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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM GREENVILLE COUNTY
Honorable Robin B. Stillwell, Circuit Court Judge

Published Opinion No: 5655 (S.C. Ct. App. Filed June 12, 2019)

Appellate Case No. 2019-001345

THE STATE, ... PETITIONER

v.

BILLY LEMURCES TAYLOR, ...RESPONDENT.

APPENDIX
Volume 2 of 2

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APPEAL FROM GREENVILLE COUNTY
Honorable Robin B. Stillwell, Circuit Court Judge

Published Opinion No. 5655 (S.C. Ct. App. Filed June 12, 2019)

Appellate Case No. 2016-000549

THE STATE, ... PETITIONER

v.

BILLY LEMURCES TAYLOR, ...RESPONDENT.

APPENDIX
Volume 2 of 2

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1 definition of possession, okay.

2 Possession can either be actual or it can be

3 constructive. And the State has, ultimately, the

4 burden of proving beyond a reasonable doubt that the

5 Defendant had both the power and intent to control

6 the disposition or use of the object. Now, actual

7 possession means that the object was in the actual,

8 physical custody of the Defendant. Constructive

9 possession means that the Defendant had dominion and

10 control or the right to exercise dominion and control

11 over the object. Mere presence at the scene is not

12 enough to prove possession. Understand that two or

13 more persons may have joint possession of an object.

14 I understand that doesn't answer your question

15 directly. But what you have to do is determine

16 whether there was actual or constructive possession

17 of the object.

18 Now, with respect to your second question, Can

19 we see a copy of law? Now, when I stood in front of

20 you, everything I said was the law. And you saw that

21 I wasn't reading it from any particular place. So,

22 with respect to some of it, the answer is, no. With

23 respect to some of it, maybe. You have to tell me

24 specifically what it is you want, okay? Then once

25 you tell me what it is that you want, the attorneys

1 and I will get together and we'll determine whether
2 it's appropriate to give you a copy of that law.
3 Sometimes I can. Sometimes I can't. But you need to
4 be as absolutely specific as you can be so I can
5 answer that question specifically. All right.
6 So, I'll ask you now, return to your jury room
7 and continue deliberations. Thank you, very much.
8 (WHEREUPON, the jury left open court at
9 approximately 1:50 p.m.)
10 THE COURT: Okay. Gentlemen, we'll be in recess
11 until we hear back from the jury. Thank you.
12 (WHEREUPON, Court's Exhibits Nos. 2 & 3 were
13 marked for identification and received into
14 evidence.)
15 (WHEREUPON, Court's Exhibit No. 4 was marked for
16 identification and received into evidence.)
17 THE COURT: All right. We're back on the
18 record. And I, again, have received a note from the
19 jury.
20 MR. EPPES: Your Honor, please wait on my
21 client.
22 THE COURT: Okay. I'm sorry.
23 MR. EPPES: Thank you, Your Honor.
24 THE COURT: I didn't notice that he wasn't in
25 here.

1 Okay, now, we're back on the record. I received
2 a note from the jury that they are currently at an
3 impasse. I've marked that note as Court's Exhibit
4 No. 4 and had the opportunity to discuss the same in
5 chambers with counsel. What I am going to do is I'm
6 going to release them for the evening and I'm going
7 to bring them back tomorrow morning at 9:00 a.m. At
8 9:00 a.m, I will give them the Allen charge and we'll
9 let them continue to deliberate.
10 All right. So, if you will bring the jury in,
11 please.
12 (WHEREUPON, the jury came into open court at
13 approximately 7:20 p.m.)
14 THE COURT: All right. Ladies and gentlemen, I
15 received your note and I recognize that you're
16 currently at an impasse. I don't necessarily blame
17 you and I don't envy your decision in this case
18 because I know it's a hard decision. So, what we're
19 going to do is take a break, a little pause, okay.
20 I'm going to let you go home for the evening, then
21 we'll come back tomorrow at 9:00.
22 Now, understand that, usually, I, and most
23 judges, are very reluctant to send a deliberating
24 jury home. And that's because a lot of things can
25 happen and most of those things, if not all of them,

1 are bad. First of all, while you're deliberating, if
2 you begin to discuss the case with someone else, that
3 poses a significant problem for proceeding in this
4 case. Also, if one of you didn't make it back
5 tomorrow for whatever reason, then it would cause,
6 again, a significant problem for us proceeding in
7 this case. So, there are a lot of problems
8 associated with sending you home. But I don't want
9 you to stay until 1:00 or 2:00 in the morning. And I
10 don't intend to subject you to that, but I do want
11 you to come back tomorrow.
12 When you come back tomorrow at 9:00, we'll come
13 back to the courthouse and I'll talk to you in the
14 courtroom -- excuse me, and I'll talk to you a little
15 bit more, okay. Then I'll let you continue your
16 deliberations. Please when you go home tonight,
17 please don't discuss the case. Again, don't do any
18 self-help. It's always a very, very sensitive matter
19 during the conduct of the trial. It's also very
20 sensitive, if not more so, while you're conducting
21 deliberations.
22 So, just go home, get some sleep, come back
23 refreshed tomorrow and come to the courtroom and
24 we'll resume deliberations. Y'all have a good
25 evening and I'll see you back here tomorrow morning.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

VOLUME II OF II

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT

APPELLATE CASE NO. 2016-000549

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
Defendant's Exhibits No. 3 and 4 (Photographs)

1 Thank you.

2 (WHEREUPON, the jury left open court and was

3 excused for the day at approximately 7:25 p.m.)

4 THE COURT: All right. Ladies and gentlemen,

5 we'll adjourn for the evening. Tomorrow morning, I

6 have probation revocations in this courtroom. So,

7 understand that when we get here in the morning,

8 there will be a lot of people who will be in and out

9 of this courtroom. So, what I intend to do is bring

10 them as promptly as I can at 9:00, give them the

11 Allen charge and then send them back to begin

12 deliberations. So, everybody is going to have to

13 move out so all the probation business can come in.

14 And as we hear further from the jury, we'll deal with

15 the jury and, ultimately, receive the verdict when

16 and if we receive one. In the meantime, y'all have a

17 great evening.

18 (WHEREUPON, the proceedings were concluded for

19 the day to be reconvened on March 4, 2016.)

20

21

22

23

24

25

1 March 4, 2016

2 THE COURT: All right. Let's go ahead and bring

3 the jury in, please.

4 MR. EPPES: Your Honor, may I review your charge

5 before you do that?

6 THE COURT: I don't have a written charge. I'm

7 going to give them the standard Allen charge.

8 MR. EPPES: Okay. You don't have it written

9 down?

10 THE COURT: No, sir.

11 MR. EPPES: Okay.

12 (WHEREUPON, the jury came into open court at

13 approximately 9:05 a.m.)

14 ALLEN CHARGE

15 THE COURT: Good morning, everybody, welcome

16 back. Thank you for being on time. I do appreciate

17 it. Ladies and gentlemen, I recognize that last

18 night you sent me a note that indicated that you were

19 at an impasse and you told me the division that you

20 had in that note as well.

21 Now, I understand that the decision that you

22 have to make is very difficult. And when you get 12

23 people together, it's difficult to have 12 people

24 agree. Particularly, when you come from different

25 walks of life and you're just thrown together on a

1 jury, it's difficult to make that decision. I know
2 that, oftentimes, it's difficult for two people, just
3 two people to make a decision. It's hard for my wife
4 and I to figure out what we're going to eat for
5 supper sometimes. So, this decision, I recognize is
6 hard.
7 But understand that it's important that you come
8 to a decision in this case. Understand that both the
9 State and the Defense have extended significant
10 resources and time and effort to get to this point.
11 Also, know that the State and the County has extended
12 resources to get to this point as well. And if
13 you're unable to come to this verdict in this matter,
14 then, essentially, we'd be left with having to do it
15 all over again, extending additional resources, time
16 and effort. Now, ladies and gentlemen, I will tell
17 you that there are no 12 other people in the County
18 of Greenville who are more capable or competent to
19 come to a decision in this matter than the 12 of you
20 are.
21 Now, again, I understand it's hard to come to a
22 decision. But those of you who are in the majority
23 should listen to the people in the minority. Those
24 of you who are in the minority should listen to the
25 people in the majority. You should take into

1 consideration your respective positions and you
2 should come to a decision in this matter. Again, it
3 really would be a waste of time, effort and resources
4 for us to have to do all of those over again. So,
5 I'm going to ask you to go back to your jury room and
6 resume your deliberations. Thank you, very much.
7 (WHEREUPON, the jury left open court at
8 approximately 9:10 a.m.)
9 (WHEREUPON, deliberations continued.)
10 THE COURT: Exceptions the charge?
11 MR. MOYER: No, Your Honor.
12 MR. EPPES: Your Honor, first, I'd note for the
13 record that last night I objected in chambers to the
14 request for an Allen charge and you denied my
15 objection.
16 THE COURT: Yes, sir.
17 MR. EPPES: I would, likewise, note for the
18 record that I move for a mistrial right now rather
19 than Allen charge instruction. And finally, I would
20 ask that you bring the jury back and tell them that a
21 hung jury is a legitimate end of a criminal trial and
22 is the occasionally inevitable result that requires a
23 unanimous verdict beyond a reasonable doubt.
24 THE COURT: Okay. All right. I appreciate your
25 motions in that regard. I think I recited the

1 appropriate standard of law to be applied in the
2 Allen charge. I also think that it is well accepted
3 in juris prudence not only in the State of South
4 Carolina, but in the United States for the Allen
5 charge to be administered when a jury has indicated
6 that they have reached an impasse. Now, certainly,
7 public policy can change if the Supreme Court of the
8 United States and the Supreme Court of South Carolina
9 decides that's an inappropriate charge, I certainly
10 would defer to them. But as it stands, it's
11 allowable. And I think in terms of -- simply in
12 terms of judicial economy, it's appropriate. So,
13 respectfully, I understand your position, but I'll
14 deny your motions.
15 MR. EPPES: May I add one more sentence, Your
16 Honor, not to argue with you because I meant to say
17 it?
18 THE COURT: Yes.
19 MR. EPPES: It is my belief that the Allen
20 charge is unduly coercive and that is another basis
21 for my objection and request for a mistrial.
22 THE COURT: Duly noted on the record. Thank
23 you, very much. I appreciate it.
24 Okay. All right. Ladies and gentlemen, what
25 we're going to do now is I'm going to ask all of

1 y'all to get out. I'm going to bring probation in.
2 If we hear back from the jury, I'll bring everybody
3 in, okay.
4 (WHEREUPON, the court was in recess awaiting a
5 verdict.)
6 (WHEREUPON, Court's Exhibit No. 5 was marked for
7 identification and received into evidence.)
8 THE COURT: All right, it's my understanding
9 that the jury has come to a verdict. Are we prepared
10 to receive the verdict?
11 MR. EPPES: We are, Your Honor. Your Honor,
12 before we do that, I would note for the record that
13 about 11:08, I had the court reporter write it down
14 that I requested that you declare a mistrial and you
15 denied my motion at that time.
16 THE COURT: Yes, sir.
17 MR. EPPES: Listed with the reasons for my other
18 denials of the motions for mistrial. I renewed my
19 objection to your Allen charge as well. And I will
20 say now that because of the delay after the Allen
21 charge and the jury reaching a verdict, I, likewise,
22 believe that a mistrial is appropriate.
23 THE COURT: Okay. Thank you, very much. I
24 appreciate that. You're protected on the record in
25 that regard.

1 Okay. Bring the jury in, please.
2 (WHEREUPON, the jury came into open court at
3 approximately 11:43 a.m.)
4 THE COURT: All right. Mr. Aiken, has the jury
5 reached a unanimous verdict, sir?
6 MR. FOREMAN: We have, Your Honor.
7 THE COURT: Pass the verdict forms to the
8 bailiff, please.
9 Okay. Madam clerk, publish the verdicts,
10 please, ma'am.
11 VERDICT
12 THE CLERK: Your Honor, this is case number
13 2014-GS-23-011862, regarding Ashley Hiott. In the
14 matter of the State of South Carolina, Plaintiff, vs.
15 Billy Lemurces Taylor, Defendant, to the charge of
16 attempted murder, we, the jury, unanimously find the
17 Defendant, Billy Lemurces Taylor, guilty. Signed
18 Foreperson, Bradley Aiken, March 4th, 2016.
19 2014-GS-23-011863, regarding Brittany Jeter. In
20 the matter of the State of South Carolina, Plaintiff,
21 vs. Billy Lemurces Taylor, Defendant, to the charge
22 of attempted murder, we, the jury, unanimously find
23 the Defendant, Billy Lemurces Taylor, guilty. Signed
24 Bradley Aiken, March 4th 2016.
25 2014-GS-23-011864, regarding Rodney Nesbitt. In

1 the matter of the State of South Carolina, Plaintiff,
2 vs. Billy Lemurces Taylor, Defendant, to the charge
3 of murder, we, the jury, unanimously find the
4 Defendant, Billy Lemurces Taylor, guilty. To the
5 charge of possession of a weapon during the
6 commission of a violent crime, we, the jury,
7 unanimously find the Defendant, Billy Lemurces
8 Taylor, guilty. Signed Foreperson, Bradley Aiken,
9 March 4th, 2016.
10 If these are your verdicts, so say you all.
11 Please signify by raising your right hand.
12 (WHEREUPON, all members of the jury raised their
13 right hand.)
14 THE COURT: All right. Any additional matters
15 to take up with respect to this jury?
16 MR. EPPES: Your Honor, I'd ask that you poll
17 the jury specifically as to each charge.
18 THE COURT: Sure.
19 All right. Madam Clerk, would you poll the
20 jury, please? And you will need to go through each
21 count, meaning with murder, possession of a weapon
22 during the commission of a violent crime and then the
23 attempted murder as well.
24 Ladies and gentlemen, when we poll the jury,
25 what that means is the clerk will ask you each

1 individually if, in fact, that was your verdict and
2 you respond appropriately.
3 THE CLERK: The verdict that was just published
4 was the verdict you reached in the jury room. I ask
5 you, was it your verdict then and is it your verdict
6 now? When I call your name, please, answer yes or
7 no.
8 As to the matter of --
9 THE COURT: Let's do this, let's do it this way.
10 When you call the roll and they stand, ask them as to
11 each count so we don't have to go through it four
12 times. Just ask them as to each count, as to murder,
13 attempted murder, attempted murder and possession of
14 a weapon.
15 THE CLERK: George Sweet, if you'll please
16 stand. As to the count of attempted murder?
17 MR. SWEET: Guilty.
18 THE CLERK: The other count of attempted murder?
19 MR. SWEET: Guilty.
20 THE CLERK: The charge of murder?
21 MR. SWEET: Guilty.
22 THE CLERK: The charge of possession of a weapon
23 during the commission of a violent crime?
24 MR. SWEET: Guilty.
25 THE COURT: And ladies and gentlemen, you can

1 answer guilty or you can just answer in the
2 affirmative. Because the actual question is was that
3 your verdict and is that your verdict now? So, you
4 can just answer in the affirmative. It's entirely up
5 to you, okay.
6 THE CLERK: Julia Bell. As to the charge of
7 murder?
8 MS. BELL: Yes.
9 THE CLERK: As to the charge of attempted
10 murder?
11 MS. BELL: Yes.
12 THE CLERK: The other charge of attempted
13 murder?
14 MS. BELL: Yes.
15 THE CLERK: Thank you.
16 THE COURT: Did you do possession of a weapon on
17 that one?
18 THE CLERK: I'm sorry, excuse me.
19 Could you stand back up, please? I apologize,
20 Ms. Bell. I need to ask you about the possession of
21 a weapon during the commission of a violent crime?
22 MS. BELL: Yes.
23 THE CLERK: Thank you.
24 MR. EPPES: Your Honor, if I may?
25 THE COURT: Yes, sir.

1 MR. EPPES: Would you please instruct the jury
2 that they are not obligated to say yes if that is not
3 the true answer?
4 THE COURT: You're welcome to speak your
5 conscious.
6 MR. EPPES: Thank you, Your Honor.
7 THE CLERK: Kenneth Borneman. As to the charge
8 of attempted murder?
9 MR. BORNEMAN: Yes.
10 THE CLERK: The charge of attempted murder?
11 MR. BORNEMAN: Yes.
12 THE CLERK: To the charge of murder?
13 MR. BORNEMAN: Yes.
14 THE CLERK: To the charge of possession of a
15 weapon during the commission of a violent crime?
16 MR. BORNEMAN: Yes.
17 THE CLERK: Thank you.
18 Youlanda Arnold. As to the charge of attempted
19 murder?
20 MR. ARNOLD: Yes.
21 THE CLERK: The other charge of attempted
22 murder?
23 MR. ARNOLD: Yes.
24 THE CLERK: To the charge of murder?
25 MR. ARNOLD: Yes.

1 THE CLERK: To the charge of possession of a
2 weapon during the commission of a violent crime?
3 MR. ARNOLD: Yes.
4 THE CLERK: Thank you.
5 Reana Coppola. As to the charge of attempted
6 murder?
7 MS. COPPOLA: Yes.
8 THE CLERK: The charge of attempted murder?
9 MS. COPPOLA: Yes.
10 THE CLERK: To the charge of murder?
11 MS. COPPOLA: Yes.
12 THE CLERK: To the charge of possession of a
13 weapon during the commission of a violent crime?
14 MS. COPPOLA: Yes.
15 THE CLERK: Emily Demers. The charge of
16 attempted murder?
17 MS. DEMERS: Yes.
18 THE CLERK: The charge of attempted murder?
19 MS. DEMERS: Yes.
20 THE CLERK: To the charge of murder?
21 MS. DEMERS: Yes.
22 THE CLERK: To the charge of the possession of a
23 weapon during the commission of a violent crime?
24 MS. DEMERS: Yes.
25 THE CLERK: Thank you.

1 Daniel Burgess. As to the charge of attempted
2 murder?
3 MR. BURGESS: Yes.
4 THE CLERK: To the charge of attempted murder?
5 MR. BURGESS: Yes.
6 THE CLERK: To the charge of murder?
7 MR. BURGESS: Yes.
8 THE CLERK: To the charge of possession of a
9 weapon during the commission of a violent crime?
10 MR. BURGESS: Yes.
11 THE CLERK: Thank you.
12 Bradley Aiken. As to the charge of attempted
13 murder?
14 MR. AIKEN: Yes.
15 THE CLERK: The charge of attempted murder?
16 MR. AIKEN: Yes.
17 THE CLERK: To the charge of murder?
18 MR. AIKEN: Yes.
19 THE CLERK: To the charge of possession of a
20 weapon during the commission of a violent crime?
21 MR. AIKEN: Yes.
22 THE CLERK: Thank you.
23 Stephanie Epps. As to the charge of attempted
24 murder?
25 MS. EPPS: Yes.

1 THE CLERK: As to the charge of attempted
2 murder?
3 MS. EPPS: Yes.
4 THE CLERK: To the charge of murder?
5 MS. EPPS: Yes.
6 THE CLERK: To the charge of possession of a
7 weapon during the commission of a violent crime?
8 MS. EPPS: Yes.
9 THE CLERK: Rodney Mueller. To the charge of
10 attempted murder?
11 MR. MUELLER: Yes.
12 THE CLERK: The charge of attempted murder?
13 MR. MUELLER: Yes.
14 THE CLERK: To the charge of murder?
15 MR. MUELLER: Yes.
16 THE CLERK: To the charge of possession of a
17 weapon during the commission of a violent crime?
18 MR. MUELLER: Yes.
19 THE CLERK: Geary Jones. To the charge of
20 attempted murder?
21 MR. JONES: Yes.
22 THE CLERK: The other charge of attempted
23 murder?
24 MR. JONES: Yes.
25 THE CLERK: The charge of murder?

1 MR. JONES: Yes.
2 THE CLERK: To the charge of possession of a
3 weapon during the commission of a violent crime?
4 MR. JONES: Yes.
5 THE CLERK: Thank you.
6 Lillibet Muhaabwa. To the charge of attempted
7 murder?
8 MS. MUHAABWA: Yes.
9 THE CLERK: To the charge of attempted murder?
10 MS. MUHAABWA: Yes.
11 THE CLERK: To the charge of murder?
12 MS. MUHAABWA: Yes.
13 THE CLERK: To the charge of possession of a
14 weapon during the commission of a violent crime?
15 MS. MUHAABWA: Yes.
16 THE CLERK: Thank you.
17 THE COURT: All right, is that everyone? Okay.
18 All right. Anything further from the jury,
19 Mr. Eppes?
20 MR. EPPES: Nothing, Your Honor. Thank you.
21 THE COURT: Anything from the State?
22 MR. MOYER: No, Your Honor.
23 THE COURT: All right, ladies and gentlemen, at
24 this time, I'm going to proceed to post-trial motions
25 and sentencing. But before I do that, what I'm going

1 to do is I'm going to dismiss you to your jury room.
2 I'm just going to come back and talk to you
3 informally and dismiss you from your jury room.
4 Thereafter, you're welcome to come back in and view
5 the post-trial motions and sentencing if you would
6 like to. You certainly are not required to. It is
7 entirely in your discretion whether you will or not.
8 So, if you'll please return to your jury room and
9 I'll dismiss you from there.
10 (WHEREUPON, the jury left open court and was
11 dismissed at approximately 11:55 a.m.)
12 THE COURT: All right. Ladies and gentlemen,
13 we'll be in recess and I'll dismiss the jury
14 informally. We'll come back into the courtroom and
15 I'll hear any post-trial motions and we'll proceed to
16 sentencing.
17 (WHEREUPON, a short break was taken.)
18 THE COURT: All right. Any motions?
19 MR. EPPES: Your Honor, I'd ask the Court to act
20 as the 13th juror and reverse the verdict of the
21 jury.
22 THE COURT: Okay. All right, I'll respectfully
23 deny the same based on the requisite standard. I
24 think that the jury's decision was based on the
25 evidence and the law as presented and they acquitted

1 their duty appropriately.
2 MR. EPPES: I want to renew my objection to both
3 the Allen charge and the continuation of the trial
4 and, again, request a mistrial.
5 THE COURT: And I respectfully deny that on the
6 same basis as I previously articulated.
7 MR. EPPES: Your Honor, I'd also like to reserve
8 for 10 days the right, if I suddenly have some
9 brainstorm, to make any other motion that I think is
10 appropriate.
11 THE COURT: Yes, sir. Absolutely. Under the
12 rules you have 10 days and I will allow you the same.
13 MR. EPPES: Finally, Your Honor, as a
14 housekeeping matter, thinking ahead, Exhibits 4, 5
15 and 6 were those big posters.
16 THE COURT: Yes, sir.
17 MR. EPPES: While the big posters have to stay
18 in the clerk's office, Mr. Moyer and I have agreed by
19 stipulation that he can provide the clerk's office
20 with colored 8-1/2 by 11 photocopies of those same
21 maps. Because I think that will be easier for the
22 clerk's office and any appellate counsel in the case
23 to be able to handle --
24 THE COURT: I agree.
25 MR. EPPES: -- dealing with those posters.

1 Mr. Moyer says he will email that to the clerk's
2 office and I hope copy me on it.
3 MR. MOYER: If we can actually just make color
4 copies ourselves and then bring them to the clerk's
5 office?
6 THE COURT: Okay. All right. Anything further?
7 MR. EPPES: Nothing further.
8 THE COURT: All right, you can approach for
9 sentencing, please.
10 SENTENCING
11 MR. EPPES: Your Honor?
12 THE COURT: Yes, sir.
13 MR. EPPES: It's my understanding the victims
14 are going to speak and I told my client it's your
15 decision as to whether he continues to look at you or
16 looks at the victim.
17 THE COURT: I'll leave it up to you. It makes
18 little or no difference to me. Okay.
19 All right. Anything further from the State with
20 respect to sentencing?
21 MR. MOYER: I have his criminal history.
22 THE COURT: Do we have the sentencing sheets?
23 Okay. I'll be happy to hear his prior record.
24 MR. MOYER: They were -- in 2007, they were
25 juvenile adjudications. He had four counts of petit

1 larceny and two counts of armed robbery.
2 MR. EPPES: Strong armed robbery.
3 MR. MOYER: Says armed.
4 THE COURT: Okay. Fair enough.
5 Okay. Anything else?
6 MR. MOYER: I believe several -- some of the
7 victims would like to address the Court, Your Honor.
8 THE COURT: All right. Okay. All right. I'd
9 be happy to hear from anyone who would like to
10 address the Court. What I would ask you, please, is
11 please stand up, state your name if you would,
12 please, very clearly so the court reporter can take
13 that down for the record. So, I'll be happy to hear
14 from anyone.
15 VICTIM NESBITT'S MOTHER: My name is Angela
16 Nesbitt. I'm Rodney's mother. When you took my
17 son's life, you took a part of me. I don't hate you,
18 I just hate what you've done because you could have
19 walked away and didn't pull that trigger that night.
20 But right now, I can't forgive you.
21 THE COURT: Thank you, ma'am.
22 VICTIM NESBITT'S FATHER: I'm Kenneth Fields,
23 I'm the father of the victim. I just wanted to take
24 this time now to thank Mr. Moyer and the jury for
25 your effort and for all that you do for the

1 community. Thank you.
2 THE COURT: Thank you, sir.
3 ASHLEY HIOTT: My name is Ashley Hiott and I'm
4 the one you shot. And I feel like you didn't just
5 affect my life, you affected my children's life. I
6 watched my children feed me and bathe me for weeks on
7 end because I couldn't do anything for myself. Not
8 once have you ever showed a bit of remorse or
9 apologetic gesture toward anything that you've done,
10 any life that you took or any security that you took
11 from us. You took a sense of peace and a sense of
12 security from my life and my children's lives. You
13 have forever and ever effected us and Rodney's
14 family. And you never showed any kind of apologetic
15 gesture. And I forgive you -- I don't hate you for
16 what you've done, but I am trying to find forgiveness
17 because I feel like that's the right thing to do.
18 But you never showed any kind of gesture for
19 anything. I don't forgive you and I think you
20 deserve the max for what you've done because it
21 effected us to the max.
22 THE COURT: All right, anyone else?
23 (There was no response.)
24 THE COURT: Okay. All right, thank you, ladies
25 and gentlemen.

1 All right. Mr. Moyer, anything further from the
2 State?
3 MR. MOYER: No, Your Honor.
4 THE COURT: Mr. Eppes, I'll be happy to hear
5 from you, sir.
6 MR. EPPES: Your Honor, in brief response to
7 what Ms. Hiott said, I have a policy because I've
8 never believed that any type of remorse showing
9 seemed sincere while charges were pending. I tell my
10 clients under no circumstances are they to do that.
11 I'm not saying that by way of excuse, I'm just
12 informing Ms. Hiott of that fact. Mr. Taylor would
13 like to make a brief statement.
14 THE COURT: Sure.
15 Mr. Taylor, I'll be happy to hear from you, sir.
16 MR. TAYLOR: I just want to apologize to the
17 Court. I want to apologize to their family for their
18 troubles, for their hardship, the pain that they're
19 going through. And I just want to deeply apologize
20 for everything that, basically, has been done. I
21 know the feeling of hurt and pain. I know the
22 feeling of, you know, people going through pain and
23 things happen. So, I just want to let them know that
24 I apologize for everything that happened.
25 THE COURT: All right. Thank you, Mr. Taylor.

1 Anything further from the Defense?
2 MR. EPPES: Yes, sir, Your Honor. Your Honor,
3 I've represented Mr. Taylor for two years almost
4 exactly. And I've met with him on a very regular
5 basis during that time because of the severity of the
6 charges. I've gotten to know his grandmother and his
7 daughter, his wife and his family, and other members
8 of his family that are in the room, his stepfather,
9 his father. And Judge, as you well know, this is a
10 tragedy for the families of the victims and it's a
11 tragedy for the families of the Defendant. This is a
12 case that everything significant happened in less
13 than a minute. And it's just heartbreaking, it's
14 heartbreaking every step of the way.
15 I believe that Mr. Taylor -- well, one other
16 thing about Mr. Taylor. He's been working for the
17 last five or six years since this unfortunate thing
18 when he was a juvenile. He suffered a lot for that,
19 too. I won't go into details, but you know me well
20 enough to know I don't generally talk about people
21 charged with armed robbery suffering anything. But
22 he was with some older kids and he accepted
23 responsibility.
24 And he got out and, by and large, he was living
25 a good life. He always worked. He worked at Bi-Lo

1 warehouse, which is a hard place to work. If you're
2 late, they fire you. He lost that job when he was
3 arrested for this. He got another job. He got a
4 better job. He's been working continuously since
5 he's been out. He's checked in with me every two or
6 three weeks for two years.
7 Judge, there's not much to say about sentencing.
8 Obviously, the crimes were horrific. Mr. Taylor is
9 relatively young. I would ask that you consider a
10 30-year sentence with concurrent time on every other
11 charge. The possession of a weapon charge is allowed
12 to be run concurrent. I know I always used to get
13 mixed up about that. And I think a 30-year sentence,
14 he would be over 50 when he got out of jail. I think
15 that gives him an incentive to behave while he's in
16 jail and gives him and his family some hope for the
17 future and it provides adequate punishment for this
18 crime.
19 THE COURT: All right. Thank you, very much.
20 All right. Ladies and gentlemen, just let me
21 say I recognize that this is an unfortunate tragic
22 circumstances.
23 And to the victims, I'm sorry you find yourself
24 in this position, I truly am. I wish there was
25 something that I could do to mitigate your sadness

1 and mitigate your sense of loss, but I'm afraid I
2 can't. But know that I'm praying for you and I'm
3 sorry this happened.
4 I also say to Mr. Taylor's friends and family,
5 I'm sorry you find yourself in this instance, too.
6 Y'all didn't deserve it either. I know that you're
7 hurting as well.
8 Okay. Mr. Taylor, the sentence of the Court is
9 that with respect to attempted murder in Indictment
10 No. 11863, the sentence of the Court is you be
11 committed to the Department of Corrections for a
12 period of 30 years, concurrent, credit for time
13 served.
14 With respect to the second attempted murder,
15 Indictment No. 11862, the sentence of the Court is
16 that you be committed to the Department of
17 Corrections for a period of 30 years, concurrent,
18 credit for time served.
19 With respect to the possession of a weapon
20 during the commission of a violent crime, the
21 sentence of the Court is that you be committed to the
22 Department of Corrections for a period of five years,
23 concurrent, credit for time served.
24 With respect to the charge of murder, the
25 sentence of the Court is that you be committed to the

1 Department of Corrections for a period of 40 years,
2 concurrent, credit time served. Good luck to you,
3 sir.
4 MR. EPPES: Your Honor?
5 THE COURT: Yes, sir.
6 MR. EPPES: He's been on house arrest for two
7 years, is there any way you would consider giving
8 him --
9 THE COURT: I think statutorily, he's entitled
10 --
11 MR. EPPES: Statutorily, you have to make a
12 decision on it.
13 THE COURT: I'll give him credit for that time.
14 MR. EPPES: Thank you.
15 MR. MOYER: If it please the Court, I can put
16 that on the record, the amount of time he's had --
17 THE COURT: Yes, sir.
18 MR. MOYER: He initially spent 146 days in jail.
19 And then he's been on home incarceration for 590
20 days.
21 THE COURT: So 590, plus 146?
22 MR. MOYER: Yes, sir.
23 THE COURT: Am I right about that?
24 MR. MOYER: Yes, sir, be 736.
25 THE COURT: 736. So, in each instance, credit

1 for time served for 736 days.

2 MR. EPPES: Thank you, Your Honor.

3 THE COURT: Yes, sir, good luck to you.

4 (WHEREUPON, the proceedings were concluded.)

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1 CERTIFICATE OF REPORTER

2

3

4 STATE OF SOUTH CAROLINA)

5 COUNTY OF GREENVILLE)

6

7

8 I, APRIL P. HERRON, Official Court Reporter for

9 the Thirteenth Judicial Circuit of the State of South

10 Carolina, do hereby certify that the foregoing is a true,

11 accurate and complete Transcript of Record of the

12 proceedings had and evidence introduced in the trial of

13 the captioned case, relative to appeal, in the Court of

14 General Sessions for Greenville County, South Carolina, on

15 the 29th day of February - March 4, 2016.

16 I do further certify that I am neither of kin,

17 counsel nor interest to any party hereto.

18

19

20 August 21, 2016

21

22

23 APRIL P. HERRON, Court Reporter

24

25

COURT'S
EXHIBIT NO. 2
IDENTIFICATION/EVIDENCE
DKT.#
DATE: 3-3-16

PLEASE REPEAT THE CHARGE
TO THE JURY THAT YOU
GAVE US THIS MORNING
REGARDING THE HAND OF
ONE IS THE HAND OF ALL
THERE IS CONFUSION ON
WHAT YOU SAID TO US.

BRAD AIKEN

COURT'S
EXHIBIT NO. 1
IDENTIFICATION/EVIDENCE
DKT.#
DATE: 3-3-16

DOES THE HAND OF ONE
HAND OF ALL APPLY TO
THE POSSESSION OF THE
GUN?

CAN WE SEE A COPY
OF THE LAW?

DO YOU HAVE TO BE HOLDING
THE GUN TO BE IN POSSESSION

COURT'S
EXHIBIT NO. 4
IDENTIFICATION/EVIDENCE
DKT.# AB
DATE: 3-3-16

	NG	G
Murder	3	9
	4	8
	3	9
	2	10
	~~7~~	
Possession	4	8
	1	11
Brittany	4	8
	5	7
Ashley	4	8
	4	8

The Jury has reached an impass.

Brad Aiken

Please provide the court's definition of murder

COURT'S
EXHIBIT NO. 6
IDENTIFICATION/EVIDENCE
DKT.# AB
DATE: 3-4-15

WITNESSES
Henry Hammett
Greenville County Sheriffs Office
5/5/2014

ARREST WARRANT NUMBER
2014A2330203843

ACTION OF GRAND JURY

TRUE BILL
Wayne Richardson
FOREMAN GRAND JURY
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-23- 011862
LMM

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

March TERM ~~2014~~ 2015

THE STATE

vs.

BILLY LEMURCES TAYLOR

Indictment for

3410

ATTEMPTED MURDER

VIOLATION § 16-03-0029

ENTERED ACCT

FILED
DEC 29 2014
Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ATTEMPTED MURDER

At a Court of General Sessions, convened on MAR 10 2015 the Grand Jurors of Greenville County present upon their oath:

That BILLY LEMURCES TAYLOR did in Greenville County, on or about the day of 2014, unlawfully, with malice aforethought, and with the intent to kill, attempt to kill Ashley Hiott. This is in violation of § 16-03-0029 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR BAR # 64155

WITNESSES

Henry Hammett

Greenville County Sheriffs Office

2/27/2014

ARREST WARRANT NUMBER
2014A2330201676

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-23- 011863
LMM

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

March TERM ~~2014~~ 2015

THE STATE

vs.

BILLY LEMURCES TAYLOR

Indictment for

3410

ATTEMPTED MURDER

VIOLATION § 16-03-0029

ENTERED ACCT LBH

FILED
DEC 29 2014
Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ATTEMPTED MURDER

At a Court of General Sessions, convened on MAR 10 2015 the Grand Jurors of Greenville County present upon their oath:

That BILLY LEMURCES TAYLOR did in Greenville County, on or about the day of 2014, unlawfully, with malice aforethought, and with the intent to kill, attempt to kill Brittany Jeeter. This is in violation of § 16-03-0029 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR BAR # 64155

WITNESSES

Henry Hammett

Greenville County Sheriffs Office

2/27/2014

ARREST WARRANT NUMBER
2014A2330201675, 2014A2330201677

ACTION OF GRAND JURY

TRUE BILL

Wayne [signature]

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-23-011064
LMM

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

March TERM ~~2014~~ 2015

THE STATE

vs.

BILLY LEMURCES TAYLOR

Indictment for

0116, 0549

MURDER AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

VIOLATION § 16-03-0010 and § 16-23-0490

ENTERED ACCT. LJH

FILED
DEC 29 2014
Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

MAR 10 2015

At a Court of General Sessions, convened on the Grand Jurors of Greenville County present upon their oath:

COUNT ONE

MURDER

That BILLY LEMURCES TAYLOR did in Greenville County, on or about the day of 2014, unlawfully and with malice aforethought kill Rodney Nesbitt by means of discharing a firearm into a motor vehicle striking Rodney Nesbitt, and that Rodney Nesbitt died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That BILLY LEMURCES TAYLOR did in Greenville County, on or about the day of , 2014, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-0490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR BAR # 64155

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 4th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT

APPELLATE CASE NO. 2016-000549

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

On March 4, 2016, appellant was indicted by a Greenville County grand jury for murder, two counts of attempted murder, and a weapons charge. R. 530 – 535. On February 29, 2016, appellant was tried before the Honorable Robin B. Stilwell and a jury. R. 1. Mark Moyer represented the State. R. 1. Frank Eppes and Carter Massingill represented appellant. Tr. 1. The jury convicted appellant. R. 507, l. 4 – 508, l. 9. Judge Stilwell sentenced appellant to forty years' imprisonment for murder and concurrent terms of thirty years' imprisonment on the two attempted murder charges and five years' imprisonment on the weapons charge. R. 524, l. 8 – 525, l. 3. This appeal follows.

ARGUMENT

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

On the night of February 22, 2014, a massive fight occurred at a nightclub in Greenville. R. 32, l. 7 – 33, l. 16. The security guards maced nearly everyone inside of the club. R. 32, l. 7 – 33, l. 16. As the occupants spilled into the parking lot, there were gunshots. R. 34, ll. 2 – 24. Many people from the club went to a nearby gas station to buy milk to pour on their faces to relieve the effects of the mace. R. 44, l. 1 – 47, l. 6. More fighting occurred in the parking lot of the gas station. R. 44, l. 1 – 47, l. 6.

Ashley Hiott, Brittany Jeter, and Jermaine Nesbitt were in the club, but were not part of the group fighting. R. 32, ll. 7 – 17. They left in Hiott's Tahoe and went to the gas station. R. 44, l. 9 – 45, l. 22. Hiott noticed a distinctive Camaro at the gas station. R. 47, l. 15 – 48, l. 10.

When Hiott's group left the gas station, the Camaro followed and pulled alongside her Tahoe. R. 50, l. 7 – 54, l. 14. Jeter was in the front passenger seat and Nesbitt was in the backseat. R. 50, l. 7 – 54, l. 14. Hiott saw three men in the Camaro, but did not know any of them and could not identify appellant as one of the men. R. 50, l. 7 – 54, l. 14.

The men in the Camaro began yelling trying to get the girls' attention. R. 62, l. 22 – 65, l. 22. Nesbitt yelled back at the men that the girls were with him. R. 62, l. 22 – 65, l. 22. The men in the Camaro yelled, "Fuck you," and Nesbitt replied, "Fuck you, too." R. 62, l. 22 – 65, l. 22.

Hiott then heard a gunshot. R. 64, ll. 13 – 14. Jeter heard two gunshots. R. 383, ll. 12 – 18. Hiott was shot in the head, but survived. R. 26, l. 23 – 27, l. 9. Nesbitt died from a gunshot wound to the head. R. 124, l. 11 – 125, l. 1. Jeter was not injured. R. 383, l. 12 – 385, l. 13.

The State's theory of the case was that appellant was the driver of the Camaro and the shooter and that Anthony Henderson and Deunte Jones where the passengers. R. 464, l. 9 – 466, l. 9. Both Henderson and Jones testified for the State that appellant was the shooter. R. 286, l. 25 – 290, l. 21. R. 344, l. 12 – 347, l. 24. Henderson was also charged with murder and attempted murder, but claimed he had not been promised anything by the State in exchange for his testimony. R. 262, l. 18 – 263, l. 10. Henderson and Jones were very good friends and had seen each other as recently as a week before trial. R. 315, ll. 14 – 25. Henderson and Jones' cousin had a child together. R. 316, ll. 1 – 2.

While Henderson was out on bond for this crime, he posted pictures of himself on Facebook with a semi-automatic weapon and messages indicating he would kill anyone who ran afoul of him. R. 316, l. 3 – 319, l. 9. (Defendant's Ex. 3 and 4). Henderson claimed he had nothing to do with the shooting except for being in the Camaro. R. 310, ll. 2 – 6. Jones had also posted threatening pictures of himself and Henderson on Facebook. R. 352, ll. 6 – 19. (Defendant's Ex. 3 and 4). Both Henderson and Jones also gave statements to the police that conflicted with their trial testimony. R. 319, l. 18 – 323, l. 11. R. 353, l. 4 – 362, l. 4.

The jury began deliberations at noon. R. 495, ll. 13-14. They asked a question about the court's hand of one, hand of all charge and returned to the jury room at 1:50 PM. R. 495, l. 17 – 498, l. 9. The jury deliberated another five hours and returned to the courtroom at 7:20 PM. R. 498, l. 17 – 499, l. 13. The jury had sent a note to the trial judge that they were at an impasse. R. 498, l. 17 – 499, l. 13. The court sent the jury home for the evening. R. 499, l. 14 – 501, l. 19.

The next morning, Judge Stilwell told the attorneys he was going to give the jury a "standard" Allen charge, but when defense counsel asked to see it, the judge said he did not have it written down. R. 502, ll. 2 – 11. The court then gave the jury the following charge:

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

R. 502, l. 12 – 504, l. 8 (emphasis added). The jury left at 9:10 AM and returned with its guilty verdicts at 11:43 AM. R. 504, l. 7 – 507, l. 3.

Immediately after dismissing the jury back for their deliberations after the Allen charge, defense counsel placed on the record that he had objected the night before to the giving of the Allen charge. R. 504, ll. 12 – 15. Defense counsel moved for a mistrial which was denied. R. 504, l. 12 – 505, l. 23. Defense counsel asked the court to bring back the jury and tell them that a hung jury was "a legitimate end of a criminal trial" and is sometimes the result of the state's

burden to prove its case beyond a reasonable doubt. R. 504, l. 12 – 505, l. 23. Defense counsel also objected to the Allen charge as unduly coercive. R. 504, l. 12 – 505, l. 23. The trial court denied appellant's motions. R. 504, l. 12 – 505, l. 23.

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

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

The charge was also directed at the minority. The note the jury sent to the judge indicating an impasse appears to show multiple votes on each charge. R. 529. For example, it shows four votes on the murder charge with the final vote before declaring an impasse showing two for not guilty and ten for guilty. R. 529. On the attempted murder charges, the votes were

7-5 in favor of guilty on the charge regarding Jeter and 8-4 on the charge regarding Hiott. R. 529. While the record does not indicate that the trial judge forced the jury to reveal their numerical vote, which is improper, the revelation of the vote increases the coercive effect because the minority knows the Allen charge is directed at them. See State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951) (holding it is improper for the court to make the jury publicly reveal its vote count).

During the beginning of the court's Allen charge, he emphasized to the jury that he knew their numerical division. R. 502, ll. 17 – 20. The comments about the "waste of time" could be directed at no persons other than the two not guilty jurors and would certainly have (and did have) an effect on them. The effect of the Allen charge here was to negate the entire day's previous deliberations and force the jury to reach a verdict despite the State not meeting its burden of proof in the judgment of some jurors. This case should be reversed.

CONCLUSION

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

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of August, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 22, 2017

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEMURCES TAYLOR,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of August, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 22nd day of August, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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.

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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. (R. pp. 507-08). 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. (R. pp. 524-26). 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. (R. p. 124). The bullet entered the right brow and exited posteriorly on the left side of the head. (R. p. 124). This was the mortal shot. (R. p. 124). He would have died relatively instantly. (R. p. 130). Cause of death was the gunshot wound to the head. (R. p. 132).

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. (R. p. 217). The bullet went through the right lateral aspect of the orbital, and it displaced both of her optic nerves. (R. p. 218). She also suffered facial fractures of the orbit. (R. p. 220). The bullet lodged behind her left eyeball, and it had not been removed at the time of trial because of its location. (R. pp. 218, 221).

Background

On the day of the shooting, Nesbitt had been in a relationship with Brittany Jeter ("Jeter") for five to six months. (R. pp. 28, 368). That Friday, February 21, 2014, the two went to a bowling alley in Spartanburg with Jeter's brother and another friend. (R. pp. 369-70). They were celebrating Nesbitt's birthday, which was that Saturday. (R. pp. 369-70). 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. (R. pp. 26, 29, 370). Hiott and Jeter were friends, and that night Jeter and Nesbitt were borrowing Hiott's Tahoe.[1] (R. p. 370).

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. (R. pp. 29, 371). 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. (R. p. 30). They stayed at the club for approximately an hour. (R. p. 31). While inside, Jeter and Nesbitt bought a shot of Hennessey and a beer each. (R. p. 372).

While they were there, a fight broke out in the front of the club. (R. pp. 32, 374). Security sprayed mace inside the club, and everyone that was inside was forced outside. (R. p. 32). When the three went outside, Jeter and Nesbitt finished their beers, and they started walking back towards the Tahoe. (R. p. 375). 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. (R. pp. 33-34). Jeter also saw the Camaro. (R. pp. 375-76). Shortly after the three got to the Tahoe, they heard gunshots. (R. pp. 376, 377).

<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. (R. p. 378). Again, Hiott was driving, Jeter was in the front passenger seat, and Nesbitt was in the rear passenger seat. (R. p. 45). When they arrived at the BP station, Hiott went inside to pay for the gasoline. (R. pp.

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[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. (R. p. 49).

45, 378). Nesbitt got out to pump the gas. (R. pp. 45, 378). Jeter later got out of the Tahoe and stood by Nesbitt while he was pumping the gas. (R. p. 378).

Hiott noted the BP was busy, and there were people in the parking lot pouring milk on their faces attempting to wash out mace. (R. pp. 45-46). When Hiott walked outside of the gas station, she observed a fight between a lady and a gentleman in the parking lot. (R. p. 47). Jeter saw there was a lot of arguing and fighting at the gas station. (R. pp. 379-80). Hiott also noticed a newer model Camaro with rims that matched the paint on the car. (R. p. 47). The Camaro was not parked at a pump, but was in a spot at the top of the gas station. (R. p. 48). Hiott did not see or hear anything from the Camaro, and there was a lot of noise in the parking lot. (R. p. 48).

When Hiott was coming back outside, Jeter got back in the Tahoe. (R. p. 379). When Hiott got back to her Tahoe, Nesbitt was still pumping the gas. (R. p. 48). Hiott stopped for a second, and then she got back into the Tahoe. (R. p. 48). Jeter had started to slide over to the driver's seat, but Hiott told her not to because she had been drinking. (R. pp. 48, 379). Hiott told Jeter that she would drive, and Jeter slid back over to the front passenger seat. (R. p. 49). Hiott got back into the driver's seat. (R. p. 49). When Nesbitt finished pumping gas, he got back in the Tahoe in the back seat on the passenger side. (R. p. 50). Hiott noted that he sat somewhere in in the middle of the back seat, but closer to the passenger side of the Tahoe. (R. p. 50).

<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. (R. p. 380). In leaving the gas station, Hiott pulled up to Pelham Road to make a right turn. (R. pp. 50-51). She noticed the Camaro had pulled beside her,

and she believed it was going left. (R. p. 51). She saw three males in the car; the driver, a passenger in the front seat, and a passenger in the back seat. (R. p. 52). She noted the passenger had little dreads, and looked like Anthony Henderson. (R. p. 52). At that time, she had never seen him before. (R. p. 52).

Hiott made the right turn onto Pelham. She got into the left lane. (R. p. 53). The Camaro also made a right turn onto Pelham, and it got into the right lane. (R. p. 53). Once they turned right onto Pelham, Jeter heard a guy's voice saying, "[h]ey, girl, hey, hey, hey."[2] (R. p. 381, l 9). Jeter looked back and saw the Camaro. (R. p. 381). It was back towards where Nesbitt's window was. (R. p. 381).

<u>Someone in the Camaro shoots at the Tahoe.</u>

The Camaro sped up and drove beside the Tahoe. (R. p. 54). Hiott indicated it was not completely side by side, but the two vehicles were neck and neck. (R. p. 54). Hiott heard some guys hollering from the car. (R. p. 63). She turned around to look, and that's when she saw the Camaro. (R. p. 63). Jeter heard someone else yell something else out of the Camaro. (R. p. 382). Nesbitt responded to the comments, saying something like "Hey, that's my old lady and my sister-in-law." (R. p. 63, l 25 – p. 64, l 1; R. p. 382). The guys in the Camaro said something else, and Jeter and Hiott told Nesbitt not to respond. (R. 64, 383). Someone from the Camaro hollered out "fuck you." (R. p. 64, l 11). Nesbitt yelled back, "[f]uck you too." (R. p. 64, l 12; <u>see</u> R. p. 383). Jeter testified, "[t]hen after that, it's like pow, gunshot." (R. p. 383, l 13). Jeter thought she heard two shots. (R. p. 383). Hiott also heard a gunshot. (R. p. 64).

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[2] Jeter did not hear any yelling until they had pulled onto Pelham Road. (R. p. 388).

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. (R. p. 383). Hiott remembered seeing a light coming, and then everything was just ringing and white. (R. pp. 64-65). Hiott could not see anything, and everything was ringing. (R. p. 65). She stopped the Tahoe pretty quickly after the shot. (R. p. 65).

Jeter remembered the Tahoe stopping, and she jumped out. (R. p. 384). Jeter saw the Camaro passing, and the Camaro's driver's side window going up as it passed the Tahoe. (R. p. 384). It sped off. (R. p. 384). Jeter got out, went to the back seat, and started screaming for Nesbitt to get up. (R. p. 385). He was not responding. (R. p. 385).

At that moment, Hiott did not realize she had been shot. (R. p. 65). She felt her nose bleeding, and she grabbed her face. (R. p. 65). Hiott remembered reaching for her door, and she recalled grabbing her phone, but she could not see anything to dial. (R. p. 65). Hiott then realized her face was getting really hot. (R. p. 65). She heard Jeter was screaming, please wake up, please wake up. (R. p. 65).

Hiott got out of the Tahoe, and she felt her way to the back of the vehicle until she collapsed at the back. (R. p. 66). Officers arrived on scene quickly. (R. p. 66). Hiott was taken to the hospital. (R. p. 67). No one in the Tahoe had a weapon, and no one in the Tahoe brandished a weapon. (R. p. 67).

When emergency personnel arrived on scene, Nesbitt was dead. (R. p. 102). Hiott, who was standing at the rear of the Tahoe, had a cloth to her head and could not see. (R. p. 102). Hiott had a wound to the right temporal area of her head. (R. p. 103).

Her eyes were swollen, and they were closed. (R. p. 103). She was taken to Greenville Memorial Hospital as a level one trauma. (R. p. 106). Hiott informed emergency personnel that she had been shot by an unknown person in a red Camaro. (R. p. 105). As police arrived, Jeter also yelled that they should go after the red Camaro. (R. p. 386). Jeter recalled seeing someone with little dreads in the Camaro. (R. p. 386).

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. (R. pp. 265, 337). Henderson was friends with Taylor. Jones did not know Taylor before that night. (R. p. 337). Taylor showed up at Bugatti later that night. (R. p. 267). He was driving his red Camaro, which had aftermarket rims at that time. (R. pp. 267-68). 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. (R. p. 269). Taylor drove Jones and Henderson to Croc's in the Camaro. (R. pp. 269, 338).

The three were in Croc's for at least an hour. (R. p. 271). At some point, a fight broke out in Croc's, and Henderson was sprayed with mace. (R. pp. 272-73, 338). Jones was not directly maced, but he did get some mace in his eyes. (R. p. 339). Henderson was not involved in the fight, and he did not know who was involved. (R. p. 273). Jones and Henderson went outside, and Taylor came out later. (R. p. 274). Henderson heard someone shooting in the parking lot. (R. p. 277). Jones also recalled hearing gunshots outside of Croc's. (R. p. 341). Jones and Henderson left Croc's with

Taylor. (R. p. 340). Taylor drove, Jones got in the back seat on the passenger side, and Henderson was in the front passenger seat. (R. p. 340).

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. (R. pp. 277, 279-80, 342). Henderson noted that on the way to the BP station, Taylor said he got to shoot his gun one time. (R. p. 277). Jones also recalled Taylor telling Henderson that he got to shoot his gun. (R. p. 341).

Taylor parked the Camaro on the side of the gas station. (R. pp. 280-81). Henderson stood at the car for a minute or two, and Taylor stood at the car for a minute or two. (R. p. 342). Jones stayed in the car. (R. p. 342). 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. (R. pp. 281-82). Henderson also noted that Taylor was trying to fight anybody at the gas station. (R. p. 282). Jones recalled there was fighting around the gas station. (R. p. 342).

Henderson recalled seeing Hiott walking at the gas station. (R. p. 283). He noted that Taylor attempted to talk to her from his car, and he was rude about it. (R. pp. 283, 284). Henderson stated that Hiott did not acknowledge Taylor at all. (R. p. 284). Jones did not see the Tahoe. (R. p. 343). He did recall that Henderson did not get any milk. (R. p. 344). Jones asked both Henderson and Taylor to leave, but they sat at the gas station for another minute or two. (R. p. 344).

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

The three then left the gas station. (R. p. 286). Henderson remembered seeing the Tahoe as it was leaving. (R. p. 286). At the time, he was sitting in the front passenger seat of the Camaro. (R. p. 286). 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. (R. p. 344). Nesbitt was yelling out the window towards the Camaro, and Taylor was yelling back. (R. p. 287). Jones heard the dude in the Tahoe and Taylor. (R. pp. 344-45). Neither Henderson nor Jones recalled what was being said, or who started the words between the two. (R. pp. 287, 345). It was hostile. (R. p. 345).

Henderson did not remember the Tahoe turned right out of the gas station, but the Camaro did. (R. p. 288). Henderson heard someone talking on his left side real loud. (R. p. 288). Then, Taylor began arguing with Nesbitt again.[3] The Camaro was in the right lane, and the Tahoe was in the left lane. (R. p. 288). Jones noted Taylor's window was down, and he was talking to the guy in the Tahoe. (R. p. 346). Jones saw Taylor reach over Henderson, and after that, he heard the shot. (R. p. 347). Jones recalled the Camaro was close to the Tahoe when he heard the shot. (R. p. 346).

Henderson heard a boom. (R. p. 290). 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. (R. p. 290). Jones heard a gunshot. (R. p. 345). He ducked. (R. p. 345). Jones did not see anything, but he looked back and saw the Tahoe was slanting off to the left. (R. p. 346). Jones noted that Taylor laughed, and they sped off. (R. p. 347). Henderson stated the Tahoe swerved to the left, and the Camaro sped down the road.

[3] Jones, who was in the back seat of the Camaro, was not involved in the argument. (R. p. 290).

(R. pp. 290-91). Neither Henderson nor Jones saw anyone in the Tahoe with a weapon. (R. pp. 297, 349).

In his statement to law enforcement, Jones had indicated Taylor's left hand and arm were out the window when the shot was fired. (R. pp. 353, 358). He recalled that Taylor reached for the gun with his right hand, and Taylor did not recall which hand he used to shoot the gun. (R. p. 362). He thought it was with the left hand. (R. p. 362). Jones did not know where the gun came from. (R. p. 363).

Immediately after the Shooting.

Henderson then asked Taylor to take him home, but Taylor refused. (R. p. 291). Jones also asked what happened. (R. p. 291). The three did not talk about the incident on the drive back towards Greenville. (R. p. 292). They drove to a house where some guys who were at the club earlier were. (R. pp. 293, 348). Jones stayed in the car at that house. (R. p. 348). 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. (R. p. 294). The three then drove to Taylor's house, and Taylor put something in the trunk of his other car, a black Audi. (R. p. 295). Taylor then took Henderson and Jones to Jones' house. (R. pp. 297, 349). Jones never talked with Taylor about what happened. (R. p. 349).

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. (R. p. 109). He stopped at a drug store that was across Pelham Road to see what was happening at Croc's. (R. pp. 109-10). Tate heard gunshots, and he saw a guy filing a gun into the air. (R. p. 110). Tate called 911 and reported the shots fired. (R. p. 111).

He saw law enforcement arrive. After he got off the phone with the dispatcher, he heard a single gunshot. (R. p. 112). Shortly thereafter, and as he was heading to talk with an officer he saw that was nearby, he saw the SUV on Pelham Road. (R. p. 112). After hearing the gunshot, Tate also saw what he described as a maroon Camaro speeding down Pelham Road towards the interstate. (R. p. 113). Tate also indicated the rims on the Camaro were not Chevrolet rims. (R. p. 113).

Donterio Harris, Taylor's friend since childhood, identified the red Camaro as Taylor's. (R. pp. 232-34). He remembered the car was pretty new. (R. p. 234). On February 21, Harris had talked with Taylor about going to Croc's. (R. p. 235). Harris did not end up going to the club with Taylor because his girlfriend's mother had died. (R. p. 235). Harris received a call from Taylor sometime between 4 and 4:30 a.m., but he did not answer it. (R. pp. 235-36). He talked with Taylor later on February 22, and Taylor informed Harris that the whole club was maced that morning. (R. pp. 236-37). Taylor borrowed a jack from Harris. (R. pp. 239-40). Taylor also later left the Camaro behind Harris's backyard with Harris's permission. (R. pp. 239-42). Harris also testified that Taylor washed the Camaro at Harris' house. (R. pp. 242-43). Harris said that Taylor had indicated he would only likely leave the car parked behind the house for a couple of hours. (R. p. 244). Taylor never came back to get the car. (R. p. 244). Harris also indicated that the rims in the picture were similar to rims that were pictured in State's Exhibit 13. (R. pp. 246-47).

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. (R. p. 89). The vehicle had large rims. (R. p. 89). Officers also spoke with Tate. (R. p. 90). Emergency personnel who treated Hiott also noted that she indicated the assailant was in a red Camaro. (R. p. 105).

Detectives tracked down the surveillance video from the gas station. (R. pp. 153-54, 392). No weapons were found in the Tahoe. (R. pp. 154, 168).

Aftermarket rims were found in a shed behind Taylor's grandfather's residence. (R. p. 415). Those rims were rented by Taylor. (R. pp. 252-59). The wheel shop records also reflected the rims were rented for a 2011 red Camaro. (R. p. 259). The Camaro was found behind Harris' residence in Greenville. (R. pp. 170, 241). It could not be seen from the street. (R. p. 170). The car had been cleaned. (R. p. 176). A firearm was found in Taylor's room when he was arrested. (R. pp. 398-99, 419-20). Taylor's fingerprint was found on the trunk lid. (R. pp. 175, 229). Investigators also spoke with Jimmy Brock. Brock was in jail at the Greenville County Detention Center at the same time as Taylor and Henderson. (R. pp. 326-29). He recalled Henderson asking him to tell Taylor to "clear his face." (R. p. 329, 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. (R. pp. 329-30).

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. (R. p. 499). The court marked the note as Court Exhibit 4. (R. p. 499). The note also outlined the divisions of the jury for each of the charges. (Court Exhibit 4; R. p.529). 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. (R. p. 499). 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. (R. p. 499). The court then brought in the jurors and released them for the evening. (R. pp. 499-500).

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

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

a decision. It's hard for my wife and I to figure out what we're going to eat for supper sometimes. So, this decision, I recognize is hard.

> But understand that it's important that you come to a decision in this case. Understand that both the State and the Defense have extended significant resources and time and effort to get to this point. Also, know that the State and the County has extended resources to get to this point as well. And if you're unable to come to this verdict in this matter, then, essentially, we'd be left with having to do it all over again, extending additional resources, time and effort. Now, ladies and gentlemen, I will tell you that there are no 12 other people in the County of Greenville who are more capable or competent to come to a decision in this matter than the 12 of you are.
>
> Now, again, I understand it's hard to come to a decision. But those of you who are in the majority should listen to the people in the minority. Those of you who are in the minority should listen to the people in the majority. You should take into consideration your respective positions and you should come to a decision in this matter. Again, it really would be a waste of time, effort and resources for us to have to do all of those over again. So, I'm going to ask you to go back to your jury room and resume your deliberations. Thank you, very much.

(R. p. 502, l 15 – p. 504, 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. (R. p. 504). The trial court acknowledged that occurred. (R. p. 504). Then Taylor moved for a mistrial instead of the Allen charge. (R. p. 504). 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." (R. p. 504, 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.

(R. p. 504, l 24 – p. 505, 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." (R. p. 505, 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. (R. p. 506). 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. (R. p.506).

The jury returned to the courtroom at 11:43 a.m. and issued its verdicts. (R. pp. 507-08).

After the jury was released, Taylor renewed his objections regarding the Allen charge and continuation of the trial. (R. p. 517). He also requested a mistrial. (R. p. 517). The trial court denied the motion on the same basis as it had previously articulated. (R. p. 517).

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. (R. 495). 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. (R. 496-98). 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. (R. 498-99). 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." (R. p. 503, l 22 – p. 504, 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. (R. p. 499). 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. (R. p. 503, l 25 – p. 504, 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; R. p. 529). 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. (R. p. 495). 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. (R. pp. 496-98). 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. (R. pp. 498-99).

The next morning, the jury received the Allen charge beginning at 9:05 a.m. and ending at 9:10 a.m. (R. pp. 502-04). Taylor placed an objection on the record at approximately 11:08 a.m. (R. p. 506). The jury rendered its verdict at 11:43 a.m. (R. p. 507). 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 Tillman, 304 S.C. at 521, 405 S.E.2d at 613 (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,

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August 24, 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,

V.

BILLY LEMURCES TAYLOR,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.".

This 24th day of August, 2017.

ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, David Alexander, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

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

This 24th day of August, 2017.

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Billy Lemurces Taylor, Appellant.

Appellate Case No. 2016-000549

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5655
Submitted February 1, 2019 – Filed June 12, 2019

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Alphonso Simon, Jr., Assistant Attorney General Samuel Marion Bailey, all of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

HILL, J.: Seven hours and twenty minutes into their deliberations following four days of trial, the jury in Billy L. Taylor's criminal trial informed the trial court they were at an impasse. The trial court sent the jury home for the night. The next morning, the trial court gave the jury a charge derived from *Allen v. United States*,

164 U.S. 492 (1896). Taylor objected to the charge and moved for a mistrial. Two-and-a-half hours later the jury returned with a guilty verdict. Taylor now appeals, contending his motion for a mistrial should have been granted, and the *Allen* charge was unconstitutionally coercive. We agree the *Allen* charge was coercive and reverse.

I.

Taylor was tried for the attempted murders of Brittany Jeeter and Ashley Hiott, the murder of Rodney Nesbit, and the possession of a weapon during the commission of a violent crime. The jury began deliberating at noon on the fourth day of trial, and soon the jury asked a question about the "hand of one, hand of all" charge. After further instruction, the jury resumed deliberations at 1:50 p.m. They returned to the courtroom at 7:20 p.m. after sending a note advising they were at an impasse. The note also contained an apparent tally of successive votes the jury had taken, indicating the latest vote was 10-2 in favor of conviction on the murder charge, 8-4 for conviction on the attempted murder charges, and 11-1 for conviction on the weapon charge. The trial court sent the jury home for the night. The next morning, the trial court gave the following charge:

> 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.
>
> 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 a 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. . . .

After the jury left the courtroom at 9:10 a.m., Taylor moved for a mistrial and also objected to the *Allen* charge on the ground that it was unduly coercive. He asked the court to instruct the jurors that a hung jury was "a legitimate end of a criminal trial" and sometimes the result of the State's burden to prove its case beyond a reasonable doubt. The trial court denied Taylor's motions. The jury returned a guilty verdict at 11:43 a.m.

II.

A. Mistrial

We first address Taylor's argument that the trial judge abused its discretion by giving an *Allen* charge rather than declaring a mistrial. A trial court should declare a mistrial as a last resort, when all other alternatives have been exhausted. A mistrial is a drastic step, "an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009).

The trial court was well within its discretion in refusing to declare a mistrial simply because the jury, after some seven hours of deliberation, announced an impasse. We review the decision with deference to the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial.

The trial court has several ways to respond to a deadlocked jury, including delivering an *Allen* charge. In fact, the trial judge has a duty to urge the jury—without pressuring or coercing them—to reach a verdict. *State v. Williams*, 344 S.C. 260, 263, 543 S.E.2d 260, 262 (Ct. App. 2001). We find no error in the trial court's choice to deny Taylor's mistrial motion.

B. *Allen* Charge

According to Taylor, the trial court's *Allen* charge was coercive because it did not tell the jurors not to give up their honestly held beliefs simply to reach a verdict, it targeted the minority "holdout" jurors, and pressured them by stating a mistrial would be a waste of time and resources. He further complains the charge did not inform the jurors they have a right not to reach a verdict.

Because a criminal defendant's right to due process is violated by a charge that coerces a jury to reach a verdict, courts have long struggled with what to tell a deadlocked jury. The substance of the original *Allen* charge was described as instructing the jury that:

> in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, [on] the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by
> the majority.

Allen, 164 U.S. at 501. The original *Allen* charge was upheld, but with time and experience courts questioned its latent coercive force, particularly when trial judges tinkered with the original version. *See United States v. McElhiney*, 275 F.3d 928, 937–38 (10th Cir. 2001) (canvassing the history and evolution of *Allen* charge); *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (Haynsworth, J.) (noting original *Allen* charge "approaches ultimate permissible limits"), *abrogated on other grounds by Bell v. United States*, 462 U.S. 356 (1983).

The United States Supreme Court continues to approve *Allen*-type charges, *see Jones v. United States*, 527 U.S. 373, 382 n.5 (1999), but many states have banned the original *Allen* charge, with some embracing a charge developed by the American Bar Association (ABA) that must be given to juries before deliberation begins. Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions,* 15 Wm. & Mary Bill of Rts. J. 893, 914–16 (2007). Versions of the charge vary in the federal circuits, but all circuits allow them, though several recommend the ABA version. *See Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1 (1988) ("All of the Federal Courts of Appeals have upheld some form of a supplemental jury charge.").

Although labelled the "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree," *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972), the label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care.

South Carolina approves the use of a modified *Allen* charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority. *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion. *See Tucker v. Catoe*, 346 S.C. 483, 492–95, 552 S.E.2d 712, 717–18 (2001) (per curiam).

Like most multi-factor constructs, the *Tucker* test does not tell us the relative weight each factor carries, nor is the list of factors exclusive. *Id.* at 491, 552 S.E.2d at 716 (emphasizing the coercion inquiry "is very fact intensive"); *Workman*, 412 S.C. at 130, 771 S.E.2d at 638 (stating coerciveness must be gauged by context and circumstances).

As to the first *Tucker* factor, the charge did not in the abstract single out the minority jurors. We cannot rest on the abstract, however, and must examine the charge in the context and setting it was given. Under the circumstances here, analysis of this first factor is shaded by considerations related to the third factor's concern with knowledge of the jury's numerical split, which we will soon take up.

As to the second factor, the charge instructed the jurors "it's important that you come to a decision in this case," and "you should come to a decision in this matter." This skirts close to the language found coercive in *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (reversing and remanding case for a new trial because the charge told the jury "[y]ou have got to reach a decision in this case"). There is a glaring difference between the trial court's obligation to tell jurors they have a duty to *attempt* to reach a unanimous verdict and telling them they "should come to a decision." Our supreme court has even cautioned trial judges "against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive." *State v. Williams*, 386 S.C. 503, 515 n.7, 690 S.E.2d 62, 68 n.7 (2010).

Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls. Recognizing the enormous power such influence can wield and its capacity to compromise impartiality, our constitution forbids the trial judge from commenting on the facts. *See* S.C. Const., art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is precisely because jurors scrutinize the trial judge's statements and instructions—a scrutiny that becomes more acute amidst heated deliberations—that the trial judge should couch them in as neutral and dispassionate terms as language and context permit. Even an otherwise benign remark, such as "you should come to a decision," could be interpreted by a rational juror that the trial judge believes the result is obvious, or at least capable of unanimous agreement. *See Quercia v. United States*, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury 'is necessarily and properly of great

weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'").

The third *Tucker* factor asks whether there has been inquiry into the numerical division of the jury. A trial court cannot, of course, ask the jury to reveal its division. *State v. Middleton*, 218 S.C. 452, 457–58, 63 S.E.2d 163, 165–66 (1951). Here the trial judge wisely did not inquire further into the specifics of the split when the jury volunteered its vote tally. The trial judge prefaced his *Allen* charge by acknowledging "you told me the division you had." So the jury knew the trial judge knew they stood 10-2 in favor of conviction on the murder charge and how they were divided on the others. This bears on our coercion analysis, for a jury laboring under such knowledge might interpret the trial judge's comments as aimed at the minority. *See, e.g.*, *Brewster v. Hetzel*, 913 F.3d 1042, 1054–55 (11th Cir. 2019) ("Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction. . . . The problem exists whether the judge asked for the information or the jury disclosed it without any prompting. If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to join the majority in order to placate the judge."). It is not coercive to give an *Allen* charge simply because the jury volunteers how it is split, *see Williams*, 344 S.C. at 264–65, 543 S.E. 2d at 263, but the trial court's knowledge of the split is relevant. In *Tucker*, the jury twice informed the trial court of its numerical split before the *Allen* charge. 346 S.C. at 485–87, 552 S.E.2d at 713–14. The supreme court noted while the trial court did not actively inquire into the jury's division, it "failed to instruct the jurors not to disclose their division in the future." *Id.* at 494, 552 S.E.2d at 717. The court concluded "knowledge of the jury's numerical division combined with knowledge of its decisional disagreement, followed by an *Allen* charge directed, at least in part, to minority jurors, is impermissibly coercive." *Id.* at 494, 552 S.E.2d at 717–18.

During its instruction on the law after closing arguments, the trial court can instruct the jury that if it encounters division it should not disclose its numerical split. *Williams*, 386 S.C. at 515 n.7, 690 S.E.2d at 68 n.7 ("[T]o alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division."). Should the jury later report a deadlock and disclose its split, the trial court should tell the jury not to reveal its numerical division again and craft any *Allen* charge mindful of how it may be interpreted given the division. This makes an already subtle task even more delicate. *See United States v. Vanvliet*, 542 F.3d 259, 268 (1st Cir. 2008) (refusing to hold jury's volunteering of division reversible error; "Instead, the district court's

knowledge of the numerical division of jurors . . . might create a coercive situation if circumstances suggest that minority or 'holdout' jurors likely would infer that the court is directing the *Allen* charge specifically at them, and implying that they should vote with the majority to get the case settled expeditiously").

The fourth *Tucker* factor in determining whether an *Allen* charge is unconstitutionally coercive is whether the time between the charge and the verdict demonstrates coercion. This factor is notoriously difficult to apply without indulging in speculation given the secrecy of jury deliberations. Here, the jury returned its guilty verdict two-and-a-half hours later, which does not dispel the likelihood of coercion. We have no way of knowing what went on in the jury room, but we do know that less than three hours after the *Allen* charge, the jury transformed from a body significantly divided on five serious felony charges involving multiple victims into one united by complete unanimity. *Tucker* found a one-and-a-half hour interval suggested coercion when there was only one juror holding out, and (as here) the jury had been hung since late the previous afternoon. 346 S.C. at 494, 552 S.E.2d at 718.

The *Tucker* criteria have never been deemed comprehensive. The most troubling thing about the charge here is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion. *See Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 423, 537 S.E.2d 279, 283 (2000) (finding trial court properly instructed a deadlocked jury by "inform[ing] the jury of the desirability of reaching a verdict . . . yet remind[ing] the jury no juror should surrender his or her conscientious conviction simply to reach a unanimous verdict"); *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992) ("[A] trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict."). Nor did the trial judge's initial charge at the end of the trial remind the jurors not to surrender their conscientious beliefs during deliberations. The original *Allen* charge included such a statement, and courts have routinely held its absence reversible error. *See* Note, *Due Process, Judicial Economy & the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 128 (1967) ("Almost without exception the courts have required that the charge contain the statement that 'no juror should yield his conscientious conviction' or words to that effect."). The Fourth Circuit has observed that if the original *Allen* charge were "stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held, it might readily be construed by the minority of the jurors as coercive, suggesting to

them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." *Rogers*, 289 F.2d at 435; *see also Smalls v. Batista*, 191 F.3d 272, 279 (2d Cir.1999) ("[A] necessary component of any *Allen*-type charge requires the trial judge to admonish the jurors not to surrender their own conscientiously held beliefs."); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) ("The reminder that no juror should merely acquiesce in the majority opinion is . . . one of the most important parts of the Allen charge."); *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.").

The charge here also overemphasized the cost and expense of a retrial. While it is not error to tell the jury that a retrial will be costly, *see State v. Singleton*, 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995), the Fourth Circuit has warned such statements are disfavored and should not be overbearing. *United States v. Hylton*, 349 F.3d 781, 788 (4th Cir. 2003); *see also McElhiney*, 275 F.3d at 945 (holding comments on cost of retrial can be coercive if overstressed). Also, telling the jury the case will "have" to be retried is misleading. A hung jury often acts as an alarm bell to all but the unthinking, awakening one side (sometimes both) to weaknesses in their case, which can lead to a plea deal rather than a retrial.

A trial court is not, however, required to advise the jury they have a right to not reach a verdict. *See, e.g.*, *United States v. Arpan*, 887 F.2d 873, 876 (8th Cir. 1989); *but see United States v. Manning*, 79 F.3d 212, 222 (1st Cir. 1996) (requiring *Allen* charge to include instruction that jury has the right to fail to agree).

All of this adds up to the conclusion that the charge unduly pressured the jury. We are certain the trial court had the best intentions, but from our perspective the *Allen* charge was unconstitutionally coercive. We therefore reverse and remand this case for a new trial.

REVERSED AND REMANDED.[1]

WILLIAMS and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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.

RECEIVED
JUN 27 2019
SC Court of Appeals

PETITION FOR REHEARING

On June 12, 2019, this Court issued an opinion in the captioned case that reversed appellant's convictions for murder, two counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime. *State v. Taylor,* Opinion No. 5655 (S.C.Ct.App. filed June 12, 2019). Pursuant to South Carolina Appellate Court Rules 221 and 240, Respondent, the State of South Carolina, petitions for rehearing and asks the Court to consider the following points that may have been misapprehended or overlooked:

The Issue Decided Was Procedurally Barred

The Court reviewed the *Allen*[1] charge but did not find any a particular part of the charge given was in itself coercive; rather, the Court found the charge lacked additional language which was not included:

> ... The most troubling thing about the charge here is what it did not say: it did not tell the jurors they should not surrender their consciously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion.

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1 *Allen v. United States,* 164 U.S. 492 (1896).

(Opinion, [unnumbered] p. 8).

The issue of whether additional language should have been included was not before the Court. The language was never requested by appellant, nor was similar language requested. Appellant did not object to the omission of the language or similar language. Consequently, the issue this Court decided, and granted relief on, was not available for review on the merits. The procedural bar was raised by respondent in its final brief, (see FBOR, p. 24), but not addressed in this Court's opinion. The record supports the issue was not preserved for this Court's review, and this Court should reconsider its opinion in light of those facts, which Respondent sets out below.

Just before the jury came in the following day after reporting an impasse, defense counsel requested to "review" the *Allen* charge before it was given; however, the judge indicated he did have a "written charge" for counsel to review, but that he would give "the standard *Allen* charge." (R. p. 502). Counsel responded, "Okay," and made no further requests. (R. p. 502).

After the charge, the trial judge asked if there were any exceptions. (R. p. 504). Defense counsel first noted that he objected "to the *request for an Allen charge*" in chambers the previous evening, which the court denied. (R. p. 504) (emphasis added). He then "move[d] for a mistrial trial right now *rather than Allen charge instruction*." (R. p. 504) (emphasis added). He also 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." (R. p. 504). In short, defense counsel repeatedly stated that he did not want *any Allen* charge given.

In his ruling, the trial judge likewise treated the general objection as just that – an objection to any *Allen* charge in general:

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.

(R. pp. 504 -505).

Defense counsel immediately asked to add to his objection: "It is my belief that the Allen charge is unduly coercive and that is another basis for my objection and request for a mistrial." (R. p. 505). The trial judge noted his objection. (R. p. 505).

Before the jury returned at approximately 11:43 a.m, defense counsel stated: "I would note for the record that about 11:08, I had the court reporter write it down that I requested that you declare a mistrial and you denied my motion at that time." (R. p. 506). Defense counsel also renewed [his] objection to [the] Allen charge...." (R. p. 506). Further, he placed an additional argument on the record: "...because of the delay after the Allen charge and the jury reaching a verdict" mistrial was appropriate. (R. p. 506).

Appellant's general objection to the giving of an *Allen* charge is again found when defense counsel renewed his objection after the jury verdict: "I want to renew my objection to both the Allen charge and the continuation of the trial and, again, request a mistrial." (R. p. 517).[2] There was no objection to any particular language, or, critically for this Court, any request for additional language.

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2 This Court found: "The trial court was well within its discretion in refusing to declare a mistrial simply because the jury, after some seven hours of deliberations, announced an impasse," and that "the trial judge has a duty to urge the jury – without pressuring or coercing them – to reach a verdict." (Opinion, [unnumbered] pp. 3-4). That answered the question that

As noted above, in its brief, Respondent submitted the argument was 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.

(FBOR, p. 24).

Yet, this Court failed to address the procedural bar.

The issue the Court reached to grant relief was not preserved by a specific objection or request for additional language. Consequently, the issue was not preserved for appellate review on merits. *State v. Hale,* 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985) ("Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge," an appellant cannot challenge charge "for the first time on appeal."); *State v. Tucker,* 319 S.C. 425, 427, 462 S.E.2d 263, 264 (1995) (general objection that "*Allen* charge is coercive in nature" resulted in procedural bar of specific claims on appeal).[3] *See also State v. Sheppard,* 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("plain error rule does not apply in South Carolina state courts"); *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (preservation requirements "meant to

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was raised by the objection. *See also Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) ("The Company takes issue with the concept of the *Allen* charge in general and argues that many states do not allow them. However, South Carolina does allow them. Accordingly, the trial court did not err in giving a version of an *Allen* charge.").

[3] The Supreme Court of South Carolina had an opportunity to affirm this procedural bar in the subsequent 2001 opinion: "The procedural bar ruling was a routine application of state," noting its disagreeing with a federal court's reasoning the procedural default – based on state law – was incorrect. *Tucker v. Catoe,* 346 S.C. 483, 488, 552 S.E.2d 712, 715 n. 5 (2001).

enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"); *State v. Varvil,* 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) ("A general objection is ordinarily insufficient to preserve an issue for appeal."); *State v. New,* 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999) ("It is well settled that an objection must be on a specific ground.").

Respondent respectfully requests the Court reconsider, and address the procedural deficiency. The record supports appellant failed to give the trial judge an opportunity to consider the language this Court finds was critically omitted. The issue is barred from review and cannot support the relief granted.

The Charge Given Was Not Coercive for Want of the Language Cited by the Court

As noted, this Court did not clearly hold any portion of the charge was coercive, but rested its decision on what the charge "did not say." (Opinion, [unnumbered] p. 8). Apart from the procedural bar as discussed above, the Court erred in finding this jurisdiction accepts that the absence of the particular language cited is fatal to the charge. In support of the necessity of the language, this Court references *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 537 S.E.2d 279 (2000), and *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 413 S.E.2d 816 (1992). (Opinion [unnumbered] p. 8). However, these cases do not support the necessity of the language in an *Allen* charge in this jurisdiction.

In *Buff*, the Court considered adherence to S.C. Code § 14-7-1130, which provides that if a jury reports deadlock to the trial court *a second time*, "it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law." 342 S.C. at 419-20, 537 S.E.2d at 281. The significant fact for the issue on appeal was whether the jury expressed consent to further deliberations. 342 S.C. at 423, 537 S.E.2d at 283. The referenced

statute has the dual purpose of "prevent[ing] forced verdicts, *and* to prevent undue severity of jury service." 342 S.C. at 402, 537 S.E.2d at 281 (quoting *State v. Freely*, 105 S.C. 243, 247, 89 S.E.643, 644 (1916)) (emphasis added). The inquiry for error does not share the same focus as that of review of an *Allen* charge. *Id. See also State v. Barnes*, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (finding relief due under the statute where jury did not consent to being sent out again). At any rate, the Court did not pass on the propriety of an *Allen* charge. Thus, the case lends no direct and necessary support to the Court's reasoning.

In *Blake*, the Court considered the effect of bailiff comments to the juror that "urg[ed] the jury to reach a verdict," including "the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. at 16, 413 S.E.2d at 817. In distinguishing bailiff comments from a judge's charge, the Court noted "a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." 307 S.C. at 18, 413 S.E.2d at 818. The Court found "the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement," consequently, "under the facts of this case," the Court found no abuse of discretion in granting a new trial. *Id.* The Court did not pass on the propriety of an *Allen* charge, or even accept the bailiff comments would not be error if the additional language was included. *Blake* does not support the necessity of the language in an actual *Allen* charge. As with *Buff*, the *Blake* opinion similarly does not lend direct and necessary support to the Court's reasoning.

Lastly, the Court also references a 1967 Virginia law review article, and a series of federal cases from various circuit appellate courts. (See Opinion [unnumbered], pp. 8-9). This proves the point that South Carolina has not set out – nor given notice to the bench and bar – that this jurisdiction requires the language to ensure an *Allen* charge will not be considered coercive.

This Court's conclusion "courts have routinely held its absence reversible error," again, does not rely on courts in this jurisdiction. (See Opinion, [unnumbered] p. 8). Respondent respectfully requests the Court reconsider its opinion regarding the acceptance and necessity of the additional language in this jurisdiction. When the additional language discussion is set out, the opinion correctly finds the charge given is not coercive. However, additional facts exist that strengthens that finding.

Other Evidence in the Tucker Factors Analysis

As to this Court's consideration of the charge given, again, though this Court does not reverse on any finding under the factors as found in *Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001), there are several prominent facts that appear to be overlooked that further strengthen the finding that nothing in the charge given requires reversal. For instance, this Court fails to critically consider the multiple divisions on differing charges as further support for the lack of coercion. The note from the jury volunteered the differing and various numerical divisions on each charge apparently after a series of votes:

	NG	G
Murder	3	9
	4	8
	3	9
	2	10
[scratched out]		
Pos[s]ession	4	8
	1	11
Brittany	4	8
	5	7
Ashley	4	8
[scratched out]	4	[scratched out] 8

(R. p. 528).

In contrast to the facts here, in *Dawson v. State*, 352 S.C. 15, 18, 572 S.E.2d 445, 446 (2002), the trial judge confirmed there was *one juror* who did not agree with the majority, then went on to tailor the charge to single out "the juror" who could holdout against the rest. The Supreme Court of South Carolina (unsurprising) found that particular language aimed specifically toward one juror was coercive. *Id.* There was no "one" juror to single out in these circumstances.[4]

The Court also failed to consider the care the trial judge took to assure the jury they would not be kept sequestered until consensus was found. When first reported, the trial judge solicitously advised the jury he would release them jury for the evening and bring them back for additional deliberations the next morning: "I don't necessarily blame you and I don't envy your decision in this case because I know it's a hard decision." (R. p. 499). He indicated they would "break" for the evening and would avoid making they stay into the wee hours of the morning. Id. He asked the jurors to "just go home, get some sleep, come back refreshed tomorrow and come to the courtroom and we'll resume deliberations." (R. p. 500). These facts, too, should be considered when critically considering the totality of the circumstances. This Court considered the fact the instruction came from the trial judge to be crucial in its analysis. (Opinion, [unnumbered] pp. 6-7). The care taken to assure the jury they would not be unreasonably kept for deliberations is also a factor to consider. *State v. Williams*, 344 S.C. 260, 265, 543 S.E.2d

[4] Though appellant candidly admitted the vote was split in different ways for different charges, he argued "the revelation of the vote increases the coercive effect...." (FBOA, p. 6). He discussed, however, only the murder charge division, reasoning "comments about the 'waste of time' could be directed at no persons other than the two not guilty jurors and would certainly have (and did have) an effect on them." (FBOA, p. 7). He does not explain why the same comments in the instruction – which did not change between charges – were only coercive for murder when the record shows various splits on different charges.

260, 263 (Ct. App. 2001) ("We also find the trial judge did not coerce a verdict by implying the jury would have to deliberate indefinitely.").

And, as this Court noted, the actual charge given addressed both the majority and minority. (Opinion [unnumbered] p. 6). *See Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("charge should be even-handed, directing both the majority and the minority to consider the other's views"); *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) (in giving an *Allen* charge, trial judge instructs, "among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors"). Specifically, 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." (R. pp. 503-04). Again, here, there was a mix of divisions over four charges, and no language identified with "any one person" like the charge in *Tucker*. *See* 346 S.C. at 493, 552 S.E.2d at 71.

Additionally, while this Court further found that cost of other proceedings was "overemphasized," (Opinion, [unnumbered], p. 9), "[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). There was no particular detail as to the cost, and, in fact, the charge as a whole was very limited and broadly fashioned. In context of the entirety of the charge, there is no reversible error.

Lastly, as to the Court's observation that telling the jury the matter would have to be retried would be "misleading," (Opinion, [unnumbered], p. 9), that observation rests on

speculation that something is weak in the evidence when that may not be the case at all. It could just as well be a misunderstanding of the law, disagreement with the law, or even a personal bias of one or more jurors that was latent or undiscovered. It is correct that additional proceedings will have to be held, but it likely would not be a welcome charge to indicate those additional proceedings may result in a guilty plea. Referencing retrial is a more neutral expression of the proceedings expected to follow.

The timing of the jury verdict in relation to the instruction – a part of the actual objection made *after* the jury reached a verdict, (R. p. 506) – was not suggestive of coercion in light of the timing of the jury deliberations. As this Court found, "[t]his factor is notoriously difficult to apply...." (Opinion, [unnumbered] p. 8). However, in light of all circumstances here, the record tends to support there was no coercive effect. The jury started its deliberations at approximately 12:00 p.m. on March 3rd. (R. p. 495). 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. (R. pp. 496-98). The jury's deliberations ended that day at approximately 7:20 p.m. (R. pp. 498-99). The next morning, the jury received the *Allen* charge beginning at 9:05 a.m. and ending at 9:10 a.m. (R. pp. 502-04). Defense counsel placed an objection on the record at approximately 11:08 a.m. (R. p. 506). The jury rendered its verdict at 11:43 a.m. (R. p. 507). The amount of time the jury spent deliberating after the charge is indicative that the jury did not find the charge coercive in these circumstances; rather, the evidence supports the jury renewed their deliberations with careful consideration.

Since the instruction was not unconstitutionally coercive, and there appeared to be no coercive effect from the timing, the trial court did not err in denying the motion for a mistrial and giving the instruction, nor in denying the mistrial during deliberations after instruction, nor

denying the mistrial after the verdict. Respondent respectfully submits for all these reasons, and those argued in the brief of respondent, the Court is correct that the record does not support coercion in the charge given in light of the *Tucker* factors. However, Respondent would request the Court reconsider its opinion in light of the foregoing which further strengthens the finding but is not included in the Court's opinion.

Conclusion

For the foregoing reasons, the Respondent respectfully requests this Court reconsider its opinion based on the foregoing.

Respectfully submitted,

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June 27, 2019
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 27 2019
SC 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, Melody J. Brown, counsel for the Petitioner, certify that I have served the within Petition for Rehearing on the Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys 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 27th day of June, 2019.

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ATTORNEYS FOR PETITIONER

The South Carolina Court of Appeals

The State, Respondent,

v.

Billy Lemurces Taylor, Appellant.

Appellate Case No. 2016-000549

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H Bruce Williams J.

John D. Geathers J.

D. Garrison Hill J.

Columbia, South Carolina

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FILED
July 15, 2019

Samuel Marion Bailey, Esquire
The Honorable Robin B. Stilwell