NO. COA08-1467

NORTH CAROLINA COURT OF APPEALS

Filed: 3 November 2009

STATE OF NORTH CAROLINA

v. McDowell County
No. 07 CRS 50203

ROBERT DEAN TAYLOR,
Defendant.

Appeal by defendant from judgment entered 14 July 2008 by Judge James U. Downs in McDowell County Superior Court. Heard in the Court of Appeals 7 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.

GEER, Judge.

Defendant Robert Dean Taylor appeals his conviction for first degree murder, contending the trial court improperly instructed the jury on the credibility of interested witnesses and coerced the jury's verdict in violation of Article I, Section 24 of the North Carolina Constitution. Even if we agreed with defendant that the trial court's initial instruction to the jury on the credibility of interested witnesses was incorrect, defendant has failed to demonstrate that this instruction rose to the level of plain error. As for defendant's second argument, we conclude that the trial

court's actions were, according to our statutory and case law, proper and did not coerce the jury's verdict.

Facts

On 6 February 1994, Detective Andy Cline of the State Bureau of Investigation was called to a wooded area north of Highway 21 in McDowell County, North Carolina to investigate the recent discovery of a decomposed human body. At the scene, Cline found the skeletal remains of a human along with a towel, a sheet, and clothing. The remains were determined to be those of Zilphia Lowery, a young woman who had been missing since July 1993. Dr. John Butts, the Chief Medical Examiner, concluded that Lowery died of blunt-force injuries to the back of her head. Lowery's skull was likely fractured by being hit with a heavy object.

Detective Dan Shook of the McDowell County Sheriff's Office became involved in the case about two years after the remains were found. He periodically reviewed the case file, "looking for anything that might just jump out." In 1998, Detective Shook ran across Robin Whited's name as a possible suspect to whom little attention had been paid when the investigation first began. Detective Shook began looking for Whited, ultimately finding him in 2005, living and working in Virginia. Detective Shook contacted Whited and interviewed him several times. Whited gave conflicting stories in these interviews and eventually admitted being involved in the coverup of Lowery's murder. He identified defendant as the person who actually killed Lowery.

On 19 April 2007, defendant was indicted for the first degree murder of Lowery. At defendant's trial, Whited testified for the State. He explained that while visiting his family in Virginia one weekend in 1993, he ran into defendant, a childhood friend. Whited invited defendant to come back to North Carolina with him. Whited had recently separated from his wife and was living in a trailer in McDowell County. Defendant subsequently returned to North Carolina, moved in with Whited, and found a job.

According to Whited, on 27 July 1993, he came home from work around 4:30 p.m. to find defendant waiting for him. Defendant had Lowery's telephone number and wanted to call her and invite her over to the trailer to party with him. Defendant had only talked to Lowery on the phone; they had never met. Defendant called Lowery and she agreed to come over, so the two men drove in Whited's truck to pick her up at a truck stop.

At the trailer, they had mixed drinks, defendant shared Xanax with Whited and Lowery, and Whited and Lowery began dancing while defendant watched from the couch. At one point, Whited looked over at defendant, who said, "Yeah, go ahead, it's fine." Whited told Lowery that he needed to take a shower. She followed him into the bathroom and the two showered together. After the shower, Whited and Lowery began having sex in the bathroom and then in the bedroom.

Whited testified that defendant came into the bedroom and said it was his turn to have sex with Lowery. Defendant grabbed Lowery, but she pulled away and asked him to stop. When Whited sat up in

the bed, defendant hit him, causing Whited to fall to the floor. Defendant hit Whited again, and Whited went to the kitchen to get some paper towels to put on his head because it was bleeding.

Whited then heard a sharp thumping noise coming from the bedroom. When he returned to the bedroom, defendant was on his knees above Lowery, who was lying undressed on the floor. A sheet and towel were wrapped around her bloody head. Whited testified that he told defendant they needed to call someone to get help, but defendant threatened to hurt Whited's family if he called anyone. Defendant told Whited that no one would believe defendant because of his past record.

Whited testified that he left the bedroom to go call for help anyway, but defendant came out after him and told him again not to call anyone. Whited then put on some clothes and went out to sit in his truck and think. While he was sitting there, defendant came out carrying Lowery's body wrapped in a sheet with a towel around her head. Whited testified that defendant again threatened to harm Whited's family if he did not help and then put Lowery's body in the back of Whited's truck. Whited drove until defendant told him to stop. They pulled over near some woods, and defendant carried Lowery's body into the woods. According to Whited, defendant was gone for less than an hour. When he returned, Whited drove back to the trailer, and they both went to sleep.

Whited went to work the next morning. When he returned home, defendant had cleaned the trailer. Sometime later, Whited found Lowery's purse underneath a chair in the trailer. He took it to a

local convenience store and left it there. Whited testified that he did not tell anyone about the crime because defendant threatened his family. Whited denied that the State had offered him any plea deal in exchange for his testimony, but admitted that it was his understanding that if defendant was convicted, then Whited either would not be charged, or he would receive a lesser sentence.

David Joseph "Jody" Stewart, Whited's next door neighbor in 1993, testified that on the night of the murder, there was loud music coming from the trailer all night. When Stewart went over to the trailer two or three times to ask them to turn the music down, no one answered. Kim Murray testified that she worked at the M&M Supermarket and found Lowery's purse hanging on the door sometime after the murder. Bo Loftis, who also worked at the M&M Supermarket, testified that he received two telephone calls from a male wanting to make sure that the purse had been given to the police.

Justin Bret Allman was defendant's cellmate in 2007 when defendant was in jail awaiting his trial. Allman testified that defendant told Allman that he and Lowery had gotten into a fight on the night of her death. Defendant said that he had spent a lot of money on "dope" and alcohol, but he did not get sex in return from Lowery as planned. Allman testified that defendant told him that he struck Lowery repeatedly and dumped her body out on Black Bear Road. Robert Johnson Ellis, who was in the same cell block as defendant, testified that defendant told him that he and Lowery had been partying and that defendant got upset when Lowery had sex with

his friend. Defendant told Ellis that he pushed Lowery and then passed out.

Defendant chose to testify on his own behalf. He acknowledged that he and Whited had been partying with Lowery that evening. According to defendant, both men had consensual sex with Lowery. Defendant claimed that the last time he saw Lowery was when he walked her from the living room to Whited's bedroom, and she got into Whited's bed. Defendant stated he then went back to the living room sofa and fell asleep. Defendant denied ever talking to Allman or Ellis about his case.

The jury found defendant guilty of first degree murder based solely on felony murder. The trial court sentenced defendant to life imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends that the trial court erred in its instructions to the jury about the credibility of interested witnesses. The trial court gave the jury the following instruction:

> Members of the jury, you have heard testimony from a witness who, to wit: Mr. Whited, that tends to show that he was testifying with the hope of receiving some concession or other benefits from the State in exchange for his testimony. No deal is made, there's been no testimony about that. But it is his hope and anticipation that he may not be charged or if, in fact, he is charged, charged substantially lesser.
>
> Now, considering those circumstances if you find that he, Mr. Whited, *testified in whole or in part for that reason and that reason only*, you should examine his testimony with great care and caution in deciding

> whether to believe it or not to believe it. If after so doing, if you believe his testimony in whole or in part, you should treat what you believe as any other believable evidence.

(Emphasis added.)

Defendant argues that the trial court's addition of the phrase "and that reason only" erroneously indicated to the jury that it should view Whited's testimony with great care and caution only if it thought he was testifying *solely* to avoid being charged himself. According to defendant, the "instruction directed the jury to discount the substantial motive of Robin Whited to lie and fabricate a case against the defendant if the jury found that *in addition to this motive*, another reason [existed] for Whited testifying on behalf of the State."

Defendant acknowledges that because he failed to object to the instructions below, his challenge to the instructions can only be reviewed for plain error. Our Supreme Court has explained:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

Here, defendant has failed to demonstrate that the trial court's insertion of the phrase "and that reason only," even if erroneous, was sufficiently prejudicial to constitute plain error. A jury would not necessarily understand the trial court's instruction in the manner suggested by defendant because the trial court directed the jury to examine Whited's testimony with care if it found that he "testified in whole *or in part* for that reason and that reason only . . . ." (Emphasis added.) While we acknowledge that the wording used by the trial court creates some ambiguity, this instruction was not the lone instruction received by the jury regarding the credibility of witnesses.

After the trial court gave the initial charge (including the challenged instruction), the jury deliberated, but was unable to reach a verdict by the end of the day and was dismissed for the weekend. When the jury returned on Monday morning, the foreperson indicated that the jury "need[ed] to be refreshed on the instructions," and the trial court, therefore, fully re-instructed the jury, including giving the following instruction on credibility of an interested witness:

> Along with that, members of the jury, there has been evidence that shows that a witness, Mr. Whited, was testifying under the hope and anticipation, possibly, that he would not be charged in this case, or that if he was charged, that it would be a lesser charge. If

> you find that he testified in whole or in part for that reason, you should examine his testimony with great care and caution in deciding whether to believe it or not believe it, either in total or in part. If after so doing, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Thus, in this version of the instruction, the trial court did not include the language at issue on appeal.

We do not believe that this case involves two inconsistent instructions, but rather the second instruction clarified any ambiguity arising out of the first instruction. As a result, we cannot conclude that the initial credibility instruction "tilted the scales" such as to cause the jury to reach its verdict. *See State v. Childress*, 321 N.C. 226, 234, 362 S.E.2d 263, 268 (1987) (holding that "in order to invoke the plain error rule this Court must determine that the alleged error 'tilted the scales' and caused the jury to reach its verdict convicting the defendant").

Defendant, however, also argues that any error "was compounded by the fact the court did not give an instruction that Robin Whited was an accomplice." According to defendant, because Whited's testimony establishes that he is an accomplice, "[t]he rule of scrutiny therefore did apply to his testimony." Defendant does not cite any authority relating to the rule of scrutiny. That rule provides that "[u]pon timely request, a defendant is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized." *State v. Irwin*, 304 N.C. 93, 100, 282 S.E.2d 439, 445 (1981).

Here, defendant did not request any such instruction, and, therefore, the decision whether to give the unrequested instruction rested within the trial court's discretion. *See State v. Bailey*, 254 N.C. 380, 385, 119 S.E.2d 165, 169 (1961) ("This Court has consistently adhered to that rule as to its being a matter of the trial judge's discretion, in the absence of a request to charge the rule, from Judge Gaston's day to ours, and the trial judge is not required to charge on the rule in the absence of a request to do so, and his voluntary reference to it rests in his sound discretion."); *State v. Summerlin*, 232 N.C. 333, 341, 60 S.E.2d 322, 328 (1950) ("Ordinarily, a defendant may be convicted upon the unsupported testimony of an accomplice, and the court is not required to charge on the rule of scrutiny, as to such evidence, in the absence of a request to do so."). Since defendant made no request for an instruction regarding the rule of scrutiny, and defendant has made no argument why this particular omission was an abuse of discretion, we cannot find any error based on the rule of scrutiny.

II

Defendant next contends that the trial court's supplemental instructions and its decision to send the jury back for more deliberations coerced the jury verdict in violation of Article I, Section 24 of the North Carolina Constitution. When the jury returned after the weekend, it resumed deliberations after being re-instructed, stopping only for lunch. In the afternoon, the

foreperson informed the trial judge that they could not arrive at a unanimous decision. The following exchange then occurred:

> THE COURT: The — you've reported to the Court that the jury cannot arrive at a unanimous decision. Mr. Allen, what I would like to know is — and I don't want to know how many for guilty or what it's guilty for and how many for not guilty, but what is the last numerical division? Is it 6-6, 9-3, what is it?
>
> THE FOREPERSON: 8-4
>
> THE COURT: Okay. And has it ever changed to 8-4 or has it been that since you initially began deliberating?
>
> THE FOREPERSON: No, it's changed. It went anywhere between, I don't know, almost 6-6 to 10-1 and undecided. After reviewing everything and discussing everything, it's pretty concrete on the 8-4. It's not moving after that.
>
> THE COURT: Okay. Well, members of the jury, I've got some further instructions to give you, and then I will give you something in addition to that. But — you're not the only jury that could hear this case, but you're the only ones we got right now. You've heard the evidence for the better part of five days, counting jury selection.
>
> And so, that in mind, you have a duty to consult with one another and deliberate with a view toward reaching an agreement if that can be done without violence to individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with your fellow or your sister jurors, whichever the case may be.
>
> But in the course of your deliberations a juror should not hesitate to reexamine his or her own views and change your opinion if you are convinced at that point that it is in error. However, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of

> the opinion of your fellow or sister jurors or for the mere purpose of returning a verdict.
>
> Now, there's no end decision. It's either guilty or not guilty. That undecided business doesn't work. You've got to go one way or the other. And you know what the definition of reasonable doubt is, I've told you that.
>
> And you go back and reconsider the evidence as you've already done, I'm sure time and time again, but with the advent of these most recent instructions. Then, after so doing if, in fact, you simply report to the Court whether you have a verdict or whether or not any further deliberations would be fruitless towards arriving at a unanimous verdict.
>
> You've heard the case, you've heard the evidence, and you've deliberated on it. Your deliberations so far have not been so protracted that — that you can't continue to do so.
>
> So that being said, do you need a break before you recommence your deliberations?

Defendant did not object to these supplemental instructions.

The court then sent the jury back for more deliberations, letting it deliberate until 6:55 p.m. At that point, he brought the jury back and instructed them as follows:

> THE COURT: All right, members of the jury, it's getting pretty close to time where I'm sure many of you are getting hungry or maybe it's past you, I don't know. But in any event, we can do one of two things. We can order you something and bring it in or let you go for a while and come back. By the time we go to taking orders and get it into you, it would be about as easy to let you have a break, go get you something to eat and then come back.
>
> My inclination is to let you work a might longer, to see if we can have a verdict today.

> If we can't, we will adjourn and come back tomorrow morning and crank it up again.

After adjourning for dinner from 6:55 p.m. until 8:00 p.m., the jury resumed deliberations until it notified the court at 8:10 p.m. that it had reached a guilty verdict. The trial court individually polled each of the jurors, confirming that each had voted in favor of conviction.

Defendant acknowledges that he did not object to the trial judge's supplemental instructions or his decision to send the jury back for further deliberations after the jury indicated it was deadlocked. He argues that the error was nonetheless preserved for appellate review under *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985), in which our Supreme Court held that a trial court's failure to comply with a mandatory statute can be raised for the first time on appeal.

Our Supreme Court, however, has already specifically rejected the argument that a violation of N.C. Gen. Stat. § 15A-1235(c) (2007) — the statute at issue here — is a violation of a mandatory statute such that the error is preserved without an objection. *See State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996) (rejecting defendant's argument that he did not need to object to the trial court's supplemental instructions under N.C. Gen. Stat. § 15A-1235(c) in order to challenge them on appeal because § 15A-1235(c) is a permissive, rather than mandatory, statute). We, therefore, review this issue for plain error.

N.C. Gen. Stat. § 15A-1235 provides:

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

In this case, the trial judge's instructions, after the foreperson reported that the jury was deadlocked, track almost exactly the language set forth in N.C. Gen. Stat. § 15A-1235. The trial judge repeated subsections (b)(1)-(b)(4) of the statute verbatim to the jury, changing them only to make them gender-neutral. The trial judge then added additional material not set forth in the statute explaining that a juror could not vote undecided, but rather had to vote either guilty or not guilty.

Defendant argues that the trial judge coerced a verdict (1) by using this latter language when the jury was "pretty concrete" in its 8-4 split, (2) then deciding to keep the jury for further deliberations in the evening, and (3) when doing so, telling the jury that if no verdict was reached that evening, they would have to "crank it up again" in the morning. We disagree.

"Our Supreme Court has held that 'a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.'" *State v. Boston*, 191 N.C. App. 637, 644, 663 S.E.2d 886, 891 (quoting *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978)), *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). Thus, "[t]o determine whether the trial court's instructions 'forced a verdict or merely served as a catalyst for further deliberation,' our Court 'must consider the [totality of the] circumstances under which the instructions were made and the probable impact of the instructions

on the jury.'" *Id.* (quoting *Alston*, 294 N.C. at 593, 243 S.E.2d at 364-65).

The *Boston* Court explained:

> Factors relevant to these inquiries include: the length of time the jury had been deliberating; the number of times the trial court inquired into the jury's numerical division; whether the trial court inquired as to whether the majority of the votes were in favor of guilt or innocence; whether the trial court was respectful to the jury or conveyed to the jury that it was irritated at the jury's lack of progress; whether the trial court threatened to hold the jury until it reached a verdict; whether the jury reported to the trial court that it was deadlocked; whether the trial court mentioned the inconvenience or expense of a new trial in the event the jury became deadlocked; whether the trial court inquired into the jury's numerical division merely for purposes of scheduling recesses; and whether the trial court was merely trying to determine whether the jury had made progress towards reaching a verdict.

Id., 663 S.E.2d at 891-92 (internal citations omitted).

In this case, the jury had deliberated for two days. The trial judge only asked about the jury's numerical division once and stressed that he did not want to know whether the votes were in favor of guilt or innocence. Our reading of the transcript suggests that the purpose of the trial judge's inquiry was to determine whether the jury had made progress and to decide how to proceed. There is no suggestion in the record that the trial judge was at all irritated with the jury. To the contrary, he respectfully sought the jurors' input into whether they preferred to continue deliberating, have food brought in, or take a dinner break. The trial judge used no language threatening to keep the

jury until it reached a verdict, but rather told them that they could "crank it back up" the next morning — a phrase that we do not find threatening or coercive. Prior to the trial court's supplemental instructions, the jury did indicate it was deadlocked, but it did not subsequently report an inability to reach a verdict.

In *State v. Rasmussen*, 158 N.C. App. 544, 557, 582 S.E.2d 44, 54, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 362 (2003), the trial court told the jury that it wanted "'to get the case done if we can do it today[]'" and indicated his preference to get a verdict on Friday rather than extend the case into the following week. The trial court also asked the jury to deliberate after normal hours in the evening, as in this case. This Court held that these circumstances were not coercive because the trial court followed the statutory language of N.C. Gen. Stat. § 15A-1235 in giving the charge. 158 N.C. App. at 561, 582 S.E.2d at 56.

In *State v. Whitman*, 179 N.C. App. 657, 671, 635 S.E.2d 906, 915 (2006), after noting that it was 4:35 p.m., the trial judge sent the jury to deliberate until 5:00 p.m. He then said he would have the jurors return at 5:00 p.m. and if they had not reached a verdict, they would discuss what they wished to do. He said he would give them a choice either to continue deliberating that evening or to go home for the evening and return in the morning, with the possibility of skipping a day due to inclement weather. *Id.* at 672, 635 S.E.2d at 915. Although the jury came back with a verdict 18 minutes later, this Court concluded that no coercion had occurred because it "[did] not read these remarks of the trial

judge, discussing practical aspects of deliberating late in the day in the face of potential inclement weather, as risking a coerced verdict." *Id.*

Defendant, in this case, urges that the jury's reaching a verdict only 10 minutes after returning from dinner strongly suggests coercion. In *Whitman*, however, this Court held that the mere fact a jury returned a verdict quickly, absent anything else in the record suggesting coercion, does not warrant a new trial. *Id.*, 635 S.E.2d at 916. Since, in this case, we do not find the trial judge's remarks in any way coercive and the record contains no other evidence of coercion, the jury's speed in returning a verdict does not warrant a new trial.

Defendant, however, points to two cases in which our appellate courts held that a trial court's instructions coerced a verdict: *State v. Dexter*, 151 N.C. App. 430, 566 S.E.2d 493, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002), and *State v. Roberts*, 270 N.C. 449, 154 S.E.2d 536 (1967). We do not believe that either case is analogous to this one.

In *Dexter*, the jury notified the trial court on three occasions that it was unable to reach a unanimous verdict and, the third time, also reported to the court that one of the jurors was asking to attend his wife's surgery the next morning. 151 N.C. App. at 431-32, 566 S.E.2d at 495. The court did not instruct the jury under N.C. Gen. Stat. § 15A-1235 (commonly known as an "*Allen* charge") or respond to the request regarding the juror's wife's

surgery; it instead simply sent the jury back to deliberate further.

On appeal, this Court observed:

> In this case, the trial court, on the third day of deliberations and upon receipt of the jury's two notes regarding its inability to reach a verdict and Juror Gock's request to attend his wife's surgery, simply asked the jury to continue deliberations. Having notified the trial court on three separate occasions that it was unable to reach a unanimous verdict and not having been given an *Allen* instruction after its final note to the trial court, the jury could reasonably have concluded that it was required to deliberate until it did in fact reach a verdict. Moreover, by not addressing Juror Gock's concerns in the presence of the jury, Juror Gock, not knowing if he would receive permission to attend his wife's surgery the next day, may have felt pressured to reach a verdict by the end of the day. Accordingly, the circumstances surrounding the jury deliberations were such that the jury might reasonably have construed them as coercive, requiring a new trial for Defendants.

Dexter, 151 N.C. App. at 433-34, 566 S.E.2d at 496.

In *Roberts*, after one juror indicated that he did not join in the verdict, the trial court stated:

> "Now, gentlemen, I instructed you previously the verdict of a jury must be unanimous. That is, all twelve of you must agree to a verdict, and until you do it cannot be accepted as a verdict by the court. For that reason, I am going to have to ask that you deliberate and consider the case further. If there are any further questions you have at this time, I will be glad to consider them. If there are not, I am going to ask that you again retire and consider the case until you reach a unanimous verdict. You may retire for that purpose."

270 N.C. at 451, 154 S.E.2d at 537 (emphasis omitted). This language suggests that the jury was required to continue deliberating until a unanimous verdict was reached. After receiving this instruction, the jury returned a guilty verdict an hour and 20 minutes later.

On appeal, the Supreme Court concluded:

> The challenged instruction might reasonably be construed by the member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

Id., 154 S.E.2d at 537-38.

In this case, in contrast to *Dexter*, the jury indicated only once that it was deadlocked, the trial judge provided the jury with the proper *Allen* charge, and there was no suggestion that any juror could not return the next day. The language used by the trial judge in addition to the statutory *Allen* charge did not contain the coercive implication of the words used in *Roberts*. We, therefore, hold that this case is controlled by *Rasmussen* and *Whitman* rather than *Dexter* and *Roberts*. Defendant is not, therefore, entitled to a new trial as a result of the trial judge's instructions during the deliberations.

No error.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).