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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-001024

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JACOB HEYWARD SEAY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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II. **The trial judge properly instructed the jurors to review the "direct/circumstantial evidence" portion of the jury charge as well as the "reasonable doubt" portion where the jury sent out a question that clearly implicated both portions of the charge.**

STATEMENT OF THE CASE

Appellant was indicted in June 2013 in Lexington County for burglary in the first degree. On May 5, 2014, Appellant was tried before the Honorable Thomas A. Russo and a jury. The jury found Appellant guilty, and Judge Russo sentenced Appellant to the mandatory minimum sentence of fifteen years. A timely notice of appeal was served and filed.

ARGUMENT

Facts Relevant to Both Issues

Appellant's jury began deliberating at 2:07 pm on the third day of trial. (R. p. 433, line 23). Without objection, the judge sent a written copy of the jury instructions back to the jury room. (R. p. 393, line 22 – p. 394, line 3). A little over two hours after commencing deliberations, the jurors sent a note to the judge indicating they had two questions. (R. p. 433-36; p. 443, line 5; p. 482). The first question was as follows: "If we have to make an assumption on the facts that were given, does that constitute reasonable doubt?" (R. p. 434, lines 3-5). The second question appeared to be a request for the definition of burglary in the first degree. (R. p. 435, line 23 – p. 436, line 20).

Regarding the first question, the judge initially stated he would simply instruct the jurors to refer to the "reasonable doubt" portion of the written jury charge he had provided them. (R. p. 434). The solicitor then requested that the judge also direct the jurors' attention to the "direct and circumstantial evidence" portion of the written charge in addition to the "reasonable doubt" portion. (R. p. 435, lines 4-7). Defense counsel stated he was concerned about the jury's use of the word "assumption" and stated he preferred that the judge simply tell the jury to refer to only the reasonable doubt portion of the charge. (R. p. 435, lines 8-13 & lines 16-22). The solicitor responded that the circumstantial evidence portion of the charge would be relevant to the jury's question because it discusses how "circumstantial evidence is proof of a chain of facts which indicate the existence of a fact" and that "it may establish collateral facts from which the main fact may be inferred." (R. p. 437, lines 3-9). Defense counsel argued that the jury is "not supposed to assume anything" and reiterated that the jury's use of the word

"assume" concerned him. (R. p. 437-38). The judge then pointed out that the jurors' use of the term "assume" was not dispositive because they could have just as easily meant "infer," and "that's what circumstantial evidence is all about." (R. p. 438, lines 17-23). The judge concluded that he would refer the jurors to the section of the charge captioned "reasonable doubt" and to "the charge on circumstantial evidence." (R. p. 438, line 24 – p. 439, line 2).

Defense counsel stated he had no objection to telling the jury to re-read the charge, but objected to the judge pointing out circumstantial evidence because it was "choosing a type of evidence which you want them to look at versus direct evidence." (R. p. 439, lines 6-10). The judge then clarified that he was "not telling them to look at circumstantial evidence," instead, he was going to refer the jurors to the whole section on "direct/circumstantial evidence, because that's how it's captioned." (R. p. 439, lines 11-22). The judge explained that, in light of the fact that both direct and circumstantial evidence had been presented in the case, "it seems to me to respond fully to their question that they need to look at the law as it relates to direct and circumstantial evidence and reasonable doubt to answer their query." (R. p. 441, lines 3-10). After defense counsel requested that the judge ask the jurors to "define their question more clearly," the judge responded that he did not think that would be proper because "I don't want them to write and tell me what it is they're doing." (R. p. 441, lines 12-18). Defense counsel agreed. (R. p. 441, line 19). The judge then stated that "if you object to the direct or circumstantial evidence, I'll certainly note that objection." (R. p. 441, lines 20-22). The judge then wrote out a note to the jury and read it to the attorneys before sending it back. (R. p. 441-42). He also had the jurors' note marked as Court's Exhibit # 4. (R. p. 442-

43). There were no further comments from defense counsel on this topic. (See R. p. 441-43).

A little over two hours later, the judge stated he had received notice that the jury was "deadlocked" and stated he was going to bring them out and "give them an Allen charge and see if that may help." (R. p. 443, lines 5-13; see p. 444, line 8). When asked if he had an objection to that procedure, defense counsel stated: "I have no legal objection to that, Your Honor. You know, from all these years, I've never known it to be good for me, but, you know, it is what it is. I think that's what we do." (R. p. 443, lines 17-20). The judge then brought the jury into the courtroom and provided "a charge that Court Administration has developed for this very situation." (R. p. 444, lines 8-12). The charge is set forth in the record at page 444, line 15 through page 446, line 19. The judge then stated:

> That's the charge that Court Administration has approved and which I wanted to share with you based on your last note. So if you would, Madam Forelady, and members of the jury, if you go back in the jury room, keep in mind the things that I just shared with you and make it – make another effort, if you can, to reach a unanimous verdict.
>
> If you cannot, Madam Forelady, if the consensus of the panel after a reasonable period of time is that you are hopelessly deadlocked, then you need to inform that matter to the Court. But I would ask that you please return back to the jury room with these thoughts in mind in hopes that you may be able to reach a unanimous verdict. Okay? (R. p. 446, line 20 – p. 447, line 8).

The jury then returned to the jury room. (R. p. 447, lines 9-10). When asked if there were any objections to the charge, defense counsel stated he "would be remiss" if he did not move for mistrial based upon the fact that "[o]ne of the jurors was crying." (R. p. 447, lines 15-18). The judge indicated he did not observe a juror crying. (R. p. 447, lines 19-21). Defense counsel stated "I don't know how you address that issue.

Obviously you have a juror in distress. It was the young lady in the front row, Your Honor." (R. p. 447, lines 22-24). The solicitor agreed with defense counsel that "she was crying" but stated that should not be a factor that would warrant a mistrial. (R. p. 447, line 25 – p. 448, line 3). The solicitor pointed out that "[i]n the course of debating a topic or discussing facts in a case, things may get heated or otherwise emotional." (R. p. 448, lines 3-5). The judge then noted that his law clerk also initially thought the juror was crying but then looked at the juror some more and figured that the juror might have just been tired. (R. p. 448, lines 8-12). The judge ruled that, whether the juror had been crying or not, he was denying the motion for mistrial. (R. p. 448, lines 12-14). The judge noted defense counsel's exception to that ruling. (R. p. 449, lines 1-2). He then asked defense counsel if there was an objection "as to the charge itself," to which defense counsel responded: "No, sir. The charge was properly worded." (R. p. 449, lines 4-5).

The judge then stated that he was considering sending "Hope" (presumably a clerk or bailiff) to the jury room to inquire whether or not the jurors would like some food to be ordered for them. (R. p. 449, lines 10-24). He noted he did not want the jurors thinking they would be deprived of food until they reached a verdict. (R. p. 449, lines 20-22). Defense counsel stated he had "no objection" to the judge's proposed procedure. (R. p. 450, lines 6-7). The jury deliberated for another two hours and ten minutes before reaching a verdict. (R. p. 447, lines 9-10; p. 450, lines 17-20). The total deliberation time was approximately seven hours. (See R. p. 433, line 13; p. 451, line 11).

I. **Any issue with the trial judge's Allen charge was not properly preserved for appellate review because defense counsel did not contemporaneously object to the charge during trial and, instead, specifically told the judge he had no objection to it because "the charge was properly worded." In any event, the trial judge's Allen charge was not unconstitutionally coercive and Appellant's arguments to the contrary are without merit.**

Issue Preservation

Appellant now contends on appeal that the trial judge' Allen charge was unconstitutionally coercive. However, Appellant's Allen charge issue is clearly unpreserved for appellate review because counsel failed to contemporaneously object to the charge below and instead waived any challenge to the Allen charge by agreeing that an Allen charge was appropriate, stating he had no objection to the charge, and conceding that the charge was "properly worded." (See R. p. 443, lines 16-20; p. 449, lines 4-5). See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) ("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal."); 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. 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."). Accordingly, this Court must dismiss Appellant's Allen charge issue as procedurally barred.

Discussion

Even if the issue had been properly preserved, the Allen charge given in this case was not unconstitutionally coercive.

Applicable Law

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 providing such an instruction, 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 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). 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. State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-576 (1995); Ayers, 284 S.C. at 269, 325 S.E.2d at 581. 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.").

The Allen Charge was Not Unconstitutionally Coercive

In Appellant's case, the trial judge's Allen charge was not unconstitutionally coercive and Appellant's assertions to the contrary are without merit.[1] Appellant first argues that, although the Allen charge did admonish the jurors to take into consideration

[1] Note that the second issue in Appellant's issue statement, regarding the trial court strongly urging the jury to return a verdict by discussing the ramifications of failing to return a verdict, is not argued in the body of Appellant's brief. (See Brief of Appellant, p. 10-12). Any contentions raised in an appellant's issue statement that are not argued in the body of the brief are not preserved for review. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("Although the Fieldses raise this alternative holding in their statement of the issues on appeal, they fail to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Regardless, the law is clear that it is not unconstitutionally coercive for a judge to advise the jurors that if they failed to reach a verdict, a mistrial would be declared and a new trial would be had at additional expense. See, e.g., 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 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); 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."); State v. Ayers, 284 S.C. at 269, 325 S.E.2d at 581 (same).

opposing views, the charge "as a whole was directed to the minority." (Brief of Appellant, p. 11). In support of this contention, Appellant asserts that the judge "deviated from the Court Administration's model charge and on three occasions implored the jurors to "reach a unanimous verdict;" that the jurors already indicated "some indecision" regarding whether or not the State met its burden of proof via its question regarding reasonable doubt; that shortly after the Allen charge the jury, "the court sent a bailiff into the jury [room] to take dinner orders, reinforcing to the jury the court's desire for a timely verdict;" and that the State's case was far from overwhelming. (Brief of Appellant, p. 11-12).

First, the fact that a judge may have deviated from the Court Administration model charge by adding his own concluding remarks would not render the charge "directed to the minority" unless the concluding remarks themselves were directed at the minority. Here, the judge's concluding remarks merely encouraged *all* the jurors to make another effort to reach a unanimous verdict while making it abundantly clear that they were not *required* to do so. (See R. p. 446-47). Second, the fact that the jurors asked a question about reasonable doubt has nothing to do with whether or not the Allen charge was directed to the minority. Third, the fact that the judge sent a clerk or bailiff to inquire "if you think you're going to need some food" (a procedure Appellant had "no objection" to at the time) is likewise unrelated to whether or not the Allen charge was directed at the minority. (See R. p. 450, lines 1-7). Cf. State v. Hughes, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999) (holding that, even if the issue had been properly preserved, the trial judge did not coerce the verdict by sending a note into the jury room asking whether the jurors would like to continue deliberations or break until morning

because "this note was simply an inquiry as to the jury's wishes and conveyed no admonition to reach a verdict"). Finally, the strength of the State's case is, again, wholly immaterial on the issue of whether or not the Allen charge was directed at the minority and wholly immaterial on the broader issue of whether or not the Allen charge was unconstitutionally coercive. Here, no portion of the Allen charge, including the judge's remarks, was directed at the minority and the charge was not unconstitutionally coercive on this basis. (See R. p. 444-47).

Appellant also argues that "once the trial court became aware that one of the jurors was crying or visibly upset, the trial court should have reevaluated the propriety of the just-given Allen charge and its coercive impact on the emotional juror and ordered a mistrial to protect the Appellant's right to a fair trial and just verdict." (Brief of Appellant, p. 12). In addition to not being preserved, this contention is plainly without merit.[2] Initially, it is totally speculative to assume that the upset juror was one of the minority jurors. It is also totally speculative to assume that, at that point in the deliberations, the minority was in favor of a "not guilty" verdict, as Appellant suggests in his issue statement. (See Brief of Appellant, p. 10). Finally, as the solicitor pointed out at trial, the fact that a juror becomes upset in the course of deliberations is entirely understandable and does not in any way warrant a mistrial.[3] (See R. p. 448, lines 1-7). See Murray v. State, 356 So.2d 71, 72 (Fla. Dist. Ct. App. 1978) (the fact that one juror

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[2] Although defense counsel made a motion for mistrial based upon the "crying" juror, he did not link this issue to any Allen charge issues. (See R. p. 447-48). 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.").

[3] There is nothing in the record to indicate the precise reason the juror may have been crying or upset. Indeed, the judge's law clerk thought the juror might have just been tired. (R. p. 448, lines 9-12). It is equally possible the juror was suffering from an allergy attack or that the juror was upset over a rude comment another juror made to her. Note that defense counsel never requested that the judge make any further inquiry about the juror's well-being. (See R. p. 447-50; p. 457-58).

began crying during the polling of the jury "does not constitute a reasonable basis for belief that the verdict of the jury may be subject to a legal challenge"); State v. Naucke, 829 S.W.2d 445, 461 (Mo. 1992) (the trial court did not abuse its discretion in refusing to declare a mistrial nor in refusing to replace a crying juror because the juror was merely "responding to the evidence properly admitted in this case"); Gilreath v. State, 247 Ga. 814, 838, 279 S.E.2d 650, 671-72 (1981) (trial judge did not err in denying defendant's mistrial motion where, even though several jurors were crying as the death penalty verdict was announced, this did not show the death penalty was imposed improperly but instead tends to show merely that the jurors appreciated the enormity of their decision). In this case, Appellant cannot establish any connection between the juror crying or being upset and any issues with the Allen charge. Significantly, the juror was apparently **not** crying at the time the verdict was pronounced or at the time of the polling. (See R. p. 451-57). In sum, the fact that a juror was emotional at the time of the Allen charge did not establish that the Allen charge was coercive and did not warrant a mistrial.

Notwithstanding all of Appellant's contentions, the Allen charge given in this case was not unconstitutionally coercive. As mentioned above, the factors to be considered are: (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 following the Allen charge. Tucker v. Catoe, 346 S.C. at 493-494, 552 S.E.2d at 717-718.

First, the trial judge's Allen charge was an even-handed admonition to both the majority and minority jurors, and no portion of the charge could reasonably be construed

as being directed at any particular juror or position. (See R. p. 444-47). See 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."); 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 State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("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."); cf. Workman v. State, Op. No. 27514, (S.C. Sup. Ct. filed April 15, 2015 (Shearouse Adv. Sh. No. 15 at 12) (finding an Allen charge unconstitutionally coercive where the trial judge instructed that the minority should consider the views of the majority but did not instruct that the majority should consider the views of the minority).

Second, the charge did not include any mandatory language telling the jurors that they were **required** to reach a verdict and instead made clear that if the jurors were "hopelessly deadlocked" after returning to the jury room they should inform the court. (See R. p. 446-47). Third, the judge made **no** inquiry into the jury's numerical division and the jury did **not** report its numerical division at any time. See generally State v.

Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 263 (Ct. App. 2001) (an Allen charge is not coercive even where the trial judge does know the numerical division of the jurors before giving the charge). Fourth and finally, the jurors deliberated for about two hours and ten minutes after the Allen charge was given. See Hale, 284 S.C. at 355, 326 S.E.2d at 422 (finding the judge's Allen charge as a whole was not coercive and did not deny the defendant a fair trial even though the jury returned a verdict only three minutes after receiving the charge); State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991) (rejecting the defendant's argument that the Allen charge was coercive because the jury returned a verdict one hour and fifteen minutes after the charge was given); State v. Ayers, 284 S.C. 266, 268-69, 325 S.E.2d 579, 580-81 (Ct. App. 1985) (finding the trial judge's instructions as a whole were not coercive in a case where the instructions were given at about 10:10 pm and the jury returned with a verdict two hours later); State v. Williams, 344 S.C. 260, 543 S.E.2d 260 (Ct. App. 2001) (rejecting defendant's argument that Allen charge was coercive where jury returned a verdict two hours and fifteen minutes after receiving the charge and fifteen minutes of this time was spent re-hearing testimony); cf. Tucker, 346 S.C. at 493-494, 552 S.E.2d at 717-718 (the fact that jurors returned a death sentence at 12:27 pm, approximately an hour and a half after receiving an Allen charge, weighed in favor of a finding of coercion, along with other factors, where the dissenting juror had been "holding out" since at least 5:00 pm the day before and where the defense attorney did object to the Allen charge but had no opportunity to object to the jury's revelation of its division because the judge failed to inform the parties that the jury sent out a note that said they were "hopelessly deadlocked at 11-1 for the death penalty"). These factors, taken together, illustrate that the Allen charge given in

this case was not unconstitutionally coercive. Accordingly, the trial judge did not err in fulfilling his duty to encourage the jury to reach a verdict in Appellant's case.

II. The trial judge properly instructed the jurors to review the "direct/circumstantial evidence" portion of the jury charge as well as the "reasonable doubt" portion where the jury sent out a question that clearly implicated both portions of the charge.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. When a jury requests an additional charge, it is sufficient for the judge to charge only those matters necessary to answer the jury's request. State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996). A trial judge commits error if he fails to answer the question asked or answers the question incorrectly or in a misleading way. See State v. Smith, 304 S.C. 129, 403 S.E.2d 162 (Ct. App. 1991).

Here, the jury question at issue was as follows: "If we have to make an assumption on the facts that were given, does that constitute reasonable doubt?" (R. p. 434, lines 3-5; p. 482). Although not stated in artful legal prose, the jurors' question plainly indicated they were having issues with evaluating the evidence and with reasonable doubt. Therefore, it was not error for the trial judge to direct the jurors to both the "direct/circumstantial evidence" and "reasonable doubt" portions of the charge, nor was it "misleading" or "suggestive" to do so.[4] (See Brief of Appellant, p. 14-15). As the

[4] Indeed, as our Supreme Court has stated, the circumstantial evidence charge is in fact a counterpart to the reasonable doubt charge because it is a charge further explaining the concept of reasonable doubt. See State v. Logan, 405 S.C. 83, 98, 747 S.E.2d 444, 452 (2013) ("[T]he circumstantial evidence instruction is best characterized as *a construct requiring the State to prove its case beyond a reasonable doubt*, while at the same time providing a framework for a "rational" and "cumulative" assessment for guiding the jury's

trial judge noted, his re-charge did not inappropriately highlight circumstantial evidence over direct evidence because he directed the jury to the section discussing both types of evidence. (R. p. 439, lines 6-22). Further, there is no contention that the language contained in either charge was incorrect, and the charge properly used the word "infer" rather than "assume." (See R. p. 397, lines 18-22).

Finally, Appellant could not possibly have suffered any prejudice from the jury reviewing the direct/circumstantial evidence portion of the charge in addition to the reasonable doubt portion. Again, the judge did not emphasize circumstantial evidence to the exclusion of direct evidence, and the direct/circumstantial evidence portion of the charge included an additional reminder that the jurors must be convinced of the defendant's guilt beyond a reasonable doubt. (R. p. 398, lines 3-10). Contrary to Appellant's contentions, the judge's re-charge did not "invade the province of the jury." (See Brief of Appellant, p. 15). This issue is entirely without merit and Appellant is not entitled to reversal on this ground.

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consideration of circumstantial evidence." (emphasis added)).

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence for burglary in the first degree.[5]

Respectfully submitted,

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June 1, 2015

[5] Significantly, any doubt about the correctness of affirming Appellant's conviction in this case is eliminated where Appellant admitted, in open court at sentencing, that he was guilty of this crime under the hand of one is the hand of all theory. (See R. p. 461, line 17 – p. 477). See State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("Any doubt about the correctness of [affirming the conviction] is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that he had participated in the robbery .... Further review of the record, therefore, is rendered unnecessary."); see also State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (upholding defendant's conviction where at sentencing the defendant apologized to the court for "getting [himself] in this trouble"). In that vein, even if Appellant was granted a new trial, the State would be able to use the admissions Appellant made at sentencing against him, thereby assuring his conviction.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-001024

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JACOB HEYWARD SEAY,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **John H. Strom,** South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **1st** day of **June, 2015.**

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