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**SC Court of Appeals**

State of South Carolina

In the Court of Appeals

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Appeal from Horry County  
Larry B. Hyman, Jr., Circuit Court Judge

The State

Respondent,

V.

Lynel Witherspoon,

Appellant

Appellate Case No. 2013-001650

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Brief of Appellant

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Statement of Issue on Appeal

Trial courts plain error in giving of, confusing, and misleading jury instructions

Trial courts error in failing to give curative instruction, clarify, and or recharge plainly confused and misled jury on questions and issues of law applicable to case.

Trial courts erred in giving of coercive Allen charge violated defendants rights to fair and impartial trial.

Where trial courts erred in denial of directed verdict motion of defendant from insufficient evidence adduced at trial.

Statement of the Case

On February 28, 2012 the Horry County Grand indicted Appellant Lynel Witherspoon on one count of distribution of cocaine as a third offense. R.178-179; R.171 ln. 20 - R.173 ln. 4. On July 24, 2013, Appellant proceeded to trial before the honorable Larry B. Hyman and a jury. Kia Wilson represented Appellant and Scott Graustein represented the State. Tr. 1.

At the conclusion of the trial on July 25, 2013 the jury found Appellant guilty. R.167 ln. 22 - R.168 ln 3. The court sentenced him to seventeen (17) years imprisonment R.174 ln. 19 - R.175 ln. 1.

### Argument

1. The trial courts erred in giving of, confusing, and misleading jury instructions.
2. Trial Courts erred in failure to recharge a confused and misled jury on questions and issues of law applicable in the case.
3. Trial courts error of coerciveness of Allen charge in its entirety.

### Discussion

Trial courts erred in failure to give curative instructions to a confused and deadlocked jury. After the giving of charge by trail judge [pg. 136 ln. 9 - pg. 147 ln. 18] which included language of sufficiency and competency of evidence and identification issues. It was instructed by the judge "If there was any reasonable doubt to the accuracy of identification [pg. 144 ln. 8 - 16] you must find the defendant NOT guilty."

[Blurton v. State 573 S.E. 2d 802] holds that "evidence presented at trial determines the charged jury instruction. If a jury instruction is provided to the jury that does not fit the facts of the case it may confuse the jury..." Records will show, in an abuse of discretion, that insufficient evidence was submitted to the jury. The judge acknowledged this in charge to jury [pg. 143 ln. 11 - pg. 144 ln. 16], where judge states "An issue in this case is the identification of the defendant as a person who committed the crime. This instruction shows the "reasonable doubt" drawn from the facts in the case.

Where evidence in trial determines the charged jury instruction it was erroneous for the judge to charge that the jury "must determine the accuracy of the identity of the defendant" and in the same instruction charges that "the State has the burden of proving identity beyond a reasonable doubt." Trial transcripts established that the State failed to produce evidence to prove identity of accused. Therefore, this matter was insufficient to submit to jury and furthermore was misleading and confusing.

On pg. 143 ln. 21 the judge tells the jury "they must determine the accuracy of the identification of the defendant." Evidence in transcript adduced at trial shows there was nothing given to determine the identity of the accused from, this is plainly misleading and is an error.

During deliberation the jury asked several questions by written note concerning facts in case [pg. 149 - 155]. Questions asked were answered by exculpatory answers adduced during trial via notes written by judge. The jury stated its inability to come to an unanimous decision, which clearly showed the State's failure in meeting its "burden of proof" also shows a "reasonable doubt" to the guilt of the accused, as charged in instruction.

[Blurton v. State 573 S.E. 2d 802] states that, "it is error to give instruction which are calculated to confuse or mislead the jury." Defendant contends that the instructions misled where a rational juror may interpret its inability to come to an unanimous decision was sufficient to show a reasonable doubt, where as implied by trial courts if this were the case, "defendant should be found not guilty" [pg. 144 ln. 8-16]. Also misleading was the instruction of "determine the identity of the defendant", when the State failed to produced this evidence to do such from.

The records will reflect that when the jury reconvened the following day (July 25, 2013), trial judge immediately rushed into Allen charge with urgency as depicted in trial transcript [pg 156 - 157]. Due to the weakness of the State's case [Mitchell 720 f2d 370] the jury in its same confused and misled state still had the need to review evidence which record reflects, was highly incompetent. Wherefore trial judge noticed plainly the state of jury's confusion and fails to recharge and clarify issues of law, facts of case, and reopening of evidence before the giving of additional separate instruction was erroneous [Blandburg v State 434 S.E. 2d 510]. A recharge of specific instructions on the applicable law and review of evidence should have been repeated, especially after failing to sequester jury that separated in doubt the night before giving of "Allen charge" and is clearly confused.

Time of giving "Allen" as partial and separate charge along with the language was coercive. Whether an "Allen charge" is unconstitutionally coercive, must be judged in

context and under all the circumstances [Tucker v Catoe, 522 S.E. 2d 712, 346 S.C. 483]. The record indicates the remarks and course of actions by trial judge were designed to have the effect of expediting the trial. In light of all the circumstances this trial had the effect of a coerced verdict [State v Spence 313 S.E. 2d 461].

Defendant contends that due to the misleading and coercive language of the "Allen charge" [pg. 159 ln. 17-24] where trial judge shows an abuse of discretion [State v Hobbs 282 S.E. 2d 258] states; whether instruction constitutes improper coercion of verdict necessarily depends upon facts and circumstances of particular case and cannot be determined by any general or definite rule: "The trial court must carefully instruct the jurors not to give up their conscientious convictions merely for the sake of achieving a verdict, and must scrupulously avoid expressing any opinion as to how the case should be decided." The trial courts decision to so instruct the jury must neither encourage disagreement nor coerce agreement, [State v Taft, 144 W.VA 704, 110 S.E. 2d 727(1959)], but should foster the jury's fair and open-minded debate 282 S.E. 2d at 272.

Where trial judge instructs, "At the same time, we usually get a verdict. What that means is that it is normal for jurors to disagree at first, but the fact that we normally get a verdict does not mean that after reasonable persons lay aside all extraneous matters and determine to decided a case on the basis of the law and evidence, they do come to a common understanding and write a verdict." A rational mind may interpret that the judge has implied that because certain jurors do not seem overcome in agreement (common understanding) by the States' burden of proof (the law and evidence), that they are not being reasonable and should ignore (lay aside) the inconsistencies or (all extraneous matters). In which the record will show that the lack of evidence in this case and all other extraneous matters insufficient to prove the elements as charged confused the jury and were brought forth in trial by State; And this language in effect constitutes coercion [Dawson v State 572 S.E. 2d 445].

Furthermore, on page 161 ln. 17-21, the judge comments "of course if you cannot reach a verdict, Madam forelady,

you advise the courts of that, and as I said, this matter will be - there will be a mistrial declared and it will be retired." This is improper against the discretion of the courts. The entire Allen charge also fails to recharge on defendants possibility of being not guilty.

For the foregoing reasons and enumerated circumstances related to trial and the giving of Allen charge amounted to coercion of a verdict where defendant was found guilty approximately 30 minutes after giving of Allen charge by a plainly confused jury directly changed the outcome of this trial.

### Argument

Evidence adduced at trial was insufficient to deny defendants directed verdict motion.

### Discussion

Trial transcripts will show State's failure to produce evidence sufficient to support elements charged in distribution of controlled substance prosecution, pg. 143 ln. 11-15, pg. 149 ln. 2 - pg. 154 ln. 20, pg. 155 ln. 2 - ln. 21, pg. 62 ln. 2 - pg. 63 ln. 17. In the absence of evidence it becomes the duty of the trial judge to direct a verdict [State v Shrock, 283 S.C. 129, 322 S.E. 2d 450(1984)]. Defense made a motion for a directed verdict. Accordingly, "the trial court should not deny the motion where evidence merely raises a suspicion that the accused is guilty" [State v Long, 325 S.C. 59, 62, 480 S.E. 2d 62, 63(1997)].

The only inference that alleges this crime ever occurred is allegations made by a three (3) time convicted informant which was unreliable and insufficient to grant a warrant. Affiant's testimony on trial even states, "he didn't witness transaction, or could not identify defendant at crime scene." State fails to prove a transfer or proves who transferred anything. Which amounts to mere suspicion, and is not substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced [State v Martin, 340 S.C. 597, 533 S.E. 2d 572(2000)].

If the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless: every circumstance relied upon by the State be proven beyond a reasonable doubt; and all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. Id at 626 n.2 677 S.E. 2d at 606 [State v. Edwards, 298 S.C. 272, 379 S.E. 2d 888].

There's no corroboration at all from any of the case investigators, no audio or visual, marked money, or substantial circumstantial evidence that tends to prove guilt of the accused. In its entirety all adduced at trial was an allegation which merely raises a suspicion of the

accused guilt. State's evidence fails to establish proof of corpus delicti. Nor was any evidence presented to draw upon the identity of accused. Therefore, trial judge should have granted a motion for directed verdict, where case was insufficient to submit to jury.

Conclusion

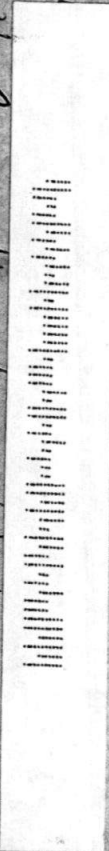
For the foregoing reasons, Appellant respectfully requests that this court reverse trial courts decision and grant Appellant a new trial, and/or vacate or dismiss the charge against him.

Respectfully Submitted,

Lyndel W. Wickupson

4/1/04

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