the Judge instructed you to listen
16 to the evidence that comes from the witness stand. That's
17 where you'll find the evidence.

18 My client comes to you not guilty and he has
19 nothing to prove. He has nothing to prove. It would be
20 hard to prove that you're innocent to a lot of different
21 things so the State has the burden of proving -- the
22 burden has shifted to the government to prove that he
23 committed the crime. They have accused him of committing a
24 crime so they should have the burden of proving him
25 guilty. A defendant should never have to prove his or her

State versus Ivery

1 own innocence. That's the law in this State.

2 Beyond a reasonable doubt, that's just a
3 doubt for -- if you have any doubt, not any doubt, but a
4 substantial reason that what has been shown to you does
5 not satisfy you that he is guilty of anything. And part
6 of the reason is based on what the prosecutor has told you
7 that they've got photos and videos, but this is 2012 and
8 with those photo opts and crops on computers, you can
9 manipulate pictures to any kind of way to serve your
10 purpose.

11 Because part of the information that you will
12 have is that my client was targeted for some reason. He
13 was targeted and therefore the police officers are going
14 to tell you that they put together a case and sent
15 somebody out and you got these pictures and they knew from
16 the beginning who they was looking for. But they going to
17 tell you that they got all these pictures here but they
18 already knew who they was looking for from the start but
19 this is just to show you that they are trying to be
20 (inaudible) just picking him out of a crowd.

21 What I'm going to ask you to do is follow the
22 law, listen to the testimony because the Judge told you
23 that he's the law giver and you're the fact finders. And
24 how do you find the facts? You listen to the evidence and
25 the credibility and believability of the witnesses.

State versus Ivery

1 You have to determine why a witness is
2 telling you something or why is he holding back this or
3 presenting this and how he is testifying. Why would he
4 say on thing this time and then say another thing another
5 time and which one it is. I believe that this case is a
6 case of deception by the government on people.

7 MS. PRICE: Your Honor, I'm going to object
8 unless Mr. Hamilton has some evidence that he's going to
9 put into the record with regard to that then this is
10 inappropriate argument at this time.

11 THE COURT: I'm going to overrule your
12 objection but don't argue in your case. Just introduce it
13 and move on.

14 MR. HAMILTON: Thank you, Your Honor.

15 At the same time -- I believe the prosecutor
16 made a misstatement by saying he's charged with possession
17 with intent to distribute. I believe His Honor will give
18 you the indictment which says, distribution. I don't
19 think it's intent to distribute. So people say things and
20 misspeak and there are a lot of things to go on in this
21 case and you listen carefully to the witnesses and what
22 they have to gain. That's the key to this thing.

23 What would a witness have to gain from the
24 testimony?

25 That's all I have. Thank you.

Irvin - Direct

1 THE COURT: Solicitor, call your first
2 witness.

3 MS. PRICE: Thank you, Your Honor. The State
4 would call Detective Irvin to the stand.

5 THE CLERK: Detective Irvin, if you would
6 come forward to be sworn in, please.

7 Please place your left hand on the Bible and
8 raise your right.

9 RUSSELL IRVIN, having been duly sworn,
10 testified as follows:

11 Thank you. You may be seated. Please state
12 your name for the record.

13 THE WITNESS: Russell Irvin.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MS. PRICE:

17 Q. Detective Irvin, I'm going to stand back here to
18 make sure everybody is hearing what you're saying. Where
19 do you work?

20 A. Greenville Police Department.

21 Q. And how long have you worked with the GPD?

22 A. Since 2003, nine years.

23 Q. What position do you currently hold?

24 A. I'm a detective in Vice and Narcotics Unit.

25 Q. What sort of duties are involved in that

Irvin - Direct

1 position?

2 A. We take complaints from the community, drug
3 related complaints, conduct drug investigations.

4 Q. Were you working for the Greenville Police
5 Department in that capacity on June 30, 2011?

6 A. I was.

7 Q. And where were you working?

8 A. In the Vice and Narcotics Unit.

9 Q. At what specific area that day, where were you
10 located on June 30th?

11 A. I was working in the office that day. We
12 conducted a drug investigation on Bigby Street, which is
13 in the Nickletown Community.

14 Q. And did that drug investigation result in charges
15 being brought against this defendant?

16 A. It did.

17 Q. How did you become involved in that
18 investigation, sir?

19 A. I was informed through Detective Cothran that
20 there was a confidential informant at the office who was
21 going to conduct a controlled purchase of narcotics. That
22 informant drove himself to our office. Whenever we have
23 an informant that is going to assist us with an
24 investigation, if they drive their vehicle to our office
25 and they're going to use that vehicle to facilitate the

Irvin - Direct

1 controlled purchase, we always go out and search that
2 vehicle that they arrived in to insure there is no
3 narcotics in the vehicle they brought with them. When I
4 say search the vehicle, that includes everything in the
5 vehicle, all the contents, whether it be locked container
6 or compartments in the vehicle.

7 Q. And what was he driving that day?

8 A. I'm not sure of the year of the model but it was
9 a Jeep Grand Cherokee.

10 Q. And that vehicle was not provided to him by the
11 Greenville Police Department?

12 A. No.

13 Q. That was his own vehicle?

14 A. Right. The vehicle he arrived in to our office.

15 Q. And you said it's common practice for y'all to
16 search the vehicle?

17 A. Yes.

18 Q. Why is that?

19 A. Well, it protects the integrity of the
20 investigation. We want to insure that he is not bringing
21 drugs with him and does not have his own drugs during the
22 investigation. By doing this we can say that when the
23 informant goes to our target location or buys from the
24 individual we're investigating and he returns to our
25 office and he has his narcotics with him, we know there is

Irvin - Direct

1 only one place that those drugs stem from and that's the
2 target of the investigation.

3 Q. And that individual, the CI, would be monitored
4 the entire time this is occurring?

5 A. We watch them go to the target location and we
6 watch them go leave and return to our office. They are
7 under surveillance the entire time.

8 Q. Did you search this confidential informant's
9 vehicle?

10 A. I did.

11 Q. Did you find anything?

12 A. I did not.

13 Q. No contraband?

14 A. No.

15 Q. You looked in all the closed compartments?

16 A. Yes, conducted a thorough search of the vehicle.
17 Like I said all open and closed containers, locked or
18 unlocked throughout the vehicle.

19 Q. After you searched the vehicle, what occurred?

20 A. I went back inside the vehicle. The vehicle was
21 parked in our parking lot. I went back inside and just
22 waited for Detective Cothran to let me know that he and
23 the informant were ready to go and make the purchase.
24 Then I drove to an area close by to where the purchase was
25 made. We monitored the transaction over what we call a

Irvin - Cross

1 wire, a recording device that allows us to listen to it as
2 it's going on.

3 Q. And after the buy occurred, what was your roll?

4 A. I returned to my office and the informant
5 returned to the office and just like I do at the beginning
6 of the buy, I conducted a second search of his vehicle to
7 insure there was nothing in the vehicle, to make sure that
8 everything was turned over to us was what he purchased and
9 he was not keeping anything for himself.

10 Q. When you say keeping anything for himself, what
11 are you referring to?

12 A. The narcotics that he purchased. He buys a
13 quantity of narcotics from our target, he turns that
14 evidence over to the detective, in this case Detective
15 Cothran. We want to make sure that he is not keeping any
16 of these narcotics for himself, again, just to keep the
17 integrity of the investigation.

18 Q. Did you write a report in this case?

19 A. I did not.

20 Q. Why not?

21 A. As is typical the case agent usually documents
22 the actions of the officer, the detective, who was
23 searching the vehicles, in this case Detective Cothran
24 documented in his report what I did.

25 Q. If you had found something in the vehicle, would

Irvin - Redirect

1 you have documented it?

2 A. Oh, certainly, yes.

3 Q. How would you have gone about documenting it?

4 A. I would have done a supplemental report to
5 Detective Cothran's original case file and his original
6 report in the case.

7 Q. But in this case, the vehicle was found to be
8 completely free of drugs before and after the
9 investigation?

10 A. Correct.

11 Q. So you had no indication that there was any kind
12 of set up or ---

13 A. No, not at all.

14 Q. Anything with regard to the CI that led you to
15 believe there was anything amiss?

16 A. No.

17 Q. Thank you, Detective. Please answer any
18 questions has for you at this time.

19 THE COURT: Mr. Hamilton.

20 CROSS-EXAMINATION

21 BY MR. HAMILTON:

22 Q. Officer, you're saying that you searched this car
23 and you know who the target individual was?

24 A. I don't remember at the time I searched the
25 vehicle I knew who the target was or not because of the

Irvin - Redirect

1 length of time that has passed.

2 Q. But narcotics investigation unit you were called
3 in just to search the vehicle?

4 A. Well, we all work at the same office and the
5 office is a rather small office so whenever an informant
6 arrives in our office the case agent talks and discusses
7 things with the informant and he normally asks another
8 detective in the office to go out and search the vehicle.
9 Because we're aware that a buy is about to be made but
10 sometimes we don't know who our target is that we're going
11 to make the buy from.

12 Q. Now, there are compartments in the vehicle that
13 are creative and you can hide drugs anywhere in an
14 automobile, right? You searched every inch of the
15 vehicle?

16 A. I didn't search every inch but I searched
17 everything that accessible short of taking the vehicle
18 apart.

19 MR. HAMILTON: That's all I have.

20 REDIRECT EXAMINATION

21 BY MS. PRICE:

22 Q. Short of taking the vehicle apart, would anybody
23 have had the opportunity to take the vehicle apart in the
24 time between you searching it the initial time and the
25 time the vehicle was returned?

Cothran - Direct

1 A. No. The vehicle sits in our parking lot until
2 the informant gets in it and leaves. Once he leaves our
3 office, we are either following him or surveilling him in
4 some way the entire time. So there is no way that anyone
5 could have accessed any type of secret compartment or
6 anything like that.

7 Q. Thank you very much.

8 MS. PRICE: Your Honor, I would ask that this
9 witness be excused.

10 MR. HAMILTON: No objection.

11 THE COURT: You're excused. Thank you for
12 coming.

13 We have a question from the jury in the first
14 case.

15 (Whereupon, there was a brief recess.)

16 Bring the jury back in.

17 (Jury re-enters the courtroom.)

18 Ladies and gentlemen, I'd like you to know
19 that we're going to try to finish this case today.

20 Call your next witness.

21 MS. PRICE: Thank you, Your Honor. The State
22 calls Detective Cothran to the stand.

23 THE CLERK: Detective, would you please come
24 forward to be sworn in, please. Place your left hand on
25 the Bible and raise your right hand.

Cothran - Direct

1 CHARLES KEITH COTHRAN, having been duly
2 sworn, testified as follows:

3 Thank you. You may be seated. State your
4 name for the record.

5 THE WITNESS: Yes. My name is Charles Keith
6 Cothran.

DIRECT EXAMINATION

8 BY MS. PRICE:

9 Q. Detective, I'm going to stand back here, again,
10 and ask you who you work for?

11 A. I work for the Greenville Police Department.

12 Q. And how long have you worked for the GPD?

13 A. Approximately seven years.

14 Q. What position do you hold?

15 A. I am currently assigned to the Investigation
16 Division.

17 Q. Is that the position you held on June 30, 2011?

18 A. No, it is not. On June 30th, 2011, I was
19 assigned the Vice and Narcotics Investigation Division.

20 Q. On June 30, 2011 under that assignment, were you
21 still a detective?

22 A. I was.

23 Q. And as a detective in that unit, what sorts of
24 duties and responsibilities were involved with you job?

25 A. In the Vice and Narcotics Unit we take in

Cothran - Direct

1 community complaints about various activities, typically
2 drug related activities. We also investigate subjects
3 that are known drug users, sellers, and work information
4 we receive from various sources.

5 Q. And did you receive information from a source on
6 June 28, 2011?

7 A. Yes, I did.

8 Q. Who was that source?

9 A. That source was a documented confidential
10 informant that I had signed up and his name was James
11 Grant and the information he provided me was he knew a
12 subject by the name of Red and his street name was Red and
13 his government name was Greg Ivery and that he could
14 purchase crack cocaine from this subject.

15 Q. At the time he gave you this information, did he
16 have you sign an agreement to work as a confidential
17 informant with you?

18 A. I don't remember if that was on the actual 28th.
19 I don't remember when he signed up. I'd have to seen that
20 form but he did sign a -- we have a packet that we have
21 informants sign. It's got a lot of information that's
22 kind of irrelevant for this case. The purpose of speed,
23 there's an informant agreement with various statements of
24 things they will not do while they are working for the
25 police department as a police undercover operative.

Cothran - Direct

1 Q. I'm going to show you what's been marked as
2 State's Exhibit 7 through 7b. Could you tell me if you're
3 familiar with those documents?

4 A. Yes, these are from the confidential informant
5 packet that we present to all of our informants. One of
6 those is an agreement, I believe it's State's 7. It's an
7 agreement that an informant would have to sign that
8 basically says that what his role will be and the
9 information he is sharing, that we cannot, as law
10 enforcement officers, make him, force him, promise him or
11 do anything to otherwise persuade him to do anything
12 against his will and that any cooperation he provides us
13 will be made known to the Solicitor's Office.

14 The second one is our City Police Department
15 informant agreement, 7a and 7b and this is the form that
16 basically goes through various -- the agreement between
17 myself and Mr. Grant is what it is.

18 Q. And what date did he sign the agreement to work
19 as a confidential informant?

20 A. This is dated June 22, 2011.

21 Q. On what date did you determine you would start an
22 investigation against this defendant based on the
23 information that confidential informant provided to you?

24 A. Mr. Grant, the confidential informant signed up
25 on the 22nd. On the 28th of June he contacted me and

Cothran - Direct

1 advised me about Mr. Ivery and told me that he could
2 purchase a quantity of crack from him. I told him to
3 arrange a deal for June 30th and to come to the office on
4 that day.

5 Q. And did he make that arrangement?

6 A. He made that arrangement and he did come to the
7 office per my instructions.

8 Q. And when with whom was this purchased planned?

9 A. This purchase was planned between the informant
10 and Mr. James Grant and Mr. Ivery.

11 Q. And the informant was the person who proposed
12 this defendant as the subject of this investigation?

13 A. Correct.

14 Q. Why would you use the subject that was brought to
15 you by the confidential informant?

16 A. Well, informants are privy to information that a
17 lot of times law enforcement we just don't have the
18 information. Obviously the informant is going to be more
19 familiar with whom they're purchasing. They're going to
20 know the subjects better. They have information we don't
21 have and a lot of times in the drug industry as me and you
22 are probably well aware it's not easy for an undercover
23 cop to just walk up to some random individual and purchase
24 any type of drug. So we use the information they provide
25 us to begin an investigation.

Cothran - Direct

1 Q. So it's easier for a CI based on the familiarity
2 with somebody to sometimes infiltrate?

3 A. Yes.

4 Q. What happened on June 30, 2011? I want you to
5 start from the very beginning when the confidential
6 informant arrived at your office?

7 A. Well, on June 30, 2011, the informant arrived at
8 the Vice and Narcotics Office at approximately 11:40 in
9 the morning. When he arrived, he called me, I met him at
10 the door and took him to the interview room where he
11 couldn't be observed by any passersby. While I was
12 speaking with him he gave some of the details about how
13 the buy would go, how we would get there. He told me he
14 was using his car.

15 Q. Is it also your policy for him to typically use
16 the car that the CI brings to the Vice and Narcotics
17 Office?

18 A. Yes. We won't allow them to use one of our
19 vehicles without one of us being the operator of the
20 vehicle. I think that's pretty clear cut as to why we do
21 that.

22 Q. Did you search the confidential informant, this
23 individual, while he was in your office?

24 A. I did search his person, his pockets, completely
25 from head to toe. He had nothing on him as far as

Cothran - Direct

1 contraband.

2 Q. And why would you search him?

3 A. As the earlier detective mentioned, we do it for
4 the integrity of the case. We want to make sure they
5 don't arrive with any contraband of any type whether
6 that's drugs or paraphernalia. We want to make sure for
7 the purpose of our investigation that they informant and
8 the information he's providing when he arrives at this
9 location that the drugs did come from the subject in
10 question.

11 Q. And there was nothing located on his person?

12 A. He had no contraband whatsoever.

13 Q. What happened after you searched the confidential
14 informant?

15 A. After searching him, I asked Detective Irvin to
16 search his vehicle. I also would have equipped the
17 confidential informant with a audio recording device and a
18 video and audio recording device. We monitor the audio
19 during the investigation.

20 Q. And why do you do that?

21 A. Again, we do that for evidentiary purposes to
22 make sure that we capture evidence for our investigation
23 and we also do it so that we can monitor the transaction
24 because of the elicit connection between drugs and
25 violence. We want to make sure that our CI, our informant

Cothran - Direct

1 is safe during the transaction.. So that who he is
2 purchasing it from isn't going to rob him or hurt him or
3 something.

4 Q. Did you test the audio video to make sure it was
5 working?

6 A. Yes. We turn it on and we'll prep it and our
7 listening boxes we flip it on to make sure we can hear
8 them clearly.

9 Q. When you say these audio recording devices and
10 these video recording devices, were they hidden on this
11 person? Without getting into specifics because I know we
12 have a safety issue to deal with ongoing investigations in
13 this county, were they hidden?

14 A. Yes, they are hidden.

15 Q. So a casual observer would not be able to notice
16 that this person is wired?

17 A. No.

18 Q. Was the confidential informant given anything?

19 A. Yes. When he first arrived I asked him what he
20 talked to Mr. Ivery about and he explained that he was
21 going to buy \$140 worth of crack cocaine from him. I went
22 and got \$140 of police funds, make a photocopy of that
23 money and he was given that \$140 of police funds for the
24 purpose of purchasing that crack cocaine from Mr. Ivery.

25 Q. I'm showing you what's marked State's Exhibit 8.

Cothran - Direct

1 Are you familiar with this exhibit?

2 A. Yes. It's the photocopy of the funds that the
3 confidential informant was given to purchase crack cocaine
4 from Mr. Ivery.

5 Q. And how can you be certain that that's the
6 photocopy that was made that day?

7 A. The case number is written at the top and it's in
8 my handwriting.

9 Q. Can you explain briefly what GPD funds are?

10 A. It's the funds that we have for purchasing drugs,
11 using informants or undercover buys. We have a designated
12 account that the police department manages. Those funds
13 are tracked and monitored to make sure that they are used
14 properly. We have a limited amount of funds so we have to
15 carefully and obviously make wise decisions when we
16 purchase drugs.

17 Q. What happened after you gave this individual,
18 this confidential informant, this \$140?

19 A. He was given the \$140. I advised the other
20 detectives that work in the Vice and Narcotics Unit where
21 we were going. Again that information was obtained from
22 the informant before we ever got started. I asked him to
23 go get in the area. Myself and other detectives then went
24 outside of our office, the informant then got in his
25 vehicle and he actually followed us to the deal location.

Cothran - Direct

1 I actually watched him turn to the incident location which
2 is Bigby Street. I watched him in my rear view mirror
3 turn onto Bigby Street.

4 Q. What was the exact incident location?

5 A. The exact incident location was . . . Street,
6 Greenville, South Carolina.

7 Q. Do you know that to be the residence of anyone
8 who is in the courtroom today?

9 A. Yes. It's where Mr. Ivery lived.

10 Q. Does anyone else live at that residence with him
11 that you're aware of?

12 A. I believe it was his grandmother or other maybe.

13 Q. So after you peel off, what do you hear?

14 A. We can hear the informant speaking with anyone.
15 When the informant arrived, initially, Mr. Ivery wasn't at
16 home at the time. He remained in the driveway for a brief
17 period of time. So I contacted him because I was under
18 the impression that Mr. Ivery would be there. I asked him
19 to wait and see if Mr. Ivery would arrive. Shortly after
20 that, he did arrive. He told Mr. Ivery that he wanted to
21 get the \$140 worth of crack, gave Mr. Ivery the \$140 of
22 police funds. Mr. Ivery then went inside and retrieved
23 the crack cocaine, brought it back out to the informant.
24 The crack cocaine was in a small plastic bag. He handed
25 him the crack cocaine and at that point the informant left

Cothran - Direct

1 and was followed back to the Vice and Narcotics office.

2 Q. And you observed this transaction; is that
3 correct?

4 A. I didn't see it physically, but I can hear it.

5 Q. At some point in time, did you review your video?

6 A. Yes. When we got back to the office, I escorted
7 the confidential informant back into the same interview
8 room we were in previously, asked Detective Irvin to
9 conduct a search of the vehicle, a post buy search of the
10 vehicle. I then turned all of the audio and video
11 recording devices off, all that equipment off, removed it,
12 conducted a search of the informant's person and did not
13 locate any contraband. The drugs he had purchased he had
14 already given to me and these drugs remained in my
15 possession and control until I took them to property and
16 evidence.

17 Q. Did you have your confidential informant identify
18 this individual that has sold him the crack by any
19 particular means once he returned to your office?

20 A. Yes. When the informant called me on the 28th
21 and told me he knew a subject by the name of Red, Gregory
22 Ivery, I began to research it on the 28th to attempt to
23 identify a person that we may be purchasing the drugs
24 from. I did that for a couple of reasons. One is it's
25 always good to know who the subject of the investigation

Cothran - Direct

1 is prior to arriving and that helps us with the integrity
2 of the case and the safety of the informant. So I
3 prepared who I believed at the time who Mr. Ivery was.

4 The way I came across Mr. Ivery's actually
5 identify is I ran it through a database with that address
6 and that address came back with that name and I prepared a
7 photo line-up from a picture that I was able to locate of
8 Mr. Ivery.

9 Q. Did you show a photo line-up to the confidential
10 informant, Mr. Grant?

11 A. I did. Immediately after I retrieved the drugs
12 from him, searched him, I went back to gather my
13 paperwork that I would need for him to complete. I had
14 that photo line-up prepared. I went in and I advised him
15 of what's called a photo line-up affidavit which tells him
16 he should feel compared to circle anyone or any of the
17 pictures unless he was absolutely certain that's the
18 person was the perpetrator.

19 Q. Did he indicate he understood the line-up that
20 you presented to him?

21 A. Yes, he did. And he actually signed saying he
22 did.

23 Q. And did he choose an image that was on your line-
24 up?

25 A. He did. He selected the person that was in

Cothran - Direct

1 position number 4.

2 Q. And who was in position number 4?

3 A. Gregory Ivery.

4 MR. HAMILTON: Your Honor, I'm going to
5 object to him saying who he selected without that person
6 being here who actually done the selection.

7 THE COURT: Overruled.

8 BY MS. PRICE:

9 Q. And he circled image No. 4?

10 A. He circled image No. 4 and the instruction I gave
11 him to initial and date inside of that circle he did as I
12 told him to do.

13 Q. When you say did as you told him to do, you told
14 him to make a mark not directing him what picture to
15 chose?

16 A. Right. At no point in time did I suggest or try
17 to compel or advise him that Mr. Ivery was the person that
18 he needed to circle. It took the line-up, it's on a
19 piece of paper, after we went through the affidavit, he
20 didn't see it up until I presented it. I flip it over, I
21 slid it to him, I didn't say anything. He, without
22 hesitation, indicated No. 4. I said will you please
23 circle, initial and date if that's the person that just
24 sold you crack. He circled, initialed and dated it.

25 Q. Did you have him sign a statement at any point in

Cothran - Direct

1 time saying what occurred that day?

2 A. Yes, we take statement from them to get their
3 account of what took place and he did complete a
4 statement.

5 Q. He signed it as well?

6 A. Yes.

7 Q. Did you threaten him in any way or coerce him to
8 make that statement?

9 A. No. The way we do it is we ask him will you give
10 us a statement about what happened. We present them with
11 a statement and they fill it out.

12 Q. I'm showing you what's been marked as State's
13 Exhibit 1, 2 and 6. Can you tell me if you're familiar
14 with those document?

15 A. Yes, I am. Exhibit 6 is the informant or
16 operative statement and I know it's mine because it's got
17 my signature at the bottom and it's a statement from
18 Mr. Grant. I believe it's Exhibit 2 is the photo line-up
19 that I presented to the confidential informant where he
20 circled, dated, and initialed the person in position No.
21 4.

22 Q. Detective, how did you present it to him because
23 that is the original copy of your photo line-up, is it
24 not?

25 A. Yes.

Cothran - Direct

1 Q. How did you present it to him?

2 A. This is the line-up affidavit that I explained to
3 you moments ago. I reviewed the statement at the top and
4 it says, "I understand that I am going to view a
5 six-person photo line-up which may or may not contain the
6 perpetrator of my incident that I should not feel
7 compelled to pick someone from the line-up." The
8 informant signed it and then following that it basically
9 says that, "I, James Grant," who is the informant, "viewed
10 the group of six photographs this 30th day of June, 2011
11 from which I have positively identified photograph No. 4
12 as being the person who sold me cocaine base." And then
13 in parenthesis it says, (crack). Then it says, "The line-
14 up was presented to me by Detective Cothran." And then
15 James signed it down at the bottom and I signed it here.

16 He would have read this first sentence that I
17 read and once he indicated that he understood, I slide
18 that to the side. There's a portion that's got the
19 photograph numbers filled out at that point. This is the
20 line-up I had. I pulled it over, I slide it in front of
21 him and he immediately points to No. 4 and he circles
22 dates and initials as I ask him to.

23 Q. Was there any hesitation on his part?

24 A. There was no hesitation whatsoever.

25 Q. Did he appear to be confused?

Cothran - Direct

1 A. No, he was, you know, very clear that that was
2 the person that he was referring to as Gregory Ivery.

3 Q. Was he impaired at any way when this was
4 happening? Did he appear to be intoxicated?

5 A. He was sober as far as the investigation goes.
6 If we have any inclination that someone is not sober prior
7 to an investigation, prior to a buy, we will not continue.
8 That's pretty clear cut why you would not continue in that
9 situation.

10 Q. After you presented the confidential informant
11 with this affidavit and he gave a statement and you did
12 the line-up, did you give him anything in exchange for his
13 work?

14 A. The reason that Mr. Grant had come to the police
15 to start with is because he had been charged with
16 shoplifting and he had asked for some assistance and
17 anything we could do. I agreed to tell the Solicitor's
18 Office and earlier, I don't know if you recall, I went
19 through that agreement that I couldn't promise him
20 anything. I would advise of his cooperation with law
21 enforcement.

22 Q. Aside from advising my office that he was
23 cooperating with law enforcement, did you give him any
24 currency?

25 A. Yes. Well, not with this buy, I don't believe.

Cothran - Direct

1 Q. Not on this occasion. What did you do after the
2 confidential informant, Mr. Grant, left?

3 A. After Mr. Grant left and the case was over as far
4 as his involvement, I field tested the drugs. The field
5 test came back positive for cocaine base. I filled out a
6 lab request and a property and evidence sheet and took the
7 drugs to property and evidence.

8 Q. What is a field test?

9 A. A field test is basically provided to law
10 enforcement so that it establishes probable cause to
11 believe the drugs that are located are a specific type of
12 drug. In this case it was tested for cocaine base which
13 crack has cocaine in it.

14 Q. I'm showing you what's been marked as State's
15 Exhibit 5. Without removing what's in the envelope, tell
16 me if you recognize the item that's in here, please.

17 A. These are the drugs that we purchased on June
18 30th from Mr. Ivery?

19 Q. How do you recognize them?

20 A. It's in a sealed bag and in that bag I see the
21 case number with my initials and the date and the case
22 number is the same case as the one that's being tried
23 today.

24 Q. Was there -- you said you put this in P&E?

25 A. Correct.

Cothran - Direct

1 Q. What is P&E?

2 A. Property and evidence. They are our index
3 custodian. They are the ones that insure that everything
4 is logged and kept secure and safe until the case is
5 eventually ended.

6 Q. Did you place anything else in property and
7 evidence?

8 A. I did. I placed a copy of the audio and video
9 recordings.

10 Q. I'm showing you Exhibits 9 and 10, are you
11 familiar with those documents?

12 A. I am.

13 Q. And what are those, sir?

14 A. State's Exhibit 9 is a plastic bag containing a
15 white rock like substance. It's my handwriting, my
16 initials, my signature and it's June 30 and clocked in at
17 12:53. And this one is also June 30th, my handwriting, my
18 initials my signature and it's a DVR Memorex DVDR.

19 Q. All right. And with regards to that DVR, did you
20 review it?

21 A. Yes, I review all of audio and video recording to
22 determine what it has captured, if it has captured
23 anything of value and the value of it. The way I review
24 it is I take it from the device, put it on my computer and
25 I play it. I make a copy of the exact recording from the

Cothran - Direct

1 device and I place it in property and evidence.

2 Q. - Let's get back to the drugs that you were given
3 by the confidential informant. How was that crack
4 packaged when it was given to you by the CI?

5 A. It was in a plastic bag.

6 Q. Did your training and experience lead you to any
7 conclusion about the packaging?

8 A. The packaging was consistent with what I had
9 observed in the past with drugs being packaged. It's
10 typically the corner of the plastic bag. It's usually
11 wrapped very tight and tied.

12 Q. Where did this sale occur again?

13 A. Street.

14 Q. And do you know it to be within one half mile of
15 a school or community center?

16 A. Yes. There is a community located on Rebecca
17 Street. It's definitely less than half of a mile. It's
18 probably an eighth of a mile if it's that far.

19 Q. How can you be certain?

20 A. I'm certain one because that particular area, a
21 patrol area where I was assigned to that area. And I also
22 took a -- we have a map that we can use and we can drag a
23 tape measure or a ruler and it will give us an
24 approximate distance and it was definitely within less
25 than half of a mile.

Cothran - Direct

1 Q. And you reviewed the video recording and after
2 you had reviewed the video and audio, did you form an
3 opinion as to who the individual was you were seeing on
4 that video?

5 A. Yes, my preliminary investigation started on June
6 28th. I had observed pictures of Mr. Ivery prior to every
7 going to the location and when I watched the video, you
8 could see Mr. Ivery in the video several different times,
9 but one time he's walking towards the confidential
10 informant. The other time he is coming back away from the
11 house.

12 Q. The video equipment was working properly when
13 these events took place? There was nothing ---

14 A. Yes, it was properly working.

15 Q. It recorded the events that you testified to
16 today?

17 A. That's correct.

18 Q. Detective, I'm showing you what's been marked as
19 State's Exhibit 4. Do you recognize that?

20 THE COURT: Solicitor, do you think this is a
21 good time to take a break?

22 MS. PRICE: Yes, sir, absolutely.

23 THE COURT: Everyone remain seated. Ladies
24 and gentlemen, please return to your jury room and have
25 lunch, bathroom break or whatever but don't discuss the

Cothran - Direct

1 case and then we'll come back and pick back up.

2 Everybody else remain seated.

3 (Jury exits the courtroom for a lunch break.)

4 Mr. Cothran, you can take a break, use the
5 restroom but don't talk to anybody. I want you to imagine
6 yourself sitting right here on this witness stand.

7 THE WITNESS: Yes, sir.

8 THE COURT: Alright, we'll be at ease for
9 about 30 minutes.

10 THE BAILIFF: Please remain seated.

11 THE COURT: Solicitor, you may continue.

12 MS. PRICE: Thank you, Your Honor.

13 BY MS. PRICE:

14 Q. I think where we left off I was asking you
15 whether the video and audio equipment to your knowledge
16 was working properly.

17 A. It was.

18 Q. And it recorded the events that you testified to
19 today?

20 A. Yes, it did.

21 Q. I want to you show you what's been marked as
22 State's Exhibit No. 4. Are you familiar with this object?

23 A. Yes. This is the copy of the video and audio
24 from the confidential informant purchase.

25 Q. Have you reviewed it?

Cothran - Direct

1 A. Yes, I reviewed it.

2 Q. And is it a fair and accurate depiction of the
3 events that took place on June 20, 2011?

4 A. It is.

5 MS. PRICE: At this time, Your Honor, the
6 State would like to move Exhibit 4 into evidence and we
7 request permission to publish it to the jury.

8 THE COURT: Any objection?

9 MR. HAMILTON: Your Honor, I would object to
10 it. He's saying that -- he's not authenticating what he
11 saw in the video as to him being there. He looked at it
12 but he wasn't the one in the video. How can he
13 authenticate something that he was not there to see?

14 THE COURT: I'll overrule your objection.
15 It's in evidence and it may be published.

16 MS. PRICE: Thank you, Your Honor. I beg the
17 Court's indulgence while I get this playing.

18 (Video marked as State's Exhibit No. 4 for
19 identification was admitted into evidence.)

20 I'd like to publish to the jury at this time.

21 (Video was played for the jury in open
22 court.)

23 BY MS. PRICE:

24 Q. Detective Cothran, again, was that a true and
25 accurate representation that occurred on June 30, 2011?

Cothran - Direct

1 A. Yes, it is.

2 Q. I noticed that there were several phone
3 conversations that the confidential informant made during
4 the course of the buy. Were any of those to you, sir?

5 A. I called him and I can't recall if he called me
6 to discuss how long it would be. He did call me and ask
7 me if I wanted him to go somewhere else and I told him no.
8 For the purpose of the integrity of the buy, I have to be
9 in control.

10 Q. So he remained at Street?

11 A. He did.

12 Q. Officer, based on your observations, surveillance
13 before, during and some after the buy, were you able to
14 identify who sold crack cocaine to this confidential
15 informant?

16 A. Yeah, I recognize -- when I watched the video I
17 paused it and was able to get a better view of Mr. Ivery
18 and I was able to identify Mr. Ivery myself from that
19 video.

20 Q. Could you please point out the individual you're
21 pointing out as Mr. Ivery, the person that sold crack
22 cocaine?

23 A. He's sitting right there.

24 Q. And can you describe what he's wearing for the
25 record?

Cothran - Cross

1 A. It looks like a dark blue shirt with light blue
2 circles. It's a button up shirt.

3 Q. I'm showing you what's been marked State's
4 Exhibit 3. Are you familiar with what this is?

5 A. This is -- like I said when I paused it, I
6 printed out that picture where you can see the subject
7 that walked in the house to retrieve the crack cocaine,
8 which was Mr. Ivery. You can see him just out of the
9 corner of the picture. This is the photograph that I
10 printed out.

11 Q. Detective Cothran, thank you very much. Please
12 answer any questions Mr. Hamilton may have for you at this
13 time.

14 THE COURT: Before we begin cross-
15 examination, I need to take up a matter with the previous
16 trial first.

17 MS. PRICE: Yes, sir.

18 THE COURT: Members of the jury if you will
19 be excused for just a few moments, we'll be back with you.
20 Thank you for your patience. Do not discuss the case.

21 (Jury exits the courtroom. There was a brief
22 break.)

23 Go ahead and bring out the jury.

24 (Jury re-enters the courtroom.)

25 Mr. Hamilton, you are recognized for your

Cothran - Cross

1 cross-examination.

2 MR. HAMILTON: May it please the Court.

3 CROSS-EXAMINATION

4 BY MR. HAMILTON:

5 Q. Officer, you've been promoted into violent crime
6 and you mentioned you used to be "B" patrol and now it's a
7 promotion?

8 A. The police department considers it a transfer.

9 Q. I was getting ready to congratulate you on being
10 promoted but at the same time you are doing something
11 different. You were working vice at the time of Gregory
12 Ivery, vice and narcotics?

13 A. Right.

14 Q. Part of what you saying you do requires a lot of
15 integrity?

16 A. Yes.

17 Q. When you're dealing with confidential informants,
18 these guys have pending criminal cases like the one in
19 this case. He had a pending criminal case but you say
20 he's trusted but you really can't trust him and that's why
21 you search the car, isn't that true? You can't trust
22 these people.

23 A. You search the vehicle for the integrity of the
24 case because you don't want to falsely accuse or allow
25 someone to falsely accuse.

Cothran - Cross

1 Q. Absolutely. It's because you can't trust these
2 people. You got to do things that make sure what they are
3 telling you is true?

4 A. You take precautions to insure the integrity of
5 the case, yes.

6 Q. But here's what I'm asking you to do in that --
7 you were in the in-camera hearing. You knew Gregory
8 Ivery. He was target in this investigation and you knew
9 him long before James Grant ever come to you?

10 A. I knew him from when I was on patrol and it was
11 strictly -- I didn't know anything about him. I knew
12 about Street because that's the area I lived in.
13 I didn't know if any criminal activity that Mr. Ivery may
14 have been involved in up until this point and I didn't
15 know his name. I had seen his face.

16 Q. You didn't know any crime that he may have been
17 involved in up until James Grant tell you and he had a
18 shoplifting charge, right? He said, hey, I got this
19 shoplifting charge and I want to set somebody up. That's
20 the first time you heard of Greg Ivery?

21 A. Yes.

22 Q. Really?

23 A. I knew of him. I did not know ---

24 Q. You investigated -- you seen this woman here at
25 her house. You talked with her. That's his mother and

Cothran - Cross

1 you been there and knocked on her door long before this
2 case?

3 A. No, I didn't.

4 Q. You never seen this woman?

5 A. The incident you're talking about was another
6 investigator. I am familiar with that but it was not me.
7 I am not the investigator that knocked on his mother's
8 door.

9 Q. But you know that police been out there more than
10 one time.

11 A. I know that the Vice and Narcotics Unit had done
12 something there in the past. I can't speak to it.

13 Q. So we agree that the Vice and Narcotics Unit that
14 you were apart of at that time had been going to
15 Street and nothing every happened.

16 A. I don't know what happened.

17 MS. PRICE: Your Honor, I believe
18 Mr. Hamilton may be opening a door here. I don't know if
19 we need to curtail the questioning but I think he's about
20 to open a door that I'm going to walk through.

21 THE COURT: I agree.

22 BY MR. HAMILTON:

23 Q. You've never been there before, before you saw
24 James Grant.

25 A. That's correct.

Cothran - Cross

1 Q. But there's no question that James Grant had
2 something to gain by trying to ---

3 A. Mr. Grant he had been arrested and he approached
4 us and asked for our assistance and the way we make our
5 agreements and our assistance is anything we do for the
6 police department will be made known to the prosecutors.
7 Once it's made known, they handle the matter of law and
8 whatever goes from there. I can't tell our informants
9 that if you give us this, your charges are going to go
10 away. I can't do that and it's clearly stated on the
11 agreement that myself and Mr. Grant signed. There will no
12 threats, coercion, force. Mr. Grant completely and
13 voluntarily provided the information and following through
14 with that information?

15 Q. But he's thinking he's trying to cooperate so he
16 could get help?

17 A. I would assume that would be his position.

18 Q. At the same time -- in the video he had stolen
19 eyeglasses trying to sell them for \$10. Did you know that
20 was in there?

21 A. I didn't know they were stolen.

22 Q. Did you know they were in the car?

23 A. I didn't search the car. Detective Irvin
24 searched it and if he did see any sunglasses in there,
25 we're not going to check to see if the sunglasses were

Cothran - Cross

1 stolen. Our intent in searching the car is for contraband
2 and sunglasses aren't contraband.

3 Q. If they're stolen, they're contraband, but I'm
4 just saying you didn't search the car anyway.

5 A. Right.

6 Q. But you did wire him with a hidden video?

7 A. Yes.

8 Q. You did know where he was going.

9 A. Yes.

10 Q. You made your case that the only time you knew
11 this Street was when he came to you, but you
12 always -- your intent was to investigate Greg Ivery, is
13 that the truth? You told us that.

14 A. Our intent to investigate Greg Ivery came on the
15 28th of June, 2011 when Mr. Grant, the confidential
16 informant, contacted me and advised me that he knew a
17 subject that we could purchase crack cocaine from. At
18 that point your client became a subject of my
19 investigation?

20 Q. Your personal investigation.

21 A. I would have followed up on that information with
22 or not Mr. Grant at that point?

23 Q. And once he did that he became the total focus
24 and he said, well, you want me to talk to somebody else
25 and you said, no, don't go talk to somebody else, I want

Cothran - Cross

1 Greg Ivery?

2 A. Like I explained moments ago for the integrity of
3 the case, it would be hard for me to say Greg Ivery sold
4 those drugs if the confidential informant had went to four
5 or five different locations and talked to numerous people.
6 But because I protected the integrity, I am absolutely
7 positively certainty that Mr. Ivery is the person that
8 sold the crack cocaine.

9 Q. Right.

10 A. That the purpose of the integrity. It is not
11 because people may or may not be honest, it's because when
12 I put someone in jail and in this case potentially goes to
13 prison, I want to make sure I'm making the correct
14 decisions and the integrity of that case is solid and then
15 there's nothing more.

16 Q. He got the person that you sent him out to get.
17 You showed him a photo line-up and all knowing that you
18 knew he was the one you targeted to get based on him
19 coming to you saying I can get this person.

20 A. Yes. It's part of my investigation to determine,
21 hopefully prior to a buy but at some point, to determine
22 who we purchase the crack cocaine from. With or without
23 the photo line-up with the video itself with that still
24 picture, I can look over there and look at the still and
25 tell you that picture is that guy.

Cothran - Cross

1 Q. And we just got to trust you that that picture
2 was taken at the time that video was made?

3 A. Yes, I would hope you would trust me.

4 Q. With all the photo shops, that picture could have
5 been taken two years ago.

6 A. Yeah, but if you look at the video and you
7 compare that video, you'll see that video and that picture
8 have not been altered.

9 Q. But you didn't take that picture.

10 A. I took that picture off of the video.

11 Q. But you didn't take the picture. You can say for
12 absolute certainty that the picture came from the video
13 while you were there. You were not there.

14 A. That picture right there on that desk, I played
15 that video, I paused it and printed it. That picture came
16 from the video that I watched and everybody in here
17 watched. It didn't come from anywhere else.

18 Q. From that video.

19 A. That video.

20 Q. That video could have been doctored?

21 A. I can tell you what I did. It was taken from the
22 device that record it, burned on my computer, that disk,
23 and taken to property and evidence.

24 Q. And it had exactly who you wanted to find on it?

25 A. It had the subject of the investigation, yes, I

Cothran - Cross

1 did.

2 Q. So in the audio -- there's no question that Greg
3 Ivery was that target. Supposed he wasn't there, you
4 don't want nobody but him.

5 A. No.

6 Q. Now, he had a camera in his hand?

7 A. The thing you saw in his hand was his cell phone.

8 Q. It could have a camera on it?

9 A. I would assume and you could snap pictures, but
10 if you start snapping pictures of someone you're buying
11 drugs from, you're probably going to have some issues.

12 MR. HAMILTON: Can I have one second, Judge.

13 BY MR. HAMILTON:

14 Q. Let's go back to when he got back. You say you
15 marked some drugs in this case.

16 A. Explain got back.

17 Q. When the person got back.

18 A. The confidential informant?

19 Q. The confidential informant got back to
20 headquarters.

21 A. To our office?

22 Q. Yeah.

23 A. Okay.

24 Q. Did you have a video of the drugs that were
25 there?

Cothran - Cross

1 A. Well, you can see us go upstairs. When he gets
2 out of the car, he tries to hand it to us and I say just
3 hold to them until I get upstairs. Let's get upstairs
4 because I don't want to remain any more visible any longer
5 than I have to be. You can see we're outside and the
6 longer I'm outside the greater the risk is to the CI being
7 discovered. So my thoughts is let's get upstairs and
8 handle out business once we're behind closed doors and
9 we're safe and nobody can see you.

10 Once get upstairs as you can see we walk up
11 the backside of the stairs in the door and into another
12 room where I say hold on, let me turn everything off and I
13 turn everything off.

14 Q. Did you take a picture of the drugs?

15 A. No. I had no reason to, I've got them.

16 Q. So there is nothing to say -- you got video of
17 everything but the drugs?

18 A. No, there's no video of the actual drugs.

19 Q. No video of the drugs.

20 MR. HAMILTON: Just one more second, Judge.

21 BY MR. HAMILTON:

22 Q. If you don't have any pictures of the drugs that
23 were taken, how do you know those are the same drugs?

24 A. Like I explained, when he enter that room I
25 turned everything off. The confidential informant handed

Cothran - Cross

1 me a plastic bag that contained a number of white rock
2 like substances. That substance remained in my control,
3 nobody else. I kept it under my control which means no
4 one else touched it, no one tampered with it, no one
5 altered it until I took it and put it in property and
6 evidence. When I put it in property and evidence, we take
7 it and we put it in a bag. We initial inside the bag, put
8 the case number and the date and that bag is heat sealed
9 and can not be opened. If it's opened, we will know.

10 I believe it was probably signed out by other
11 technicians for testing.

12 Q. Other than -- since this is such a high tech
13 society today, show me a picture when he handed you the
14 drugs?

15 A. I don't have a picture where he handed me the
16 drugs. I never for any of my investigations taken
17 pictures of someone handing me the drugs, confidential
18 informant or otherwise.

19 Q. If he says he never handed you the drugs then ---

20 A. Then he would be lying.

21 Q. --- how do you know he did?

22 A. He would be lying.

23 Q. He would be lying if he said he didn't hand you
24 the drugs?

25 A. I think the video clearly shows that he purchased

Cothran - Redirect

1 the drugs, that he received the drugs. They even
2 discussed it about the quality of the drugs. You hear him
3 refer to it that it looks like mid(ph), that is high
4 quality. From my experience and understanding of what
5 crack cocaine -- the quality of crack cocaine is affected
6 by the purity and the way its cooked.

7 Q. Okay.

8 A. When you hear them talking about and you hear
9 Mr. Ivery bragging in essence about the quality of the
10 drugs and then you hear the confidential informant say,
11 yeah, this looks good, yeah, this looks good, the quality
12 is there. So obviously unless your client and the
13 confidential informant had some kind of conversation about
14 that substance that they're looking at, I have no reason
15 to believe at all that they substance didn't come from
16 your client.

17 Q. I understand but I still have -- you're saying
18 that he gave you some drugs but I didn't see that in the
19 picture.

20 A. If you're asking me to produce a photograph or
21 video of the confidential informant handing me the drugs
22 that he purchased from your client, I can not do that. My
23 personal feeling is that's the best I can answer your
24 question. I can't produce that video.

25 Q. Right, you can't produce the video. And he was a

Cothran - Redirect

1 target prior to this and you knew him.

2 MS. PRICE: Your Honor, I'm going to object.
3 This is asked and answered.

4 THE COURT: Sustained.

5 MR. HAMILTON: That's all we have.

6 THE COURT: Redirect?

7 MS. PRICE: Just briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. PRICE:

10 Q. Detective, to be clear, you don't have authority,
11 no one in law enforcement other than folks that work with
12 me and my office, the Solicitor's Office, have any powers
13 of negotiation on outstanding charges; is that correct?

14 A. That is correct. We can only make what a person
15 is doing known to those who have that authority.

16 Q. And you may not know of other outstanding charges
17 that are pending or other background information that
18 comes to you that leads into the decisions that
19 prosecutors make?

20 A. That's correct.

21 Q. And you mentioned the commentary on the video
22 about the quality of the drugs.

23 A. Correct.

24 Q. To be clear, this was a high quality product was
25 what he was explaining?

Cothran - Recross

1 A. The conversation that they had when you hear them
2 talking it being mid(ph), that is a street term used to
3 attribute a certain level of quality and vice and
4 narcotics when you buy lower quality product versus a
5 higher quality product it costs you more. The bragging
6 about it looking good -- when you hear mid(ph), the best
7 way I can describe it is that product is of a higher
8 quality than some of the other products you may buy. In
9 this case, the product would be crack cocaine?

10 Q. So the distributor, the seller, is bragging about
11 the quality of their sale?

12 A. They're bragging about the quality of the product
13 they're selling which is the crack cocaine.

14 Q. Saying you're getting a good bargain?

15 A. Right, that you're getting a good deal because
16 you're getting -- basically, you're getting a lower grade
17 price for a higher quality product.

18 Q. Detective, I'm going to ask you a question and I
19 already know the answer to this question, would you or
20 have you ever lied or compromised your integrity as an
21 officer by planting evidence, altering photographs,
22 altering videos, doing anything to compromise the
23 integrity of any of your investigations?

24 A. Absolutely not.

25 MS. PRICE: Thank you. I have no further

Cothran - Recross

1 questions.

2 THE COURT: Mr. Hamilton, do you have any
3 further questions.

4 RECROSS-EXAMINATION

5 BY MR. HAMILTON:

6 Q. But that happens though.

7 MS. PRICE: Your Honor, I'm going to object.
8 That's a statement.

9 THE COURT: I didn't even hear what you said.

10 MR. HAMILTON: He said he never did it but
11 it's been proven that not just on tv but ---

12 MS. PRICE: Objection, again, Your Honor.
13 He's testifying.

14 THE COURT: Go ahead and ask him a question.

15 BY MR. HAMILTON:

16 Q. Officers make it right and make the case by
17 planting manipulating their testimony and evidence, it
18 happens.

19 A. Are you asking me if it happens?

20 Q. Yes. You don't do it.

21 A. I am sure that there is a small percentage of
22 police officers, however, I have never done that. I take
23 pride in what I do and the integrity and ethics in the
24 line of work ask everyone here knows is paramount.

25 THE COURT: You may step down.

Grant - Direct

1 Call you next witness.

2 MS. PRICE: The State calls James Grant.

3 THE CLERK: Mr. Grant, please come up to be
4 sworn. Would you place your left hand on the Bible and
5 raise your right.

6 JAMES GRANT, having been duly sworn,
7 testified as follows:

8 Thank you. You can be seated. Please state
9 your name for the record.

10 THE WITNESS: James Grant.

11 DIRECT EXAMINATION

12 BY MS. PRICE:

13 Q. Mr. Grant, how old are you?

14 A. Fifty years old.

15 Q. And where are you from originally?

16 A. New York.

17 Q. And did you at one time live in Greenville?

18 A. Yeah.

19 Q. I see you're in a jump suit. Where are you
20 incarcerated?

21 A. Crenshaw.

22 Q. Why are you incarcerated?

23 A. I told you I ain't want to be in no trial. All
24 of these questions I really don't want to answer. I told
25 you I'm not putting on no trial for you. I'm not putting

Grant - Direct

1 on no trial for him. I ain't got nothing to do with
2 neither one of y'all problem. I asked you earlier before
3 we even came here I plead the Fifth. I ain't got nothing
4 to do with it. You keep bringing me here in this
5 courtroom. They told me I can't come here or I'm going to
6 get charged so I'm here. I'm telling you straight up and
7 I'm telling the judge -- I'm not disrespecting the jury,
8 I'm not disrespecting you, Your Honor -- I don't have
9 nothing to say so I wish you would just let me roll on up
10 out of here.

11 Q. You sure you don't want to testify today because
12 you didn't receive the deal that you wanted to on your
13 shoplifting charges, sir?

14 A. See you keep trying to twist things. I told you
15 that ---

16 Q. Isn't it true that you're not testifying and
17 you're angry with the State because you did not ---

18 A. I told you ---

19 Q. --- get the deal that you ---

20 A. I'm not angry with you or no ---

21 THE COURT: We have to have one person at a
22 time talking.

23 THE WITNESS: Yeah, I'm angry at you for
24 trying to put me in your criss-cross so, no, I'm not
25 testifying. I just plead the Fifth. I'm not going to

Grant - Direct

1 disrespect these people here. I'm not going to disrespect
2 the judge. So right now I ain't got nothing to say to you
3 and excuse me, Judge, I plead the Fifth on all of it. So
4 I don't have nothing else.

5 MS. PRICE: Your Honor, I would ask you to
6 instruct the witness that he is not entitled to the
7 protections of the Fifth Amendment.

8 THE COURT: That's right. You are not on
9 trial and you need to answer.

10 MR. HAMILTON: Your Honor, I object. He has
11 a right to counsel and if he wants a lawyer ---

12 THE COURT: He's not on trial. He's not
13 being accused of a crime. He can answer how he sees fit.
14 We have to take the answer as he gives it but you need to
15 give an answer.

16 MS. PRICE: Thank you, Judge.

17 BY MS. PRICE:

18 Q. So you're incarcerated.

19 THE COURT: You need to go ahead and answer.

20 THE WITNESS: I told you I ain't on no trial
21 so y'all can do whatever and just go on and do it. I'm
22 not going to answer no question.

23 MS. PRICE: Your Honor, I would like
24 permission to treat this witness as hostile, continue to
25 ask him questions whether he agrees to answer them.

Grant - Direct

1 THE COURT: Permission is granted.

2 MS. PRICE: Thank you, Judge.

3 BY MS. PRICE:

4 Q. Do you know the defendant, Gregory Ivery?

5 A. (No response.)

6 Q. How do you know him?

7 A. (No response.)

8 Q. Prior to June 30, 2011 how long did you know him?

9 A. (No response.)

10 Q. Do you know Detective Cothran?

11 A. (No response.)

12 Q. How do you know him?

13 A. (No response.)

14 Q. Prior to the incident in this case how long have
15 you known him?

16 A. (No response.)

17 Q. Do you remember giving a statement to Detective
18 Cothran?

19 A. (No response.)

20 Q. Let me rephrase, isn't it true that you gave a
21 statement to Detective Cothran on June 30, 2011?

22 A. (No response.)

23 Q. Is this your signature?

24 A. (No response.)

25 Q. Isn't it true that you entered into an informant

Grant - Direct

1 agreement?

2 A. (No response.)

3 Q. Are these your signatures?

4 A. (No response.)

5 MS. PRICE: Let the record reflect that I am
6 showing the witness Exhibit 6, 7, 7a and 7b and he is
7 refusing to answer.

8 BY MS. PRICE:

9 Q. Isn't it true that you identified this defendant,
10 Mr. Gregory Ivery, on June 30, 2011 by circling his image
11 and putting your initials here?

12 A. I ain't circle nothing.

13 Q. These aren't your signatures, sir.

14 A. Those are my signatures but I ain't circle
15 nothing.

16 Q. That's your signature, then. You admit that
17 these are you signatures?

18 A. That's my signature but I didn't circle nothing.

19 Q. You didn't circle but you put your signature on
20 it; is that correct?

21 A. I ain't put my signature on nothing.

22 Q. Isn't it true that you signed and put your
23 signature on this on this affidavit that says, "I, James
24 Grant, view a group of six photographs, 30th of June, for
25 which I positively identified photograph 4 as being the

Grant - Direct

1 person who sold me cocaine base."

2 A. No, I didn't.

3 Q. Is that your signature?

4 A. I didn't sign that.

5 Q. Is that you signature?

6 A. I didn't sign that.

7 Q. Mr. Grant -- I'm showing you State's Exhibit 5.

8 Isn't it true that you purchased what's in this envelope
9 from Gregory Grant on June 30, 2011?

10 A. I didn't purchase nothing from him or nobody
11 else. I don't smoke a pipe and I don't buy crack.

12 Q. Can you explain why you're on a video, then, sir?

13 A. I'm not on no video.

14 Q. That's not you on the video. Isn't it true that
15 you were given \$140 to purchase crack and that you did
16 purchase it from the defendant showing you State's Exhibit
17 8, sir?

18 A. You ain't give me nothing and he ain't gave me
19 nothing.

20 Q. Which is why you're angry today, isn't it?

21 A. I don't have no money. Where the money at?

22 Q. You're mad because nobody gave me nothing; isn't
23 that right?

24 A. I'm mad because you called me up here and asked
25 me to do something and I told you I don't want no part of

Grant - Direct

1 it and then you got mad and told me don't disrespect you.
2 I told you I wasn't disrespecting you. Now, you call me
3 back up here again sitting here all day and in front of
4 these people trying to make you criticize this man for my
5 behavior. It ain't going to happen.

6 Q. I'm not sure I follow you, but ---

7 A. You follow me.

8 Q. I'm going to ask you one more question and then
9 I'm done. Isn't it true that on June 30, 2011, you
10 operated as a confidential informant for this detective,
11 Detective Cothran, that you went to _____ Street, you
12 purchased crack cocaine from Gregory Ivery? You gave it
13 to Detective Cothran so that you could beat your
14 shoplifting charge. Isn't it true that you are
15 incarcerated right now on a shoplifting charge?

16 A. The charge was from '09 and it ain't got nothing
17 to do with him and the charge ain't only for 32 months, so
18 if I was an informant why the hell am I in jail for 32
19 months on a shoplifting charge? You can't play me like
20 that.

21 MS. PRICE: Beg the Court's indulgence.

22 BY MS. PRICE:

23 Q. You pled guilty on August 25, 2011 off of the
24 trial docket in this county to shoplifting; is that
25 correct?

Grant - Direct

1 A. It ain't got nothing to do with you or him so I
2 don't know why you're bringing it up.

3 THE COURT: Hold on.

4 THE WITNESS: That ain't got nothing to do
5 with this case. All you trying to do is trying to find
6 something to pinpoint me because that man stopped me and
7 asked me a bunch of questions and you trying to get me to
8 throw him. It ain't going to work because he ain't never
9 did nothing to me. I don't work for you. I'm doing my
10 time. I'm not going to be your do boy. Excuse you Court,
11 excuse you, Your Honor, excuse you jury. I ain't got
12 nothing to do with it. Let me go do my time and whatever
13 problem y'all got, y'all handle that yourself.

14 BY MS. PRICE:

15 Q. Okay.

16 A. Keep me out of it. Stop trying to twist the jury
17 by making it look like I'm helping you because I'm not
18 helping you ---

19 Q. I don't think you're helping me. Were you
20 arrested on June 16, 2011?

21 A. The question has nothing to do with you or this
22 case.

23 Q. True or false, you were arrested in June 16,
24 2011?

25 A. That's none of your business.

Grant - Cross

1 Q. Isn't it true you were arrested on June 16, 2011
2 and that's why you went to this detective on June 22,
3 2011, sir?

4 A. If you go call my lawyer I had this case. I was
5 incarcerated. This case was supposed to be ran
6 concurrent. They didn't run it concurrent so therefore
7 you or this case has nothing to do with my old shoplifting
8 charge because I'm doing my time for it. I got serve and
9 I'm doing my time. I'm paying my debt to society and I'm
10 not going to help you try to lock somebody else up. I
11 don't know nothing about what you're talking about.
12 Please let me go.

13 MS. PRICE: That's all.

14 THE COURT: Mr. Hamilton, would you like to
15 ask him any questions.

CROSS-EXAMINATION

16 BY MR. HAMILTON:

17 Q. I just have one question. I understand that you
18 don't know anything. I would like to ask whether or not
19 -- you said you did not circle that.

20 A. No, I didn't.

21 MR. HAMILTON: That's all I got.

22 THE COURT: Step down. Call you next
23 witness.

24 MS. PRICE: The State calls Ms. Kara Bennick
25

Armstrong - Direct

1 Q. Answer any questions Mr. Hamilton has for you.

2 MR. HAMILTON: I have no questions.

3 THE COURT: Call your next witness.

4 MS. PRICE: Yes, sir. The State calls James
5 Armstrong.

6 THE CLERK: Place your left hand on the Bible
7 and raise your right hand.

8 JAMES ARMSTRONG, having been duly sworn,
9 testified as follows:

10 Thank you. You may be seated. State your
11 name for the record.

12 MR. HAMILTON: Your Honor, we'll stipulate to
13 his qualifications.

14 THE WITNESS: James William Armstrong.

15 DIRECT EXAMINATION

16 MS. PRICE: Since they stipulated to your
17 qualifications which are quite lengthy, Your Honor, I'd
18 move to have to Mr. Armstrong qualified in the field of
19 chemical drugs.

20 THE COURT: Any objections?

21 MR. HAMILTON: No objection.

22 BY MS. PRICE:

23 Q. Mr. Armstrong, were you asked to analyze any
24 chemical substances in this case?

25 A. Yes, ma'am, I was.

Armstrong - Direct

1 Q. How did you obtain the chemical substances?

2 A. Received them from the property and evidence room
3 that's in the basement of law enforcement center.

4 Q. When did you check the substances out of property
5 and evidence?

6 A. I received the item on July 1, 2011.

7 Q. I'm showing you what's been marked as State's
8 Exhibit 5. Could you please open it and tell me if this
9 is what you checked out of property and evidence?

10 A. Yes, ma'am, it is.

11 Q. How do you know?

12 A. The outer bag has my initials and the date which
13 is heat sealed. The inner bag also has my initials and
14 the date where I cut the bag open. And it also has my
15 initials along with an item number and weight that
16 contains a rock substance.

17 MS. PRICE: Your Honor, the State would move
18 to have State's Exhibit No. 5 entered into evidence at
19 this time.

20 THE COURT: Any objection?

21 MR. HAMILTON: No objection.

22 MS. PRICE: Thank you, Your Honor.

23 (Drugs previously marked as State's Exhibit
24 No. 5 for identification was admitted into evidence.)
25

Armstrong - Direct

1 BY MS. PRICE:

2 Q. Mr. Armstrong, if the substance that you'd been
3 asked to analyze wasn't sealed, what would you do?

4 A. We'd make a notation on the bag if they didn't
5 catch it at the property and evidence room. If we caught
6 early enough, we would actually tell the property clerks
7 it was not sealed and have the officer come back and seal
8 the evidence.

9 Q. How did you analyze the substance in this case?

10 A. I did a chemical spot test and an instrumental
11 analysis.

12 Q. How much material do you need to perform these
13 tests?

14 A. Approximately 100th or so of a gram.

15 Q. How many bags came to you when you did your
16 analysis?

17 A. I had one.

18 Q. Just one. And what did your test and analysis
19 reveal the substance in that bag to be, sir?

20 A. I found this bag containing rock substance to
21 contain cocaine base at the weight of 1.79 grams.

22 Q. Does cocaine base have a common street name?

23 A. Also known as crack cocaine.

24 Q. And how many grams?

25 A. 1.79.

Armstrong - Direct

1 Q. After you analyze the material, did you document
2 the tests you conducted and your results?

3 A. Yes, ma'am, I did.

4 Q. How did you do that?

5 A. I generated a lab report and then the evidence
6 was taken back to property and evidence.

7 Q. Does that lab report kept in the course of
8 regularly conducted business at the Greenville County
9 Crime Lab?

10 A. Yes, ma'am, it is.

11 Q. And is it your regular practice to document your
12 findings in these drug reports after you analyze
13 substances from property and evidence?

14 A. Yes.

15 Q. I'm showing you what's been marked as State's
16 Exhibit 12, sir. Are you familiar with that?

17 A. Yes, I am.

18 Q. And what is it, sir?

19 A. This is a copy of my drug analysis report for
20 case no. City-201155552.

21 Q. How do you recognize it?

22 A. My name is printed and signed with a date at the
23 bottom.

24 Q. And after you analyzed this material, what did
25 you do with it?

Armstrong - Cross

1 A. After the analysis was complete, the items were
2 sealed up and taken back to evidence for storage.

3 Q. Is the evidence that was marked as State's
4 Exhibit 5 the same evidence you returned to Greenville
5 County Property and Evidence?

6 A. Yes, ma'am, it is.

7 Q. And is it in substantially the same condition
8 today as when you returned it to property and evidence,
9 sir?

10 A. Yes, it is.

11 Q. Thank you very much. Please answer any questions
12 Mr. Hamilton may have.

13 THE COURT: Mr. Hamilton.

14 CROSS-EXAMINATION

15 BY MR. HAMILTON:

16 Q. You analyzed this to be crack cocaine and based
17 on the chain of custody, you don't know where it came
18 from?

19 A. That's correct.

20 Q. Do you have any information that it came from a
21 subject named James Grant?

22 A. I was given a lab request form just to analyze
23 items under this case number and this item number.

24 Q. So you don't know where it came from?

25 A. I have no idea.

Cothran - Recall

1 MR. HAMILTON: That's all I have, Judge.

2 THE COURT: Thank you. You may step down.

3 MS. PRICE: May this witness be excused, Your
4 Honor?

5 MR. HAMILTON: No objection.

6 (Witness excused.)

7 MS. PRICE: Your Honor, we would briefly
8 recall Detective Cothran only for the purpose of moving in
9 some statements.

10 THE COURT: All right.

11 (Detective Cothran retakes the stand.)

12 CHARLES COTHRAN, having been duly sworn,
13 testified as follows:

14 BY MS. PRICE:

15 Q. Detective, I'm showing you what's now opened and
16 marked as State's Exhibit 5. It's been moved into
17 evidence. Is this what you retrieved from Mr. Grant when
18 he returned to your office, sir?

19 A. Yes, it is.

20 Q. I'm showing you what has been marked as State's
21 Exhibit 1 and 2. What are those exhibits, sir?

22 A. Exhibit 1 is the photo line-up affidavit that I
23 presented to Mr. Grant the day of the incident. State's
24 Exhibit 2 is the photo line-up where Mr. Grant circled and
25 initialed and dated indicating Mr. Ivery was the person

Cothran - Recall

1 who sold him the crack cocaine.

2 MS. PRICE: Your Honor, at this time, the
3 State would move to have State's Exhibits 1 and 2 moved
4 into evidence under the prior inconsistent statement.

5 THE COURT: Any objections?

6 MR. HAMILTON: I object, Your Honor. He
7 clearly stated he did not circle that.

8 THE COURT: I'm going to overrule the
9 objection. They are not hearsay.

10 MS. PRICE: Thank you, Your Honor.

11 (Affidavit previously marked as State's
12 Exhibit 1 for identification was admitted into evidence.)

13 (Photo line-up previously marked as State's
14 Exhibit 2 for identification was admitted into evidence.)

15 BY MS. PRICE:

16 Q. I'd like to show you State's Exhibit 6. Once
17 again tell me what that item is, sir?

18 A. This is the confidential informant or operative
19 statement that Mr. James Grant completed the day of the
20 incident.

21 MS. PRICE: At this time, the State would
22 move to have State's Exhibit 6 moved into evidence as well
23 as we would request permission to have Detective Cothran
24 publish that to the jury.

25 THE COURT: Any objections?

Cothran - Recall

1 MR. HAMILTON: Your Honor, he testified that
2 he didn't sign anything.

3 THE COURT: State's No. 6 is in evidence.

4 (Statement previously marked as State's
5 Exhibit No. 6 for identification was admitted into
6 evidence.)

7 MS. PRICE: Thank you, Your Honor.

8 THE WITNESS: At the very top of the form it
9 says, "Confidential Informant/Operative Statement." The
10 charge is distribution of cocaine base. The case number
11 is 11-55552. The date is 6/30/11. The defendant Gregory
12 Ivery, race, black, sex, male. The transaction location
13 is Street, time 12:53, substance bought, cocaine
14 base, amount spent \$140. Surveillance detectives,
15 Cothran, Irvin, Hyatt, Wilks, Brown. Type if surveillance
16 audio video. Summary in Mr. Grant's writing: "I have Greg
17 Ivery \$140 for some crack so that I can flip for a bill.
18 I have crack to Detective Cothran." The bottom left is
19 CI/Operative with an X mark that I placed indicating where
20 he needed to sign. James Grant's signature and it's got
21 Detective and then Cothran CK and then my signature.

22 BY MS. PRICE:

23 Q. Thank you, Detective Cothran.

24 MS. PRICE: No further questions from the
25 State.

Cothran - Recall

1 THE COURT: Mr. Hamilton.

2 BY MR. HAMILTON:

3 Q. You took those statements -- when did you take
4 those statements?

5 A. Immediately after. When you watch the video, we
6 come up the stairs going to the room, I turn everything
7 off, I get the drugs, secure the drugs in my desk lock and
8 key, go back with the paperwork that I need to have
9 completed. You can actually hear me telling him it
10 shouldn't take us long to get the paperwork done because
11 he had an appointment or had to meet his wife or someone
12 at that time.

13 Q. And there's no evidence that he handed you any
14 drugs?

15 A. Other than my testimony, no.

16 MR. HAMILTON: Thank you.

17 THE COURT: You can step down.

18 MS. PRICE: No further witnesses from the
19 State.

20 THE COURT: Members of the jury panel, we
21 have to take up some matters out here. If you would step
22 into the jury room, do not discuss the case, and we'll be
23 back with you shortly.

24 (Jury exits the courtroom.)

25 Any motions?

State versus Ivery

1 MR. HAMILTON: I do have motions. I probably
2 should have objected at the introduction of the evidence
3 and that is there is no evidence of drugs being
4 transferred or handed to the detective. Clearly he took
5 some drugs down there but there is not evidence to show
6 that it came from the defendant or the confidential
7 informant. The confidential informant did verify that he
8 gave that detective anything. He said he didn't buy
9 anything from this defendant and there is no evidence of
10 this drugs coming from the defendant and we ask for a
11 directed verdict on that.

12 THE COURT: That is a question for the jury
13 and I deny the motion.

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

21 THE COURT: I will deny that motion as well.

22 MR. HAMILTON: That's all we have, Judge.

23 THE COURT: We'll take a brief break.

24 (Whereupon, there was a break.)

25 MR. HAMILTON: Judge, we're ready to proceed.

State versus Ivery

1 THE COURT: Are you planning on presenting
2 any witnesses?

3 MR. HAMILTON: The defendant will rest his
4 case.

5 THE COURT: Let me talk to your client. If
6 you would come on up here and let the clerk swear you in.

7 THE CLERK: Would you please raise your right
8 hand.

9 GREGORY IVERY, having been duly sworn,
10 testified as follows:

11 THE COURT: Let me go over certain rights
12 that you have and I want to make sure you understand these
13 rights. The first thing I want to tell you is that if you
14 would like to testify, you may. You have that right. You
15 can come over here and you can place your left hand on the
16 Bible. You can raise your right to be sworn in to tell
17 the truth, nothing but the truth, and you can testify.
18 However, I want you to understand that if you do testify,
19 you may be cross-examined on any and all relevant issues
20 in connection with your case.

21 Furthermore, if you have a criminal record
22 that involves crimes of dishonesty or false statements, or
23 you have a criminal record that crimes that serves time
24 more than one year and the Court determines that the
25 probative value outweighs its prejudicial effect, then

State versus Ivery

1 doubt. The standard is beyond a reasonable doubt. It
2 simply means you're firmly convinced. It means the doubt
3 would be reasonable that's left in your mind.

4 I want to take a few moments to summarize
5 with you how the evidence that we put before you today and
6 it, in deed, does show beyond a reasonable doubt how this
7 defendant is guilty. In order to convict this defendant
8 there has to be evidence of each of the elements of the
9 offense for which the defendant has been charged.

10 As you heard the defendant is charged with
11 defendant is charged with distribution of cocaine base and
12 cocaine base within one half mile of a school. I think I
13 tripped on that in my opening and I hope I had enough
14 coffee this afternoon to get out of my mouth the rest of
15 my closing, but that is the accurate charges in the case.

16 As the State as I said I have to prove every
17 element of those crimes and show you that I've proven each
18 element beyond a reasonable doubt. The elements of those
19 crimes are for distributing cocaine base, the defendant
20 distributed, which means he delivered over than by
21 administering or dispensing which would be like what a
22 pharmacist does. He delivered meaning he actually handed
23 it to someone, in this case, or transferred cocaine base.

24 So let's look at distribute. You saw the
25 video, you have affidavit's from the confidential

State versus Ivery

1 informant, you saw him speak with him. You have testimony
2 from Detective Cothran and all of it indicates that this
3 defendant delivered crack to Mr. Grant in exchange for
4 \$140 which was provided to him by Detective Cothran.

5 Now, you heard that this buy was monitored
6 the entire time it was occurring and you heard that the CI
7 and his vehicle was searched both before and after the
8 buy. The only place, ladies and gentlemen, that these
9 drugs could have come from was this defendant. You saw
10 the entire video and, in fact, it was probably fairly
11 tedious in parts of it but there is a reason you got to
12 watch the entire video and that reason is the integrity of
13 the case. It is something that Detective Cothran has hit
14 on, it's something I'm going to hit on now.

15 Integrity is important here. We want you to
16 see everything from beginning to end. There's nothing
17 hidden from you. Everything that you saw is exactly what
18 happened that day. The only place that these drugs could
19 have come from was from the individual that handed them to
20 this confidential informant on the video.

21 I submit to you if you listen closely to the
22 video as was suggested by Detective Cothran, you can hear
23 this defendant and you could hear the CI talking about the
24 quality of the drugs that were just handed over. You have
25 the video in evidence and if you feel it's necessary to

State versus Ivery

1 listen to it again, we have that available if you need to.

2 As to the second element whether he
3 delivered, he delivered cocaine base which is crack. You
4 heard James Armstrong. He testified that all together
5 this substance is 1.79 grams of crack. You'll have this
6 in your jury deliberation room. You can look at it and
7 you can see it's broken up and you also have the lab
8 report that shows it tested positive as cocaine base. I
9 don't think there's any doubt that the substance before
10 you is cocaine base.

11 The State also has to prove for the
12 additional charge that the defendant distributed cocaine
13 base within the distance of half mile of a school knowing
14 that he was within that distance. You heard testimony
15 from the detective that the school, in this case, the
16 community center was within one half mile of this
17 defendant's residence. You ask yourself do you know if
18 there is a school within a one block radius of your
19 residence? Is that something you would know?

20 Now, you may not like the informant in this
21 case or his past. I can tell I don't like him very much
22 myself. People don't like drug dealers and don't hang out
23 with drug dealers. It's criminals that hang out with drug
24 dealers and dealers are the people that they hang out
25 with. We can't as prosecutors or detectives try to hide

State versus Ivery

1 going to conclude, common sense. Common sense is my final
2 statement that I worked out here because I started out
3 with there was some kind of deal. You just have to apply
4 your common sense and if you honestly believe that the
5 government has failed -- this is a lesson to take that
6 extra step but do something -- this is a learning
7 experience but not at the expense of my client.

8 Thank you.

9 THE COURT: Thank you, Mr. Hamilton.

10 Members of the jury, it is now my duty as the
11 trial judge to instruct you on the law applicable to this
12 case and in that regard it is your duty to accept and
13 apply the law as I state it to you. Furthermore, it is
14 your exclusive duty to decide all the issues of the fact
15 in this case and to determine the effect, value, weight
16 and truth of the evidence. Both the State and this
17 defendant have the right to expect that you will carefully
18 and consider and evaluate the evidence and apply the law
19 of this case to it so that in the end both the State of
20 South Carolina and this defendant will have received a
21 fair and impartial trial.

22 Furthermore, I want you to understand that
23 when I use the word defendant I refer to Mr. Gregory Allan
24 Ivery. Also, it is important to understand that the State
25 of South Carolina charges the defendant with the offense

State versus Ivery

1 known as distribution of cocaine base, crack cocaine, and
2 distribution of cocaine base within one half mile of a
3 school or park. These offenses are in violation of
4 Section 44-53-0375 and 44-53-0445 of the South Carolina
5 Code of Laws that amended. To these charges the defendant
6 has entered a plea of not guilty.

7 His plea of not guilty placed the burden on
8 the State to prove the guilt of the defendant beyond a
9 reasonable doubt. It is vital to understand that the
10 defendant is presumed under the law to be innocent of the
11 charges. It is a fundamental rule of our law that a
12 defendant regardless of the seriousness of the charges
13 against him is always presumed innocent of the crimes for
14 which he is charged unless and until his guilt has been
15 proved by evidence that satisfies you beyond a reasonable
16 doubt.

17 The presumption of innocence is not a mere
18 legal theory or legal phrase. The presumption of
19 innocence is very important and you need to understand
20 this presumption accompanies the defendant from the time
21 of his arrest and appearance in this court and continues
22 with the defendant even after you retire to the jury room
23 to deliberate.

24 In other words, the defendant receives the
25 benefit of the presumption of innocence until the very end

State versus Ivery

1 of this trial when you would deliberate upon the evidence
2 and decide whether the State has proven his guilt beyond a
3 reasonable doubt.

4 Proof beyond a reasonable doubt is proof that
5 leaves you firmly convinced of the defendant's guilt.

6 There are few things that we know with absolute certainty
7 so even in criminal cases the law does not require proof
8 that overcomes every possible doubt. However, based on
9 your consideration of the evidence you are firmly
10 convinced the defendant is guilty of the crimes charged,
11 you must find him guilty.

12 If on the other hand, you think there's a
13 real possibility that he is not guilty, you must give him
14 the benefit of the doubt and find him not guilty. Please
15 understand that reasonable doubt may arise from evidence
16 that has been presented in the case or from the lack of
17 evidence in the case.

18 It is your responsibility to determine
19 whether or not reasonable doubt exists as to the guilt of
20 this defendant. I charge you that the defendant is
21 entitled to every reasonable doubt arising in the whole
22 case. If upon any issue of fact essential to conviction
23 and a verdict of guilty you have a reasonable doubt as to
24 how that issue should be resolved, it would be your duty
25 to resolve that reasonable doubt in favor of the

State versus Ivery

1 defendant. Thus in summary it is important to understand
2 that a defendant is not required to prove his innocence.
3 Instead the state is required by law to prove every
4 essential element of offenses charges against the
5 defendant by evidence which satisfies you of his guilt
6 beyond a reasonable doubt. Only then can you convict the
7 defendant and find him guilty.

8 Furthermore, evidence can be direct or
9 circumstantial. Direct evidence is testimony by a witness
10 about what the witness personally saw or heard or did.
11 Circumstantial evidence is indirect evidence. In other
12 words, it is proof of one or more facts from which one can
13 find another fact. You may consider both direct and
14 circumstantial evidence equally.

15 During this trial, you and I have separate
16 duties to perform. As the Judge, it is my responsibility
17 to preside over this trial. Furthermore I have the duty
18 to rule upon the admissibility of the evidence offered
19 during the trial. In that regard, you are to consider
20 only the evidence before you, thus you are to consider
21 only the testimony which as been presented from this
22 witness stand together with any exhibits submitted into
23 the record of this case.

24 Also I have the additional duty to charge you
25 on the law applicable to this case, and in that regard it

State versus Ivery

1 is your duty to accept and apply the law as I now state it
2 to you. If you have preconceived ideas as to what the law
3 is or what the ought to be and it does not agree with what
4 I tell you the law is, then you are obligated under your
5 oath to abandon these preconceptions and accept the law as
6 I now state it to you.

7 In this trial you are the sole and exclusive
8 judge of the facts and I am the judge of the law. Do not
9 infer that I have any opinion about the facts in this case
10 from anything I have said during the course of this trial.
11 In this regard the law simply does not permit me to have
12 an opinion about the facts. As to yours it is your duty
13 alone to determine the effect, value, weight and truth of
14 the evidence presented during the course of this trial.

15 Furthermore, it is your job as jurors to
16 determine the credibility and believability of the
17 witnesses who have testified in this case. In determining
18 the believability of witnesses who have testified in this
19 trial, you may believe one witness over many or many over
20 one. You may believe a part of the testimony of a witness
21 and reject the remaining part. You may believe the
22 testimony of a witness in its entirety or reject it in
23 full. You may consider whether the witness has an
24 interest in the result of the trial, whether the witness
25 is prejudice towards either part, the opportunity for the

State versus Ivery

1 witness to have seen the matters and things about which
2 the witness may testify and the way the witness acts on
3 the witness stand.

4 I further instruct you that the defendant did
5 not testify on his own behalf is not a factor to be
6 considered by you in any way in your deliberations and in
7 your consideration on the question of guilt or innocence.
8 In this regard, the defendant has the constitutional right
9 to remain silent. Any exercise of this right must not be
10 considered by you in your deliberations. The fact that
11 the defendant did not testify should not even be discussed
12 in the jury room. The burden of proof as I stated to you
13 is on the State. The defendant has no obligation to prove
14 his innocence. The burden of proof remains with the State
15 to prove the defendant's guilt beyond a reasonable doubt
16 and the fact that a defendant did not testify is not a
17 factor to be considered by you in deciding the guilt or
18 the innocence of the defendant.

19 When you consider the whole case if you have
20 a reasonable doubt as to the guilt or the innocence of the
21 defendant then he is entitled to that reasonable doubt and
22 would be entitled to a verdict of not guilty. However, if
23 upon considering the whole case, you find that the State
24 has proved by evidence which satisfies you of the guilt of
25 the defendant beyond a reasonable doubt, then in such

State versus Ivery

1 circumstance it would equally be your duty to convict the
2 defendant and find him guilty.

3 Furthermore, the rules of evidence ordinarily
4 do not permit witnesses to testify regarding opinions or
5 conclusions. An exception to this rule exists for
6 witnesses we call expert witnesses. A witness, who by
7 education or experience has become an expert in some art,
8 science, or profession may give an opinion as to the
9 subject the witness claims to be an expert in and they
10 also give the reasons for the opinion. You should
11 consider any expert opinion given by a witness like any
12 other evidence give it the weight you think it deserves.

13 If you decide that an expert witness's
14 opinion is not based on sufficient education and
15 experience or if you decide that the reasons that are
16 given in support of the opinion are not sound or that the
17 opinion is outweighed by other evidence, you may disregard
18 the opinion entirely. An expert witnesses testimony is to
19 be given no greater weight than that of any other witness
20 simply because the witness is an expert and you do not
21 have to accept an expert's opinion even though it is
22 uncontradicted.

23 In exercising your mental processes and
24 attempting to decide the truth, the law simply requires
25 that you exercise your good judgment, your common sense,

State versus Ivery

1 your sense of logic and reason and your experiences in
2 life. Then you apply these attributes to the evidence and
3 apply the law as I now state it to you and thus arrive at
4 a verdict.

5 Please understand that the testimony of a
6 police officer is not entitled to more weight than that of
7 any other witness. You are the sole judges of the
8 credibility of a witness and you are not to give more
9 weight to a police officer's testimony solely because he
10 is a police officer. Rather you should judge an officer's
11 testimony by the same standards that you apply to all
12 other witnesses.

13 The defendant is charged with distribution of
14 cocaine base commonly referred to as crack cocaine. Under
15 South Carolina Code Section 44-54-0375. In this state the
16 State must prove beyond a reasonable doubt that the
17 defendant distributed cocaine base. Distribute means to
18 deliver or to actually, constructively, or attempt to
19 transfer a drug other than by administering or dispensing.
20 Deliver means to actually, constructively or attempt to
21 transfer a drug. A transfer can involve an exchange for
22 money, a barter or a gift. It does not have to be
23 anything given in exchange for the drugs for a transfer to
24 constitute distribution. Simply a giving of drugs from
25 one person to another with or without any exchange of any

State versus Ivery

1 compensation would constitute distribution.

2 The defendant is also charged with
3 distribution of cocaine base within proximity of a school
4 or a park. In this regard, the State must prove beyond a
5 reasonable doubt that the defendant distributed, sold,
6 purchased, manufactured or unlawfully possessed with
7 intent to distribute cocaine base within one half miles of
8 the grounds of a public, private, elementary, middle or
9 secondary school, playground or a park, a public
10 vocational or trade school or technical education center
11 or a public or private college or university.

12 Ladies and gentlemen, I am now drawing to the
13 end of the charge. I want you to clearly understand that
14 you are not partisans or advocates for the State or for
15 the defendants. You do not serve as jurors to award your
16 friends or punish your enemies. In this regard, you have
17 been selected by both the State and this defendant to be
18 fair and impartial jurors. It is your duty by your joint
19 deliberations to determine the truth in this case giving
20 to this defendant the benefit of any reasonable doubt on
21 each and even issue. Then to the facts which you have
22 determined to be true, you should take and apply the law
23 as it has been given to you by this Court and thus arrive
24 at a verdict which speaks the truth in this case.

25 In fact, the word verdict which as a latin

State versus Ivery

1 derivative means to speak to truth, thus when you have
2 accomplished these responsibilities you will have
3 satisfied your oath as jurors and you have discharged your
4 duty to this court.

5 Ms. Clerk, would you please hand them the
6 jury form.

7 Now, Mr. Foreman, I have handed you the jury
8 form. When you arrive at a verdict for each offense you
9 will write your verdict on the form. For each separate
10 charge if the State has failed to prove the guilt of this
11 defendant beyond a reasonable doubt, your verdict for the
12 charge will be two words, not guilty. However, should the
13 State have proved their case against this defendant below
14 beyond a reasonable doubt, then your verdict on that
15 charge will be one word, guilty.

16 Mr. Foreman, once a decision has been made
17 for each charges, just check whichever choice is your
18 word. The verdict that you rendered in this case must be
19 verdict of each and every juror. It must be your
20 unanimous verdict. All 12 jurors must agree on the
21 verdict for which you authorized for the foreman to write
22 for the jury.

23 Mr. Foreman and members of the jury, I want
24 you to further understand that the order in which the
25 choices of verdict appear on the verdict form are not

State versus Ivery

1 suggestive of any verdict on the part of this court. The
2 verdict in this case is to be determined by you and not
3 the Court.

4 Furthermore, ladies and gentlemen, please
5 understand that even though I have given the verdict form
6 to the foreman, it is not his verdict alone. It is the
7 verdict of all 12 of you and I emphasize again it must be
8 unanimous.

9 In a moment, you will retire to the jury
10 room. However, I would ask that you do not begin your
11 deliberations until you are told to do so. The law
12 requires that I now consult with the attorneys about this
13 charge. After doing so, the bailiff will bring in the
14 items of evidence and instruct you to begin your
15 deliberations.

16 Also, should you have any questions during
17 your deliberations, you must put them in writing and send
18 them to me by way of the bailiff. The bailiff will be
19 placed immediately outside the jury doors to provide
20 security and assistance for you during your deliberations.

21 Once you have reached your verdict, please
22 knock on the jury room door and ask the bailiff to advise
23 the Court that you have reached a verdict and we will
24 return you to the courtroom as promptly as possible
25 thereafter.

State versus Ivery

1 Thank you. You may retire to the jury room,
2 but again, do not begin your deliberations.

3 (Jury exits courtroom.)

4 Any objections to the charge from the State?

5 MS. PRICE: Nothing from the State, Your
6 Honor.

7 THE COURT: Anything from the defense?

8 MR. HAMILTON: Nothing from the defense.

9 THE COURT: Please take a look at the items
10 of evidence, make sure they're in order and send them
11 back.

12 Are all items of evidence in order?

13 MS. PRICE: Yes, Your Honor.

14 THE COURT: From the defense?

15 MR. HAMILTON: Yes, Your Honor.

16 THE COURT: Send them back and tell them to
17 begin and bring out the alternate.

18 (Alternate juror dismissed.)

19 (Jury begins deliberations.)

20 (Whereupon, this trial was in recess during
21 deliberations.)

22 We have a note from the jury. They want to
23 see the transaction. Go ahead and set up and bring them
24 in.

25 (Jury re-enters the courtroom.)

State versus Ivery

1 (Video played in open court.)

2 If you go on back in to the jury room and
3 continue your deliberations. Thank you.

4 THE BAILIFF: Come to order, court is in
5 session.

6 THE COURT: We have a note from the jury. It
7 says, "We can not reach a decision. Eleven guilty, one
8 not guilty, the juror voting not guilty will not,"
9 underling, "change their vote under any circumstances."
10 I'll just give them an Allan charge and see if ---

11 MS. PRICE: That's fine, sir.

12 THE COURT: Mr. Hamilton.

13 MR. HAMILTON: Your Honor, with the hour
14 being as it is, I will accept that juror's opinion.

15 THE COURT: I'm going to give them an Allan
16 charge one time and a little bit of time and if they can't
17 reach a verdict, we'll go from there. Go ahead and bring
18 them in.

19 (Jury re-enters the courtroom.)

20 Ladies and gentlemen of the jury, I'm going
21 to give you one more charge and then we'll go from there.
22 Members of the jury, when a matter is in dispute, it isn't
23 always easy for even two people to agree so when 12 people
24 must agree it becomes even more difficult. In most case,
25 absolute certainty can not be reached or expected.

State versus Ivery

1 However, you have a duty to make every reasonable effort
2 to reach a verdict. In doing this, you should consult
3 with one another, express your own views, and listen to
4 the opinions of your fellow jurors, tell each other how
5 you feel and why you feel that way, discuss your
6 differences.

7 Although the verdict of your jury must be
8 unanimous, every one of you has a right to your own
9 opinion. The verdict that you agree to must be your own
10 verdict, the result of your own convictions, and you
11 should not give up your firmly held beliefs merely to be
12 in agreement with your fellow jurors. The majority should
13 consider the minority's position and visa versa. You
14 should carefully consider and respect the opinions of each
15 other and re-evaluate your position for reasonableness,
16 correctness and impartiality.

17 You must lay aside all outside matters and
18 re-examine the questions before you based on the law and
19 evidence in this case.

20 I want you to understand if you can not agree
21 on a verdict in this case, we're just going to have to
22 come back on week with another jury pool, select another
23 jury of 12 people and one alternate. Judge is going to
24 have to be here to try the case. Lawyers are going to
25 have to be up here and try the case again, the bailiffs

State versus Ivery

1 will have to be here, law clerk will have to be here; all
2 of that time, all of that effort, all of those expenses
3 associated with trying this case again, and I don't see
4 how another group of 12 people will do a better job than
5 the 12 of you.

6 So I would ask that you go back in your jury
7 room, just re-examine your beliefs, think about what
8 you're doing, respect each other's opinion and try to make
9 a decision within a reasonable amount of time.

10 Thank you very much. You may proceed.

11 (Jury question marked as Court's Exhibit No.
12 2 for identification.)

13 Any objections to the charge from the State?

14 MS. PRICE: No, Your Honor.

15 THE COURT: From the defense?

16 MR. HAMILTON: No, Your Honor.

17 THE COURT: We'll take it easy until
18 something happens.

19 (Whereupon, court was in recess during
20 deliberations.)

21 (Verdict reached by jury at 7:15 p.m.)

22 THE COURT: I understand we have a verdict.
23 I want to go over a few things in this courtroom and I
24 want everybody to be clear on what I'm about to say. This
25 jury is coming back with a verdict. I don't know what it

State versus Ivery

1 is, guilty or not guilty, but they've had a hard job.
2 They've worked hard. They've been here all day working on
3 this thing and I don't want any reaction at all from the
4 public to this verdict or anybody in this courtroom. If I
5 hear somebody clapping or saying yeah, talking or doing
6 anything and I hear it, I'm going to put you in jail for
7 10 days. I want to be clear about that. If anybody in
8 this courtroom does not think they can abide by my ruling,
9 you need to leave the courtroom now because when that jury
10 comes back in, we're going to lock that door down until
11 that verdict is received and they are dismissed. So if
12 anybody needs to leave right now, please do.

13 Does anybody have any questions about what I
14 said?

15 (No response.)

16 Go ahead and bring out the jury.

17 (Jury re-enters the courtroom.)

18 Mr. Foreman, do you have a verdict?

19 MR. FOREMAN: Yes, we do.

20 THE COURT: Would you hand it to the bailiff,
21 please.

22 Madam Clerk, would you publish the verdict.

23 THE CLERK: Yes, sir. Your Honor, the State
24 versus Gregory Allan Ivery, Case 2011-GS-23-9810 and 9811
25 as to the charge of distribution of cocaine base, we the

State versus Ivery

1 jury unanimously find the defendant, Gregory Allan Ivery,
2 guilty. As to the charge of distribution of cocaine base
3 in proximity of a school or park, we the jury find the
4 defendant, Gregory Allan Ivery, guilty.

5 Ladies and gentlemen, the verdict that I just
6 published is the verdict that you reached in the jury
7 room, I ask you was that your verdict then and is it your
8 verdict now? If so, please raise your right hand.

9 (Jury complies.)

10 THE COURT: Thank you, very much. Is there
11 any need for further from the defense?

12 MR. HAMILTON: Your Honor, I would like the
13 jury poled.

14 THE COURT: Go ahead and pole the jury.

15 THE CLERK: Yes, sir.

16 As I call your name please answer yes or no.

17 Khang Van, is your verdict guilty, if yes,
18 say yes, if it is.

19 JUROR VAN: Yes.

20 THE CLERK: Pamela Moore.

21 JUROR MOORE: Yes.

22 THE CLERK: Thank you. James Smith.

23 JUROR SMITH: Yes.

24 THE CLERK: Jayne Cleveland.

25 JUROR CLEVELAND: Yes.

State versus Ivery

1 THE CLERK: Alice Piepho.

2 JUROR PIEPHO: Yes.

3 THE CLERK: Michael Whitaker.

4 JUROR WHITAKER: Yes.

5 THE CLERK: Bruce Berryhill.

6 JUROR BERRYHILL: Yes.

7 THE CLERK: Kim Summers.

8 JUROR SOMMERS: Yes.

9 THE CLERK: Angela Cheslak.

10 JUROR CHESLAK: Yes.

11 THE CLERK: Lataya Peronet

12 JUROR PERONET: Yes.

13 THE CLERK: Brittany Stalter.

14 JUROR STALTER: Yes.

15 THE CLERK: Richard Myers.

16 JUROR MYERS: Yes.

17 THE COURT: Thank you very much. Members of
18 the jury, I want to thank you for your service. Thank you
19 for your efforts and all that you have done. You are free
20 to go and you have earned a three-year exemption by being
21 here and you will be paid. If you have any complaints
22 about the amount of the check, you can complain to this
23 man right there. I didn't have anything to do with it.
24 You are free to go and everybody else remain
25 seated.

State versus Ivery

1 (Jury dismissed from the trial.)

2 Any motions from the defense?

3 MR. HAMILTON: Your Honor, we just would
4 renew our previous motions and directed verdict. Also, we
5 make a new motion that the jury had got into a hard
6 situation and possibly coerced into reaching a verdict.

7 THE COURT: Thank you, very much. I deny
8 those motions. We poled the jury and they raised their
9 right hand and verbally responded that it was their
10 verdict. So those motions are denied.

11 Solicitor, whenever you're ready.

12 MS. PRICE: Thank you, Your Honor. You heard
13 the facts that were presented at trial today. I'd like to
14 just tell you that this is a distribution of crack third
15 offense for the purposes of sentences that's reflected on
16 the sentencing sheet. As to his prior record, he has a
17 1981 possession with intent to distribute heroine, 1985,
18 he violated parole and had another PWID heroine, 1986
19 distributing heroine, two counts, and 2009 possession of
20 drug paraphernalia.

21 Your Honor, as you know the distribution
22 third carries 10 to 30 years, can not be suspended and no
23 home incarceration is permissible. And the one half mile
24 charge carries up to 10 years.

25 Your Honor, there is at least one other

State versus Ivery

1 pending charge in our office right now based on another
2 buy conducted by this same confidential informant and it's
3 my understanding based on speaking with law enforcement
4 that this individual has been active and pervasive in his
5 community as a distributor.

6 The State is asking for the maximum amount of
7 time this Court is willing to give this individual and/or
8 to run the half mile consecutive to the distribution
9 charge. But, of course, Your Honor has heard the facts
10 today so we leave it to the Court's discretion.

11 THE COURT: Mr. Hamilton, I'd be glad to hear
12 from you if you'd like to say anything.

13 MR. HAMILTON: Your Honor, I can't argue with
14 the verdict of the jury other than that the circumstances
15 involved in this in that there was a lot of information
16 that was presented that the jury could have found that the
17 State did not meet its burden, but they did find that they
18 did meet the burden.

19 He's here and, Your Honor, you can see that
20 his family is here. He has a supportive family. He has
21 some stuff in the past and all of it is 20 years old, over
22 20 years old in most of his involvement. This information
23 about him being a menace to society or being -- I don't
24 know how much the Court can rely on that. Other than
25 that, his record shows that he has not been involved in in

State versus Ivery

1 criminal activity for over 20 years. If I'm mistaken on
2 that addition or subtraction, I apologize.

3 He has some disability -- don't you draw some
4 kind of disability?

5 DEFENDANT IVERY: I don't draw it no more but
6 I've been disabled for about 13 years, stroke and
7 aneurism.

8 MR. HAMILTON: So his health was not all that
9 -- he exercised his right to go to trial. He didn't take
10 the stand to try to mislead the Court other than asking
11 everybody to do their job, even to me to do my job, the
12 prosecutor, the Court and the jury. Everybody did their
13 job, Judge, and you've got a job to do. It's just that I
14 don't think that he presented nothing to this Court that
15 he should be punished to the degree that he should get the
16 maximum penalty and run it concurrent.

17 This case started out with a 10-year plea and
18 that's what they thought about it at that time, but he
19 exercised his right because it is a right. I don't think
20 he abused it because he didn't come up and take the stand
21 -- in federal court you get punished for testifying and
22 losing -- so I think the State court should recognize he
23 did not do that.

24 THE COURT: Anything further?

25 DEFENDANT IVERY: I want to apologize to the

State versus Ivery

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

10 THE COURT: In reference to the distribution
11 of cocaine base, third offense, the sentence of the Court
12 is 23 years. In reference to the proximity of the school,
13 the sentence of the Court is 10 years and it will run
14 concurrent.

15 Thank you.

16 MS. PRICE: Thank you, Your Honor.

17 ---END OF TRANSCRIPT RECORD---

18 I, the undersigned Caroline Hiskell, Official
19 Court Reporter for the Thirteenth Judicial Circuit of the
20 State of South Carolina, do hereby certify that the
21 foregoing is a true, accurate, and complete transcript of
22 record of all the proceedings had and evidence introduced
23 in the trial of the captioned case, relative to appeal, in
24 the Court of General Sessions, Greenville, South Carolina
25 on the 11th day of October, 2012.

WITNESSES

Charles Cothran

Greenville Police Department

9/19/2011

ARREST WARRANT NUMBER

M802284

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY

Foreperson of Petit Jury

Date: 10/11/12

DOCKET NO. 2011-GS-23-

KBS

009810

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June

TERM 2011 ²⁰¹²

THE STATE

vs.

GREGORY ALLAN IVERY

Indictment for

0107

DISTRIBUTION OF COCAINE BASE WITHIN 1/2
MILE OF A SCHOOL OR PARK

VIOLATION § 44-53-0445

RECEIVED

DEC 27 2011

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE WITHIN 1/2 MILE OF A
SCHOOL OR PARK

JUN 12 2012

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

That GREGORY ALLAN IVERY did in Greenville County, on or about the 30th day of June 2011, distribute a quantity of Cocaine Base (Crack Cocaine), a controlled substance, while being within one-half (1/2) mile proximity of NICHOLTOWN COMMUNITY CENTER. This is in violation of §44-53-445 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Gregory Allan Ivery

AKA:

Race: BLACK Sex: M Age: 58DOB: SS#

Address:

City, State, Zip: TAYLORS, SC 29687DL#: SID#*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near schoolin violation of § 44-53-0445(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0108☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Price, Lauren DavisSC Bar#DefendantAttorney for DefendantSC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code today § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Obtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Hick

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2157Sentence Date: 10-11-2012

WITNESSES

Charles Cothran

Greenville Police Department

9/19/2011

ARREST WARRANT NUMBER
M802283

ACTION OF GRAND JURY

TRUE BILL

Jonathan P. Davis
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUilty

Foreperson of Petit Jury

Date: *10/11/12*

DOCKET NO. 2011-GS-23-^{KBS} 009811

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June

TERM *2012*
2011

THE STATE

vs.

GREGORY ALLAN IVERY

Indictment for

3014

DISTRIBUTION OF COCAINE BASE
(CRACK COCAINE)

VIOLATION § 44-53-0375

RECEIVED

DEC 27 2011

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE (CRACK COCAINE)

At a Court of General Sessions, convened on **JUN 12 2012** the Grand Jurors of Greenville
County present upon their oath:

That GREGORY ALLAN IVERY did in Greenville County, on or about the 30th day of June 2011, distribute,
dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver to an undercover operative a quantity
of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law.

This is in violation of §44-53-375 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

10-30

COUNTY OF Greenville
 STATE VS.
Gregory Allan Ivery

AKA:

Race: BLACK Sex: M Age: 58DOB: SS#:Address: CircleCity, State, Zip: Mauldin, SC 29662DL#: SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: DRUGS/ MFG/DIST/METH OR COCAINE BASE 3RD OFFENSE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS2309811A/W#: M802283Date of Offense: 6/25/2011S.C. Code § : 44-53-0375CDR Code #: 3014

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 44-53-0375(B)(3) of the S.C. Code of Laws, bearing CDR Code # 3039
☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Price, Lauren Davis44011 SC Bar#Gregory Ivery DefendantAttorney for Defendant252 SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 23 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: today☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPSObtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$100.00
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$2500
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$5.00
3% to County (if paid in installments)		\$
TOTAL		\$

Clerk of Court/ Deputy Clerk

Court Reporter: Paul B.W. Chensim

SCCA/217 (03/2011)

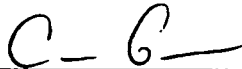
Presiding Judge

Judge Code: 2157Sentence Date: 10-11-2012

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 22nd, 2014



Carmen V. Ganjehsani
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT

APPELLATE CASE NO. 2012-213216

FINAL BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
I. The Trial Court erred in admitting a video recording of the alleged drug transaction where the State failed to properly authenticate the video when it did not present any witness at trial who could testify that the video accurately depicted the alleged drug transaction.....	5
II. The <u>Allen</u> charge given by the Trial Court was unconstitutionally coercive where (1) it was improperly directed to the sole juror voting not guilty; and (2) the Trial Court strongly urged the jury to return a verdict by apprising the jury of the time, expense and effort that would be incurred if the case had to be retried	10
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<u>Allen v. United States</u> , 164 U.S. 492 (1896)	passim
<u>Dawson v. State</u> , 352 S.C. 15, 572 S.E.2d 445 (2002)	14
<u>Green v. State</u> , 351 S.C. 184, 569 S.E.2d 318 (2002).....	11, 13
<u>Lowenfield v. Phelps</u> , 484 U.S. 231 (1988).....	11, 12
<u>State v. Aragon</u> , 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003).....	7
<u>State v. Campbell</u> , 259 S.C. 339, 191 S.E.2d 770 (1972)	7
<u>State v. Jones</u> , 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996).....	13
<u>State v. Lee</u> , 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012).....	8
<u>Trull v. State</u> , 811 So.2d 243 (Miss. Ct. App. 2000).....	8
<u>Tucker v. Catoe</u> , 346 S.C. 483, 552 S.E.2d 712 (2001)	11, 12, 13, 14
<u>United States v. Medina-Herrera</u> , 606 F.2d 770 (7th Cir. 1979)	7
<u>United States v. Rivera-Maldonado</u> , 194 F.3d 224 (1st Cir. 1999)	7

Statutes

S.C. CODE ANN. § 44-53-375	4
S.C. Code ANN. § 44-53-444	4

Rules

Rule 901, SCORE.....	6
----------------------	---

STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court erred in admitting a video recording of the alleged drug transaction where the State failed to properly authenticate the video when it did not present any witness at trial who could testify that the video accurately depicted the alleged drug transaction.
- II. The Allen charge given by the Trial Court was unconstitutionally coercive where (1) it was improperly directed to the sole juror voting not guilty; and (2) the Trial Court strongly urged the jury to return a verdict by apprising the jury of the time, expense and effort that would be incurred if the case had to be retried.

STATEMENT OF THE CASE

On June 12, 2012, Appellant Gregory Allan Ivery was indicted by the Greenville County Grand Jury for (1) distribution of crack cocaine in violation of S.C. CODE ANN. § 44-53-375; and (2) distribution of crack cocaine within ½ mile of a school or park in violation of § 44-53-445. R.106.

A trial was held before the Honorable William Seals and a jury on October 11, 2012.

R. 1. Ivery was represented by Ernest Hamilton, and the State was represented by Assistant Solicitor Lauren Davis Price. Id.

After informing the court that it could not reach a decision with “eleven guilty, one not guilty,” the Trial Court gave an Allen¹ charge, after which the jury returned a verdict of guilty on both counts. R. 95, l. 6 – 99, l. 4. The Trial Court sentenced Ivery to (1) twenty-three years as a third offender for distribution of crack cocaine; and (2) ten years concurrent on the proximity to a school or park charge. R. 104, ll. 10-14.

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

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

ARGUMENT

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

At trial, Detective Charles Keith Cothran testified that an individual named James Grant signed an agreement to work as a confidential informant with the Greenville City Police Department. R. 24, l. 5 – 25, l. 25. Grant asked if there was anything he could do for the police department because he had been charged with shoplifting and therefore, he decided to become a confidential informant in an effort to try to get assistance with his shoplifting charge. R. 37, ll. 14-21; 49, ll. 3-10.

Grant informed Detective Cothran that he could purchase crack cocaine from an individual named Greg Ivery. R. 24, ll. 9-14. Detective Cothran told Grant to arrange a deal for June 30, 2011 and to come to the police department that day. R. 26, ll. 2-4.

On June 30, 2011, Detective Cothran testified that Grant arrived around 11:40 a.m. and he equipped Grant with a hidden audio and video recording device. R. 27, l. 7 – 29, l. 17. Detective Cothran also said that Grant explained the he was going to buy \$140 worth of crack cocaine from Ivery, and Detective Cothran accordingly gave Grant \$140 of police funds for the purpose of purchasing crack cocaine from Ivery. R. 29, ll. 19-24.

Detective Cothran then said that he and other detectives got in their vehicles, Grant got in his own vehicle, and Grant then followed the officers to the deal location which was purportedly Ivery's residence. R. 30, l. 23 – 31, l. 9.

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

the home to retrieve the crack cocaine and brought it to Grant. Grant then left and returned to the police department. R. 31, l. 14 – 32, l. 1.

Detective Cothran did not physically see or observe any of the alleged drug transaction. R. 32, ll. 2-4.

At trial, the State moved to admit the video recording of the alleged drug transaction into evidence and publish it to the jury. R. 42, l. 21 – 43, l. 7; State's Ex. 4 (video). Ivery's counsel objected on the ground that Detective Cothran could not authenticate the video because he was not in the video and did not observe the events that occurred in the video. R. 43, ll. 9-13. The Trial Court overruled Ivery's objection and the video was admitted into evidence and played for the jury in open court. R. 43, ll. 14-22. Ivery renewed his objection to the admissibility of the video recording at the close of the State's case because Detective Cothran could not verify that the video was an accurate portrayal of the alleged transaction. R. 78, ll. 14-21.

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

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

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

The State presented no witness at trial who could testify that the video accurately depicted the alleged drug transaction. Detective Cothran conceded he did not observe the alleged transaction. R. 32, ll. 2-4. While Detective Cothran testified that he could hear the conversation during the alleged transaction, he never verified at trial that it was Ivery’s voice on the audio. Id.; cf. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 626-27 (Ct. App. 2003) (finding the State properly authenticated taped telephone conversation between victim and defendant where victim had known defendant for over ten years and recognized his voice during the conversation).

At trial, Grant denied ever purchasing any crack from Ivery and denied that it was him appearing in the video recording. Grant further denied circling Ivery’s picture in a subsequent photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18 – 21. Therefore, the State presented no witness who could testify that the video recording accurately represented the events that occurred during the alleged drug transaction.

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

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

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

The Trial Court's improper admission of the video recording was not harmless where there was a reasonable probability that the jury's verdict was influenced by the challenged evidence." Lee, 339 S.C. at 527, 732 S.E.2d at 228. Here, the State heavily relied on the videotape to identify Ivery as the individual who allegedly sold drugs to Grant. In the State's opening statement, the solicitor informed the jury that the entire drug transaction was recorded on video and let the jury know that they would be able to view the video. R. 11, ll. 9-12.

During trial, Detective Cothran could only identify Ivery as the person who allegedly sold the drugs by watching the video since he did not observe the transaction firsthand. R. 44, ll. 12-19.

During the State's closing, the solicitor also highlighted the video, repeatedly reminding the jury that they saw the entire video of the transaction and that they could watch the video again if they needed to. R. 80, ll. 24-25; 81, ll. 9-12; 81, l. 24 – 82, l. 1.

During their deliberations, the jury asked to view the video of the transaction again and the video was replayed for them. R. 94, l. 22 – 95, l. 1.

Without the video recording, the State's identification of Ivery as the one who sold drugs to Grant would have rested primarily on Grant's pre-trial identification of Ivery, a witness who then declined to identify Ivery at trial as the seller and who denied ever circling Ivery's picture in a photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18-21. Although it was a jury determination as to the credibility of Grant, the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Accordingly, it was error for the Trial Court to have admitted the video recording into evidence, and Ivery is entitled to a new trial.

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

During jury deliberations, the jury sent a note back to the court which stated, "We can not reach a decision. Eleven guilty, one not guilty, the juror voting not guilty will not . . . change their vote under any circumstances." R. 95, ll. 6-9. The Trial Court decided to give an Allen² charge over the objection of Ivery's defense counsel who stated that he would "accept that juror's opinion." R. 95, ll. 10-18.

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

Ladies and gentlemen of the jury, I'm going to give you one more charge and then we'll go from there. Members of the jury, when a matter is in dispute, it isn't always easy for even two people to agree so when 12 people must agree it becomes even more difficult. In most case[s], absolute certainty can not be reached or expected.

However, you have a duty to make every reasonable effort to reach a verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors, tell each other how you feel and why you feel that way, discuss your differences.

Although the verdict of your jury must be unanimous, every one of you has a right to your own opinion. The verdict that you agree to must be your own verdict, the result of your own convictions, and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The majority should consider the minority's opinion and visa versa. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness and impartiality.

You must lay aside all outside matters and re-examine the questions before you based on the law and evidence in this case.

I want you to understand if you can not agree on a verdict in this case, we're just going to have to come back on[e] week with another jury pool, select another jury of 12 people and one alternate. Judge is going to have to be here to try the case. Lawyers are going to have to be up here and try the case

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

again, the bailiffs will have to be here, law clerk will have to be here; all of that time, all of that effort, all of those expenses associated with trying this case again, and I don't see how another group of 12 people will do a better job than the 12 of you.

So I would ask that you go back in your jury room, just re-examine your beliefs, think about what you're going, respect each other's opinion and try to make a decision within a reasonable amount of time.

R. 95, l. 20 – 97, l. 9.

The jury returned that same evening with a verdict of guilty for distribution of crack cocaine and guilty for distribution of crack cocaine in proximity to a school or park. R. 98, l. 23 – 99, l. 4.

Ivery's defense counsel argued that with respect to the Allen charge, the jury was "coerced into reaching a verdict." R. 101, ll. 4-6.

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

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

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

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

things, the following factors:

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

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

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

The Allen charge given by the Trial Court in this case was similarly coercive. While the Trial Court informed the “majority [to] consider the minority’s position and visa versa,” the charge as a whole was nevertheless directed to the minority juror when the Trial Court knew that there was only one juror who was voting not guilty and who, according to the rest of the jurors, would not “change their vote under any circumstances.” R. 95, ll. 6-10. In its charge, the Trial Court asked for a re-evaluation of “your position for reasonableness, correctness and impartiality,” and further instructed that “[y]ou must lay aside all outside matters and re-examine the questions before you

based on the law and evidence in this case.” R. 96, ll. 13-19. In the conclusion of its charge, the Trial Court again asked for a “re-examin[ation of] your beliefs.” R. 97, l. 7.

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

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

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

verdict. R. 96, l. 20 – 97, l. 5; Tucker, 346 S.C. at 493, 552 S.E.2d at 717 (finding Allen charge coercive where jury was told of importance of uniramous verdict).

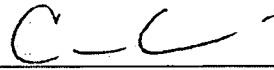
Finally, while the jury volunteered its numerical division and alignment on guilt to the Trial Court, the Trial Court failed to instruct the jury not to state its division in the future should it be deadlocked again. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C-V-G', is written above a horizontal line.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 7th, 2014



Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT

CERTIFICATE OF SERVICE

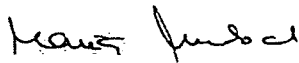
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of February, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2014.



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

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,

V.

GREGORY ALLAN IVERY,

APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467- 8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT.....	9
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.	9
II. Any issue with the trial judge's presentation of an <u>Allen</u> 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.	13
CONCLUSION.....	23

TABLE OF AUTHORITIES

South Carolina Cases:

<u>Bank of New York v. Sumter County</u> , 387 S.C. 147, 691 S.E.2d 473 (2010).	15
<u>Bowers v. Charleston & W. Carolina Ry. Co.</u> , 210 S.C. 367, 42 S.E.2d 705 (1947).	16
<u>Dawson v. State</u> , 352 S.C. 15, 572 S.E.2d 445 (2002).	19
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).	14
<u>Green v. State</u> , 351 S.C. 184, 569 S.E.2d 318 (2002).	20
<u>Nickles v. Seaboard Air Line Ry.</u> , 74 S.C. 102, 54 S.E. 255 (1910).	17, 18
<u>State v. Aragon</u> , 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003).	10
<u>State v. Ayers</u> , 284 S.C. 266, 325 S.E.2d 579 (Ct. App. 1985).	17, 19
<u>State v. Ballew</u> , 83 S.C. 82, 63 S.E. 688 (1909).	16
<u>State v. Bixby</u> , 388 S.C. 528, 698 S.E.2d 572 (2010).	10
<u>State v. Black</u> , 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995).	16
<u>State v. Blalock</u> , 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003).	14
<u>State v. Brown</u> , 402 S.C. 119, 740 S.E.2d 493 (2013).	15
<u>State v. Burnett</u> , 226 S.C. 421, 85 S.E.2d 744 (1954).	16
<u>State v. Darr</u> , 262 S.C. 585, 206 S.E.2d 870 (1974).	17
<u>State v. Douglas</u> , 369 S.C. 424, 632 S.E.2d 845 (2006).	10
<u>State v. Ezell</u> , 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996).	19
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).	10
<u>State v. Groome</u> , 274 S.C. 189, 262 S.E.2d 31 (1980).	9
<u>State v. Hale</u> , 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).	17, 21
<u>State v. Hoffman</u> , 312 S.C. 386, 440 S.E.2d 869 (1994).	14
<u>State v. Hughes</u> , 336 S.C. 585, 521 S.E.2d 500 (1999).	21

<u>State v. Johnson</u> , 363 S.C. 53, 609 S.E.2d 520 (2005).	14
<u>State v. Jones</u> , 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996).	19
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 368 (1995).	10
<u>State v. Kelly</u> , 372 S.C. 167, 641 S.E.2d 468 (Ct. App. 2007).	17
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).	14
<u>State v. Logan</u> , 279 S.C. 345, 306 S.E.2d 622 (1983).	16
<u>State v. McDonald</u> , 343 S.C. 319, 540 S.E.2d 464 (2000).	10
<u>State v. Middleton</u> , 218 S.C. 452, 63 S.E.2d 163 (1951).	20
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997).	21
<u>State v. Pauling</u> , 322 S.C. 95, 470 S.E.2d 106 (1996).	15, 22
<u>State v. Penland</u> , 275 S.C. 537, 273 S.E.2d 765 (1981).	16
<u>State v. Rich</u> , 293 S.C. 172, 359 S.E.2d 281 (1987).	11
<u>State v. Rios</u> , 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010).	15
<u>State v. Robinson</u> , 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2004).	17
<u>State v. Rogers</u> , 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004).	14
<u>State v. Simmons</u> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).	18
<u>State v. Singleton</u> , 319 S.C. 312, 460 S.E.2d 573 (1995).	19, 22
<u>State v. Sullivan</u> , 310 S.C. 311, 426 S.E.2d 766 (1993).	14
<u>State v. Torres</u> , 390 S.C. 618, 703 S.E.2d 226 (2010).	10
<u>State v. Williams</u> , 266 S.C. 325, 223 S.E.2d 38 (1976).	15
<u>State v. Williams</u> , 303 S.C. 410, 401 S.E.2d 168 (1991).	14
<u>State v. Williams</u> , 344 S.C. 260, 543 S.E.2d 260 (Ct. App. 2001).	19, 22
<u>State v. Williams</u> , 386 S.C. 503, 690 S.E.2d 62 (2010).	22

<u>Tucker v. Catoe</u> , 346 S.C. 483, 552 S.E.2d 712 (2001).	19
<u>Winburn v. Minnesota Mut. Life Ins. Co.</u> , 261 S.C. 568, 201 S.E.2d 372 (1973). ...	11, 12
<u>United States Supreme Court Cases:</u>	
<u>Allen v. United States</u> , 164 U.S. 492 (1896).	18
<u>Lowenfield v. Phelps</u> , 484 U.S. 231 (1988).	18
<u>Other State and Federal Cases:</u>	
<u>Brooks v. Commonwealth</u> , 15 Va. App. 407, 424 S.E.2d 566 (Va. Ct. App. 1992).	12
<u>Crutcher v. State</u> , 68 So. 3d 724 (Miss. Ct. App. 2011).	11
<u>United States v. Brokemon</u> , 959 F.3d 206 (11th Cir. 1992).	22
<u>Other Authorities:</u>	
Rule 901, SCORE.	10, 12

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. (R. pp. 24-25; p. 37). 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. (R. p. 23; p. 25; p. 37). 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. (R. pp. 24-25).

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. (R. p. 24; p. 26). 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. (R. pp. 26-27; p. 29; p. 31). 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. (R. p. 15; p. 18; pp. 27-29). 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. (R. p. 18; pp. 27-29). 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 (R. pp. 18-19; pp. 30-31).

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. (R. p. 18; p. 31). Shortly thereafter, Appellant arrived at his residence, and Grant gave him the law enforcement funds he had received from Detective Cothran. (R. p. 31). In exchange, Appellant gave Grant a small plastic bag he had retrieved from his residence that contained 1.79 grams of crack cocaine. (R. p. 31; p. 69; p. 71). Grant then left Appellant's residence, and the officers followed him back to their office. (R. p. 32).

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. (R. p. 32). 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. (R. pp. 33-35).

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. (R. pp. 3-4; pp. 105-106; pp. 108-109). 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. (R. pp. 16-19; pp. 26-32). Additionally, Detective Cothran noted that he secured an audio-visual recording of the transaction from the recording

¹ During trial, Detective Cothran confirmed that he was familiar with the area where the transaction occurred based on his patrol experience. (R. p. 40). He further confirmed that Appellant's residence was located approximately one-eighth of a mile away from a community center. (R. p. 40).

device equipped to Grant prior to the transaction and indicated that the recording equipment was working properly at that time. (R. pp. 39-42). 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. (R. pp. 41-43).

Following Detective Cothran's testimony, the solicitor moved for the recording to be admitted into evidence, and defense counsel objected. (R. p. 43). 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?" (R. p. 43). The trial judge then overruled the objection, and the recording was admitted and played for the jury. (R. p. 43). 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. (R. pp. 43-44).

Subsequently, Grant testified for the State and noted he was currently incarcerated while serving a thirty-two month sentence for shoplifting. (R. p. 60; p. 66). 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. (R. pp. 64-65). As his testimony continued, he further asserted that he was not going to be the solicitor's "do boy." (R. p. 67).

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. (R. p. 69; p. 72). Armstrong confirmed that the substance was 1.79 grams of crack cocaine, and the crack cocaine was admitted into evidence without objection. (R. pp. 70-71). 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. (R. p. 74; p. 76).

Subsequently, the State rested its case, defense counsel moved for a directed verdict, and the motion was denied. (R. pp. 77-78). 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.

(R. p. 78). Once again, the trial judge denied the motion. (R. p. 78). The trial judge then instructed the jury on the applicable law, and the jury began its deliberations. (R. pp. 83-94).

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. (R. p. 95). In response to the note, the trial judge indicated he intended to give the jury an Allen² charge, and the solicitor agreed with the trial judge's decision to give the supplemental charge while defense

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

counsel responded: "Your Honor, with the hour being as it is, I will accept that juror's opinion." (R. p. 95). 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.

(R. pp. 95-97). 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. (R. p. 97). In response, both the solicitor and defense counsel affirmatively stated that they had no objections. (R. p. 97).

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 (R. pp. 97-99). 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. (R. p. 101). 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.

(R. pp. 103-104). The trial judge then sentenced Appellant to an aggregate term of imprisonment of twenty-three years. (R. p. 104).

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. (R. pp. 99-100).

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. (R. p. 97; p. 101).

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. Brokemon, 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.

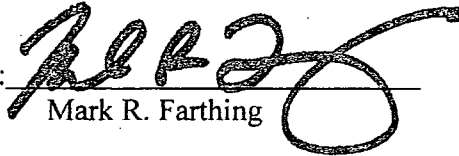
Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:



Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 24, 2014

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:



Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 24, 2014

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,

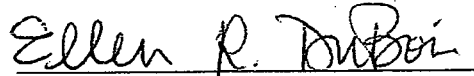
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent 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 24th day of January, 2014.


ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727