Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00142-CR

ROBIN CRAIG MCNUTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 96-46932

O P I N I O N

A jury found Robin Craig McNutt, appellant, guilty of misdemeanor theft, and the trial court assessed punishment at two days in the county jail, and a fine of $1,250.00. In three points of error, appellant contends the trial court erred in coercing the jury with an oral *Allen* charge requiring the jury to deliberate further, and which oral instruction violated his state and federal constitutional rights. We affirm.

A recitation of the facts is unnecessary to the disposition of this case because appellant challenges only the trial court's oral instruction to the jury requiring further deliberation after the jury told the trial court they were split. At about 3:05 p.m., January 21, 1998, the jury commenced deliberations. At 6:00 p.m.,

the trial court told the bailiff to bring the jury in to determine how they stood. After the jury was seated, the trial court asked the foreperson if they had taken a vote and if they were split. The foreperson told the trial court they were split 3 to 3. Thereafter, the following verbal exchange between the foreperson and the trial court occurred:

> THE COURT: There's been a lot of testimony that you've heard. An a lot of time taken by yourselves, the Court, and the personnel –
>
> JUROR: Would you turn the microphone on, please?
>
> THE COURT: Yes. Do you feel that it would be beneficial to get away from it for a while and come back tomorrow morning and continue to deliberate because I'm going to tell you, it will be a long time before I let the case be a hung jury. I mean, I'm going to try to get a decision.
>
> JUROR: I thought that more deliberation could bring us more to a unanimous decision.
>
> THE COURT: This evening?
>
> JUROR: It's hard to say.
>
> THE COURT: Or should it take a break? I mean, I'm asking for your best judgment because we don't want to stay here until six o'clock and then come back. Sometimes you might find it best to take a break and get away from it and come back and rehash it.
>
> JUROR: Okay. Yeah. I think we would like to go ahead and come back tomorrow morning.
>
> THE COURT: Then – I'm sorry –
>
> JUROR: Maybe come back tomorrow morning will be better.
>
> THE COURT: Why don't we begin tomorrow at – as I told you, I begin docket call at nine o'clock. If that's not too early, you can come at 9 and you could be deliberating

> while I work on tomorrow's docket. Same instructions; don't discuss the case and don't discuss the case amongst yourselves even tomorrow until the bailiff comes in and tells you to begin again.
>
> Don't remain in any of these halls so that you won't have the opportunity to mingle with those who are interested in the case. With those instructions, you're excused until tomorrow morning. Thank you.
>
> The jury reconvened the following morning at 9:24 a.m., and reached a guilty verdict by 10:40 a.m.

In point one, appellant contends the above communication constitutes an improper *Allen* charge, and the charge together with the trial court's solicitation of the jury split was coercive. Because appellant failed to object to the trial court's instruction, the State contends he has waived error. We agree.

An *Allen* charge is a supplemental instruction to a deadlocked jury essentially stating that the jurors should examine the submitted questions with candor and a proper regard and deference for the opinions of each other and decide the case if they can conscientiously do so. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896); *Duc Vu v. State*, 750 S.W.2d 8, 9 (Tex.App.–Texarkana 1988, pet. ref'd).

An objection to a failure to follow statutory procedures is necessary to preserve a claimed error when the court gives an *Allen* charge to a deadlocked jury. *Calicult v. State*, 503 S.W.2d 574, 575 (Tex.Crim.App.1974); *Verret v. State*, 470 S.W.2d 883, 886-87 (Tex.Crim.App.1971); *Duc Vu*, 750 S.W.2d at 9. Appellant did not object: (1) when the trial court said he was bringing the jury back in to see how they stood, (2) when the trial court asked the foreperson if the jury was split, and (3) he did not object before, during, or after the trial court orally instructed the jury concerning further deliberations. We find appellant has preserved nothing for review, and we overrule appellant's point of error one.

In points two and three, appellant contends that the same instruction to the jury violated his rights to due process as guaranteed by the state and federal constitutions, and article 1.04 , Texas Code of Criminal Procedure. Appellant cites no authority to support these points, nor does he make any argument as to how the trial court's instruction violates due process and the statute. Appellant has presented nothing

for us to review. TEX. R. APP. P. 38.1(h); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex.Crim.App.1996).

We overrule appellant's points of error two and three.

We affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed October 14, 1999.
Panel consists of Justices Draughn, Lee, and Hutson-Dunn*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe Draughn, Norman Lee, and D. Camille Hutson-Dunn, sitting by assignment.