

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-196546

THE STATE,

Respondent,

vs.

CEDRIC FLOOD,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
S.C. Bar# 100145

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

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

Appellant failed to preserve the issue regarding section 14-7-1330 of the South Carolina Code. Nevertheless, the trial judge did not err when he sent the jury back to deliberations for the second time with the jury's consent.

STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Appellant for first-degree criminal sexual conduct and kidnapping. On July 19, 2011, Appellant proceeded to trial. Attorneys Douglas Mellard and Mark Wise represented Appellant, and Assistant Solicitors Glenn Justis and Harrison Bell represented the State.

On July 21, 2011, the jury returned a verdict of not guilty on the first-degree criminal sexual conduct charge and a verdict of guilty on the kidnapping charge. (R. p. 78.) The Honorable Edgar W. Dickson sentenced Appellant to life without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code. (R. p. 93.)

STATEMENT OF FACTS

On September 29, 2009, Appellant kidnapped his ex-girlfriend ("the victim"). (R. p. 2; R. pp. 5-10.)

At trial, the victim testified that when she returned to her house, she saw Appellant behind her car. (R. p. 4.) The victim tried to run away from Appellant; however, she was unable to escape. Appellant pointed a gun to her back. Appellant told the victim, "I'm going home, you're going with me, and going to my house because I'm going to kill you." (R. p. 6.) Appellant shoved victim in the trunk of the victim's van and drove to Appellant's sister's house. (R. p. 7.) As Appellant drove to his sister's house, he kept telling the victim that he was going to kill her.

After they arrived at Appellant's sister's house, Appellant took the victim to the living room and pointed the gun to the victim's head and chest. (R. p. 9.) There was no one else in the house. Appellant told the victim that her son was going to miss her after Appellant kills her. (R. p. 10.) Thereafter, Appellant got up and told the victim that he wanted sex and demanded the victim come to the back room. According to the victim, Appellant pointed the gun at the victim and told her to take her clothes off. Scared for her life, the victim complied. Appellant took his clothes off and got on top of the victim. (R. p. 11.) Appellant had sexual intercourse with the victim multiples times. (R. pp. 11-12; R. pp. 14-16.)

At some point, Appellant put duct tape on the victim's legs, head, eyes, and mouth. (R. pp. 16-17.) In addition, Appellant handcuffed the victim to the bed. (R. pp. 13-16.) Eventually, Appellant left. (R. p. 17.) At that point, the victim was able to get out of the handcuffs and escape. (R. p. 18.)

At trial, Lt. James Shumpert testified that when he arrived on the scene, the victim had a handcuff on one of her wrists. (R. p. 34.) Furthermore, the victim looked like she had been duct taped around her ankles and her mouth. (R. pp. 34-36.) After Lt. Shumpert obtained a search warrant, he went inside Appellant's sister's house and found duct tape in the bedroom where the victim claimed she was tied up. (R. pp. 38-39.) In addition, one of the officers found a BB gun in one of the bedrooms. (R. p. 47.) At trial, a forensic scientist testified that the DNA profile developed from the semen on the victim's vaginal swab matched the DNA profile of Appellant. (R. p. 48; R. pp. 49-50.)

On July 20, 2011, at 4:25 p.m., the jury began deliberations. (R. p. 51.) On the same day, at 5:05 p.m., the jury sent a note to the judge asking for the definition of law for kidnapping and criminal sexual conduct. (R. pp. 51-52.) The trial judge re-read the jury charges on kidnapping and criminal sexual conduct. (R. pp. 52-55.) Shortly thereafter, the jury returned to deliberations. (R. p. 55.) After 6:00 p.m. that evening, the jury sent the judge another note indicating that they wanted to hear the victim's testimony again. (R. p. 56; R. p. 59.) The trial judge decided to retire the jury for the evening and replay the victim's testimony at 9:30 the next morning. (R. pp. 61-63.)

The next morning, the trial judge replayed the victim's testimony for the jury, and the jury continued their deliberations. (R. p. 71.) At some point, the jury sent a note informing the trial judge that they could not come to a unanimous decision on either charge. The trial judge stated that the jury probably just needed some more time to deliberate. (R. p. 72.)

Furthermore, the trial judge advised the attorneys that he was inclined to give the jury an Allen¹ charge; however, he was opened to suggestions. At that point, the trial judge asked Appellant's trial counsel their position on him giving the Allen charge. Appellant's trial counsel replied, "That's fine, Your Honor."

Thereafter, the trial judge gave the jury an Allen charge. (R. pp. 72-74.) The jury retired to the jury room and continued deliberations. (R. p. 74). After the trial judge gave the Allen charge, the trial judge asked, "Anything from the Defense regarding my charge?" (R. p. 75.) Appellant's trial counsel replied, "No, sir."

At some point, the jury sent the trial judge two additional jury notes. (R. p. 75; R. p. 94.) Both notes stated there was one juror that indicated he would "never" change his mind. The trial judge held an off-the-record conference in his chambers with the attorneys. (R. p. 75.) The trial judge brought the jury back into the courtroom and gave the following charge:

THE COURT: I've gotten two notes from you. I did not respond to the first one, so I got the second one that's essentially the same thing. You know, it reminds me of when my children repeat things like I was hard of hearing, and I apologize for not getting back to you sooner than that. But let me tell you, I'm not going to recharge the law to you again, I'm not going to do that. But I want y'all - - if y'all have ever been involved in Court proceedings before, y'all know that it takes a lot of people a lot of time and a lot of work just to get to Court. Okay? And we've been in this trial now for a few days, and I know these deliberations have been hard on y'all, and I know that they are some very hard decisions that you are being asked to make, and I know that there's serious disagreement among you. But I want to remind you that if you think it is tough on you, I want you to think about how tough it is on the parties.

¹ Allen v. United States, 164 U.S. 492 (1896) (defining the charge used to encourage a deadlocked jury to reach a verdict).

Now, the parties want you to make a decision in this case, and they want you to make that decision without compromising any of your convictions or your beliefs. Now, considering that and considering it's still early in the day, I want to apologize to you and tell you that rather than try this case again I'm treating this as a work day. Sometimes you've got to work overtime. So, I'm asking y'all to return to your deliberations and bring back a fair, just and impartial verdict. Okay? Thank y'all very much.

(R. pp. 75-76.)

At 2:50 p.m., the jury returned to the jury room and continued deliberations.

Thereafter, in attempt to clarify the record, the trial judge stated that the attorneys reviewed the additional charge in chambers before he read the charge to the jury. (R. p. 76.) Moreover, the trial judge asked Appellant's trial counsel if Appellant had any exceptions to the additional charge, and Appellant's trial counsel replied, "No, sir."

At 5:00 p.m. that day, the jury returned a verdict. (R. p. 77.)

ARGUMENT

I.

Appellant failed to preserve the issue regarding section 14-7-1330 of the South Carolina Code. Nevertheless, the trial judge did not err when he sent the jury back to deliberations for the second time with the jury's consent.

Appellant contends the trial judge erred when he sent the jury back to deliberations for the second time in violation of section 14-7-1330 of the South Carolina Code. However, not only did Appellant not object to the additional charge, Appellant reviewed the additional charge beforehand and consented to the charge. (R. pp. 76-77.) Because Appellant failed to object to the additional charge and call to the attention of the trial judge section 14-7-1330, the issue was not preserved for review. Regardless, the trial judge did not err when he gave the jury the additional charge and the jury continued deliberations.

A. Appellant failed to preserve the issue regarding section 14-7-1330 of the South Carolina Code.

Although Appellant argues on appeal that the trial judge erred when he gave the jury an additional charge after the jury returned for the second time, Appellant never objected to the additional charge during trial. Furthermore, the trial judge allowed Appellant to review the additional charge beforehand, and Appellant consented to the additional charge. (R. pp. 76-77.)

“An issue may **not** be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.” State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (emphasis added); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“In order for an issue to be preserved for appellate review, it must have been

raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.”); see also State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) (holding error in jury instructions is not preserved for review if the defendant fails to object).

Furthermore, not only did Appellant fail to object to the additional charge, Appellant reviewed the charge beforehand and consented to the additional charge. (R. pp. 76-77.) Because Appellant conceded during trial that the charge was proper, the issue is not preserved. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (holding an issue conceded at trial is not preserved for review); see also Hendrix v. E. Distrib., Inc., 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (holding where issue is not preserved for review, it should not be addressed by appellate court); Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (citing Hendrix) (“An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court’s opinion should be vacated to the extent it addressed an issue that was not preserved.”):

In summary, Appellant never objected to the additional charge, in fact, Appellant consented to the additional charge. Therefore, the issue Appellant now complains of on appeal is not preserved for review.

B. Furthermore, the trial judge did not err when he gave the additional charge to the jury.

Appellant contends the trial judge erred when he gave an additional charge after the jury returned twice without a verdict. However, the trial judge did not violate section 14-7-1330 of the South Carolina Code because the jury consented to the continuation of deliberations.

Furthermore, the additional charge was not coercive because the trial judge told the jury not to give up any of their convictions or beliefs.

i. The trial judge did not violate section 14-7-1330.

Section 14-7-1330 of the South Carolina Code provides the procedure a trial judge must use when a jury fails to agree upon a verdict:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, **it shall not be sent out again without its own consent** unless it shall ask from the court some further explanation of the law.

S.C. Code Ann. § 14-7-1330 (emphasis added).

This Court advised the following: “At the second indication of deadlock, courts typically inquire as to whether more deliberations would be beneficial to the jury, and the issue of consent is determined from the jury's response.” State v. Robinson, 360 S.C. 187, 193-194, 600 S.E.2d 100, 103 (Ct. App. 2004); see also State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922) (noting that whether the jury exercised “due and thorough deliberation upon any cause” without reaching a unanimous verdict must be determined by the trial court in the exercise of sound discretion).

Moreover, in Edwards v. Edwards, our Supreme Court held that the jury implicitly consented to the continuation of deliberations. 239 S.C 85, 93, 121 S.E.2d 432, 436 (1961). In Edwards, the jury returned to the courtroom three times without having agreed upon a verdict. Id. The trial judge asked the jury to return to the jury room one more time. Id.

Our Supreme Court reasoned:

There was no response or indication of unwillingness on the part of any member of the jury, but on the contrary they returned immediately to the jury room for further deliberation. No verbal acceptance of the request of the trial Judge was made, but consent was implied. Had there been a statement to the effect that further consideration of the case was without their consent, it would have become the duty of the trial Judge to discharge them. However, under the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he should not have dismissed them but permitted further deliberation as was done in the instant case.

Id.; see also Buff v. South Carolina Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) (“[W]hen a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.”)

Similar to the jury in Edwards, the jury in this case made no response or indication of an unwillingness to return to deliberations. Therefore, because consent was implied, the judge did not violate section 14-7-1330 of the South Carolina Code.

ii. The additional charge was not coercive.

Appellant claims the additional charge was coercive. However, the judge merely encouraged the jury to keep an open mind and consider the opinions of the other jurors. The trial judge made it clear that he did not want anyone to compromise their convictions or beliefs.

“The trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it.” State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 108-109 (1996) (holding the trial judge's second Allen charge was not coercive). When determining whether or not a charge is coercive,

courts look at the following factors: 1) the length of the deliberations prior to the charge; 2) the length of the deliberations following the Allen charge; 3) and the total length of deliberations. State v. Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 262-263 (Ct. App. 2001) (holding the trial judge did not coerce a verdict by implying the jury would have to deliberate indefinitely).

Furthermore, “[t]he trial judge may not indicate to or threaten the jury that they must agree or, failing to agree, they will remain in the jury room for a specified length of time. Id. at 264, 543 S.E.2d at 263. Moreover, this Court has held that it is not coercive to charge a jury that the failure to reach a verdict will require a new trial at additional expense. State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct. App. 1985).

Turning to the case at hand, Appellant failed to provide a sufficient record for review regarding the length of deliberations prior to the first Allen charge and the length of deliberations prior to the additional charge. See State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998) (holding the burden is on appellant to provide a sufficient record for review.) Thus, this Court is unable to apply the factors mentioned above.

However, when this Court looks at the trial judge’s instructions as a whole, it is clear the charge was not coercive. See Williams, 344 S.C. at 264, 543 S.E.2d at 263 (“Review of an Allen charge requires this court to consider the charge in light of the accompanying circumstances.”). Here, the jury only deliberated for approximately an hour and a half on the first day of deliberations. On the following morning, the jury listened to the victim’s testimony again. After hearing the additional Allen charge, the jury returned to the jury room at 2:50 p.m. and returned a verdict at 5:00 p.m. Furthermore, the trial judge never threatened or indicated to the jury that

they must agree, or failing to agree, they would remain in the jury room for a specified amount of time. In summary, the additional charge was not coercive.

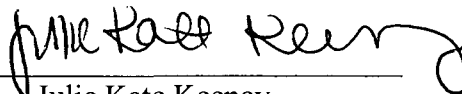
CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
Bar # 100145

By: 
Julie Kate Keeney
Bar# 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 27, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-196546

THE STATE,

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vs.

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Appellant.

CERTIFICATE OF COUNSEL

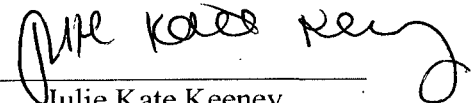
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
Bar # 100145

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

By:



Julie Kate Keeney
Bar# 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3427

ATTORNEYS FOR RESPONDENT

September 27, 2012

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Appeal from Orangeburg County
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Appellate Case No. 2011-196546

THE STATE,

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vs.

CEDRIC FLOOD,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 27th day of September, 2012.

Ellen R. DuBois

ELLEN R. DUBOIS
Legal Assistant

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



ALAN WILSON
ATTORNEY GENERAL

September 27, 2012

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Re: State v. Cedric Flood (2011196546)

Dear Ms. Hackett:

Enclosed herewith and served upon you are two copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Julie Kate Keeney
Assistant Attorney General
Bar # 100145

JKK/erd

Enclosures

cc: The Honorable Jenny A. Kitchings (original and nine copy enclosed)
Victim Services (with enclosure)

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