ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On 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)

THE STATE, ... PETITIONER

v.

BILLY LEMURCES TAYLOR, ...RESPONDENT.

Appellate Case No. 2019-001345

STATE'S BRIEF OF PETITIONER

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II. Did the Court of appeals err in granting relief on the absence of certain language in the *Allen* charge when the language is not necessary to the charge and the remainder of the charge was not coercive?

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

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id,* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan,* 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) (citing *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.*

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison,* 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). "A jury charge that is substantially correct and covers the law does not require reversal." *Logan,* 405 S.C. at 91, 747 S.E.2d at 448 (quoting *Brandt,* 393 S.C. at 549, 713 S.E.2d at 604).

STATEMENT OF THE CASE

On February 29– March 4, 2016, Respondent Billy Lemurces 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, Esq., and Carter Massingill, Esq., represented Taylor. The State was represented by Assistant Solicitor Mark Moyer of the Thirteenth Judicial Circuit Solicitor's Office. The jury convicted Taylor as charged. (App. pp. 515-516). Judge Stillwell sentenced Taylor 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. (App. pp. 532-34). Taylor appealed.

On June 12, 2019, the Court of Appeals issued a published opinion that reversed the convictions. *State v. Taylor,* Opinion No. 5655 (S.C.Ct.App. filed June 12, 2019). (App. p. 590-98).[2] The State filed a timely petition for rehearing on June 27, 2019. (App. pp. 599-609). The Court of Appeals denied the petition on July 15, 2019.

The State filed a timely petition for writ of certiorari on August 29, 2019. Taylor made a return to the petition on October 14, 2019. This Court granted the State's petition on December 16, 2019, and ordered additional briefing. This brief of petitioner follows.

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[2] Reported at 427 S.C. 208, 829 S.E.2d 723 (Ct.App. 2019).

STATEMENT OF FACTS

The jury found that on February 22, 2014, Taylor shot and killed Rodney 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. (App. p. 128). The bullet entered the right brow and exited posteriorly on the left side of the head. (App. p. 128). This was the mortal shot. (App. p. 128). He would have died "relatively instantly." (App. p. 134). Cause of death was the gunshot wound to the head. (App. p. 136).

Ashley Hiott, the driver of the Tahoe, was also shot in the head. Hiott suffered a gunshot wound to the right temple region of her head. (App. p. 221). The bullet went through the right lateral aspect of the orbital, and it displaced both of her optic nerves. (App. p. 222). She also suffered facial fractures of the orbit. (App. 224). The bullet lodged behind her left eyeball, and it had not been removed at the time of trial because of its location. (App. pp. 222 and 225).

Brittany Jeter was also in the Tahoe. At the time of the shooting, Nesbitt had been in a relationship with Brittany Jeter ("Jeter") for five to six months. (App. pp. 32, 372). That Friday, February 21, 2014, the two went to a bowling alley in Spartanburg with Jeter's brother and another friend. (App. pp. 373-74). They were celebrating Nesbitt's birthday, which was that Saturday. (App. pp. 373-74). 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. (App. pp. 30, 33, 374). Hiott and Jeter were friends, and that night Jeter and Nesbitt were borrowing Hiott's Tahoe.[3] (App. p. 374).

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[3] 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. (App. p. 53).

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. (App. pp. 33, 375). 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. (App. p. 34). They stayed at the club for approximately an hour. (App. p. 35). While inside, Jeter and Nesbitt bought a shot of Hennessey and a beer each. (App. p. 376).

While they were there, a fight broke out in the front of the club. (App. pp. 36, 378). Security sprayed mace inside the club, and everyone that was inside was forced outside. (App. p. 36). When the three went outside, Jeter and Nesbitt finished their beers, and they started walking back towards the Tahoe. (App. p. 379). 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. (App. pp. 37-38). Jeter also saw the Camaro. (App. pp. 379-80). Shortly after the three got to the Tahoe, they heard gunshots. (App. pp. 380, 381).

The victims stop for gas at a local BP station.

Hiott, Jeter, and Nesbitt got back into Hiott's Tahoe, and the three drove down Pelham Road to a nearby BP gas station. (App. p. 382). Again, Hiott was driving, Jeter was in the front passenger seat, and Nesbitt was in the rear passenger seat. (App. p. 49). When they arrived at the BP station, Hiott went inside to pay for the gasoline. (App. pp. 49, 382). Nesbitt got out to pump the gas. (App. pp. 49, 382). Jeter later got out of the Tahoe and stood by Nesbitt while he was pumping the gas. (App. p. 382).

Hiott noted the BP was busy, and there were people in the parking lot pouring milk on their faces attempting to wash out mace. (App. pp. 49-50). When Hiott walked outside of the gas station, she observed a fight between a lady and a gentleman in the parking lot. (App. p. 51).

Jeter saw there was a lot of arguing and fighting at the gas station. (App. pp. 383-84). Hiott also noticed a newer model Camaro with rims that matched the paint on the car. (App. p. 51). The Camaro was not parked at a pump, but was in a spot at the top of the gas station. (App. p. 52). Hiott did not see or hear anything from the Camaro, and there was a lot of noise in the parking lot. (App. p. 52).

When Hiott was coming back outside, Jeter got back in the Tahoe. (App. p. 383). When Hiott got back to her Tahoe, Nesbitt was still pumping the gas. (App. p. 52). Hiott stopped for a second, and then she got back into the Tahoe. (App. p. 52). Jeter had started to slide over to the driver's seat, but Hiott told her not to because she had been drinking. (App. pp. 52, 383). Hiott told Jeter that she would drive, and Jeter slid back over to the front passenger seat. (App. p. 53). Hiott got back into the driver's seat. (App. p. 53). When Nesbitt finished pumping gas, he got back in the Tahoe in the back seat on the passenger side. (App. p. 54). Hiott noted that he sat somewhere in in the middle of the back seat, but closer to the passenger side of the Tahoe. (App. p. 54).

The Tahoe and the Camaro leave the gas station at the same time.

Hiott drove a loop around the parking lot and stopped before pulling out onto Pelham Road. (App. p. 384). In leaving the gas station, Hiott pulled up to Pelham Road to make a right turn. (App. pp. 54-55). She noticed the Camaro had pulled beside her, and she believed it was going left. (App. p. 55). She saw three males in the car; the driver, a passenger in the front seat, and a passenger in the back seat. (App p. 56). She noted the passenger had little dreads, and looked like Anthony Henderson. (App. p. 56). At that time, she had never seen him before. (App. p. 56).

Hiott made the right turn onto Pelham. She got into the left lane. (App. p. 57). The Camaro also made a right turn onto Pelham, and it got into the right lane. (App. p. 57). Once they turned right onto Pelham, Jeter heard a guy's voice saying, "[h]ey, girl, hey, hey, hey."[4] (App. p. 385, l 9). Jeter looked back and saw the Camaro. (App. p. 385). It was back towards where Nesbitt's window was. (App. p. 385).

Someone in the Camaro shoots at the Tahoe.

The Camaro sped up and drove beside the Tahoe. (App. p. 58). Hiott indicated it was not completely side by side, but the two vehicles were neck and neck. (App. p. 58). Hiott heard some guys hollering from the car. (App. p. 67). She turned around to look, and that's when she saw the Camaro. (App. p. 67). Jeter heard someone else yell something else out of the Camaro. (App. p. 386). Nesbitt responded to the comments, saying something like "Hey, that's my old lady and my sister-in-law." (App. p. 67, l 25 – p. 68, l 1; App. p. 386). The guys in the Camaro said something else, and Jeter and Hiott told Nesbitt not to respond. (App. 68, 387). Someone from the Camaro hollered out "fuck you." (App. p. 68, l 11). Nesbitt yelled back, "[f]uck you too." (App. p. 68, l 12; App. p. 387). Jeter testified, "[t]hen after that, it's like pow, gunshot." (App. p. 387, l 13). Jeter thought she heard two shots. (App. p. 387). Hiott also heard a gunshot. (App. p. 68).

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. (App. p. 387). Hiott remembered seeing a light coming, and then everything was just

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4 Jeter did not hear any yelling until they had pulled onto Pelham Road. (App. p. 392).

ringing and white. (App. pp. 68-69). Hiott could not see anything, and everything was ringing. (App. p. 69). She stopped the Tahoe pretty quickly after the shot. (App. p. 69).

Jeter remembered the Tahoe stopping, and she jumped out. (App. p. 388). Jeter saw the Camaro passing, and the Camaro's driver's side window going up as it passed the Tahoe. (App. p. 388). It sped off. (App. p. 388). Jeter got out, went to the back seat, and started screaming for Nesbitt to get up. (App. p. 389). He was not responding. (App. p. 389).

At that moment, Hiott did not realize she had been shot. (App. p. 69). She felt her nose bleeding, and she grabbed her face. (App. p. 69). Hiott remembered reaching for her door, and she recalled grabbing her phone, but she could not see anything to dial. (App. p. 69). Hiott then realized her face was getting really hot. (App. p. 69). She heard Jeter was screaming, please wake up, please wake up. (App. p. 69).

Hiott got out of the Tahoe, and she felt her way to the back of the vehicle until she collapsed at the back. (App. p. 70). Officers arrived on scene quickly. (App. p. 70). Hiott was taken to the hospital. (App. p. 70). No one in the Tahoe had a weapon, and no one in the Tahoe brandished a weapon. (App. p. 71).

When emergency personnel arrived on scene, Nesbitt was dead. (App. p. 106). Hiott, who was standing at the rear of the Tahoe, had a cloth to her head and could not see. (App. p. 106). Hiott had a wound to the right temporal area of her head. (App. p. 107). Her eyes were swollen, and they were closed. (App. p. 107). She was taken to Greenville Memorial Hospital as a level one trauma. (App. p. 110). Hiott informed emergency personnel that she had been shot by an unknown person in a red Camaro. (App. p. 109). As police arrived, Jeter also yelled that they should go after the red Camaro. (App. p. 388). Jeter recalled seeing someone with little dreads in the Camaro. (App. p. 388).

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. (App. pp. 269, 341). Henderson was friends with Taylor. Jones did not know Taylor before that night. (App. p. 341). Taylor showed up at Bugatti later that night. (App. p. 271). He was driving his red Camaro, which had aftermarket rims at that time. (App. pp. 271-72). 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. (App. p. 273). Taylor drove Jones and Henderson to Croc's in the Camaro. (App. pp. 273, 342).

The three were in Croc's for at least an hour. (App. p. 275). At some point, a fight broke out in Croc's, and Henderson was sprayed with mace. (App. pp. 276-77, 342). Jones was not directly maced, but he did get some mace in his eyes. (App. p. 343). Henderson was not involved in the fight, and he did not know who was involved. (App. p. 277). Jones and Henderson went outside, and Taylor came out later. (App. p. 278). Henderson heard someone shooting in the parking lot. (App. p. 281). Jones also recalled hearing gunshots outside of Croc's. (App. p. 345). Jones and Henderson left Croc's with Taylor. (App. p. 344). Taylor drove, Jones got in the back seat on the passenger side, and Henderson was in the front passenger seat. (App. p. 344).

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. (App. pp. 281, 283-84, 346). Henderson noted that on the way to the BP station, Taylor said he got to shoot his gun one time. (App. p. 281). Jones also recalled Taylor telling Henderson that he got to shoot his gun. (App. p. 345).

Taylor parked the Camaro on the side of the gas station. (App. pp. 284-85). Henderson stood at the car for a minute or two, and Taylor stood at the car for a minute or two. (App. p. 346). Jones stayed in the car. (App. p. 346). 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. (App. pp. 285-86). Henderson also noted that Taylor was trying to fight anybody at the gas station. (App. p. 286). Jones recalled there was fighting around the gas station. (App. p. 346).

Henderson recalled seeing Hiott walking at the gas station. (App. p. 287). He noted that Taylor attempted to talk to her from his car, and he was rude about it. (App. pp. 287, 288). Henderson stated that Hiott did not acknowledge Taylor at all. (App. p. 288). Jones did not see the Tahoe. (App. p. 347). He did recall that Henderson did not get any milk. (App. p. 348). Jones asked both Henderson and Taylor to leave, but they sat at the gas station for another minute or two. (App. p. 348).

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

The three then left the gas station. (App. p. 290). Henderson remembered seeing the Tahoe as it was leaving. (App. p. 290). At the time, he was sitting in the front passenger seat of the Camaro. (App. p. 290). 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. (App. p. 348). Nesbitt was yelling out the window towards the Camaro, and Taylor was yelling back. (App. p. 291). Jones "heard the dude in the Tahoe" and Taylor. (App. pp. 348-49). Neither Henderson nor Jones recalled what was being said, or who started the words between the two. (App. pp. 291, 349). It was hostile. (App. p. 349).

Henderson did not remember the Tahoe turned right out of the gas station, but the Camaro did. (App. p. 292). Henderson heard someone talking on his left side real loud. (App. p. 292). Then, Taylor began arguing with Nesbitt again.[5] The Camaro was in the right lane, and the Tahoe was in the left lane. (App. p. 292). Jones noted Taylor's window was down, and he was talking to the guy in the Tahoe. (App. p. 350). Jones saw Taylor reach over Henderson, and after that, he heard the shot. (App. p. 351). Jones recalled the Camaro was close to the Tahoe when he heard the shot. (App. p. 350).

Henderson heard a boom. (App. p. 294). 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. (App. p. 294). Jones heard a gunshot. (App. p. 349). He ducked. (App. p. 349). Jones did not see anything, but he looked back and saw the Tahoe was slanting off to the left. (App. p. 350). Jones noted that Taylor laughed, and they sped off. (App. p. 351). Henderson stated the Tahoe swerved to the left, and the Camaro sped down the road. (App. pp. 294-95). Neither Henderson nor Jones saw anyone in the Tahoe with a weapon. (App. pp. 301, 353).

In his statement to law enforcement, Jones had indicated Taylor's left hand and arm were out the window when the shot was fired. (App. pp. 357, 362). 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. (App. p. 366). He thought it was with the left hand. (App. p. 366). Jones did not know where the gun came from. (App. p. 367).

Immediately after the Shooting.

Henderson then asked Taylor to take him home, but Taylor refused. (App. p. 294). Jones

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[5] Jones, who was in the back seat of the Camaro, was not involved in the argument. (App. p. 294).

also asked what happened. (App. p. 295). The three did not talk about the incident on the drive back towards Greenville. (App. p. 296). They drove to a house where some guys who were at the club earlier were. (App. pp. 297, 352). Jones stayed in the car at that house. (App. p. 352). 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. (App. p. 298). The three then drove to Taylor's house, and Taylor put something in the trunk of his other car, a black Audi. (App. p. 299). Taylor then took Henderson and Jones to Jones' house. (App. pp. 301, 353). Jones never talked with Taylor about what happened. (App. p. 353).

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. (App. p. 113). He stopped at a drug store that was across Pelham Road to see what was happening at Croc's. (App. pp. 113-14). Tate heard gunshots, and he saw a guy filing a gun into the air. (App. p. 114). Tate called 911 and reported the shots fired. (App. p. 115). He saw law enforcement arrive. After he got off the phone with the dispatcher, he heard a single gunshot. (App. p. 116). Shortly thereafter, and as he was heading to talk with an officer he saw that was nearby, he saw the SUV on Pelham Road. (App. p. 116). After hearing the gunshot, Tate also saw what he described as a maroon Camaro speeding down Pelham Road towards the interstate. (App. p. 117). Tate also indicated the rims on the Camaro were not Chevrolet rims. (App p. 117).

Donterio Harris, Taylor's friend since childhood, identified the red Camaro as Taylor's. (App. pp. 236-38). He remembered the car was pretty new. (App. p. 238). On February 21, Harris had talked with Taylor about going to Croc's. (App. p. 239). Harris did not end up going to the club with Taylor because his girlfriend's mother had died. (App. p. 239). Harris received a call from Taylor sometime between 4 and 4:30 a.m., but he did not answer it. (App. pp. 239-

40). He talked with Taylor later on February 22, and Taylor informed Harris that the whole club was maced that morning. (App. pp. 240-41). Taylor borrowed a jack from Harris. (App. pp. 243-244). Taylor also later left the Camaro behind Harris's backyard with Harris's permission. (App. pp. 243-46). Harris also testified that Taylor washed the Camaro at Harris' house. (App. pp. 246-47). Harris said that Taylor had indicated he would only likely leave the car parked behind the house for a couple of hours. (App. p. 248). Taylor never came back to get the car. (App. p. 248). Harris also indicated that the rims in the picture were similar to rims that were pictured in State's Exhibit 13. (App. pp. 250-51).

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. (App. p. 93). The vehicle had large rims. (App. p. 93). Officers also spoke with Tate. (App. p. 94). Emergency personnel who treated Hiott also noted that she indicated the assailant was in a red Camaro. (App. p. 109).

Detectives tracked down the surveillance video from the gas station. (App. pp. 157-58, 396). No weapons were found in the Tahoe. (App. pp. 158, 172).

Aftermarket rims were found in a shed behind Taylor's grandfather's residence. (App. p. 419). Those rims were rented by Taylor. (App. pp. 256-63). The wheel shop records also reflected the rims were rented for a 2011 red Camaro. (App. p. 263). The Camaro was found behind Harris' residence in Greenville. (App. pp. 174, 245). It could not be seen from the street. (App. p. 174). The car had been cleaned. (App. p. 180). A firearm was found in Taylor's room when he was arrested. (App. pp. 402-03, 423-24). Taylor's fingerprint was found on the trunk lid. (App. pp. 179, 233). Investigators also spoke with Jimmy Brock. Brock was in jail at the

Greenville County Detention Center at the same time as Taylor and Henderson. (App. pp. 330-33). He recalled Henderson asking him to tell Taylor to "clear his face." (App. p. 333, 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. (App. pp. 333-34).

As noted, after hearing the evidence, the jury convicted Taylor as charged.

ARGUMENT

I.

The Court of Appeals erred in reversing Taylor's convictions for murder, two counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime, on a challenge to the substance of an *Allen* charge when that challenge to the substance of the *Allen* charge was not made to the trial judge and is procedurally barred from review on appeal.

The Court of Appeals reviewed the *Allen* charge but did not find any a particular part of the charge given was in itself coercive; rather, the Court of Appeals 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.

(App. p. 597).

The issue decided was procedurally barred and should not have been decided. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved.").

The issue of whether additional language should have been included was not properly before the Court. The language was never requested, nor was similar language requested. Taylor did not object to the omission of the language or similar language. Consequently, the issue the Court of Appeals decided, and granted relief on, was not available for review on the merits. The procedural bar was raised by the State in its final brief, (see App. p. 585, FBOR, p. 24), but not addressed in the Court of Appeals opinion. The State raised the issue in the petition for rehearing, (App. p. 599-603), but the Court of Appeals declined to address the issue, (see App. p. 611). However, the record supports the issue was not preserved for review.

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 not have a "written charge" for counsel to review, but that he would give "the standard *Allen* charge." (App. p. 510). Counsel responded, "Okay," and made no further requests. (App. p. 510).

After the charge, the trial judge asked if there were any exceptions. (App. p. 512). Defense counsel first noted that he objected "to the *request for an Allen charge*" in chambers the previous evening, which the court denied. (App. p. 512) (emphasis added). He then "move[d] for a mistrial trial right now *rather than Allen charge instruction.*" (App. p. 512) (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." (App. p. 512). 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.

(App. pp. 512 -513).

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." (App. p. 513). The trial judge noted his objection. (App. p. 513).

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." (App. p. 514). Defense counsel also renewed [his] objection to [the] Allen charge...." (App. p. 514). 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. (App. p. 514).

The 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." (App. p. 525).[6] There was no objection to any particular language, or, as is critical for proper appellate review of omitted language which is the focus in this appeal, any request for additional language.

The issue the Court of Appeals 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

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[6] The Court of Appeals 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." (App. pp. 592-93). That answered the question that 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.").

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).[7] *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.*

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[7] In his return to the petition, Taylor indicated that *Tucker* "does not stand for the proposition that an objection on coerciveness is too general to be considered on appeal." (Return, p. 6). Taylor misapprehends the argument and *Tucker.* A general objection does not provide the trial judge with any opportunity to cure a perceived ill. Thus, this Court has found the lack of specificity to support a procedural bar. The relevant issue in *Tucker* was whether the "trial judge erred in giving the jury an *Allen* charge" after a report that the jury was "hopelessly deadlocked." 319 S.C. at 427, 462 S.E.2d at 264. The Court noted after giving the charge, "Appellant objected generally on the ground an *Allen* charge is coercive in nature and requested an instruction as to the consequences of not being able to reach a unanimous decision for the death penalty (i.e. the defendant would be sentenced to life)." *Id.* The Court found the issue barred and cited: "*State v. Bailey,* 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground below and then argue another ground on appeal); *State v. Crowley,* 226 S.C. 472, 85 S.E.2d 714 (1955) (***objection must be on specific ground***)." 319 S.C. at 427, 462 S.E.2d at 264 (emphasis added). Further, this Court had an opportunity to affirm the 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).

Taylor does not dispute appellate courts continue to require a specific argument to preserve an issue for appeal. *See Lawing v. Trinity Mfg., Inc.,* 406 S.C. 13, 32, 749 S.E.2d 126, 136 (Ct. App. 2013), *aff'd in part as modified, rev'd in part sub nom. Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 781 S.E.2d 548 (2015) ("Lawing did not make an objection to the correctness of the language of the charge, only to whether the doctrine was applicable. Therefore, Lawing's arguments regarding the substantive correctness of the charge are not preserved."). His current position that an objection to the ***giving*** of a charge preserves the issue of ***particular language*** in the charge, if accepted, would undercut one purpose of procedural bars: "...to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, supra.* Further, as noted above, the ruling by the trial judge addressed the giving of the charge. (App. pp. 512 -513). That indicates the objection as understood by the trial court was only to the giving of a charge. The record does not show the court recognized the exception as something more. *See State v. Bowers,* 428 S.C. 21, 29, 832 S.E.2d 623, 627–28 (Ct. App. 2019), *reh'g denied* (Sept. 20, 2019) ("The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue ***when the record indicates that the trial court and the State understood the basis for the objection.***"). (emphasis added).

Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (preservation requirements "meant to 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.").

As noted above, the State argued in its response brief in the Court of the Appeals that 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.

(App. p. 585, FBOR, p. 24).

The State also asked the Court of Appeals to reconsider its opinion and address the preservation challenge raised. (App. pp. 599-605). The record supports Taylor failed to give the trial judge an opportunity to consider the language the Court of Appeals found was critically omitted. It is not preserved under clear preservation rules: "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94.

The fact that the issue was not preserved for review is dispositive --- the Court of Appeals should not have considered the issue on the merits and certainly should not have granted relief. *Dunbar, supra.* The grant of relief should be vacated. *Id.*

II.

The Court of Appeals erred in granting relief on the absence of certain language in the *Allen* charge when the language is not necessary to the charge and the remainder of the charge was not coercive.

Even if the issue is considered available for review on the merits, the charge given was not coercive for want of the language cited by the Court of Appeals.

Again, the Court of Appeals did not clearly hold any portion of the charge was coercive, but rested its decision on what the charge "did not say." (App. p. 597). *See, e.g., State v. Logan,* 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) ("A jury charge is correct if, when read as a whole, the charge adequately covers the law.") (citing *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)). The Court of Appeals 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, the Court of Appeals referenced *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). (App. p. 597). However, those cases do not support the necessity of the language in an *Allen* charge in this jurisdiction.

In *Buff*, at issue was 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 of Appeals' reasoning.

In *Blake*, at issue was the effect of bailiff comments to a 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 of Appeals also referenced a 1967 Virginia law review article, and a series of federal cases from various circuit appellate courts. (App. p. 597). 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. The Court of Appeals' conclusion that "courts have routinely held its absence reversible error," again, does not rely on courts in this jurisdiction. (See App. p. 597). The State raised these points in its petition for hearing, (App. pp. 603-605). However, the Court of Appeals declined to address the

argument. (App. p. 611). Essentially, there was no error in the charge given, thus, reversal was not warranted.

Other Evidence in the Tucker Factors Analysis

Though the Court of Appeals did not reverse on any finding under the factors as found in *Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001), (see App. p. 594), 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

(App. p. 537).

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

Court found that particular language aimed specifically toward one juror was coercive. *Id.* There was no "one" juror to single out in these circumstances.[8]

The Court of Appeals 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 for the evening and bring the jury 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." (App. p. 503). 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." (App. p. 504). These facts, too, should be considered when critically considering the totality of the circumstances. The Court of Appeals considered the fact that the instruction came from the trial judge to be crucial in its analysis. (App. p. 595). Consequently, and logically, 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 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 the Court of Appeals noted, the actual charge given addressed both the majority and minority. (App. p. 595). *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

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[8] Though Taylor candidly admitted the vote was split in different ways for different charges, he argued "the revelation of the vote increases the coercive effect...." (App. p. 553-54, FBOA, pp. 6-7). 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." (App. p. 554, 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.

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." (App. pp. 511-12). 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 the Court of Appeals further found that cost of other proceedings was "overemphasized," (App. p. 598), "[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.

Further still, as to the observation by the Court of Appeals that telling the jury the matter would have to be retried would be "misleading," (App. p. 598), 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 welcomed charge, for example, 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, (App. p. 514) – was not suggestive of coercion in light of the timing of the jury deliberations. As the Court of Appeals found, "[t]his factor is notoriously difficult to apply...." (App. p. 597). 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. (App. p. 499). 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. (App. pp. 500-02). The jury's deliberations ended that day at approximately 7:20 p.m. (App. pp. 502-503). The next morning, the jury received the *Allen* charge beginning at 9:05 a.m. and ending at 9:10 a.m. (App. pp. 510-12). Defense counsel placed an objection on the record at approximately 11:08 a.m. (App. p. 514). The jury rendered its verdict at 11:43 a.m. (App. p. 515). 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. The Court of Appeals was correct to the extent it found the record does not support coercion in the charge actually given in light of the *Tucker* factors. However, if this Court finds the issue available for merits review, the State would request the Court also consider the Court of Appeals' opinion in light of the foregoing which further strengthens the finding the charge given was not coercive.

CONCLUSION

Based on the foregoing, the State asks this Court to reverse the Court of Appeals and affirm the convictions.

Respectfully submitted,

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January 14, 2020

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
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S.C. SUPREME COURT

On 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)

THE STATE, ...PETITIONER

v.

BILLY LEMURCES TAYLOR, ...RESPONDENT.

Appellate Case No. 2019-001345

PROOF OF SERVICE

I, Angela Brown, certify that I have served the State's Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to: David Alexander, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina, 29211

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

This 15th day of January, 2020.

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