

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS)
Plaintiff)
Vs.)
ISAAC AUSTRIE)
Defendant)

CASE NO. ST-08-CR-0000370

ACTION FOR: 14 V.I.C. 2253(A)

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: ORDER BOOK
MICHAEL C. QUINN, ESQUIRE
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JUDGES & MAGISTRATES, SUPERIOR COURT
JESSE BETHEL, ESQ., ASSISTANT ATTORNEY GENERAL
IT DIVISION
✓ HENRY L. FEUERZEIG, ESQUIRE
COURTNEY REESE, ESQ., ASSISTANT ATTORNEY GENERAL

Please take notice that on September 21, 2009 a(n) MEMORANDUM
OPINION AND ORDER dated September 21, 2009 was entered by the Clerk in
the above-entitled matter.

Dated: September 21, 2009

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT



DIANE MATTHEW-TURNBULL
COURT CLERK II

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,)	
)	CRIMINAL NO. ST-08-CR-370
Plaintiff,)	
)	V.I. Code Ann. tit. 14, §§ 921, 922(a)(1),
v.)	11(a); 2253(a), 11(a)
)	
ISAAC AUSTRIE,)	
(D.O.B.: 05-28-84))	
)	
Defendant.)	
)	
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MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Isaac Austrie's Motion for New Trial. The Defendant is represented by Henry L. Feuerzeig, Esq., and Michael Quinn, Esq. The People of the Virgin Islands are represented by Assistant Attorneys General Courtney Reese, Esq., and Jesse Bethel, Esq. The Court will grant the Defendant's Motion for New Trial and order a new trial of Count II of the Information.

FACTS

On or about September 8, 2008, the police arrested Isaac Austrie ("Austrie") and Charmaine Clarke ("Clarke") and charged them with premeditated first degree murder, unauthorized use of a firearm during the commission of a crime of violence and first degree assault. An information was later filed against Austrie and Clarke charging them with first degree premeditated murder, unauthorized use of a firearm during the commission of a crime of violence and other crimes.

After Austrie and Clarke's first trial ended in a mistrial, they were tried again on the charges of premeditated murder first degree and unauthorized use of a firearm during the

commission of a crime of violence.¹ The Court also charged the jury as to the lesser included crime of murder second degree and advised the jury that if it found the Defendant not guilty of murder first degree, or if they were unable to reach a verdict on that charge, they could consider the Defendant's guilt or innocence of the lesser included offense. In its instructions relating to the firearm charge, the Court advised the jury that the elements of that charge were that the Defendant Isaac Austrie: (1) on or about May 18, 2008, in St. Thomas, Virgin Islands; (2) knowingly possessed a firearm; (3) that it was possessed during the commission of a crime of violence; and (4) that he was not licensed or authorized by law to possess a firearm at the time of the alleged offense. The jury was advised that murder of any degree is considered by the law to be a crime of violence.

The jury was also charged to deliberate with a view towards reaching a verdict. The following instruction was given regarding the subject of how to deliberate:

Your verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous.

During the course of this trial, you have, no doubt, received certain definite impressions as to how it should be decided. Please do not allow these impressions to become so irrevocably fixed as to prevent you from fairly and frankly discussing this case with any of your fellow jurors who may have a different point of view. It is your duty, as jurors, to give careful attention and consideration to the views of your fellow jurors; to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or

¹ At the time of the second trial which commenced with jury selection on June 15, 2009, Austrie was charged in the Second Amended Information dated February 24, 2009, in Count I with premeditated first degree murder and in Count II with unauthorized use of a firearm during the commission of a crime of violence.

effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

After receiving the charge on June 18, 2009, the jury retired to deliberate. After deliberating on June 18, 2009, the jury sent a note to the Court indicating that it could not reach a verdict. The Court excused the jury for the night and directed them to continue deliberating the next day. After deliberating on June 19, 2009, the jury again indicated that it could not reach a verdict on all counts. The People requested that the Court receive a partial verdict. Defendant Austria requested that the Court declare a mistrial, because continued deliberation after receiving an additional charge would be coercive. The Court instructed the jury as follows:

Members of the jury, I am going to ask you to return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And often after further discussion, jurors are able to work out their differences and agree.

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 individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

With that instruction, I will return you to the jury room. Thank you.

Thereafter, the jury returned a note to the courtroom indicating that they had reached a verdict as to one count. The Clerk then inquired of the jury and they delivered a verdict of Guilty as to Count II of the Information, which charged Austrie with unauthorized use of a firearm during the commission of a crime of violence. The jury indicated that they were unable to reach a verdict as to murder first degree or the lesser included offense of murder second degree under Count I of the Information.

On September 4, 2009, Austrie filed a motion for a new trial as to Count II of the Information – unauthorized use of a firearm during the commission of a crime of violence – contending that the verdict was “dramatically inconsistent” and that it is a “testament to the coercive nature of the Allen charge given by the Court.” The Court must now determine whether the Defendant is entitled to a new trial as to Count II of the Information.

DISCUSSION

Defendant’s motion for new trial on Count II of the Information is based on Rule 135 of the Superior Court Rules and Rule 33(a) of the Federal Rules of Criminal Procedure. Superior Court Rule 135 states that a motion for new trial may be granted if required in the interest of justice.² Rule 33 of the Federal Rules of Criminal Procedure also governs motions for new trial³

² Super. Ct. R. 135 provides:

The court may grant a new trial to a defendant if required in the interest of justice. The court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. . . . A motion for a new trial based on [grounds other than newly discovered evidence] shall be made within 10 days after finding of guilty, or within such further time as the court may fix during the 10-day period.

and states that a new trial may be granted if it is required in the interest of justice.⁴ *See U.S. v. Charles*, 949 F.Supp. 365, 368 (D.V.I. 1996) (“In assessing such ‘interest,’ the court may weigh the evidence and credibility of witnesses; if the court determines that there has been a miscarriage of justice, the court may order a new trial.”); *Gov’t of the V.I. v. Leycock*, 93 F.R.D. 569, 571 (D.V.I. 1982) (under “exceptional circumstances” the court may exercise its discretion to order a new trial when it is in the interests of justice).

In *People v. Brewley*, 49 V.I. 137, 141 (Super. Ct. 2007), this Court stated that a new trial may be granted for two separate but distinct reasons: (1) where there has been a miscarriage of justice, or (2) where trial error within a reasonable probability had a substantial influence on the jury verdict. *Id.* Regarding the first ground for granting a new trial, the Court said that a miscarriage of justice may occur where the verdict is irrational or where the jury’s verdict is against the weight of the evidence.

In the instant case, Austria attacks the verdict as irrational, but does not premise the motion for a new trial on that ground. Instead, Austria argues that the additional charge given to the jury after they had commenced deliberations was coercive and that the court abused its discretion by giving the instruction. The so-called *Allen* charge is disfavored in the Third Circuit because it causes jurors to distrust their judgment and opinion if it is at odds with a majority of their fellow jurors. *United States v. Fiorovanti*, 412 F.2d 407, 420 (3d Cir. 1969). The *Allen* charge is improper because of “its tendency to hurt, [and because of] its tendency to erode the jurors’ capacity for meaningful group deliberation with its concomitant arguing, influencing, and exchange of views.” *Id.* In the instant case, the charge given to the jury after it reported that it

³ “The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure. . . .” Super. Ct. R. 7.

⁴ Fed. R. Crim. P. 33(a) provides, in pertinent part, that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”

was deadlocked cannot be considered coercive. Indeed, the characterization of the charge as an “*Allen* charge” or “modified *Allen* charge” by Austrie is inaccurate and misleading because the Court did not reference the majority and minority jurors in any way or in any way disparage the views of any of the jurors. The charge given to the jury was virtually identical to the charge recommended by the Third Circuit in *Fioravanti* which was adopted from Mathes and Devitt § 79.01 (1965).⁵ The charge suggested in *Fioravanti* and the one given in this case are not coercive. The charge simply reminds the jury of their duty to deliberate with a view towards reaching a verdict, admonishes the jurors to listen to the views of their fellow jurors, but also advises the jurors not to give up their strongly held beliefs simply to reach a verdict. Since the charge delivered to the jury after they had reported their deadlock in the present case is in accordance with Third Circuit law, the Court did not commit error by delivering the charge to the jury and the Court will not grant a new trial on that ground.

Although the Court does not believe that it committed error during the course of the second trial of Austrie that requires a new trial, the Court is nevertheless concerned about whether the interest of justice is served by the jury verdict in this case under Count II. The jury found the Defendant guilty of unauthorized use of a firearm during the commission of a crime of

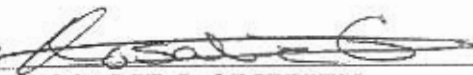
⁵ We suggest that if there is any disposition to instruct jurors to consult with others in the deliberative process, that trial judges use the following charge extracted from ‘Federal Jury Practice and Instructions,’ Mathes and Devitt, 1965, § 79.01: ‘It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.’

Fioravanti, 412 F.2d at 420, n. 32.

violence, namely murder. Yet, notwithstanding that verdict, the jury reported that it was unable to reach a verdict as to whether or not the Defendant had committed the crime of murder, the predicate for the guilty verdict on the firearm charge. As such, the jury verdict in the present case is irrational and should be set aside. *Brewley*, 49 V.I. at 141. The Court, therefore, will order that the Defendant be granted a new trial on Count II of the Information. A separate Order will follow.

DATED: September 21, 2009

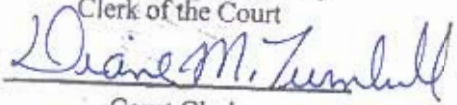
ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 
ROSALIE J. GRIFFITH
Court Clerk Supervisor 9/21/09


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 9/21/09
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk