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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
General Sessions Court
Kristi L. Harrington, Circuit Court Judge

Case No. 2015-GS-08-01333
Appellate Case No. 2015-002688

The State,

Respondent,

v.

Sha'Quille Washington,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Sha'Quille Washington, was indicted by the grand jury of Berkeley County on a charge of murder, in connection with the shooting death of Herman Manigault. R. pp. 1-2. He was tried before a jury on October 12-16, 2015, with Judge Kristi L. Harrington presiding. The jury returned a verdict of guilty of the lesser-included offense of voluntary manslaughter. R. p. 620. Judge Harrington sentenced appellant to 30 years' imprisonment. R. pp. 3, 631. Judge Harrington subsequently denied appellant's motion to reconsider the sentence. R. p. 4.

ARGUMENT

This case arose from an altercation that occurred in the early morning hours of August 26, 2013, outside a Berkeley County club called A Place in the Woods. Many people had gathered at the club for a party on the night of August 25. Alcohol was being served, and most everyone there had been drinking. Appellant, who was then 17 years of age, and his uncle, Larry Kinloch, were both at the club that night. R. pp. 82, 157-59. The deceased, Herman ("Trey") Manigault, also went to the club that night with his girlfriend, Arianna Coakley; his cousin, Larry Jenkins; and another acquaintance, Christina ("Taj") Lockwood. R. pp. 39, 80. After they had been there for some time, a fight broke out in the parking lot of the club. Ultimately, gunshots were fired, and Manigault was killed.

There were many conflicts and inconsistencies in the accounts of the various witnesses that testified. Who provoked the fight and who possessed or fired a weapon were matters in dispute. Coakley, Manigault's girlfriend, and Jenkins, Manigault's cousin, gave testimony that attempted to establish appellant provoked the altercation and shot Manigault.[1] R. pp. 44-45, 84-85. But Coakley did not see appellant shoot anyone. R. pp. 105, 110. Moreover, Jenkins did not observe the first shots, instead claiming he saw appellant shooting after Manigault was already on the ground. R. pp. 44-45. Other witnesses contradicted the testimony of Coakley and Jenkins and affirmatively stated they were observing appellant when the first shots were fired. R. pp. 470, 476, 483-84. One of those witnesses testified appellant did not have a gun. R. p. 470. She and another

[1] Another witness, Christina Lockwood, had identified appellant as the shooter in a statement, but she testified she did not see the actual fight and did not see the shooting. R. pp. 221, 251. Lockwood denied seeing appellant point a gun. R. p. 230. She testified she put information in her statement based on what others had said. R. pp. 230, 251.

witness, watching appellant when the shooting occurred, both testified he was not in proximity to where the shots were fired, and they both observed him running away after the shooting started. R. pp. 476, 483-84.

Although some witnesses attempted to establish that appellant or Larry Kinloch provoked or started the altercation, many witnesses gave testimony tending to show Manigault was the instigator. Earlier, Manigault had told the cook something was bothering him. R. pp. 123-24. While inside the club, Manigault had repeatedly told his girlfriend appellant was "looking at" him, and Manigault had said he was "going to snap," was "about to snap." R. pp. 83, 100-01, 109-10. When he and others went outside immediately before the altercation occurred, Jenkins testified Manigault took off his shirt, which Jenkins acknowledged indicated there was going to be a fight. R. p. 56. A disinterested witness, who was not there for the party but only to pick up a food order, confirmed that Manigault[2] took off his shirt like he was about to engage in a fight. R. pp. 459-60. Others confirmed Manigault's shirt was off. R. pp. 243, 388. Coakley testified that a week earlier Kinloch had approached her, tried to talk with her, and asked for her number, but she denied that Kinloch's attempt to "hit on" her had caused the stare-down that night with Manigault, her boyfriend of four years. R. pp. 82, 98-99, 109.

Other specific aspects of the evidence are discussed in greater detail in connection with the issues argued below.

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[2] The witness, Renard Deveaux, did not identify Manigault by name, but by his clothing. He specified it was the person in the brown shorts that took off his shirt. R. p. 460. Manigault was wearing shorts that were described as khaki, tan, or brown. R. pp. 118, 279, 459-60. Appellant was wearing blue and multi-colored swim-trunk-like shorts. R. pp. 117-18, 341. Kinloch was wearing jeans. R. p. 118.

I. THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE TESTIMONY OF A DEFENSE WITNESS THAT LARRY KINLOCH TOLD THE WITNESS HE COMMITTED THE SHOOTING.

Larry Kinloch was called as a prosecution witness. He testified he was at the club that night and drunk. R. pp. 185, 188. He denied involvement in the fight and claimed he was outside smoking when he heard a gunshot. R. p. 164. He denied having a weapon. R. pp. 187-88. He denied that he had seen Quentin Kenneth Grant and Darlene Washington after the shooting that night, and he denied telling them he did the shooting. R. pp. 175-76. The defense called Grant as a witness and sought to elicit his testimony that Kinloch told him he did the shooting. The state objected on hearsay grounds, and the trial court sustained the objection and struck the witness's testimony. R. pp. 436-38, 448. The court's ruling was reversible error.

Evidentiary rulings are governed by an abuse of discretion standard. *See State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 569 (2010); *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001). An abuse of discretion occurs when the trial court's ruling is controlled by an error of law or a factual conclusion that is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); *State v. Garner*, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct. App. 2010). The court's ruling on the state's hearsay objection was governed by multiple errors of law.

The South Carolina Rules of Evidence define what is and is not hearsay, for purposes of the admissibility or inadmissibility of out-of-court statements. A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony. Rule 801(d)(1)(A), SCRE. Evidence of a prior inconsistent statement is admissible not

merely as impeachment evidence but as substantive evidence. *See State v. Copeland*, 278 S.C. 572, 581-82, 300 S.E.2d 63, 68-69 (1982); *In re Richard D.*, 388 S.C. 95, 99-100, 693 S.E.2d 447, 449-50 (Ct. App. 2010). In this case, Kinloch testified in the state's case-in-chief, was cross-examined by the defense, and specifically denied having told Grant he did the shooting. The testimony of Grant that Kinloch told him he did the shooting is a prior inconsistent statement that is squarely within the definition of non-hearsay contained in Rule 801(d)(1)(A). *Cf. State v. Fossick*, 333 S.C. 66, 68-70, 508 S.E.2d 32, 33 (1998) (finding trial court erred in excluding testimony of person who heard witness's statement "I killed that bitch . . . ," after witness testified and on cross-examination denied having made the statement). The court abused its discretion in refusing to admit Grant's testimony that Kinloch said he did the shooting.

Even if the court had been correct in finding the statement was hearsay, it erred in its conclusion that the statement was not within any hearsay exception. Hearsay is admissible if it falls within one of the specific exceptions recognized by Rule 803 of the evidence rules. Like prior inconsistent statements, a statement that is admissible under a Rule 803 exception may be used substantively, to prove the truth of the matter asserted. *See Stahlnecker*, 386 S.C. at 622-23, 690 S.E.2d at 572-73. The statement of Kinloch to Grant is admissible under two Rule 803 exceptions, present sense impression and excited utterance. *See* Rule 803(1), (2), SCRE. Grant testified he was with Kinloch, his best friend, minutes after the shooting, and Kinloch said he did it. R. pp. 438, 446. Kinloch's statement was an excited utterance – a statement relating to a startling event made while the declarant was under the stress or excitement caused by the event. *See* Rule 803(2), SCRE. It satisfied the three requirements for admissibility under this

exception: (1) it related to a startling event, the shooting; (2) Kinloch made it to a friend minutes after the shooting, while Kinloch was under the stress of excitement; and (3) the stress of excitement was caused by the startling event, the shooting. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573; *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007); *State v. Hendricks*, 408 S.C. 525, 532, 759 S.E.2d 434, 437-38 (Ct. App. 2014). The startling event of shooting someone would suspend a person's reflective thinking such that fabrication was unlikely, in accordance with the rationale underpinning the excited utterance exception. *See Ladner* 373 S.C. at 116, 644 S.E.2d at 691; *LaCoste*, 347 S.C. at 160, 553 S.E.2d at 468; *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). Indeed, where Kinloch's statement was inculpatory, any likelihood he fabricated the statement is non-existent.

Kinloch's statement was also a present sense impression – a statement describing or explaining an event made immediately after the event. *See* Rule 803(1), SCRE. It met the three requirements for admissibility under this exception: (1) it described or explained an event, the shooting; (2) it was contemporaneous with the shooting, occurring immediately thereafter; and (3) Kinloch personally perceived the event, the shooting. *See State v. Parvin*, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015); *Hendricks*, 408 S.C. at 533, 759 S.E.2d at 438. Evaluating the totality of the circumstances, the statement of Kinloch to Grant fell within both of these exceptions.

The error in refusing to allow this testimony was extremely prejudicial. This prosecution was premised on very weak evidence. No witness testified as to who fired the initial shots. One witness claimed he saw appellant shooting, but that was only after the initial shots had been fired and Manigault was on the ground. R. pp. 44-45. His

claim was disputed by two witnesses who were observing appellant at the time the first shots were fired and testified he did not have a gun, was not where the shots were fired, and ran after the shooting started. R. pp. 470, 476, 483-84. One witness testified Manigault told her Kinloch was going to shoot him. R. pp. 423, 430. In light of this evidence and the many conflicts and contradictions in the various accounts of the night's events, had the jury been allowed to consider the statement of Kinloch that he did the shooting, the outcome of the deliberations likely would have been different. The court's error in excluding this evidence was prejudicial, and appellant is entitled to a new trial.

II. THE TRIAL COURT ERRED IN REFUSING TO ADMIT A TOXICOLOGY REPORT AND TESTIMONY OF THE FORENSIC PATHOLOGIST CONCERNING THE REPORT'S FINDINGS AS TO THE DECEASED'S BLOOD ALCOHOL LEVEL.

Dr. Erin Presnell, a forensic pathologist, conducted Manigault's autopsy. R. pp. 377, 381. The defense sought to introduce her testimony and a toxicology report that revealed Manigault's blood alcohol content. The state objected, and the court sustained the objection. R. pp. 452-53. The defense proferred her testimony concerning the report and the report itself, which stated Manigault had a blood alcohol level of .235. R. pp. 454-56, 635, 638. This evidence was relevant and admissible.

Relevant evidence is generally admissible. *See* Rule 402, SCRE. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Rule 401, SCRE. In this case, the blood alcohol content of Manigault was probative of the issue whether he was the person who provoked the altercation that occurred outside the club. As previously noted, Manigault had complained during the night that something was bothering him and that he was "about to

snap." R. pp. 83, 100-01, 109-10, 123-24. Witnesses testified that, upon going outside, Manigault removed his shirt, in preparation for an altercation. R. pp. 56, 459-60. Although there was testimony that he had been drinking, that testimony did not establish how much alcohol he had consumed. The level of his intoxication was relevant to whether his judgment was impaired and whether, due to his condition, he provoked and instigated this fight. His condition at the time of the events was a component of the complete picture of what occurred. Independent evidence, based on scientific testing, revealed with certainty his blood alcohol content. This evidence was relevant and its probative value outweighed any prejudicial effect that its admission would have had. *See* Rule 403, SCRE; *cf. Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 477, 540 S.E.2d 484, 487 (Ct. App. 2000) (physician's alcohol dependency was relevant to his decision-making process, and its probative value outweighed any prejudicial effect).

The stated basis for the state's objection was Rule 404, one of the rules in the relevancy section of the evidence rules. That rule is inapplicable to the issue of the admissibility of evidence of Manigault's blood alcohol level. Rule 404 addresses the admissibility of character evidence and evidence of other crimes, wrongs, or acts. Manigault's intoxication was not a matter of character. Nor was it a crime, wrong, or bad act. Rule 404 simply had no applicability to the question of the admissibility of the blood alcohol level. The court's exclusion of this evidence was controlled by an error of law and constituted an abuse of discretion.

The court's erroneous ruling was prejudicial. A person with the high blood alcohol content documented by the toxicology report and the accompanying impairment in judgment resulting from such extreme intoxication would have a decreased sensitivity

to pain, lowered inhibitions, a tendency toward overreaction to a perceived affront, and even aggressive or violent behavior. Coupled with the testimony establishing Manigault was bothered, about to snap, and took his shirt off in order to fight, the additional evidence of his extreme intoxication likely would have influenced the jury's deliberations as to the issue of who instigated the fight and likely would have altered the outcome. Exclusion of the toxicology evidence as to his blood alcohol level of .235 was reversible error.

III. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF A DEFENSE WITNESS WHO HAD BEEN PRESENT IN THE COURTROOM BRIEFLY, IN VIOLATION OF THE SEQUESTRATION ORDER.

Kevin Watson, a defense witness, was called to testify on the third day of trial. R. p. 405. The state objected on the basis that the witness had been present in the courtroom during a previous witness's testimony, in violation of the sequestration order issued earlier in the trial. R. p. 407. Watson stated he had come to court for the first time that day, and he entered the courtroom when he was told his name was called. R. p. 407. He acknowledged he had been in the courtroom that day, when Detective Shuler was on the stand, and had "seen a thing on the screen" but, besides that, did not hear any testimony. R. pp. 409-10. The court prohibited the witness from testifying. R. p. 411. This ruling was error.

A party is not entitled to sequestration of witnesses as a matter of right. *State v. Simmons*, 384 S.C. 145, 173, 682 S.E.2d 19, 33 (Ct. App. 2009); *State v. Caldwell*, 378 S.C. 268, 278, 662 S.E.2d 474, 480 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998); *see* Rule 615, SCRE (court ***may*** order witnesses excluded so they cannot hear testimony of other witnesses). Indeed, the mere opportunity

for witnesses to compare testimony is insufficient to compel sequestration. *State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981); *State v. Carmack*, 388 S.C. 190, 197, 694 S.E.2d 224, 227 (Ct. App. 2010); *Caldwell*, 378 S.C. at 279, 662 S.E.2d at 480. Where a sequestration order has been issued, violation does not automatically result in disqualification of the witness to testify. In fact, our appellate courts have frequently approved allowing testimony from witnesses who had been sequestered but were in the courtroom during the testimony of one or more other witnesses. *See, e.g.*, *State v. Saltz*, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001); *State v. Huckabee*, 388 S.C. 232, 241-43, 694 S.E.2d 781, 785-86 (Ct. App. 2010); *Simmons*, 384 S.C. at 173-74, 682 S.E.2d at 33-34; *Fulton*, 333 S.C. at 375, 509 S.E.2d at 827.

Where there has been a violation of a sequestration order, the court may discipline the witness; however, the question of excluding the witness's testimony depends upon the particular circumstances and is within the court's discretion. *Huckabee*, 388 S.C. at 241, 694 S.E.2d at 785. Here, based on the circumstances surrounding the particular sequestration violation, the court abused its discretion in prohibiting the witness from testifying.

The violation of the sequestration order was minor. The witness was present during the playing of a video, when Detective Shuler was on the stand, but had heard no testimony. The infraction occurred on the third day of trial. The witness was not present during the first two days of trial, having come forward as a witness the same day he was called to testify. Because he was not present for the earlier days of trial, he had not been made aware of the sequestration order, and he had entered the courtroom when he was informed his name had been called. The minor violation of the sequestration order was

unknowing and unintentional, and certainly not flagrant. Under these circumstances, the court abused its discretion in excluding the witness. *Cf. Simmons*, 384 S.C. at 173-74, 682 S.E.2d at 33-34 (trial court did not abuse discretion in allowing testimony of officer who had heard testimony of other witnesses *in camera* and who violated sequestration order by entering courtroom during defendant's testimony because he was "'sent for' to testify"; evidence did not establish he entered courtroom knowingly and intentionally in effort to violate order); *State v. Tisdale*, 338 S.C. 607, 615-18, 527 S.E.2d 389, 394-95 (Ct. App. 2000) (trial court did not abuse its discretion in denying mistrial based on violation of sequestration order, where the violation was not flagrant or intentional).

The court's erroneous exclusion of the witness's testimony was prejudicial. In a proffer, the witness testified he was outside when tussling was going on, saw the fighting, and did not see either Kinloch or appellant with a weapon. R. p. 414. In this case, the witnesses' accounts were extremely contradictory. Coakley and Jenkins claimed appellant had a gun, but others who observed him when the shots were fired disputed he had a weapon. Where there was such a sharp conflict in the testimony, it was prejudicial to the defense for the court to prohibit the testimony of this witness who would have corroborated the witnesses who testified appellant did not have a weapon.

IV. THE TRIAL COURT ERRED IN REFUSING THE DEFENSE'S REQUEST FOR A JURY CHARGE ON SELF-DEFENSE.

The court denied a defense request for a jury charge on self-defense. R. pp. 534-35. There was evidence in the record to support a charge on self-defense, and the court's refusal to give such a charge warrants a new trial.

The law to be charged is determined by the evidence presented at trial. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016); *State v. Smith*, 391 S.C. 408, 412,

706 S.E.2d 12, 14 (2011); *State v. Bryant*, 391 S.C. 225, 469, 705 S.E.2d 465, 233 (Ct. App. 2010). If there is any evidence in the record to support a requested charge, the court must give it. *Smith*, 391 S.C. at 412, 706 S.E.2d at 14. The court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented at trial. *Smith*, 391 S.C. at 412, 706 S.E.2d at 14.

As noted above, testimony was presented that tended to establish Manigault was the one provoking the altercation. He had indicated to others that he was bothered by something and "about to snap." R. pp. 83, 100-01, 109-10, 123-24. His girlfriend of four years acknowledged that Kinloch had "hit on" her a week earlier. R. pp. 82, 98, 108. When Manigault went outside, immediately before the altercation began, he took off his shirt, in preparation for a fight. R. pp. 56, 459-60.

Coakley claimed that, after the people had moved outside, appellant had a gun. However, by her account, he drew the gun to ***defend himself*** after ***she*** raised a beer bottle to strike ***him***. R. p. 104. Although she claimed he had struck Manigault first, this claim was contradicted by a witness who stated appellant was not near the fight and by appellant's own statement. R. pp. 480, 632-34.

Based on the evidence that Manigault was bothered and about to snap, then went outside and took his shirt off to fight, the record supports an inference that the altercation was provoked by Manigault, not appellant. Moreover, the state's own witness, Coakley, admitted she was attempting to strike appellant and he pulled a gun to defend himself. These facts in the record were sufficient to support a charge of self-defense, and the court committed error in refusing a self-defense charge.

This error was prejudicial. As previously noted, the evidence of what occurred that night was not at all clear. The accounts of the various witnesses were rife with contradictions and conflicts. The jurors clearly had difficulty reaching a verdict, as shown by their communication with the court that they were "hopelessly at an impasse." *See* R. p. 644. The question of appellant's guilt or innocence was not certain, and a genuine likelihood exists that giving a jury charge on self-defense would have altered the outcome. The court's refusal of a self-defense charge is reversible error.

V. THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUEST FOR A JURY CHARGE ON ACCOMPLICE LIABILITY.

The state requested a charge on accomplice liability, to which the defense objected because the record was devoid of any evidence to support such a charge. R. pp. 528-29, 532-34. The court committed reversible error in giving the accomplice liability charge.

Under the theory of accomplice liability stated as "the hand of one is the hand of all," one who joins with another to accomplish an illegal purpose is liable criminally for the actions of his confederate incidental to the execution of the common design and purpose. *See Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011); *State v. Ward*, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002).

To determine if an accomplice liability charge should have been given in this case, the question is whether there was any evidence that another co-conspirator was the shooter and that appellant was acting with him when the crime took place. *See Barber*, 393 S.C. at 237, 712 S.E.2d at 439. In this case, there was ***no evidence*** that a co-conspirator was the shooter. The defense had attempted to introduce such evidence, but

the court had refused to admit Grant's testimony concerning Kinloch's statement that he did the shooting, and the court had instructed the jury to disregard that testimony. R. pp. 436-37, 448. With that testimony excluded, there was no evidence in the record to support an accomplice liability charge, and the court's charging the jury on that theory of criminal liability was reversible error.

In *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014), the Court of Appeals addressed the precise issue presented here.[3] The trial court gave an accomplice liability charge, over defense counsel's objection. *Wilds*, 407 S.C. at 437, 756 S.E.2d at 389. The trial record established there was ***no evidence*** that anyone other than the defendant was the shooter. *See Wilds*, 407 S.C. at 439, 756 S.E.2d at 390. The Court of Appeals found the trial court erred in giving the charge and the error was prejudicial. *See Wilds*, 407 S.C. at 439, 756 S.E.2d at 390-91. The Supreme Court upheld that determination, initially granting a writ of *certiorari*, but ultimately dismissing the writ as improvidently granted. *See Wilds v. State*, 414 S.C. 341, 778 S.E.2d 112 (2015).

Here, as in *Wilds*, it was error to give an accomplice liability charge in the absence of any evidence that someone else was the shooter. As in *Wilds*, the error was prejudicial. Giving such a charge upon the evidence in this record was confusing to the jury. In fact, the jury requested that the court clarify the law of "hand of one is hand of all." *See* R. pp. 604, 643. Moreover, the jury's confusion is clearly reflected in a later note to the court, in which it confused the "hand of one is the hand of all" doctrine to pertain to "acting in concert with the victim." *See* R. pp. 604, 645. The court did not

[3] Procedurally, the issue was decided in the context of a post-conviction relief claim of ineffective assistance of appellate counsel for failing to challenge in Wilds's direct appeal the giving of a charge on accomplice liability. *See Wilds*, 407 S.C. at 437, 756 S.E.2d at 389.

correct this confusion, instead simply informing the jury, "You have been given all instructions on the law in my charge to you. Please continue your deliberations." *See* R. pp. 604, 645. The confusion that resulted from giving an accomplice liability charge, which was unsupported by the evidence, likely contributed to the guilty verdict. The court should grant a new trial because of this prejudicial error.

VI. THE TRIAL COURT ERRED IN GIVING AN *ALLEN* CHARGE AT THE CLOSE OF A DAY'S DELIBERATIONS, THEN EXCUSING THE JURY FOR THE NIGHT.

Late in the afternoon of the fourth day of trial, the jury reported to the court that it was deadlocked. The court informed the attorneys she intended to bring the jury in, give an *Allen*[4] charge, and release the jurors for the evening. R. p. 605. The defense objected to this procedure, arguing that the jury should be sent home and the *Allen* charge not given until the jury returned the next morning, but if the charge was to be given that afternoon, the jury should then resume deliberations. R. p. 605. Over the defense objection, the court gave the *Allen* charge and sent the jury home for the night. R. pp. 606-09. After the jury left, the defense renewed its objection, not to the charge given, but to the court's procedure of giving the charge and not having the jurors stay together and continue their deliberations. R. p. 610. The court explained her ruling, stating that under the law she had to give the *Allen* charge before breaking for the evening. R. p. 612. This ruling was erroneous.

Contrary to the court's ruling, the law does not require that, before the jury could be sent home for the evening, the court had to give an *Allen* charge. Rather, if the court is going to break for the day after the jury is deadlocked, the practice in that situation is to

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[4] *See Allen v. United States*, 164 U.S. 492 (1896).

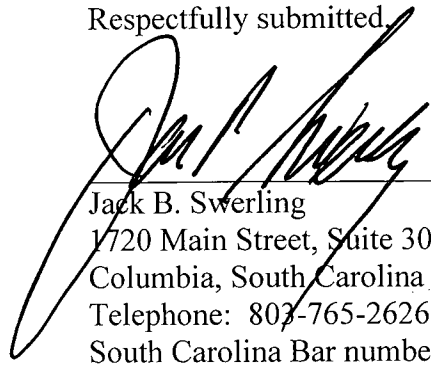
send the jury home with instructions to return the next day, and to give the *Allen* charge the next day immediately before the jury resumes deliberations. *Cf. Harvey v. Strickland*, 350 S.C. 303, 307-08, 566 S.E.2d 529, 532 (2002) (on medical malpractice and medical battery claims, jury reported it could not agree; jury was excused for the day but brought back the next morning for further deliberations after an *Allen* charge); *State v. Tillman*, 304 S.C. 512, 521, 405 S.E.2d 607, 612 (Ct. App. 1991) (at about 9:30 p.m., after almost four hours of deliberations, jury reported it was hung; trial judge excused jury for the night and gave *Allen* charge the next morning, after which jury resumed deliberations). The court's ruling, controlled by an error of law, was an abuse of discretion.

The procedure adopted by the court also was prejudicial. The procedure undermined the very purpose of an *Allen* charge, which by its terms directs the jurors to continue to deliberate and to specifically consult with each other, express their views, listen to the other jurors, and discuss their differences with open minds. R. p. 607. However, rather than sending the jurors back to carefully consider and respect the opinions of the others and reevaluate their own positions in accordance with the court's instructions, R. p. 608, the court sent them home. The effect of the court's procedure was to separate the jurors, a group that is required to deliberate and reach consensus, and instead send them home to contemplate the case individually, thereby altering the manner in which juries conduct their deliberations. This procedure was prejudicial, and this Court should reverse and grant appellant a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand his case for a new trial.

Respectfully submitted,



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APPEAL FROM BERKELEY COUNTY
General Sessions Court
Kristi L. Harrington, Circuit Court Judge

Case No. 2015-GS-08-01333
Appellate Case No. 2015-002668

The State,

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Sha'Quille Mi'Leak Jamal Washington,

Appellant.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final brief and final reply brief of appellant comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings* (April 15, 2014).

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