STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001542

THE STATE, ...RESPONDENT,

v.

LARRY E. ADGER, III, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in issuing an Allen charge because the charge given was not unduly coercive to the jury.

STATEMENT OF THE CASE

Appellant was indicted by the Anderson County Grand Jury for trafficking meth amphetamine (28 grams to 100 grams), trafficking crack-cocaine (28 grams to 100 grams), and possession of a controlled substance. On June 18–19, 2018, Appellant appeared before the Honorable R. Lawton McIntosh, and a jury, for trial. Assistant Solicitors Kristin Reeves, Esquire, and Chelsey Moore, Esquire, represented the State; Charles White, Esquire, represented Appellant. The jury found Appellant guilty of all three charges. On August 26, 2019, a sentencing hearing was held. Due to Appellant's prior convictions, he was sentenced to twenty-five years' incarceration and a $50,000 fine.

Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

At the conclusion of the trial judge's jury charges, following his instructions on the elements of the charged crimes and the State's burden of proof, the trial judge instructed the jurors on their roles in the process. He explained:

> First, you don't serve as jurors to be partisans or advocates for either side. You were chosen by both sides because you represented either verbally or by your silence that you could be fair and impartial to both sides of this case and decide this case solely based on the evidence and without prejudice to either party.
>
> That means when you begin your deliberations, you must [use] your experiences that you have in this life, good common sense, and your sense of logic and reasoning in discussing all the evidence and hopefully reaching a unanimous verdict.
>
> Let me say something about the deliberations. Deliberation is defined as a careful consideration weighing with a view towards a decision. Regardless what any of you may think about our jury system, I will submit to you that the genius of the system is that it allows 12 different men and wom[e]n such as yourselves who come from different backgrounds, who have different life experiences and perspectives, to listen to the testimony and consider all the evidence, to talk about it, and to ultimately reach a verdict.
>
> We call them deliberations for a reason. You are to consider the evidence carefully and deliberately and discuss it in a calm, thorough, and courteous manner. Remember, you're not partisans or advocates. You're judges of the facts. You are to listen to your fellow jurors' point[s] of view.
>
> Let me tell you why they have this point of view. You're to walk through and discuss all the evidence in this case. And if you're doing something deliberately, you should not be in a hurry. You should not be in a hurry in this case. This is the parties' only day in court. They do not have a second time to come back here [and] have a second bite of the apple.
>
> In order for your verdict to stand, it must be unanimous. With that being said, each of you must decide this case on your own, but you should do that only after you have impartially considered all the evidence and discussed it fully with your fellow jurors and you listen to your other points of view and the reason for those points of view.

> Do not be afraid to change your opinion. If the weight of the evidence during your discussions and your deliberations convinces you that's the right thing to do, but do not change a firmly held belief simply to appease your fellow jurors.

Neither party objected to the charges as they were given. (Tr.p.226, line 24–Tr.p.228, line 22; Tr.p.233, line 22–Tr.p.234, line 1)

At 12:17 p.m., the jury began deliberations. These continued, with only a break during which the trial judge responded to a question,[2] until 2:03 p.m. At that point, the trial judge placed on the record that he received a note from the jury reading, "We are at an impasse on two of the three charges. Advice." The trial judge told the parties his inclination was not to provide an Allen charge at that point because he felt jurors had not deliberated long enough at that point. Instead, the trial judge wanted to speak with jurors to confirm they had reviewed all the evidence, were communicating with each other, and then send them back to continue deliberations. If, after that, they state they are at an impasse, then the trial judge would provide an Allen charge. The trial judge then asked the parties whether they objected to that course of action and neither party objected to the proposed course of action. (Tr.p.234, line 11–Tr.p.237, line 22)

After the jury returned to the courtroom, the trial judge confirmed with the Foreman that the note was correct. The trial judge asked the Foreman whether: (1) the jury had considered all the testimony and exhibits, (2) every juror had been given the opportunity to express his or her points of view and explain why they had them; (3) "constructive communication" occurred among the jurors. In response, the Foreman noted there were "differing interpretations of the evidence." The trial judge then asked the jurors to go back to the jury room while he discussed

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[2] The question was about whether a vehicle involved in the case possessed a dash cam. The trial judge told the jury he was not permitted to comment on the evidence and the jury must focus its deliberations solely on the evidence provided during the trial. (Tr.p.234, line 12–Tr.p.236, line 6)

this information with the parties. After the jurors left, the trial judge immediately stated he was hesitant to push jurors any further by asking them whether they felt "locked in" because he believed that would then force him to provide an Allen charge at that time. Trial counsel confirmed he also did not want to push the jurors any further at that time because he would "rather not have an Allen Charge unless it's necessary." The trial judge confirmed he would call the jury back into the courtroom and ask them to reevaluate the evidence and continue the deliberations. Trial counsel specifically agreed to this language. The jury returned to the courtroom, and the trial judge asked them to "go back over all the evidence and the testimony and the exhibits in th[e] case and just continue [their] deliberations." The jury began deliberating again at 2:11 p.m. (Tr.p.237, line 23–Tr.p.240, line 24)

At 3:04 p.m., the trial judge received another note from the jury stating they had "discussed the testimony and evidence thoroughly and repeatedly and there d[id] not appear to be any chance of receiving 100 percent vote on two of the three charges." The trial judge announced that he believed his only option at that point was to give an Allen charge to the jury. Appellant provided the parties with a copy of the proposed charge and allowed them to review it. Trial counsel conceded the proposed charge was a "traditional" Allen charge but still objected to it because asking a jury to reevaluate their decisions is, "in some way coercing them to make a decision." He claimed the Allen charge was "taking their decision away from one individual, two individuals, however many it is." The trial judge noted the objection, and explained that an Allen charge, by its nature and design, is supposed to nudge jurors towards making a decision. When the jury returned, the trial judge issued the following Allen charge:

> Ladies and gentlemen, you've stated that you've been unable to agree on a verdict in this case. As I instructed you earlier, in order for your verdict to stand, it will have to be unanimous. The verdict – when a matter is in dispute, it is amazing for

even 2 people to agree on that matter, much less when you have 12 people. That even becomes more difficult.

In most cases an absolute certainty cannot be reached or even expected; however, you have a duty to make a reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds.

Although, the verdict of the jury must always be unanimous, every one of you has the right to your own opinion. The verdict that you agree upon must be your own verdict, the result of your own convictions, and you should not give up a firmly held belief merely to be in agreement with your fellow jurors.

The majority should consider the minorities[’] position, the minorities should consider the majority’s position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and evidence in this case.

If you do not agree on the verdict in this case, I must declare a mistrial. In that case, it does not mean that anyone wins. It just means that at some point in the future, I will try this case with some other jury sitting where you now sit. The same participants will come in, and the same players are asked basically the same questions and give basically the same answers and we’ll go through the whole process again.

You were selected in the same manner and from the same source as any future jury will be. And there’s no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors than you or that more clearer evidence will be produce on side or the other.

Therefore, Mr. Foreman, I’m going to ask that you go back and continue your deliberations if you will, please, sir. Thank you.

(Tr.p.241, line 3–Tr.p.246, line 19)

The jury was sent back to deliberations at 3:13 p.m. At 4:13 p.m., the trial judge received notice they had reached their verdicts. The jury found Appellant guilty of all three of his charges. The jury was then individually polled to confirm they all voted guilty on all three charges. The jurors were then excused. (Tr.p.246, line 20–Tr.p.251, line 3)

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is 'any evidence' to support its findings.").

ARGUMENT

The trial judge did not err in issuing an Allen charge because the charge given was not unduly coercive to the jury.

"Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence only if that failure was prejudicial to the defendant. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011).

"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). "Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)).

"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. In Tucker, the Supreme Court of South Carolina adopted the standard established by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. Those factors are:

(1) Whether the charge spoke specifically to the minority juror(s);

(2) The language of the charge, including statements such as "You have [] to reach a decision in this case";
(3) Whether the trial judge inquired into the jury's numerical division, a question generally considered coercive; and
(4) Weighing the length of time between the issuance of the Allen charge and the jury's return of a verdict (with verdicts returned "shortly after" the supplemental charge suggesting a possibility of coercion) against trial counsel's failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Initially, the State would note Appellant's argument that the Allen charge is coercive demonstrates Appellant's misunderstanding of the legal requirements for an Allen charge. As the trial judge correctly noted, some degree of coercion is present in every Allen charge. By its very nature, an Allen charge is a request for deadlocked jurors to open themselves up, with a "disposition to be convinced, to each other's arguments." Lee-Grigg, 374 S.C. at 418 n.1, 649 S.E.2d at 57 n.1. An appellate court is only concerned with whether such a charge is unconstitutionally coercive. See Tucker, 346 S.C. at 491, 552 S.E.2d at 716.

On the merits, analyzed under the Lowenfield factors, the trial judge's Allen charge was not unconstitutionally coercive. The trial judge spoke to both the majority and minority jurors, without knowledge of or questioning their numerical division, and asked them to "consult with one another, express [their] own views, and listen to the opinions of [their] fellow jurors.[3] Tell each other how [they] fe[lt] and why [they] felt that way. Discuss [their] differences with open

[3] Throughout his brief, Appellant repeatedly mentions the presence of a young, black, female juror on the panel as a "minority juror." See, e.g., (Br. of Appellant, p.4). From the context used, the State believes Appellant reads Allen as pertaining solely to racial minorities, rather than its broader application to any juror, regardless of race, gender, or other identity or background, who merely has an opinion of guilt which differs from that of the majority of other jurors. Appellant's interpretation of "minority juror" is, in this situation, at odds with the broader application of the term because there is no evidence in the record that the young, black, female juror was in the voting minority of the jury. Notably, neither the trial judge nor the parties even knew what the minority position[s] was/were as to Appellant's guilt or any numerical breakdown for such. Accordingly, the personal information of the juror is a non-factor in the Allen question before this Court.

minds." The trial judge was adamant that jurors "should not give up a firmly held belief merely to be in agreement with your fellow jurors. Notably, the trial judge never told the jury they were forced to reach a decision in the case: he clearly asserted that he was only asking the jurors to return to the jury room and attempt to reach a verdict also informed the jurors that if they failed to reach a verdict, the case would simply be retried with a new jury.

The final factor, the length of time between the Allen charge and the jury's verdict, also supports its constitutionality. In the instant case, the jury deliberations only occurred for approximately four hours in total. While it is true the jury only deliberated from 3:13 p.m. to 4:13 p.m. after receiving the charge, such a period was very reasonable in that situation. The pre-Allen deliberations occurred, with several interruptions, from 12:17 p.m. to 3:04 p.m. Over one-fourth of the jury's deliberations occurred after the trial judge issued the charge.

In Tucker, the Supreme Court of South Carolina stated the post-Allen deliberation period, approximately an hour and a half, was a "relatively short period of time" in that case because deliberations in that case began at 1:33 p.m. on the first day of deliberations, the jury became deadlocked around 5:00 p.m. that day, and the jury received an Allen charge around 11:00 a.m. on the second day, returning with a verdict around 12:27 pm. In total, the jury deliberated for approximately eight and a half hours, over half of that deadlocked before receiving the Allen charge. Id. at 485–88, 494, 552 S.E.2d at 713–14, 718. Here, unlike Tucker, the post-Allen discussions constituted a significant portion of the jury's deliberations, over one-fourth of them.

Finally, additional evidence that the jurors were not coerced are the jurors themselves: after the verdict, the trial judge polled each individual juror and asked whether, even after the reading of the verdict, he or she still believed Appellant was guilty of the charged crimes. All

twelve jurors confirmed their votes. Accordingly, the trial judge did not err in denying trial counsel's request for a supplemental Allen charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed

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April 13, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Apr 13 2020
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APPEAL FROM ANDERSON COUNTY
Court of General Sessions
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001542

THE STATE, ...RESPONDENT,

v.

LARRY E. ADGER, III, ...APPELLANT.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending one copy, via mail, of the same to:

Charles W. Whiten, Jr., Esquire
P.O. Box 716
Anderson, South Carolina 29622

Digital copies of the same documents have also been sent, via electronic mail to Mr. Whiten at the following email address:

cwhiten2000@gmail.com

I further certify that all parties required by Rule to be served have been served this 13th day of April, 2020.

Anne Mueller

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From: Anne Mueller
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Subject: State v. Larry E. Adger, III, Appellate Case No. 2019-001542
Date: Monday, April 13, 2020 12:18:00 PM
Attachments: Adger, Larry - Initial Brief of Respondent and Designation of Matter - 2019-001542 (02255656-2xD2C78).pdf

Mr. Whiten,

I inadvertently sent you a copy of the Initial Brief with a missing signature on the page 12 of the brief. I am now sending another copy with all the necessary signatures. We will be refiling the attached version with the Court today.

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RECEIVED
Apr 13 2020
SC Court of Appeals

April 13, 2020

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RE: State v. Larry E. Adger, III– Appellate Case No. 2019-001542

Dear Mr. Whiten:

I am enclosing one copy of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. Another copy has also been sent to you via email using the email address you provided to the South Carolina Bar. Please let me know if you have any issues or questions.

Sincerely,

FOR William F. Schumacher
Assistant Attorney General
Bar Number 100231

WFS/ssm
Enclosures

cc: Honorable Jenny A. Kitchings
(copy via electronic filing)
Victim Advocacy Division