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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIE L. BURTON, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)	No. 444, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On January 3, 2023, a New Castle County grand jury indicted Willie L. Burton ("Burton") on two counts each of drug dealing and illegal possession of a controlled substance and one count of second-degree conspiracy.[1] Prior to trial, the State moved to amend one of the drug dealing counts in the indictment, which the Superior Court granted.[2] The State also entered a *nolle prosequi* on the other drug dealing charge and on one of the counts of illegal possession of a controlled substance.[3] Burton's case proceeded to a jury trial in the Superior Court on October 30, 2023.[4] On November 1, 2023, the jury found Burton guilty of all remaining charges after the Superior Court *sua sponte* provided it with a charge pursuant to *Allen v. United States*.[5]

During Burton's sentencing on November 7, 2023, the State moved orally to have Burton redeclared an habitual offender and to sentence him accordingly on his drug dealing conviction.[6] After receiving no opposition from the defense, the

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[1] A1 at D.I. 1; A13-16.

[2] A4 at D.I. 23, 24.

[3] A1.

[4] A4 at D.I. 24.

[5] A4 at D.I. 29; 164 U.S. 492 (1896).

[6] A522. On June 20, 2014, the Superior Court declared Burton an habitual offender in Criminal ID No. 1306022928. *See* Ex. A. The court made this determination under 11 *Del. C.* § 4214(a), which provided generally that any person who had been

Superior Court redeclared Burton an habitual offender under § 4214(a) based on his drug dealing conviction, and it merged his illegal possession and drug dealing convictions for sentencing.[7] The Superior Court sentenced Burton to serve a total of five years of Level V imprisonment followed by decreasing levels of supervision.[8]

On December 1, 2023, Burton timely filed a Notice of Appeal. On April 3, 2024, Burton filed his opening brief. This is the State's answering brief.

convicted three times of a felony and who was subsequently convicted of a felony may be sentenced "up to life imprisonment." 11 *Del. C.* § 4214(a) (eff. Jul. 3, 2013).

[7] Opening Br. Ex. A.

[8] *Id.*

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court did not abuse its discretion by providing the jury with an *Allen* charge. Burton cannot demonstrate that the charge was coercive based on its timing, its language, the length of the jury's deliberations before and after the charge, and the complexity of the case.

II. Denied. Burton has waived the issue regarding the absence of a written motion to have him redeclared an habitual offender based on his trial counsel's concessions about his habitual offender status. In any event, Burton cannot show plain error from the absence of a written motion.

STATEMENT OF FACTS

Evidence presented at trial established that, around 11 a.m. on November 17, 2022, Detective Anthony Randazzo with the Safe Streets Task Force of the New Castle County Police Department ("NCCPD") was conducting surveillance in his undercover vehicle at the Budget Inn and Superlodge motels in the area of Route 9 and Memorial Drive in New Castle.[9] While at the Budget Inn, Detective Randazzo noticed a Honda sedan in the motel's rear parking lot that was occupied by a white female driver (Tonya Wyatt) and a black male passenger (Scott Johnson).[10] The Honda, which had a temporary registration tag, left when unmarked police vehicles entered the parking lot.[11] Detective Randazzo then drove across the street to the Superlodge motel where he continued to conduct surveillance in the motel's parking lot.[12] Detective Randazzo saw the Honda with the same occupants in the motel's parking lot.[13] The detective observed Johnson exit the Honda and approach a group of individuals who had congregated between an SUV and a sedan that were located a few parking spaces from the Honda.[14] The detective observed a Toyota Yaris enter

[9] A89-90.

[10] A92, A95.

[11] A92.

[12] A93-94.

[13] A94.

[14] A99.

the lot and park next to the Honda.[15] The Yaris was occupied by a white female driver (Angela Taylor) and an older white male passenger (Hamilton Martell).[16] The detective then saw Burton approach the driver's side of the Yaris and have a conversation with Taylor.[17] Taylor handed Burton some money, and Burton walked to Johnson and handed it to him.[18] Johnson reached into his right pants pocket and pulled an object that he gave to Burton.[19] In turn, Burton walked to the driver's side of the Yaris, reached inside the vehicle, and engaged in an exchange or a hand-to-hand drug transaction with Taylor.[20] Burton quickly walked away from the area, and the Yaris left moments later.[21] Detective Randazzo radioed his observations to other members of the Safe Streets Task Force.[22] Because of resource issues, police did not stop Burton on that day but decided to stop the Yaris instead.[23]

NCCPD Detective Lewis Martin activated his emergency equipment to pull

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[15] A100.

[16] *Id.*, A132-33.

[17] A101.

[18] A102.

[19] *Id.*

[20] A102-04.

[21] A103.

[22] A106.

[23] A105-06.

over the Yaris.[24] After a delay, the Yaris stopped in front of a Wawa along Memorial Drive.[25] Detective Martin removed Taylor from the vehicle, and, when asked about her whereabouts, she initially lied to the detective by claiming that she had simply come from the grocery store.[26] Taylor then changed her account and admitted to the detective that she had come from the grocery store and the Superlodge motel.[27] Police searched the vehicle and found a tote bag containing various suspected controlled substances, which were sent to the Delaware Division of Forensic Science ("DFS") for testing.[28] This testing confirmed that two glassine bags stamped "Rite Aid" contained fentanyl, and police also seized methamphetamine from the tote bag.[29] The bags were not processed for fingerprints or DNA evidence.[30] Taylor was arrested.[31]

Taylor testified at trial that she had abused drugs for 10 to 16 years, and she used heroin and methamphetamine.[32] On the morning of her arrest, Martell picked

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[24] A208-10.

[25] A207-08, A210.

[26] A210-11.

[27] A211.

[28] A148, A154.

[29] A115, A148, A160, A173.

[30] A116.

[31] A165.

[32] *Id.*

her up at her residence in the Yaris, and they went to the grocery store.[33] From there, Taylor drove to the Superlodge motel so she could purchase heroin.[34] Taylor said that Burton, who had the nickname "Fug," approached her vehicle to see what she needed.[35] Taylor said that she handed Burton $20 for two bags of heroin, and Burton left and then returned with the drugs, which he handed to her.[36] Taylor gave Burton an extra $2.[37] After reviewing a video of the traffic stop, Taylor confirmed that the drugs were stamped "Rite Aid."[38] Taylor testified that she initially lied to police when she was stopped, but she subsequently admitted that she had dope in her purse that she had purchased from Burton.[39] Taylor denied that she had any agreement with the State to testify against Burton in exchange for dismissing charges against her.[40] She also denied that anyone had promised that she would not be "locked up" if she told police that Burton had sold her the fentanyl.[41]

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[33] A165-66.

[34] A166.

[35] A168.

[36] A169-70.

[37] A170.

[38] A187.

[39] A171-73, A180.

[40] A176.

[41] A186.

Members of the Task Force also stopped the Honda that Wyatt was driving.[42] NCCPD Sergeant Bradley Landis testified that seven bags of suspected heroin or fentanyl fell from Johnson's pant leg when he exited the vehicle, and additional bags were found on Johnson's person during a search incident to his arrest.[43] DFS confirmed that the substances contained fentanyl and acetylfentanyl.[44] All of the bags of fentanyl were stamped "Rite Aid."[45] Johnson was also found with cocaine on his person.[46]

Wyatt testified that she picked up Johnson, whom she knew as "TY," on the morning of November 17, 2022, as part of a "crack and gas" arrangement.[47] Under this arrangement, Wyatt drove Johnson to various locations to sell drugs in exchange for Johnson providing Wyatt with crack to smoke.[48] Johnson also smoked crack with Wyatt.[49] They eventually drove to the Budget Inn so Johnson could sell illegal drugs there, such as "blue bags, crack cocaine, [and] pills."[50] Johnson became

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[42] A232.

[43] A232-34.

[44] A239-41; State's Ex. 9.

[45] A241.

[46] A240, A309.

[47] A281-83.

[48] A282.

[49] *Id*.

[50] A253.

concerned about a potential police presence at the motel, and Johnson directed Wyatt to drive him home.[51] A few hours after dropping off Johnson, he called Wyatt and told her to pick him up.[52] Wyatt picked up Johnson and dropped him off at a house behind the Superlodge motel, and Johnson told Wyatt to park at the motel and that he would meet her there.[53] Johnson climbed in and out of Wyatt's car at the motel.[54] Wyatt testified about seeing a vehicle pull into the parking lot with a Caucasian woman inside and Burton then engaging in a suspected drug transaction with her.[55] When police surrounded Wyatt's vehicle at the motel, Johnson said, "I'm f*****g done."[56] Johnson left his crack pipe on the passenger side of the vehicle, and he stuck some drugs down his pants.[57] Wyatt recalled that one of the drugs was stamped "Rite Aid."[58]

Wyatt was arrested and charged with drug dealing and related offenses.[59] Wyatt said she met with the prosecution, her attorney, and Detective Randazzo in

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[51] A256.

[52] *Id*.

[53] A256-57.

[54] A257.

[55] A258-60.

[56] A270.

[57] *Id*.

[58] A271.

[59] A261.

May 2023, and the State introduced into evidence a proffer letter from that meeting.[60] Wyatt testified that no one forced her to attend the meeting and that she was not promised anything in exchange for the meeting.[61] Shortly before trial, Wyatt met with the prosecution again and signed a cooperation agreement, which was admitted into evidence at trial.[62] Wyatt understood that there were not any promises being made in exchange for her cooperation.[63] On the day before Burton's trial, Wyatt pled guilty to two misdemeanors and received a probationary sentence.[64]

Burton testified in the defense's case. Burton denied being at the Budget Inn but admitted that he was at the Superlodge motel.[65] Burton claimed that Johnson was the one engaged in drug dealing.[66] Burton denied that he approached Taylor's vehicle to sell her drugs but claimed that Taylor gave him money so he could purchase cocaine for himself.[67]

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[60] A262.

[61] A263.

[62] A265.

[63] A266.

[64] A266-67.

[65] A312.

[66] *Id.*

[67] A313.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY PROVIDING AN *ALLEN* CHARGE.

Question Presented

Whether the Superior Court abused its discretion by *sua sponte* providing an *Allen* charge to the jury.

Standard and Scope of Review

This Court generally reviews the trial judge's decision to provide an *Allen* charge for an abuse of discretion.[68]

Merits

Burton argues that the Superior Court "erred in *sua sponte* giving the *Allen* charge over defense counsel's objection."[69] Burton contends that the State questioned the need for an *Allen* instruction, and the Superior Court did not expressly weigh any of the factors required to determine whether the instruction would have been coercive.[70] Burton contends that application of these factors demonstrates that the *Allen* charge was coercive.[71] Burton complains that the timing of the instruction shows its coerciveness, as it "was given less than one hour and 15 minutes before

[68] *Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012)

[69] Opening Br. at 36.

[70] *Id.* at 33.

[71] *Id.* at 36.

the end of the day."[72] Burton also alleges that the jury "spent several hours deliberating before the instruction and returned a guilty verdict on all counts in less than one hour and 15 minutes after the *Allen* charge," which "establishes the coercive nature of the *Allen* charge."[73] Burton concedes that the language of the *Allen* charge was "not coercive," but argues that the case was not complex.[74] Burton is mistaken.

A. Jury Deliberations

The final day of Burton's jury trial resumed at 9 a.m. on November 1, 2023.[75] Before the jury entered the courtroom, the Superior Court conducted oral argument on Burton's request for an adverse-inference jury instruction based on the police's alleged failure to have preserved certain evidence.[76] After the court took a five-minute recess, the jury then entered the courtroom for closing summations.[77] The State presented its initial closing argument, followed immediately thereafter by the defense, which estimated that its argument would be "about 15 minutes or so."[78] The State provided a short rebuttal argument.[79] The trial judge then instructed the

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[72] *Id.* at 33.

[73] *Id.* at 35.

[74] *Id.* at 35-36.

[75] A348.

[76] *Id.*

[77] A378-79.

[78] A379-434.

[79] A434-40.

jury.[80] After the judge confirmed with the parties that there were no exceptions to the instructions, he dismissed the alternate jurors and had the bailiff take an oath.[81] The judge instructed the attorneys to be "within 15 minutes of the courthouse during deliberations" but appeared to strongly recommend that counsel remain in the courthouse.[82] With the exception of the start of the proceedings on that day, none of the times are noted in the official transcript. Yet the foregoing is reproduced in approximately 120 pages of that transcript.[83]

The jury then retired to deliberate and, at some point, sent the judge a note asking when Burton was formally arrested.[84] After discussing the issue with counsel, the trial judge brought the jury into the courtroom and provided it with a short supplemental instruction.[85] Neither the time that the jury retired to deliberate nor the times related to resolving the note are listed in the official transcript, but the issue regarding the note spanned about four pages of that transcript.[86]

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[80] A440-66.

[81] A466-67.

[82] A467.

[83] A348-467.

[84] A467, A470.

[85] A470-71.

[86] A467-71.

The jury then sent the judge a second note stating: "We are stuck on charge one and three. Do we keep going or do we stop at what we have? Charge two is unanimous."[87] The judge reconvened the proceeding and asked for the State's position.[88] The prosecutor responded, "I have another hour and 14 minutes to wait."[89] When the judge asked if the prosecutor would like for him to provide the jury with an *Allen* charge, she remarked that it "[d]idn't work out so well last week," apparently referring to a different case in which the charge was given.[90] Burton's trial counsel objected to the *Allen* charge because, "[t]he jury has been at it about as long as the evidence took to come in" and noted that it had sent a note "about two hours ago."[91] Trial counsel also noted that the jury had reached a verdict on one of the charges.[92] Based on the prosecutor's and trial counsel's remarks, it appears that the jury's second note about a deadlock arrived at approximately 3:15 p.m., while the first note was provided around 1:15 p.m.

The judge expressed concerns that a hung jury would result in Burton "remain[ing] in prison until the State makes a determination as to whether to . . .

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[87] A471.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] A472.

[92] *Id.*

retry him or not," and the judge has "got an-hour-and-15 minutes to go to maybe get him out . . . [o]r in."[93] The judge decided that "its time for an *Allen* charge" because "[t]hey're here—they're not saying they want to go home, they want to know should they continue to go."[94] The judge did not "know that it's been as long as we did the evidence," and the prosecutor remarked that "[t]he evidence was all day this trial, yesterday, or until 3:00."[95] Although the prosecutor believed that the jury was "not hopelessly deadlocked" based on its question about whether to "keep going," the judge decided to provide an *Allen* charge nonetheless.[96] He did not believe that Burton was similar to one of the codefendants (Johnson), who "got out of prison, immediately started dealing drugs and is back in prison for a minimum of eight years."[97] The judge "wanted to take this hour-and-15 minutes to see if we can get this resolved one way or the other" as he would "hate to have somebody stay around for another four months or so if [he] could get the jury to make a decision one way or the other."[98]

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[93] A472-73.

[94] A473.

[95] *Id.*

[96] A474.

[97] *Id.*

[98] A475.

The judge then brought the jury into the courtroom and noted "[n]ot a lot of smiles."[99] He then proceeded to provide the following *Allen* charge:

> [] I'm going to answer your note with what's called an Allen charge. It's named after a case. I'm going to read this to you, then I'm going to ask you to go back and continue to deliberate.
>
> I'd like to suggest a few thoughts that might—you may wish to consider in your deliberations, along with the evidence and instructions previously given to you.
>
> Every case is important to the parties affected. Trial—the trial has been time-consuming, and if you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, it must be disposed of at some time.
>
> There appears to be no reason to believe that another trial would not be as equally time-consuming for the parties involved, nor does there appear to be any reason to believe the case could be tried again better or more exhaustively than it has been at this trial.
>
> Any future jury must be selected in the same manner and from the same sources as you've been chosen. So there appears to be no reason to believe that the case could be—ever be submitted to 12 men and women more intelligent, more impartial and more competent to decide it, or that a more—more or clearer evidence would be produced on behalf of either side.
>
> Of course, these matters suggest themselves upon brief reflection to all of us who have sat through the trial. The only reason they're mentioned is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence of the case.
>
> There are matters which, along with other and perhaps more obvious ones, remind us how important and desirable it is for you to

[99] *Id.*

unanimously agree upon a verdict, but only if you can do so without violence to your individual judgment and conscience.

You should not surrender your conscientious convictions. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to any individual judgment. Each of you must decide the case for yourself but you should do so only after consideration of the evidence with your fellow jurors, and in the course of your deliberations, you should not hesitate to change your opinion when convinced that it is erroneous.

In order to bring 12 minds to unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to and regard for the opinions of each other. That is to say, in conferring with each other, each of you should pay due attention and respect to the view of the others, and listen to each other's arguments with a disposition to re-examine your own views.

If much the greater number of you are for one side, each dissenting juror ought to consider whether his or her position is a reasonable one, since it makes no effective impression on the minds of so many equally honest, intelligent fellow jurors who bear the same responsibility, suffer under the same sanction and the same oath and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth.

In a like manner, the jurors who constitute the greater number should consider the reasons of those who take a different position to see whether there may be—there may be persuasive merit in their position.

You are not partisan; you are judges of the facts. Your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive judges of the credibility of all the witnesses, and of the weight and effect of the evidence.

The performance of this high duty, you're at liberty to disregard any comments of both the Court and counsel, including, of course, the remarks I'm now making.

> Remember, at all times, no juror should yield his or her conscious belief as to the weight and meaning of the evidence. Remember also that after full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.
>
> You may conduct your deliberations as you choose, but I suggest that you now retire and carefully reconsider all the evidence bearing upon the questions before you and see whether it's possible to arrive at a unanimous verdict. If, however, upon further deliberation, you believe that a unanimous verdict is simply not possible, please inform the bailiff.
>
> I do not suggest in any way that you must remain together until a verdict is reached, nor do I suggest that you must deliberate for any particular length of time before being discharged.
>
> So if you can go back and consider the evidence.[100]

The jury exited the courtroom, although the time it retired to deliberate is not noted in the official transcript.[101] The jury eventually returned to the courtroom and announced its verdict, finding Burton guilty of drug dealing, second-degree conspiracy, and illegal possession of a controlled substance.[102] The time of the verdict is not noted in the transcript, although, in thanking the jury for its service, the judge noted that "it's late."[103] Based on inferences from the official transcript, it

[100] A475-81.

[101] A481.

[102] A483-84.

[103] A484.

appears that the jury deliberated for not more than one hour and 15 minutes following the *Allen* charge.

B. *Allen* Charge

"[S]upplementary instructions, sometimes referred to as an 'Allen charge' or 'dynamite charge' are generally proper in order to encourage the jury to reach a verdict."[104] Yet "a trial judge may not coerce the jury into reaching a verdict and, for that reason, any such charge must be carefully examined to determine its total effect on the jury in reaching a verdict."[105] Moreover, there are basic standards that must not be compromised in providing an *Allen* charge, including that "a jury verdict must be unanimous and freely given," "each individual juror must be convinced of the defendant's guilt beyond a reasonable doubt," and "there is no absolute necessity that the jury reach a verdict."[106] An *Allen* charge that "include[s] an admonition that each individual juror not surrender his or her honest convictions and not to return any verdict contrary to the dictates of personal conscience" is sufficient to eliminate the danger that the jury will compromise these fundamental principles.[107]

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[104] *Brown v. State*, 369 A.2d 682, 684 (Del. 1976).

[105] *Id.*

[106] *Id.*

[107] *Id.*

But the language of the *Allen* instruction is not this Court's sole consideration in determining whether the instruction is coercive. Rather, this Court analyzes the circumstances surrounding the trial judge's decision to provide the instruction, including: "(1) the timing of the instruction, (2) the words used in the instruction, (3) the length of the deliberations before both and after the instruction, and (4) the complexity of the case."[108] "The manner in which jury instructions are given, including the timing, is a matter within the sound discretion of the trial court."[109]

C. *Allen* Charge Not Coercive

Considering the timing of the instruction, the *Allen* charge appears to have been given around 3:15 p.m. While this Court has found that an instruction given "early in the day" is not coercive under this factor,[110] Burton cites nothing evidencing a *per se* rule imposing a cutoff time to have provided this instruction.[111] This Court has found an *Allen* charge provided at 2:30 p.m. not coercive under this factor,

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[108] *Collins*, 56 A.3d at 1020 (cleaned up); *see Streitfield v. State*, 369 A.2d 674, 677 (Del. 1977).

[109] *Maxion v. State*, 1992 WL 183093, at *1 (Del. July 22, 1992).

[110] *Davis v. State*, 1999 WL 86055, at *3 (Del. Jan. 20, 1999); *see Collins*, 56 A.3d at 1020-21 (instruction given at 10:58 a.m.).

[111] *See Gilbert v. Mullin*, 302 F.3d 1166, 1175 (10th Cir. 2002) (although raising concerns about the trial court having issued an *Allen* charge at 11:00 p.m., or "so late in the evening," declining to find that "the court's giving of the *Allen* charge at such a late hour was, under the circumstances of this case, in and of itself coercive"); *United States v. Sisson*, 859 F. App'x 728, 729 (6th Cir. 2021) (declining to find that an *Allen* charge given at 8:30 p.m. on a Friday night was "inherently coercive").

rejecting the defendant's bald allegation that, at that time, "the jury was tired and therefore 'more susceptible to pressure.'"[112] This Court has likewise upheld an *Allen* charge provided at 4:15 p.m., finding an absence of coercion based on how deliberations proceeded afterward, including the trial court's dismissal of the jurors at around 5:00 p.m. and an extended break in deliberations.[113]

Here, Burton's allegations that the *Allen* charge was coercive based on its timing are similarly unsupported. The instruction was provided well within the Superior Court's normal operating hours. The record does not evidence that the jury was fatigued and more susceptible to pressure. The jury's note provided a suggestion about continuing deliberations while also indicating that these deliberations were "stuck."[114] The trial judge was seemingly concerned about the jury conducting its deliberations in accordance with the Superior Court's normal operating hours.[115]

Regarding the language of the *Allen* charge, Burton concedes that the Superior Court relied on the pattern instruction and that it was not coercive. Nevertheless, the charge did not single out a particular group, but it encouraged all jurors, whether part

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[112] *See Boatson v. State*, 457 A.2d 738, 743 (Del. 1983).

[113] *Maxion*, 1992 WL 183093, at *1.

[114] A471.

[115] *See* A475.

of a majority or minority group, to re-examine their positions. This approach has been deemed not erroneous as a matter of law.[116] And the Superior Court stressed that each juror should not violate their conscience in reaching a verdict, and the court did not impose any requirement for the jury to reach a full verdict.[117]

Nor does the length of deliberations before and after the *Allen* charge evidence coercion. It appears that the jury did not deliberate for more than six hours and 15 minutes before the trial judge provided the *Allen* charge, while the jury deliberated not more than an hour and 15 minutes afterward. Burton does not cite any decisions imposing a minimum amount of time for deliberations before and after an *Allen* charge. A jury's deliberation for one and one-half hours following an *Allen* charge has been deemed sufficient to show an absence of "an immediate post-charge guilty verdict," or that "the verdict [was] rendered in such a short period of time as to raise a suspicion of coercion."[118] Jury deliberations totaling six or less hours before an *Allen* charge have been held sufficient to demonstrate no coercion.[119] And "an *Allen*

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[116] *See Collins*, 56 A.3d at 1021.

[117] *See Brown*, 369 A.2d at 684.

[118] *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985); *see Papantinas v. State*, 2003 WL 1857548, at *2 (Del. Apr. 8, 2003) (noting that the jury had deliberated for approximately the same amount of time—one and one-half hours—before and after the *Allen* charge); *Collins*, 56 A.3d at 1022 (jury's deliberation for approximately two hours after *Allen* charge did not demonstrate coercion); *Davis*, 1999 WL 86055, at *3 (jury deliberated for two hours after *Allen* charge).

[119] *United States v. Vanvliet*, 542 F.3d 259, 269 (1st Cir. 2008) (six hours of jury deliberations followed by "the unequivocal jury declaration of deadlock") (citing

charge coming relatively early is arguably less coercive than one coming after a jury has worn itself out after several days of deadlocked deliberations."[120] Finally, the factual issues were not complex and primarily involved the jury weighing the credibility of the State's witnesses, who testified about Burton's drug dealing, versus Burton's denials of involvement in drug dealing.[121] In sum, the foregoing four factors support the conclusion that the *Allen* charge provided in this case was not coercive.

Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (absence of plain error where *Allen* charge given slightly over one hour after jury deliberations started)); *Davis*, 1999 WL 86055, at *3 (jury had deliberated for approximately four hours when *Allen* charge provided).

[120] *United States v. Sawyers*, 902 F.2d 1217, 1220 (6th Cir. 1990).

[121] *See Papantinas*, 2003 WL 1857548, at *2 (determining that "the factual issues were not complex" and, as such, "[t]he four factors . . . support only" the conclusion that the *Allen* charge was not coercive); *Davis*, 1999 WL 86055, at *3 (noting the absence of complex factual issues and that "[a]ll of these factors support the conclusion that the jury was not coerced into reaching its verdict"). *But see Collins*, 56 A.3d at 1016 (in upholding the trial judge providing an *Allen* charge, noting that "[t]he jury was considering a complex case based largely on circumstantial evidence").

II. BURTON HAS WAIVED THE ISSUE REGARDING HIS SENTENCING AS AN HABITUAL OFFENDER AND, IN ANY EVENT, CANNOT SHOW PLAIN ERROR.

Questions Presented

Whether Burton has demonstrated plain error regarding his sentencing as an habitual offender.

Standard and Scope of Review

This Court generally reviews the Superior Court's determination that a defendant is an habitual offender to ensure that it is "supported by substantial evidence in the record" and is "free from legal error and abuse of discretion."[122] However, the failure to raise an objection in the trial court generally constitutes a waiver of the issue on appeal, unless the error is plain.[123] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[124] It is "limited to material defects which are apparent on the face of the record; which

[122] *Morales v. State*, 696 A.2d 390, 394 (Del. 1997).

[123] Supr. Ct. R. 8; *Kirby v. State*, 1998 WL 184492, at *1 (Del. Apr. 13, 1998) (waiver of issue concerning procedure used to find defendant an habitual offender).

[124] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[125]

Merits

Burton argues that the Superior Court "erred in granting the State's oral petition [to declare Burton an habitual offender] and committed plain error in declaring [him] an habitual offender."[126] Burton complains that the State failed to file a written petition as required under 11 *Del. C.* § 4215(b) and Superior Court Criminal Rule 32(a)(3).[127] Burton concedes that his counsel did not "object to the State's oral application to declare [him] an habitual offender," but he argues that "this was not a decision that defense counsel could make."[128] Burton contends that the State's failure to file a motion "was plain error that warrants relief."[129] Burton's arguments are unavailing.

A. Sentencing

At trial, the parties discussed the issue of Burton's sentencing as an habitual offender after the jury rendered its verdict.[130] Before the court recessed, and in

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[125] *Id.*

[126] Opening Br. at 43.

[127] *Id.* at 40.

[128] *Id.* at 42.

[129] *Id.* at 43.

[130] A489.

Burton's presence, the prosecutor requested permission to "ask one question," which was "really a question for [Burton's trial counsel]."[131] The prosecutor then appeared to have asked trial counsel in shorthand language whether she needed to prepare a motion to have Burton redeclared an habitual offender since she had provided counsel with certified copies of Burton's prior convictions.[132] Trial counsel responded that he's "not disputing the record."[133]

At Burton's sentencing hearing on November 7, 2023, the State moved to have him redeclared an habitual offender and to be sentenced accordingly.[134] The State noted that it had provided trial counsel "last week at trial the certified copies [of Burton's convictions]" and that Burton has been previously declared an habitual offender in June 2014.[135] Trial counsel responded: "No basis to oppose that, Your Honor."[136] The State clarified that it was seeking to have the habitual offender status apply to Burton's drug dealing conviction.[137] The judge then highlighted several convictions that qualified as predicate offenses to redeclare Burton an habitual

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[131] *Id.*

[132] *See id.* ("Do I need to prepare an actual—I provided [trial counsel] with the certified copies of—").

[133] A489-90.

[134] A522.

[135] *Id.*

[136] *Id.*

[137] A522-23.

offender and noted that the Superior Court had previously declared him an habitual offender under § 4214(a).[138] The court then asked the State whether it was taking the "position that the eight years [on the drug dealing offense] is mandatory," to which it responded: "No."[139] The State agreed that, as an habitual offender, the Superior Court could sentence Burton to serve anywhere from zero years of incarceration to life imprisonment under § 4214(a).[140] The Superior Court proceeded to sentence Burton on the drug dealing offense, as an habitual offender, to 20 years of Level V imprisonment, suspended after five years for decreasing levels of supervision.[141] In its sentence order, the Superior Court expressly determined that Burton is an habitual offender under § 4214(a).[142]

B. Burton Has Waived His Argument About the Absence of a Written Motion.

Burton has waived any contention about the absence of a written motion to redeclare him an habitual offender. To be sure, the plain language of § 4215(b) seems to contemplate the State filing a written motion, "at any time after conviction

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[138] A523.

[139] A524.

[140] A525.

[141] A543.

[142] Opening Br. Ex. A. Section 4214(a) provides generally that a person who has been convicted three times of a felony and who is thereafter convicted of a subsequent felony may be sentenced "up to life imprisonment." 11 *Del. C.* § 4214(a) (eff. July 11, 2018).

and before sentence," and the Superior Court conducting a separate hearing on that motion.[143] Moreover, echoing this statute, Rule 32(a)(3) states that "[t]he attorney general shall file a motion to declare the defendant an habitual criminal pursuant to 11 *Del. C.* § 4214 promptly after conviction and before sentence."[144]

But the procedural requirements related to a habitual offender determination may be waived and were in fact waived in this case. In *Johnson v. State*, this Court concluded that the defendant's stipulation to the State's record of his convictions waived his right to a hearing on his habitual offender status.[145] In *Abduhl-Akbar v. State*, the defendant conceded under a plea agreement that he was an habitual offender, and he also signed a stipulation listing his prior felony convictions and stating that they qualified as predicate felonies for the purpose of his habitual offender status.[146] Nonetheless, in appealing from the denial of a motion for sentence reduction, he argued that he was improperly sentenced as an habitual offender because the State had not filed a motion and no hearing was held about his status.[147] This Court concluded that "[t]he purpose of the motion is to give notice to a defendant that the State intends to seek an enhanced sentence" and that "[t]he

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[143] *See* 11 *Del. C.* § 4215(b).

[144] Super. Ct. Crim. R. 32(a)(3).

[145] 1991 WL 235359, at *2 (Del. Sept. 18, 1991).

[146] 1997 WL 776208, at *1 (Del. Dec. 4, 1997).

[147] *Id.*

hearing is held to determine, as a matter of fact, whether a defendant has the prior convictions necessary to be classified as an habitual offender."[148] This Court found that "there was no need for a motion or hearing and Abduhl-Akbar was deemed to have waived those procedural requirements."[149]

In *Loncki v. State*, which Burton cites in his opening brief, the defendant entered into a plea agreement in which he agreed that he was an habitual offender.[150] At the time of sentencing, the State had not filed a habitual offender motion, although the State promised that it would file the motion after sentencing.[151] The Superior Court sentenced him as an habitual offender nonetheless.[152] The defendant subsequently filed a motion for correction of an illegal sentence based on the absence of the habitual offender motion, and the State then filed that motion.[153] After a hearing, the Superior Court declared the defendant an habitual offender and resentenced him to the same term as his original sentence.[154] In affirming his sentence on appeal, this Court found that the defendant has "stipulated to his status

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[148] *Id.*

[149] *Id.*

[150] 2007 WL 71108, at *1 (Del. Jan. 9, 2007).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

as an habitual offender" and "waived the procedural requirements of a motion and hearing to determine his status."[155]

In an attempt to distinguish *Loncki*, Burton contends that his case is factually different because *Loncki* involved a plea agreement, while Burton "did not stipulate through a plea that he was an habitual offender" and "did not admit in open court that he was an habitual offender."[156] Burton also contends that stipulating to his habitual offender status was "not a decision that defense counsel could make."[157] But Burton's attempts to distinguish his circumstances fail because this Court has concluded that a defendant may be bound by their counsel's concession about their habitual offender status made in their presence, even where the defendant had proceeded to trial.

In *Fields v. State*, the prosecutor informed defense counsel and the Superior Court during and after the jury's deliberations about the State's intention to file a motion to have the defendant declared an habitual offender.[158] After the jury's verdict, the defendant's trial counsel informed the trial judge in the defendant's presence that the defendant qualified to be declared an habitual offender under §

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[155] *Id.*

[156] Opening Br. at 42.

[157] *Id.*

[158] 2005 WL 3200359, at *2 (Del. Nov. 28, 2005).

4214(a).[159] At sentencing, the trial judge noted that trial counsel had sent a letter in response to the State's habitual offender motion conceding that the State's factual representations were correct, and neither the defendant nor his counsel objected to the defendant's status as an habitual offender.[160] On appeal, the defendant complained about allegedly insufficient notice of the State's intention to have him sentenced as an habitual offender because "there was no hearing to determine his status as an habitual offender."[161] In rejecting the contention, this Court determined that the defendant had actual notice of the State's intention and "the factual basis for the State's habitual offender motion was conceded by the defense at the time of sentencing."[162] Accordingly, "[b]ased on the concessions made by defense counsel, there was no need for a hearing to determine [the defendant's] status as an habitual offender and the judge properly proceeded to the sentencing phase of the hearing."[163]

In the instant case, Burton's trial counsel conceded Burton's habitual offender status on the record in two instances: (1) when the prosecutor seemingly asked about the need to file an habitual offender motion following the jury's verdict; and (2) during Burton's sentencing hearing when counsel advised that there was no basis to

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

oppose the State's oral motion to redeclare Burton an habitual offender.[164] Burton does not appear to allege that any of these concessions were done outside his presence or that he was unaware of them. Accordingly, counsel's concessions obviated the need for a written habitual offender motion.

C. No Plain Error

Nevertheless, Burton has not demonstrated plain error based on the lack of a written motion. Burton does not appear to dispute the Superior Court's 2014 order declaring him an habitual offender or that he is in fact such an offender.[165] Burton has not shown an absence of substantial evidence supporting the Superior Court's determination. In addition to citing its prior order, the Superior Court methodically examined Burton's prior convictions and found several that qualified as predicate offenses for finding Burton an habitual offender under § 4214(a).[166] Burton does not

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[164] A489-90, A522.

[165] *See Mobley v. State*, 1998 WL 515243, at *1 (Del. June 25, 1998) (rejecting defendant's claim under plain error standard of review that he was erroneously sentenced as an habitual offender where counsel conceded that the defendant's status as an habitual offender was factually accurate and counsel did not have any legal grounds to contest the finding); *Whiteman v. State*, 2001 WL 1329693, at *1 (Del. Oct. 23, 2001) (finding that the Superior Court properly relied on a prior order declaring the defendant an habitual offender in connection with a burglary conviction when sentencing the defendant to life imprisonment as an habitual offender on a subsequent conviction for unlawful sexual penetration).

[166] *See* A523.

appear to dispute the existence of these convictions. Burton has not demonstrated any prejudice from the State's failure to have filed a formal motion.[167]

[167] *See Arbolay v. State*, 2021 WL 5232345, at *7 (Del. Sept. 14, 2021) (finding an absence of prejudice based on the State's failure to have complied with the procedural requirement to have held a separate hearing on a habitual offender petition, noting that the defendant "did not request a separate hearing and has not shown that he suffered any prejudice").

CONCLUSION

The State respectfully requests that this Court affirm the judgment below for the foregoing reasons.

/s/ Brian L. Arban
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Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 North French Street, 5th Floor
Wilmington, Delaware 19801
(302) 577-8500

Dated: May 3, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIE L. BURTON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 444, 2023
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 6,758 words, which were counted by Microsoft Word 2016.

Dated: May 3, 2024

/s/ Brian L. Arban
Brian L. Arban
Deputy Attorney General

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

WILLIE L BURTON

Alias: See attached list of alias names.

DOB: 1968
SBI: 00465027

CASE NUMBER:
1306022928

CRIMINAL ACTION NUMBER:
IN13-07-0235
THEFT $1500 OR>(F)
IN13-07-0237
CONSP 2ND(F)

COMMITMENT
Nolle Prosequi on all remaining charges in this case
CONSOLIDATED: 1 Charge(s) for CCP NC Case#: 0306022928

SENTENCE ORDER

NOW THIS 20TH DAY OF JUNE, 2014, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

Restitution is to be submitted by Department of Justice within 90 days.

AS TO IN13-07-0235- : TIS
THEFT $1500 OR>

Effective June 26, 2013 the defendant is sentenced as follows:

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

- The defendant is placed in the custody of the Department of Correction for 18 month(s) at supervision level 5

AS TO IN13-07-0237- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department

Ex. A

STATE OF DELAWARE
VS.
WILLIE L BURTON
DOB: 1968
SBI: 00465027

of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3 **GPS**

- Hold at supervision level 3 **GPS**

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
WILLIE L BURTON
DOB: 1968
SBI: 00465027

CASE NUMBER:
1306022928

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with A S

Have no contact with B D

Have no contact with J S

Have no contact with East Scrap Metal

Have no contact with Lehigh Testing Laboratory

Have no contact with Delaware Fleet Services

Have no contact with Shusters Salvage

TASC to evaluate and monitor. The Court retains the jurisdiction to modify this sentence.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Obtain and remain gainfully employed.

This is a Senate Bill 50 consolidated Order. The Case no.(s) on the front of the sentence order is/are consolidated with this case. See notes for all lower court and/ or Superior Court case no(s) that are hereby discharged with financials to be paid under this case.

STATE OF DELAWARE
VS.
WILLIE L BURTON
DOB: 1968
SBI: 00465027

If there is an outstanding capias in the case(s) consolidated it is to be withdrawn immediately. All financials are to be transferred to this case in Superior Court. A copy of this order is to be mailed and/or faxed to the Court(s) that consolidation effects.

NOTES

Level 3 GPS monitoring until defendant testifies at trial of co-defendant, Andre Shelton.

NCCo Court of Common Pleas cases to be consolidated pursuant to Senate Bill 50:
Case #1205018388, criminal action # MN12053805

JUDGE MARY M JOHNSTON

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
WILLIE L BURTON
DOB: 1968
SBI: 00465027

CASE NUMBER:
1306022928

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	15.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	2.00
DELJIS FEE ORDERED	2.00
SECURITY FEE ORDERED	20.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	30.00
SENIOR TRUST FUND FEE	100.00
TOTAL	369.00

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
WILLIE L BURTON
DOB: 1968
SBI: 00465027

CASE NUMBER:
1306022928

LASANTOS BURTON
WILLIE BURTON
LASANTOS L BURTON
LASANTO BURTON
FRANK SMITH
LEAN BURTON
SHAUN BURTON
WILLIE L LASANTOS
SHAWN BURTON
WILLIE L BURTION