STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2016-000549

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville County Courthouse
Greenville, South Carolina 29601

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

APPELLANT'S 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in denying Taylor's motion for a mistrial when the jury had indicated it was at an impasse after seven hours of deliberations, and the Allen charge given by the trial court was not unconstitutionally coercive?

STATEMENT OF THE CASE

On February 29– March 4, 2016, Appellant Billy Lemurces Taylor ("Taylor") was tried by a jury for the murder of Rodney Nesbitt, the attempted murders of Brittany Jeter and Ashley Hiott, and possession of a weapon during the commission of a violent crime. Taylor was tried in the Greenville County Court of General Sessions before the Honorable Robin B. Stillwell, Circuit Court Judge. Frank Eppes and Carter Massingill represented Taylor. The State was represented by Assistant Solicitor Mark Moyer of the Thirteenth Judicial Circuit Solicitor's Office.

On March 4, 2016, Taylor was convicted of murder, two counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime. (Tr. 565-66). He was sentenced to forty years confinement for the murder conviction, thirty years confinement for each of the attempted murder convictions, and five years confinement for the possession of a weapon during the commission of a violent crime conviction, all to be served concurrently. (Tr. 582-83). Before this Court is Taylor's direct appeal of his convictions and sentences. Taylor requests this Court reverse his convictions and remand for a new trial. The State respectfully requests this Court deny Taylor's appeal and affirm his convictions and sentences.

STATEMENT OF FACTS

On February 22, 2014, Billy Lemurces Taylor ("Taylor") shot and killed Rodney Nesbitt ("Nesbitt") while Nesbitt was sitting in the back seat of a Chevrolet Tahoe on Pelham Road in Greenville. Nesbitt suffered a gunshot wound to the head. (Tr. 182). The bullet entered the right brow and exited posteriorly on the left side of the head. (Tr. 182). This was the mortal shot. (Tr. 182). He would have died relatively instantly. (Tr. 188). Cause of death was the gunshot wound to the head. (Tr. 190).

Taylor also shot Ashley Hiott ("Hiott"), the driver of the Tahoe in the head. Hiott suffered a gunshot wound to the right temple region of her head. (Tr. 275). The bullet went through the right lateral aspect of the orbital, and it displaced both of her optic nerves. (Tr. 276). She also suffered facial fractures of the orbit. (Tr. 278). The bullet lodged behind her left eyeball, and it had not been removed at the time of trial because of its location. (Tr. 276, 279).

Background

On the day of the shooting, Nesbitt had been in a relationship with Brittany Jeter ("Jeter") for five to six months. (Tr. 86, 426). That Friday, February 21, 2014, the two went to a bowling alley in Spartanburg with Jeter's brother and another friend. (Tr. 427). They were celebrating Nesbitt's birthday, which was that Saturday. (Tr. 427). After leaving the bowling alley, Jeter and Nesbitt went back to Woodruff, dropped off Jeter's brother (who was then Hiott's boyfriend and the father of her children), and then went to

Hiott's house. (Tr. 84, 87, 428). Hiott and Jeter were friends, and that night Jeter and Nesbitt were borrowing Hiott's Tahoe.[1] (Tr. 428).

Nesbitt wanted to continue celebrating his birthday, so the three decided to go to Croc's, a nightclub in Greenville located just off of Pelham Road. (Tr. 87, 429). Hiott drove, Jeter sat in the front passenger seat, and Nesbitt sat in the back seat. The three arrived at Croc's between 1:30 and 1:45 in the morning. (Tr. 88). They stayed at the club for approximately an hour. (Tr. 89). While inside, Jeter and Nesbitt bought a shot of Hennessey and a beer each. (Tr. 430).

While they were there, a fight broke out in the front of the club. (Tr. 90, 432). Security sprayed mace inside the club, and everyone that was inside was forced outside. (Tr. 90). When the three went outside, Jeter and Nesbitt finished their beers, and they started walking back towards the Tahoe. (Tr. 433). Outside of the club, Hiott saw an orange or red sports car, either a Mustang or Camaro, parked in the middle of the grass section outside of the club. (Tr. 91-2). Jeter also saw the Camaro. (Tr. 433-34). Shortly after the three got to the Tahoe, they heard gunshots. (Tr. 434, 435).

<u>The victims stop for gas at a local BP station.</u>

Hiott, Jeter, and Nesbitt got back into Hiott's Tahoe, and the three drove down Pelham Road to a nearby BP gas station. (Tr. 436). Again, Hiott was driving, Jeter was in the front passenger seat, and Nesbitt was in the rear passenger seat. (Tr. 103). When they arrived at the BP station, Hiott went inside to pay for the gasoline. (Tr. 103,

[1] Hiott had purchased the Tahoe a few weeks prior to the shooting, and the rear passenger window in the Tahoe would not stay up; it was broken when she purchased the vehicle. (Tr. 107).

436). Nesbitt got out to pump the gas. (Tr. 103, 436). Jeter later got out of the Tahoe and stood by Nesbitt while he was pumping the gas. (Tr. 436).

Hiott noted the BP was busy, and there were people in the parking lot pouring milk on their faces attempting to wash out mace. (Tr. 103-04). When Hiott walked outside of the gas station, she observed a fight between a lady and a gentleman in the parking lot. (Tr. 105). Jeter saw there was a lot of arguing and fighting at the gas station. (Tr. 437-38). Hiott also noticed a newer model Camaro with rims that matched the paint on the car. (Tr. 105). The Camaro was not parked at a pump, but was in a spot at the top of the gas station. (Tr. 105). Hiott did not see or hear anything from the Camaro, and there was a lot of noise in the parking lot. (Tr. 106).

When Hiott was coming back outside, Jeter got back in the Tahoe. (Tr. 437). When Hiott got back to her Tahoe, Nesbitt was still pumping the gas. (Tr. 106). Hiott stopped for a second, and then she got back into the Tahoe. (Tr. 106). Jeter had started to slide over to the driver's seat, but Hiott told her not to because she had been drinking. (Tr. 106, 437). Hiott told Jeter that she would drive, and Jeter slid back over to the front passenger seat. (Tr. 107). Hiott got back into the driver's seat. (Tr. 107). When Nesbitt finished pumping gas, he got back in the Tahoe in the back seat on the passenger side. (Tr. 108). Hiott noted that he sat somewhere in in the middle of the back seat, but closer to the passenger side of the Tahoe. (Tr. 108).

<u>The Tahoe and the Camaro leave the gas station at the same time.</u>

Hiott drove a loop around the parking lot and stopped before pulling out onto Pelham Road. (Tr. 438). In leaving the gas station, Hiott pulled up to Pelham Road to make a right turn. (Tr. 108-09). She noticed the Camaro had pulled beside her, and

she believed it was going left. (Tr. 109). She saw three males in the car; the driver, a passenger in the front seat, and a passenger in the back seat. (Tr. 110). She noted the passenger had little dreads, and looked like Anthony Henderson. (Tr. 110). At that time, she had never seen him before. (Tr. 110).

Hiott made the right turn onto Pelham. She got into the left lane. (Tr. 111). The Camaro also made a right turn onto Pelham, and it got into the right lane. (Tr. 111). Once they turned right onto Pelham, Jeter heard a guy's voice saying, "[h]ey, girl, hey, hey, hey."[2] (Tr. 439, l 9). Jeter looked back and saw the Camaro. (Tr. 439). It was back towards where Nesbitt's window was. (Tr. 439).

Someone in the Camaro shoots at the Tahoe.

The Camaro sped up and drove beside the Tahoe. (Tr. 112). Hiott indicated it was not completely side by side, but the two vehicles were neck and neck. (Tr. 112). Hiott heard some guys hollering from the car. (Tr. 121). She turned around to look, and that's when she saw the Camaro. (Tr. 121). Jeter heard someone else yell something else out of the Camaro. (Tr. 440). Nesbitt responded to the comments, saying something like "Hey, that's my old lady and my sister-in-law." (Tr. 121, l 25 – 122, l 1; Tr. 440). The guys in the Camaro said something else, and Jeter and Hiott told Nesbitt not to respond. (Tr. 122, 441). Someone from the Camaro hollered out "fuck you." (Tr. 122, l 11). Nesbitt yelled back, "[f]uck you too." (Tr. 122, l 12; see Tr. 441). Jeter testified, "[t]hen after that, it's like pow, gunshot." (Tr. 441, l 13). Jeter thought she heard two shots. (Tr. 441). Hiott also heard a gunshot. (Tr. 122).

[2] Jeter did not hear any yelling until they had pulled onto Pelham Road. (Tr. 446).

Jeter initially dropped down to the floorboard, but then she looked to the back seat and saw Nesbitt was slumping over. Then Jeter turned around and saw Hiott had blood pouring from her face. (Tr. 441). Hiott remembered seeing a light coming, and then everything was just ringing and white. (Tr. 122-23). Hiott could not see anything, and everything was ringing. (Tr. 123). She stopped the Tahoe pretty quickly after the shot. (Tr. 123).

Jeter remembered the Tahoe stopping, and she jumped out. (Tr. 442). Jeter saw the Camaro passing, and the Camaro's driver's side window going up as it passed the Tahoe. (Tr. 443). It sped off. (Tr. 443). Jeter got out, went to the back seat, and started screaming for Nesbitt to get up. (Tr. 443). He was not responding. (Tr. 443).

At that moment, Hiott did not realize she had been shot. (Tr. 123). She felt her nose bleeding, and she grabbed her face. (Tr. 123). Hiott remembered reaching for her door, and she recalled grabbing her phone, but she could not see anything to dial. (Tr. 123). Hiott then realized her face was getting really hot. (Tr. 123). She heard Jeter was screaming, please wake up, please wake up. (Tr. 123).

Hiott got out of the Tahoe, and she felt her way to the back of the vehicle until she collapsed at the back. (Tr. 124). Officers arrived on scene quickly. (Tr. 124). Hiott was taken to the hospital. (Tr. 125). No one in the Tahoe had a weapon, and no one in the Tahoe brandished a weapon. (Tr. 125).

When emergency personnel arrived on scene, Nesbitt was dead. (Tr. 160). Hiott, who was standing at the rear of the Tahoe, had a cloth to her head and could not see. (Tr. 160). Hiott had a wound to the right temporal area of her head. (Tr. 161). Her eyes were swollen, and they were closed. (Tr. 161). She was taken to Greenville

Memorial Hospital as a level one trauma. (Tr. 164). Hiott informed emergency personnel that she had been shot by an unknown person in a red Camaro. (Tr. 163). As police arrived, Jeter also yelled that they should go after the red Camaro. (Tr. 444). Jeter recalled seeing someone with little dreads in the Camaro. (Tr. 444).

Taylor, Anthony Henderson, and Deunte Jones also went to Croc's that night.

Anthony Henderson ("Henderson"), one of Taylor's co-defendants, Deunte Jones ("Jones") (another co-defendant), and another friend named Cory started at Bugatti, a different club, on February 21. (Tr. 323, 395). Henderson was friends with Taylor. Jones did not know Taylor before that night. (Tr. 395). Taylor showed up at Bugatti later that night. (Tr. 325). He was driving his red Camaro, which had aftermarket rims at that time. (Tr. 325-26). Henderson, Jones, and Taylor decided to go to Croc's; Cory indicated he would not be going to Croc's because he needed to pick up his girlfriend from her job. (Tr. 327). Taylor drove Jones and Henderson to Croc's in the Camaro. (Tr. 327, 396).

The three were in Croc's for at least an hour. (Tr. 329). At some point, a fight broke out in Croc's, and Henderson was sprayed with mace. (Tr. 330-31, 396). Jones was not directly maced, but he did get some mace in his eyes. (Tr. 397). Henderson was not involved in the fight, and he did not know who was involved. (Tr. 331). Jones and Henderson went outside, and Taylor came out later. (Tr. 332). Henderson heard someone shooting in the parking lot. (Tr. 335). Jones also recalled hearing gunshots outside of Croc's. (Tr. 399). Jones and Henderson left Croc's with Taylor. (Tr. 398). Taylor drove, Jones got in the back seat on the passenger side, and Henderson was in the front passenger seat. (Tr. 398).

Taylor, Henderson, and Jones also go to the BP station.

After they left Croc's, the three went to the BP station on Pelham to get Henderson some milk to help get rid of the mace. (Tr. 335, 337-38, 400). Henderson noted that on the way to the BP station, Taylor said he got to shoot his gun one time. (Tr. 335). Jones also recalled Taylor telling Henderson that he got to shoot his gun. (Tr. 399).

Taylor parked the Camaro on the side of the gas station. (Tr. 338-39). Henderson stood at the car for a minute or two, and Taylor stood at the car for a minute or two. (Tr. 400). Jones stayed in the car. (Tr. 400). Henderson started to go inside the gas station, but it was overcrowded, and he did not want to walk past a group of angry guys who just arrived at the gas station. (Tr. 339-40). Henderson also noted that Taylor was trying to fight anybody at the gas station. (Tr. 340). Jones recalled there was fighting around the gas station. (Tr. 400, 401).

Henderson recalled seeing Hiott walking at the gas station. (Tr. 341). He noted that Taylor attempted to talk to her from his car, and he was rude about it. (Tr. 341, 342). Henderson stated that Hiott did not acknowledge Taylor at all. (Tr. 342). Jones did not see the Tahoe. (Tr. 401). He did recall that Henderson did not get any milk. (Tr. 402). Jones asked both Henderson and Taylor to leave, but they sat at the gas station for another minute or two. (Tr. 402).

Taylor shoots at the Tahoe while they are on Pelham Road.

The three then left the gas station. (Tr. 344). Henderson remembered seeing the Tahoe as it was leaving. (Tr. 344). At the time, he was sitting in the front passenger seat of the Camaro. (Tr. 344). Jones did not remember seeing the Tahoe when they

were pulling out, but it was in front of the Camaro when they were pulling out. (Tr. 402). Nesbitt was yelling out the window towards the Camaro, and Taylor was yelling back. (Tr. 345). Jones heard the dude in the Tahoe and Taylor. (Tr. 402-03). Neither Henderson nor Jones recalled what was being said, or who started the words between the two. (Tr. 345, 403). It was hostile. (Tr. 403).

Henderson did not Henderson did not remember the Tahoe turned right out of the gas station, but the Camaro did. (Tr. 346). Henderson heard someone talking on his left side real loud. (Tr. 346). Then, Taylor began arguing with Nesbitt again.[3] The Camaro was in the right lane, and the Tahoe was in the left lane. (Tr. 346, 347). Jones noted Taylor's window was down, and he was talking to the guy in the Tahoe. (Tr. 405). Jones saw Taylor reach over Henderson, and after that, he heard the shot. (Tr. 405). Jones recalled the Camaro was close to the Tahoe when he heard the shot. (Tr. 404).

Henderson heard a boom. (Tr. 348). Henderson got low in the seat, and when he looked up, he saw Taylor bringing his hand back inside the car from outside the window. (Tr. 348). Jones heard a gunshot. (Tr. 403). He ducked. (Tr. 403). Jones did not see anything, but he looked back and saw the Tahoe was slanting off to the left. (Tr. 404). Jones noted that Taylor laughed, and they sped off. (Tr. 405). Henderson stated the Tahoe swerved to the left, and the Camaro sped down the road. (Tr. 348-49). Neither Henderson nor Jones saw anyone in the Tahoe with a weapon. (Tr. 355, 407).

In his statement to law enforcement, Jones had indicated Taylor's left hand and arm were out the window when the shot was fired. (Tr. 411, 416). He recalled that

[3] Jones, who was in the back seat of the Camaro, was not involved in the argument. (Tr. 348).

Taylor reached for the gun with his right hand, and Taylor did not recall which hand he used to shoot the gun. (Tr. 420). He thought it was with the left hand. (Tr. 421). Jones did not know where the gun came from. (Tr. 421).

Immediately after the Shooting.

Henderson then asked Taylor to take him home, but Taylor refused. (Tr. 349). Jones also asked what happened. (Tr. 349). The three did not talk about the incident on the drive back towards Greenville. (Tr. 350). They drove to a house where some guys who were at the club earlier were. (Tr. 351, 406). Jones stayed in the car at that house. (Tr. 406). Henderson got out to try to wash the mace off of his face. While there, Henderson heard Taylor tell those guys that he shot his gun. (Tr. 352). The three then drove to Taylor's house, and Taylor put something in the trunk of his other car, a black Audi. (Tr. 354). Taylor then took Henderson and Jones to Jones' house. (Tr. 355, 407). Jones never talked with Taylor about what happened. (Tr. 407).

Austin Tate, a BMW employee who was driving home on the early morning of February 22, saw there was an extremely large crowd outside of Croc's that morning. (Tr. 167). He stopped at a drug store that was across Pelham Road to see what was happening at Croc's. (Tr. 167-68). Tate heard gunshots, and he saw a guy filing a gun into the air. (Tr. 168). Tate called 911 and reported the shots fired. (Tr. 169). He saw law enforcement arrive. After he got off the phone with the dispatcher, he heard a single gunshot. (Tr. 170). Shortly thereafter, and as he was heading to talk with an officer he saw that was nearby, he saw the SUV on Pelham Road. (Tr. 170). After hearing the gunshot, Tate also saw what he described as a maroon Camaro speeding

down Pelham Road towards the interstate. (Tr. 171). Tate also indicated the rims on the Camaro were not Chevrolet rims. (Tr. 171).

Donterio Harris, Taylor's friend since childhood, identified the red Camaro as Taylor's. (Tr. 290-92). He remembered the car was pretty new. (Tr. 292). On February 21, Harris had talked with Taylor about going to Croc's. (Tr. 293). Harris did not end up going to the club with Taylor because his girlfriend's mother had died. (Tr. 293). Harris received a call from Taylor sometime between 4 and 4:30 a.m., but he did not answer it. (Tr. 293-94). He talked with Taylor later on February 22, and Taylor informed Harris that the whole club was maced that morning. (Tr. 294-95). Taylor borrowed a jack from Harris. (Tr. 296-98). Taylor also later left the Camaro behind Harris's backyard with Harris's permission. (Tr. 297-300). Harris also testified that Taylor washed the Camaro at Harris' house. (Tr. 300-01). Harris said that Taylor had indicated he would only likely leave the car parked behind the house for a couple of hours. (Tr. 302). Taylor never came back to get the car. (Tr. 302). Harris also indicated that the rims in the picture were similar to rims that were pictured in State's Exhibit 13. (Tr. 304).

Police investigation

The first officer that arrived on the scene recalled Jeter had stated that a red or orange newer model Camaro with tinted windows had pulled beside them before the gunshot. (Tr. 147). The vehicle had large rims. (Tr. 147). Officers also spoke with Tate. (Tr. 148). Emergency personnel who treated Hiott also noted that she indicated the assailant was in a red Camaro. (Tr. 163).

Detectives tracked down the surveillance video from the gas station. (Tr. 211-12, 450). No weapons were found in the Tahoe. (Tr. 212, 226).

Aftermarket rims were found in a shed behind Taylor's grandfather's residence. (Tr. 473). Those rims were rented by Taylor. (Tr. 310-17). The wheel shop records also reflected the rims were rented for a 2011 red Camaro. (Tr. 317). The Camaro was found behind Harris' residence in Greenville. (Tr. 228, 299). It could not be seen from the street. (Tr. 230). The car had been cleaned. (Tr. 234). A firearm was found in Taylor's room when he was arrested. (Tr. 456-57, 477-78). Taylor's fingerprint was found on the trunk lid. (Tr. 233, 287). Investigators also spoke with Jimmy Brock. Brock was in jail at the Greenville County Detention Center at the same time as Taylor and Henderson. (Tr. 384-87). He recalled Henderson asking him to tell Taylor to "clear his face." (Tr. 387, l 13). Brock relayed the message to Taylor, who responded by asking Brock to tell Henderson to blame the back seat rider or Taylor would blame it on Henderson. (Tr. 387-88).

ARGUMENT

I. The trial court did not abuse its discretion in denying Taylor's motion for a mistrial. The trial court's decision to give an Allen charge was warranted by the duration of the jury's deliberations before the jury indicated it reached an impasse, and the charge that was given was not unconstitutionally coercive in light of the context in which it was given and under all of the circumstances presented.

What occurred at trial

During the evening of March 3, 2016, the judge received a note from the jury that they were at an impasse. (Tr. 557). The court marked the note as Court Exhibit 4. (Tr. 557). The note also outlined the divisions of the jury for each of the charges. (Court Exhibit 4). After discussing the matter with counsel in chambers, the court decided to release the jury for the evening and to bring them back the next morning at 9 a.m. (Tr. 557). At 9 a.m., the court would give the jury the Allen[4] charge, and then the court would allow the jury to continue to deliberate. (Tr. 557). The court then brought in the jurors and released them for the evening. (Tr. 557-58).

Starting at 9:05 the next morning, the judge gave the jury the following instructions:

> 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, just 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.

[4] Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896).

> 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 15 – 562, l 6).

After the jury left for deliberations, the court asked if there were any exceptions to the charge. Taylor first noted for the record that he objected to the request for an Allen charge on the previous night in chambers, and his objection was denied. (Tr. 562). The trial court acknowledged that occurred. (Tr. 562). Then Taylor moved for a mistrial instead of the Allen charge. (Tr. 562). Third, Taylor requested the court bring the jury back "and tell them that a hung jury is a legitimate end of a criminal trial and is the occasionally inevitable result that requires a unanimous verdict beyond a reasonable doubt." (Tr. 562, ll 20-23).

In response, the Court stated,

> Okay. All right. I appreciate your motions in that regard. I think I recited the appropriate standard of law to be applied in the Allen charge. I also think that it is well accepted in juris prudence not only in the State of South Carolina, but in the United States for the Allen charge to be administered when a jury has indicated that they have reached an impasse. Now, certainly, public policy can change if the Supreme Court of

> the United States and the Supreme Court of South Carolina decides that's an inappropriate charge, I certainly would defer to them. But as it stands, it's allowable. And I think in terms of -- simply in terms of judicial economy, it's appropriate. So, respectfully, I understand your position, but I'll deny your motions.

(Tr. 562, l 24 – Tr. 563, l 14).

Taylor then added an additional argument to his motions. He contended that the Allen charge "is unduly coercive and that is another basis for my objection and request for a mistrial." (Tr. 563, ll 19-21). The trial court noted the argument for the record.

Before the jury came back with a verdict, defense counsel had noted on the record that at around 11:08 a.m., he requested the court declare a mistrial, and the court had denied the motion at that time. (Tr. 564). Taylor further noted that the reasons listed for the mistrial were the other denial of motions for mistrial, and his renewal of the objection to the Allen charge. Taylor also reasoned that the delay after the Allen charge and the jury reaching a verdict warranted a mistrial. The court noted that Taylor was protected on the record regarding the motion.

The jury returned to the courtroom at 11:43 a.m. and issued its verdicts. (Tr. 565-66).

After the jury was released, Taylor renewed his objections regarding the Allen charge and continuation of the trial. (Tr. 575). He also requested a mistrial. (Tr. 575). The trial court denied the motion on the same basis as it had previously articulated. (Tr. 575).

Discussion

The trial court did not abuse its discretion in denying Taylor's motion for a mistrial. The charge was properly given after the jury had indicated it had reached an impasse after seven hours of deliberations.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"The trial judge has a duty to urge the jury to reach a verdict but he may not coerce them." State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575 (1995). An Allen charge is given by a court when the jury has reached an impasse in its deliberations and is unable to reach a consensus. United States v. Burgos, 55 F.3d 933, 935-36 (4th Cir.1995); Allen v. United States, 164 U.S. 492 (1896). The decision

to give such a charge is within the discretion of the trial or sentencing court. Burgos, 55 F.3d at 935. "[T]he trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict." Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000).

Here, the jury initially started its deliberations at approximately 12:00 p.m. on March 3. (Tr. 553). The jury received additional instructions in response to a question at 1:43 p.m., and the jury resumed its deliberations shortly after 1:50 p.m. (Tr. 554-56). The jury's deliberations ended on March 3 at approximately 7:20 p.m., which was the recess after the jury sent its note indicating it had reached an impasse. (Tr. 556-57). In total, the jury deliberated for approximately seven hours and thirteen minutes before the Allen charge was given. It was well within the Court's discretion to find that an Allen charge was appropriate under these circumstances. See generally State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 613 (Ct.App.1991) (finding Allen charge was timely when jury indicated deadlock after four hours of deliberations). As a result, it was not an abuse of discretion for the trial court to deny Taylor's request for a mistrial.

The trial court also did not err in the Allen charge it provided to the jury. The instruction was not unconstitutionally coercive.

The test for determining whether a given charge is unconstitutionally coercive is fact intensive. Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001).

> "An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments." State v. Lee–Grigg, 374 S.C. 388, 418 n. 1, 649 S.E.2d 41, 57 n. 1 (Ct.App.2007) (internal quotation marks omitted), aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010). "In South Carolina state courts, an Allen charge cannot be directed to the

> minority voters on the jury panel." Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). "Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views." Id. "A trial judge has a duty to urge, but not coerce, a jury to reach a verdict." Id.

"Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (internal quotation marks omitted). In determining whether an Allen charge is unconstitutionally coercive, a court should look to whether (1) the charge spoke specifically to the minority juror(s); (2) the judge included in his charge any language such as "You have got to reach a decision in this case;" (3) there was an inquiry into the jury's numerical division, which is generally coercive; and (4) whether the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion; and if so, whether the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield v. Phelps, 484 U.S. 231, 237, 108 S.Ct. 546, 550-51 (1988)); see State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010), cert. denied, 131 S. Ct. 230, 178 L. Ed. 2d 153 (2010); see Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) (recognizing adoption of Tucker factors in non-capital case to determine whether an Allen charge is unconstitutionally coercive).

> 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) (citations omitted).

The charge given in Taylor's case was not unconstitutionally coercive, especially when considered in the context of all of the circumstances presented at trial. First, the charge did not speak specifically to the minority jurors. To the contrary, the charge given requested the jurors in the majority to consider the views of the jurors in the minority and vice versa. The trial court instructed, "[b]ut 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." (Tr. 561, l 22 – Tr. 562, l 2). Nothing else in the trial court's instructions could be construed as being directed solely at the minority jurors. . First, unlike in Tucker, the instructions that were given were not directed towards the minority jurors. In Tucker, there was one holdout juror at the time the Allen charge was given. As part of the instruction that was given that reflected its direction towards the minority, the trial court in Tucker instructed the jury,

> **It was never intended that the verdict of the jury should be the view of any one person.** On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we may have the benefit of collective thought and of collective reasoning.

Tucker, 346 S.C. at 493, 552 S.E.2d at 71 (emphasis added). The instructions in this case never targeted the minority jurors in a similar way.

Second, the trial court did not include any language that required the jury to reach a decision. After the court was made aware of the impasse by the jury's note, he sent the jury home for the evening. (Tr. 557). When the trial court gave its Allen charge the next day, the court advised the jury that if it was unable to reach a verdict, the case

would have to be retried with some additional expense to the state and county. The court only once indicated the jurors should take into consideration their respective positions and that they should come to a decision. (Tr. 561, l 25 – Tr. 562, l 2). It was clear from the trial court's instruction that the jury was not required to reach a verdict. Further, "[i]t is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense". State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995) (citing State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct.App.1985)); see also State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996).

Third, the trial court did not inquire into the jury's numerical division. Here, the jury informed the trial court of the division voluntarily when it informed the court that it reached an impasse. (Court Exhibit #4). That the judge was aware of the numerical division did not render the charge coercive. "[I]t is not necessarily coercive to give an Allen charge even though the jury reports it is deadlocked eleven to one." State v. Williams, 344 S.C. 260, 264-65, 543 S.E.2d 260, 263 (2001) (citing State v. Jones, 320 S.C. 555, 558-59, 466 S.E.2d 733, 734-35 (Ct.App.1996) (concluding the trial court gave a proper Allen charge even though the jury sent a note stating it was "hung 11 to 1" because the charge, taken as a whole, was not coercive)); see also Williams, 386 S.C. at 515, 690 S.E.2d at 68 (finding no coercion when jury disclosed numerical division without solicitation). Again, nothing in the trial court's instruction reflected that it utilized the information contained in the note in directing its instructions towards the minority view on the jury.

Fourth, the timing of the jury verdict in relation to the instruction was not suggestive of coercion in light of the timing of the jury deliberations. The jury initially started its deliberations at approximately 12:00 p.m. on March 3. (Tr. 553). The jury received additional instructions in response to a question at 1:43 p.m., and the jury resumed its deliberations shortly after 1:50 p.m. (Tr. 554-56). The jury's deliberations ended on March 3 at approximately 7:20 p.m., which was the recess after the jury sent its note indicating it had reached an impasse. (Tr. 556-57).

The next morning, the jury received the Allen charge beginning at 9:05 a.m. and ending at 9:10 a.m. (Tr. 560-62). Taylor placed an objection on the record at approximately 11:08 a.m. (Tr. 564). The jury rendered its verdict at 11:43 a.m. (Tr. 565). In total, the jury deliberated for approximately seven hours and thirteen minutes before the Allen charge was given, and another two hours and thirty minutes after the Allen charge was given. The timing is not reflective of the charge being coercive. See State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 613 (Ct.App.1991) (finding jury verdict given one hour and fifteen minutes after Allen charge not result of coercion from charge); Williams, 344 S.C. at 265, 543 S.E.2d at 263 (finding Allen charge not coercive where deliberations after Allen charge lasted approximately two hours and twenty minutes, and total deliberation time was six hours); but see Workman, 412 S.C. at 132, 771 S.E.2d at 639 (finding deliberations of less than 2 hours after receipt of Allen charge was result of coercion when other factors reflected Allen charge was targeted towards jurors in the minority view). The jury deliberation timing is also distinguishable from the circumstances presented in Tucker. In Tucker, the Supreme Court found that the one and one-half hours spent by the jury was a short amount of time in comparison

to the length of time the minority juror had held out prior to the Allen charge. Tucker, 346 S.C. at 494, 552 S.E.2d at 718. In Taylor's case, the jury had deliberated for a little over seven hours before the Allen charge was given, and it further deliberated for another two and one-half hours after the instruction. The amount of time the jury spent deliberating after the charge was given is indicative that the jury did not find the charge coercive.

Taylor's reliance upon language from State v. Pauling is misplaced. Taylor asserts the Allen charge here was coercive because it did not include language that the jurors should not "give up any well-founded conscientious convictions." First, Respondent would note that this argument is not preserved for appellate review. At no point did Taylor present this argument as an objection on the record to the Allen charge that was given. The only request Taylor did make was to ask the judge to instruct the jury that a hung jury is a legitimate end of the trial. Since Taylor did not present this argument at trial, it is not preserved for appellate review. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Second, Pauling does not hold that an Allen charge must include the language relied upon by Taylor to not be coercive. The language Taylor contends was missing from his charge was presented in the first of two Allen charges that were given in Pauling, and the language was not specifically challenged in Pauling. Pauling, 322 S.C.

at 97, 470 S.E.2d at 108 (1996). Under the circumstances presented in Pauling, the phrasing was just a part of the reasoning the Allen charge was not found to be coercive. Pauling is just a reminder that the test for determining whether a given charge is unconstitutionally coercive is fact intensive, and different forms of charges are acceptable depending upon the context in which they are given and the surrounding circumstances.

Altogether, the Allen charge that was given by the trial court in this case was not unconstitutionally coercive. The charge was not directed towards the minority jurors, it did not require the jury to reach a verdict, it was not preceded by a request by the judge for the numerical division, and the duration of the jury's deliberation process reflects the jury was not improperly coerced by the instruction. Since the instruction was not unconstitutionally coercive, the trial court did not err in denying the motion for a mistrial.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Taylor's appeal and affirm his convictions for murder, two counts of attempted murder, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

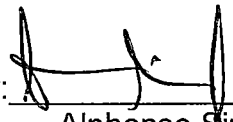
MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville County Courthouse
Greenville, South Carolina 29601

ATTORNEYS FOR RESPONDENT

By: 
Alphonso Simon Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

July 5, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2016-000549

THE STATE,

Respondent,

vs.

BILLY LEMURCES TAYLOR,

Appellant

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, David Alexander, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 5th day of July, 2017.

ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR APPELLANT

ALAN WILSON
ATTORNEY GENERAL

July 5, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Billy Lemurces Taylor*
Appeal from Greenville County
Appellate Case No. 2016-000549

Dear Ms. Kitchings:

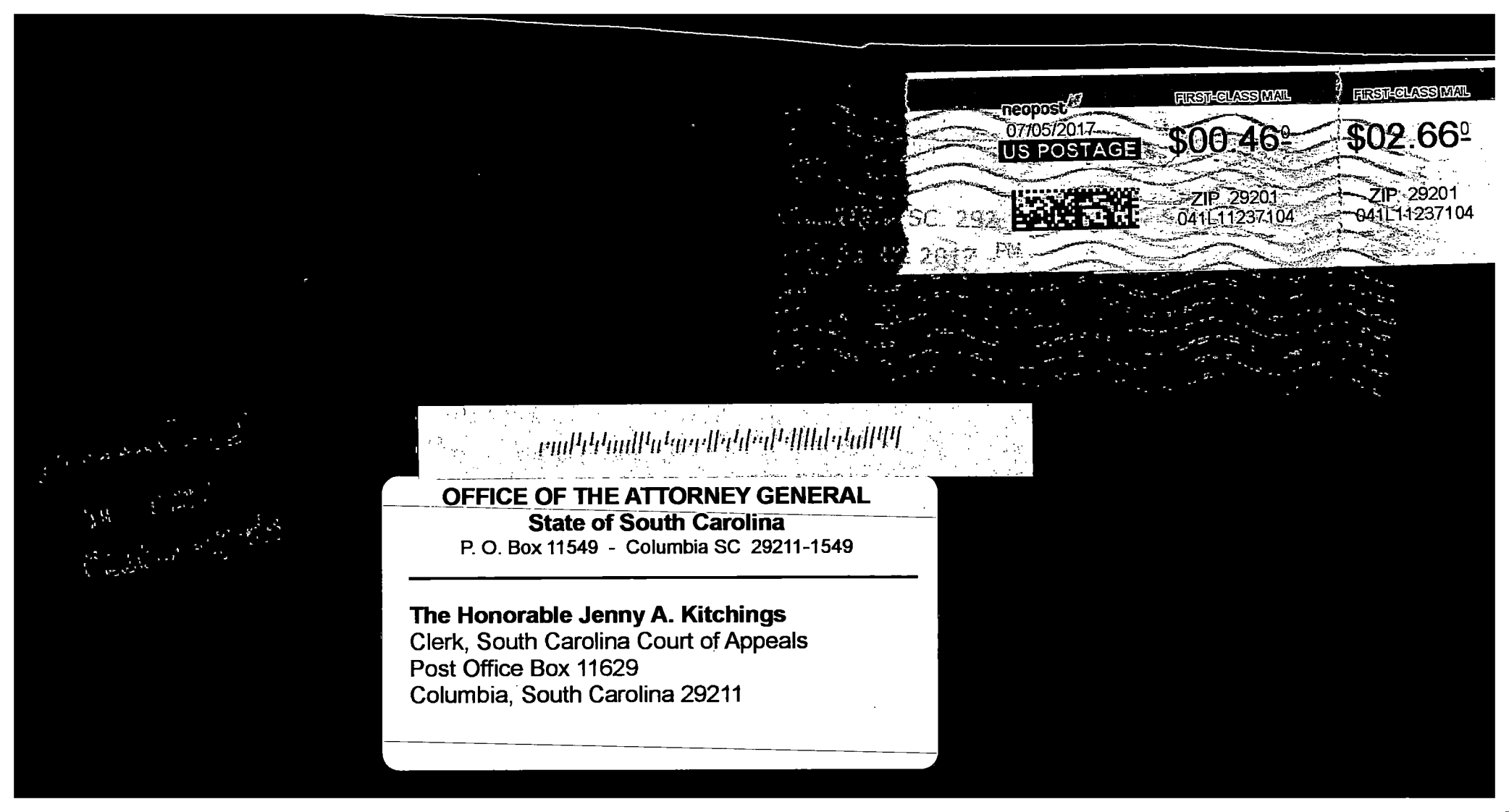
Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.,
Assistant Attorney General

AS/dmd
Enclosures
cc: David Alexander, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, III, Solicitor, Thirteenth Judicial Circuit (w/copy of encl.)
Trisha Allen, Victim Services (w/copy of encl.)


neopost
07/05/2017
US POSTAGE
FIRST-CLASS MAIL
$00.46⁰
ZIP 29201
041L11237104
FIRST-CLASS MAIL
$02.66⁰
ZIP 29201
041L11237104
SC 292
2017 PM
OFFICE OF THE ATTORNEY GENERAL
State of South Carolina
P. O. Box 11549 - Columbia SC 29211-1549
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211