STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT

APPELLATE CASE NO. 2016-000549

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in not declaring a mistrial after the jurors declared they were at an impasse and, instead, giving a coercive Allen v. United States, 164 U.S. 492 (1896) charge?

STATEMENT OF THE CASE

On March 4, 2016, appellant was indicted by a Greenville County grand jury for murder, two counts of attempted murder, and a weapons charge. R. ___. On February 29, 2016, appellant was tried before the Honorable Robin B. Stilwell and a jury. Tr. 1. Mark Moyer represented the State. Tr. 1. Frank Eppes and Carter Massingill represented appellant. Tr. 1. The jury convicted appellant. Tr. 565, l. 4 – 566, l. 9. Judge Stilwell sentenced appellant to forty years' imprisonment for murder and concurrent terms of thirty years' imprisonment on the two attempted murder charges and five years' imprisonment on the weapons charge. Tr. 582, l. 8 – 583, l. 3. This appeal follows.

ARGUMENT

The trial court erred in not declaring a mistrial after the jurors declared they were at an impasse and, instead, giving a coercive *Allen v. United States*, 164 U.S. 492 (1896) charge.

On the night of February 22, 2014, a massive fight occurred at a nightclub in Greenville. Tr. 90, l. 7 – 91, l. 16. The security guards maced nearly everyone inside of the club. Tr. 90, l. 7 – 91, l. 16. As the occupants spilled into the parking lot, there were gunshots. Tr. 92, ll. 2 – 24. Many people from the club went to a nearby gas station to buy milk to pour on their faces to relieve the effects of the mace. Tr. 102, l. 1 – 105, l. 6. More fighting occurred in the parking lot of the gas station. Tr. 102, l. 1 – 105, l. 6.

Ashley Hiott, Brittany Jeter, and Jermaine Nesbitt were in the club, but were not part of the group fighting. Tr. 90, ll. 7 – 17. They left in Hiott's Tahoe and went to the gas station. Tr. 102, l. 9 – 103, l. 22. Hiott noticed a distinctive Camaro at the gas station. Tr. 105, l. 15 – 106, l. 10.

When Hiott's group left the gas station, the Camaro followed and pulled alongside her Tahoe. Tr. 108, l. 7 – 112, l. 14. Jeter was in the front passenger seat and Nesbitt was in the backseat. Tr. 108, l. 7 – 112, l. 14. Hiott saw three men in the Camaro, but did not know any of them and could not identify appellant as one of the men. Tr. 108, l. 7 – 112, l. 14.

The men in the Camaro began yelling trying to get the girls' attention. Tr. 120, l. 22 – 123, l. 22. Nesbitt yelled back at the men that the girls were with him. Tr. 120, l. 22 – 123, l. 22. The men in the Camaro yelled, "Fuck you," and Nesbitt replied, "Fuck you, too." Tr. 120, l. 22 – 123, l. 22.

Hiott then heard a gunshot. Tr. 122, ll. 13 – 14. Jeter heard two gunshots. Tr. 441, ll. 12 – 18. Hiott was shot in the head, but survived. Tr. 84, l. 23 – 85, l. 9. Nesbitt died from a

gunshot wound to the head. Tr. 182, l. 11 – 183, l. 183, l. 1. Jeter was not injured. Tr. 441, l. 12 – 443, l. 13.

The State's theory of the case was that appellant was the driver of the Camaro and the shooter and that Anthony Henderson and Deunte Jones where the passengers. Tr. 522, l. 9 – 524, l. 9. Both Henderson and Jones testified for the State that appellant was the shooter. Tr. 344, l. 25 – 348, l. 21. Tr. 402, l. 12 – 405, l. 24. Henderson was also charged with murder and attempted murder, but claimed he had not been promised anything by the State in exchange for his testimony. Tr. 320, l. 18 – 321, l. 10. Henderson and Jones were very good friends and had seen each other as recently as a week before trial. Tr. 373, ll. 14 – 25. Henderson and Jones' cousin had a child together. Tr. 374, ll. 1 – 2.

While Henderson was out on bond for this crime, he posted pictures of himself on Facebook with a semi-automatic weapon and messages indicating he would kill anyone who ran afoul of him. Tr. 374, l. 3 – 377, l. 9. (Defendant's Ex. 3 and 4). Henderson claimed he had nothing to do with the shooting except for being in the Camaro. Tr. 368, ll. 2 – 6. Jones had also posted threatening pictures of himself and Henderson on Facebook. Tr. 410, ll. 6 – 19. (Defendant's Ex. 3 and 4). Both Henderson and Jones also gave statements to the police that conflicted with their trial testimony. Tr. 377, l. 18 – 381, l. 11. Tr. 411, l. 4 – 420, l. 4.

The jury began deliberations at noon. Tr. 553, ll. 13 -1 14. They asked a question about the court's hand of one, hand of all charge and returned to the jury room at 1:50 PM. Tr. 553, l. 17 – 556, l. 9. The jury deliberated another five hours and returned to the courtroom at 7:20 PM. Tr. 556, l. 17 – 557, l. 13. The jury had sent a note to the trial judge that they were at an impasse. Tr. 556, l. 17 – 557, l. 13. The court sent the jury home for the evening. Tr. 557, l. 14 – 559, l. 19.

The next morning, Judge Stilwell told the attorneys he was going to give the jury a "standard" Allen charge, but when defense counsel asked to see it, the judge said he did not have it written down. Tr. 560, ll. 2 – 11. The court then gave the jury the following charge:

> Good morning, everybody, welcome back. Thank you for being on time. I do appreciate it. Ladies and gentlemen, I recognize that last night you sent me a note that indicated that you were at an impasse and you told me the division that you had in that note as well.
>
> Now, I understand that the decision that you have to make is very difficult. And when you get 12 people together, it's difficult to have 12 people agree. Particularly, when you come from different walks of life and you're just thrown together on a jury, it's difficult to make that decision. I know that, oftentimes, it's difficult for two people to make a decision. It's hard for my wife and I to figure out what we're going to eat for supper sometimes. So, this decision, I recognize is hard.
>
> But understand that **it's important that you come to a decision in this case.** Understand that both the State and the Defense **have extended significant resources and time and effort to get to this point. Also, know that the State and the County has extended resources to get to this point as well.** And if you're unable to come to this verdict in this matter, then, essentially, we'd be left with having to do it all over again, **extending additional resources,** time and effort. Now, ladies and gentlemen, I will tell you that there are no 12 other people in the County of Greenville who are more capable or competent to come to a decision in this matter than the 12 of you are.
>
> Now, again, I understand it's hard to come to a decision. But those of you who are in the majority should listen to the people in the minority. Those of you who are in the minority should listen to the people in the majority. You should take into consideration your respective positions and **you should come to a decision in this matter. Again, it really would be a waste of time, effort and resources for us to have to do all of those over again.** So, I'm going to ask you to go back to your jury room and resume your deliberations. Thank you, very much.

Tr. 560, l. 12 – 562, l. 8 (emphasis added). The jury left at 9:10 AM and returned with its guilty verdicts at 11:43 AM. Tr. 562, l. 7 – 565, l. 3.

Immediately after dismissing the jury back for their deliberations after the Allen charge, defense counsel placed on the record that he had objected the night before to the giving of the

Allen charge. Tr. 562, ll. 12 – 15. Defense counsel moved for a mistrial which was denied. Tr. 562, l. 12 – 563, l. 23. Defense counsel asked the court to bring back the jury and tell them that a hung jury was "a legitimate end of a criminal trial" and is sometimes the result of the state's burden to prove its case beyond a reasonable doubt. Tr. 562, l. 12 – 563, l. 23. Defense counsel also objected to the Allen charge as unduly coercive. Tr. 562, l. 12 – 563, l. 23. The trial court denied appellant's motions. Tr. 562, l. 12 – 563, l. 23.

The trial judge erred in its Allen charge and it coerced the verdict. See State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). "The trial judge has the duty to urge the jury to reach a verdict, but he may not coerce it." Id. at 99, 470 S.E.2d at 108-09. The charge given by the trial judge in Pauling was upheld, but it contained a crucial point that Judge Stilwell's charge lacked—that the jurors should not "give up any well-founded conscientious convictions." Id. at 97, 470 S.E.2d at 108. Judge Stillwell's charge repeatedly emphasized that a new trial would be a "waste" of time and resources and, more importantly, never told the jury that they did not have to give up their own individual convictions. Instead, he repeatedly told them they "should" come to a decision.

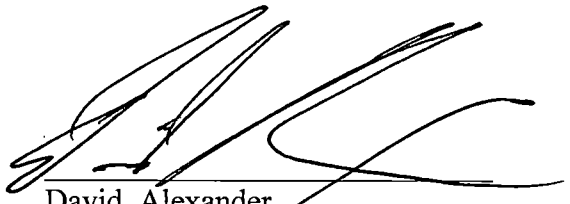
The trial judge's decision here is much like the charge held coercive in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001). In Tucker, the Court held the charge coercive because it unduly emphasized that the jury should reach a verdict, was directed at the minority, and the jury returned a verdict shortly after the charge. Id. The Tucker charge was held coercive even though the trial judge told the jurors not to violate their individual consciences. Here, the same coercive factors are present plus the lack of any direction that the jurors should not give up strongly held, well-founded beliefs just to reach a unanimous verdict.

The charge was also directed at the minority. The note the jury sent to the judge indicating an impasse appears to show multiple votes on each charge. R. ___ (Court's Ex. 4). For example, it shows four votes on the murder charge with the final vote before declaring an impasse showing two for not guilty and ten for guilty. R. ___ (Court's Ex. 4). On the attempted murder charges, the votes were 7-5 in favor of guilty on the charge regarding Jeter and 8-4 on the charge regarding Hiott. R. ___ (Court's Ex. 4). While the record does not indicate that the trial judge forced the jury to reveal their numerical vote, which is improper, the revelation of the vote increases the coercive effect because the minority knows the Allen charge is directed at them. See State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951) (holding it is improper for the court to make the jury publicly reveal its vote count).

During the beginning of the court's Allen charge, he emphasized to the jury that he knew their numerical division. Tr. 560, ll. 17 – 20. The comments about the "waste of time" could be directed at no persons other than the two not guilty jurors and would certainly have (and did have) an effect on them. The effect of the Allen charge here was to negate the entire day's previous deliberations and force the jury to reach a verdict despite the State not meeting its burden of proof in the judgment of some jurors. This case should be reversed.

CONCLUSION

For the above-stated reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 27 2017
SC Court of Appeals

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Billy Lemurces Taylor, #325370, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of February, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2017.

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