COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-18-00175-CR

MIGUEL ANGEL AGUILAR — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1479403D

MEMORANDUM OPINION[1]

Miguel Angel Aguilar appeals his conviction and probated sentence for possession of less than one gram of cocaine, which police found between the front and passenger seats of his truck after a traffic stop. In two points, appellant contends that the trial court erred by issuing an unduly coercive *Allen* charge and

[1]*See* Tex. R. App. P. 47.4.

by denying his motion for mistrial after the State's allegedly improper jury argument. We affirm.

I. *Allen* Charge

In his first point, appellant claims the trial court erred by giving the jury an unduly coercive *Allen* charge.

A. Applicable Law

It is well settled that the length of time a jury deliberates is discretionary with the trial court. Tex. Code Crim. Proc. Ann. art. 36.31 (West 2006); *Montoya v. State*, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961 (1991). When a jury has declared itself deadlocked, the trial court may give a supplemental charge widely known as an *Allen* charge. *Mixon v. State*, 481 S.W.3d 318, 325 (Tex. App.—Amarillo 2015, pet. ref'd); *see Allen v. United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 157 (1896). Generally speaking, an *Allen* charge is designed to remind the jury that if it is not able to reach a verdict, a mistrial will result, the case will remain pending, and there is no guarantee that a second jury will find the issue any easier to resolve. *Mixon*, 481 S.W.3d at 325; *see Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006); *Gonzales v. State*, No. 02-16-00136-CR, 2017 WL 710639, at *4 (Tex. App.—Fort Worth Feb. 23, 2017, no pet.) (mem. op., not designated for publication). Although such a charge is permissible in both the federal system and Texas courts, trial courts must be careful to word it and administer it in a noncoercive manner. *Barnett*, 189 S.W.3d at 277 n.13; *see Lowenfield v. Phelps,* 484 U.S.

231, 237, 108 S. Ct. 546, 550 (1988); *Howard v. State,* 941 S.W.2d 102, 123–24 (Tex. Crim. App. 1996), *cert. denied*, 535 U.S. 1065 (2002), *overruled in part on other grounds by Easley v. State*, 424 S.W.3d 535 (Tex. Crim. App. 2014), *and modified in part on other grounds by Simpson v. State*, 119 S.W.3d 262, 265–66 (Tex. Crim. App. 2003).

The primary inquiry in determining the propriety of an *Allen*, or "dynamite" charge, is its coercive effect on juror deliberation, "in its context and under all the circumstances." *Lowenfield,* 484 U.S. at 237, 108 S. Ct. at 550 (quoting *Jenkins v. United States,* 380 U.S. 445, 446, 85 S. Ct. 1059, 1060 (1965)); *Howard*, 941 S.W.2d at 123. A supplemental charge which suggests that *all* jurors reevaluate their opinions in the face of disparate viewpoints cannot be said to be coercive on its face. *Howard*, 941 S.W.2d at 123. An *Allen* charge is less likely to be coercive when (1) a time lapse between the charge and the jury's decision is not unduly short, (2) the trial court did not give the charge prematurely, and (3) the jurors were not "required to deliberate for an unreasonable length of time" before the charge was given. *United States v. Eghobor*, 812 F.3d 352, 359 (5th Cir. 2015).

B. Applicable Facts

Here, the trial court held voir dire and seated the jury on April 10, 2018. Trial began at 8:59 a.m. on April 11, 2018 and concluded at 1:40 p.m. after a lunch break of an hour and twelve minutes. The jury deliberated from 1:41 p.m. to 3:45 p.m. At 3:45 p.m., the jury informed the trial judge that it was deadlocked:

THE COURT: We're back on the record outside the presence of the jury.

The Court has received Jury Note No. 5 which reads, we are hung 11 to one, and the Court is going to send in the standard Allen charge.

Any objection from the State?

MR. YOUNG: No, Your Honor.

THE COURT: Any objection from the Defense?

MR. FACTOR: Yes, Judge. We object[.] I'd like the record to reflect that the jury has been deliberating over two hours, which is fairly close to the period of time that they were hearing testimony. And although they're not obligated to us, they've told us it's 11 to one. And therefore, I think in view of the fact that . . . we have a very small minority, that the . . . Allen charge would be coercive. So we move for a mistrial.

THE COURT: And for the record, the jury began deliberations at 1:40, and it's now 3:45. So they've been deliberating exactly two hours and five minutes.

So based on that, I will overrule your objection and send in the Allen charge.

The trial court's instruction read as follows:

You are instructed that in a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of other jurors, each juror should show a proper regard to the opinion of the other jurors.

You should listen, with a disposition to being convinced, to the arguments of the other jurors. If a large number of jurors are for deciding the case one way, those in the minority should consider whether they are basing their opinion on speculation or guesswork, and not on the evidence in the case. Those in the minority should keep in mind the impression the evidence has made on a majority of the jurors who are of equal honesty and intellect as the minority.

> If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the Court to declare a mistrial and discharge the jury.
>
> This indictment will still be pending, and it is reasonable to assume that the *case* will be tried again before another jury at some future time. Any such future jury will be impaneled in the same way this jury has been impaneled and will likely hear the same evidence which has been presented to this jury. The questions to be determined by that jury will be the same questions confronting you and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.
>
> With this additional instruction, you are instructed to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury if you can do so without doing violence to your conscience.

After the trial judge gave the jury the *Allen* charge, it deliberated from 3:46 p.m. to 4:32 p.m., at which time the trial judge recessed court for the day. The next day, April 12, 2018, the jury deliberated from 9:01 a.m. to 9:28 a.m.; at 9:29 a.m. the jury returned a guilty verdict.

C. Analysis

Appellant does not challenge the language of the *Allen* charge. Instead, appellant's sole argument is that the jury "immediately" returned a guilty verdict after receiving the *Allen* charge, thus evidencing that the instruction had a coercive effect on the lone holdout juror.

As did the appellant in *Minze v. State*, appellant relies on several federal cases to support his argument. No. 02-15-00352-CR, 2016 WL 4474352, at *4–5 (Tex. App.—Fort Worth Aug. 25, 2016, no pet.) (mem. op., not designated for

publication) (citing *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985); *United States v. Robinson*, 560 F.2d 507, 517–18 (2d Cir. 1977) (op. on reh'g en banc), *cert. denied*, 435 U.S. 905 (1978); *United States v. De Stefano*, 476 F.2d 324, 337 (7th Cir. 1973); *United States v. Moore*, 429 F.2d 1305, 1307 (9th Cir. 1970); *United States v. Pope*, 415 F.2d 685, 690–91 (8th Cir. 1969), *cert. denied*, 397 U.S. 950 (1970)). This court distinguished the holdings of those cases:

> The *Bonam* court held that the verdict in that case, reached one and a half hours after the charge was given, was not "rendered in such a short period of time as to raise a suspicion of coercion." The *Robinson* court provided that the facts that the jury deliberated three hours after the first supplemental charge in that case and four hours after the second one were "strong indications that the effect of the [second] charge was minimal." The *De Stefano* court relied on the fact that the jury deliberated four additional hours after receiving the supplemental charge in the case before it to conclude "that instead of it having [a] coercive effect . . ., the supplemental charge caused the jury to take additional time to deliberate." As evidence of no coercion, the *Moore* court relied on facts showing that after the jury received the supplemental instruction in that case, it deliberated further, asked to hear and did hear all the testimony, retired again, and reached a verdict. Finally, the *Pope* court stated that the fact that the jury deliberated almost four hours after receiving the supplemental charge combined with the supplemental charge's "moderate tone" "[wa]s indicative of the absence of a coercive effect" in that case.

Minze, 2016 WL 4474352, at *4 (footnotes omitted). Accordingly, this court held that even though the jury reached its verdict only fifteen to twenty minutes after hearing the *Allen* charge (and did not view any additional evidence), Minze did not show coerciveness "under all the circumstances." *Id.* at *5.

Additionally, the Fifth Circuit has explained its jurisprudence on *Allen*-charge coerciveness:

We have affirmed *Allen* charges in more stringent circumstances than those here. In *United States v. Betancourt*, 427 F.2d 851, 854 (5th Cir. 1970), we affirmed a charge where the trial had begun at 9 a.m. on the day of the verdict, the jury did not receive the case until 6:13 p.m., it reported itself deadlocked at 8:19 p.m., and it returned its verdict at 10:23 p.m. on a stormy night. In *United States v. Bottom*, 638 F.2d 781, 788 (5th Cir. Unit B Mar. 1981), we affirmed an *Allen* charge, explaining: "The jury deliberated another three hours after the '*Allen'* charge was given from 9:56 A.M. to 1:40 P.M., not an unduly short amount of time. The time of the day was not late. The day was not Friday or the day before a holiday. The weather was not alleged to be inclement." Here, although the district court gave the charge on a Friday, it was not late in the day or close to a holiday, and the jury deliberated for about two-and-a-half hours after receiving the charge. The timing here also presented less potential for coerciveness than it did in *Betancourt. Cf.* [*U.S. v.*]*Montalvo*, 495 Fed. Appx. [391,] 393–94 [5th Cir. 2012] (rejecting challenge to *Allen* charge that jury received less than four days before Christmas because it was not issued on the day before a holiday; there was no indication that the jury expressed concern about, or that the judge mentioned, the approaching holiday; and the circumstances that may have pressured the jury were less extreme than those in *Betancourt*).

Additionally, we have rejected a claim that the jury's decision to forego a meal renders an *Allen* charge coercive. *United States v. Reeves*, 892 F.2d 1223, 1229 (5th Cir. 1990). We have also rejected claims of coerciveness with similarly short and even shorter deliberation periods. *See Bottom,* 638 F.2d at 788 (charge given after eight hours of deliberation, verdict returned three hours after *Allen* charge); *United States v. Scruggs*, 583 F.2d 238, 241 (5th Cir. 1978) (charge given after four-and-a-half hours of deliberation, verdict returned 48 minutes after charge); *United States v. Bailey*, 468 F.2d 652, 664–65 (5th Cir. 1972) (charge given after three-and-a-half hours of deliberation, verdict returned one-and-a-half hours after charge); *Andrews v. United States*, 309 F.2d 127, 129 (5th Cir. 1962) (charge given after one hour and five minutes of deliberation, verdict returned 25 minutes after charge). We conclude here that Andaverde–Tiñoco has not shown that the district court abused its discretion in its use of the *Allen* charge.

United States v. Andaverde-Tiñoco, 741 F.3d 509, 517–18 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1912 (2014).

Similarly, we hold that the record here does not show "under all the circumstances" that the *Allen* charge was unduly coercive. Although the jury informed the trial court that only one juror was a holdout, the trial court's instruction was directed to all of the jurors and clearly stated that a juror should not reach a verdict against his or her conscience. *See Robinson*, 560 F.2d at 517 ("The judge's warning that 'under no circumstances must any juror yield his conscientious judgment' makes the use of the Allen charge proper and not coercive."). And although the total time of the jury's deliberation following the *Allen* charge was only slightly over an hour, it did not return its verdict until the next day; thus, we disagree with appellant's characterization that the jury returned its verdict "immediately" after receiving the instruction. Finally, the jury's total time of deliberation was not out of proportion with the time it took to try the case. We overrule appellant's first point.

II. Denial of Mistrial

In his second point, appellant argues that the State improperly commented on his decision not to testify:

> [STATE]: You're allowed to make reasonable inferences from the evidence. An officer told you that that baggie of cocaine was right there within his reach. Right next to where the gun would have been within his reach. He had plenty of opportunity from the time he saw those lights behind him to pour it out and stick it right there. It was in his care, custody and control the entire time. It's his car. It's in his reach. It's next to his gun that he knows about.

Who else is it going to be? All of the Defense witnesses --

MR. FACTOR: I object. That's a comment on his failure to testify. I object.

THE COURT: That's sustained.

MR. FACTOR: Request the jury to be instructed.

THE COURT: Disregard the last sentence of the argument.

MR. FACTOR: Move for mistrial.

THE COURT: That's denied.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000). We must uphold the ruling if it was within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

Assuming that the prosecutor's statement, "Who else is it going to be?" could be construed as an improper comment on appellant's decision not testify (as the trial court decided),[2] we conclude that the trial judge did not abuse her discretion by denying the motion for mistrial.

[2]In context, the statement could refer to the fact that the only other occupant of the car was appellant's twelve-year-old son, who had been sitting in the front passenger seat; police found the cocaine in a baggie that was between the two seats and partially obscured. Appellant's witnesses all testified that other

In determining whether improper jury argument warrants a mistrial, we consider (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007). Here, the prosecutor's comment was oblique at best, and the State made no other argument that could be construed as a comment on appellant's decision not to testify. Moreover, the argument was consistent with other argument by the State that there was no evidence anyone else drove appellant's truck that day, that it was unreasonable to believe that one of appellant's coworkers would have left cocaine in the truck and not retrieved it, that it was unreasonable to believe that the cocaine belonged to appellant's twelve-year-old son, and that appellant had admitted placing the gun under the seat "right next to the coke." Considering the context of the comment, which followed similar argument, the trial judge's curative instruction was more likely to be effective here.

Further, although appellant refuted the State's evidence of possession with evidence that other people frequently drove his truck, which he used for construction work, the strength of the State's evidence was nevertheless high. In

---

members of the construction crews that worked with appellant frequently used the truck in which he was stopped; thus, appellant's trial strategy was to show that another person could have placed the cocaine there without his knowledge and consent.

its opening statement, the State urged the jury to use its common sense to decide whether appellant possessed cocaine that an officer found within "about 12 inches of [a] gun" in appellant's truck. When the officer who stopped appellant indicated that he would be searching the truck because he had seen an open container of alcohol and a bottle of tequila in the backseat, appellant admitted having an open container of alcohol in the truck and also told the officer there was a gun under the driver's seat. That gun was in close proximity to the baggie of cocaine in between the driver and front passenger seats; the arresting officer testified that while sitting in the driver's seat, appellant could have reached for the baggie or placed it there. Considering the strength of the evidence in light of the oblique nature of the prosecutor's comment and the likely efficacy of the trial court's instruction to disregard, we hold that the trial court did not abuse its discretion by denying the motion for mistrial. Accordingly, we overrule appellant's second point.

Because we have overruled both of appellant's points, we affirm the trial court's judgment.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: GABRIEL, KERR, and BIRDWELL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 30, 2018