

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00240 COA

HILL STOKES A/K/A HILL STOKES, JR. APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN L. HATCHER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEY FOR APPELLANT: DARNELL FELTON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: CARLA CLARK

NATURE OF THE CASE: POSSESSION OF A FIREARM BY A FELON

TRIAL COURT DISPOSITION: CONVICTION

MANDATE ISSUED: 7/8/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

On January 20, 1995, the Appellant, Hill Stokes, was convicted in the Circuit Court of Coahoma County, Mississippi, for the possession of a deadly weapon at a time when he had been previously convicted of a felony in violation of section 97-37-5 of the Mississippi Code of 1972. On February 15, 1995, Stokes was sentenced to serve a term of three years in an institution under the supervision and control of the Mississippi Department of Corrections, pursuant to the provisions of section 99-

19-81 of the Mississippi Code of 1972, since he had been previously convicted of two or more drug-related felony offenses and was classified as a habitual offender. Stokes now appeals from his conviction to this Court and cites the following errors:

I. THE LOWER COURT ERRED IN NOT ALLOWING STOKES TO CROSS EXAMINE THE STATE'S WITNESSES REGARDING THEIR DRUG ACTIVITY, CONCERNING CREDIBILITY, BIAS AND ABILITY TO PERCEIVE THE INCIDENTS.

II. THE LOWER COURT ERRED IN DENYING STOKES A SELF-DEFENSE INSTRUCTION WHEN AN EVIDENTIARY BASIS EXISTED FOR THE INSTRUCTION.

III. THE ERRORS IN THE AGGREGATE, IF NOT SINGULARLY, DENIED STOKES A FAIR TRIAL.

Having found error, we reverse and remand for a new trial.

#### A. THE FACTS

The Appellant, Hill Stokes, was convicted in January 1988, of three separate drug-related crimes which are undisputedly classified as felonies pursuant to the laws of the State of Mississippi. As a convicted felon, Stokes was prohibited from thereafter possessing a deadly weapon pursuant to section 97-37-5 of the Mississippi Code of 1972. The incident that led to the present charge occurred on October 6, 1994, around 12:00 noon, and the facts are heavily disputed as to what took place. However, it appears clear that on that day, Stokes, John Sharp, Carl Lester Smith ("Lester"), and Clarence Gober, Jr., were in close proximity to each other near a playground in Jonestown, Mississippi, when a physical altercation occurred between Sharp and Lester concerning a sum of money Sharp owed Lester. During this incident, Stokes claimed that he approached the two men and requested that Sharp pay a debt he owed to Stokes in the sum of \$50. Stokes testified that during the melee, Sharp lunged at him and attempted to pull out a pistol which was concealed under his shirt. According to Stokes, he grabbed the gun by its barrel and struck Sharp in the head with the weapon. It is undisputed that Stokes struck Sharp, who was later treated at a nearby hospital, with the weapon.

On the other hand, Sharp testified that Stokes approached him with a pistol that was clearly visible, tucked in Stokes' pants. Clarence Gober, a bystander, testified that Stokes approached Sharp with the gun and told Sharp that he was tired of Sharp following him at night. Gober stated that at this point, he turned away and did not see what transpired, although he thought he heard a shot fired and later saw Stokes with the pistol in his hands. After the incident, Gober testified that he observed Stokes place the weapon under a stairway. Gober retrieved the weapon and later turned it in to the Chief of Police, J. B. Kirk. The weapon in question was a .32 caliber pistol and was admitted into evidence at trial. Another witness, Chauncey Williams, identified the weapon as the pistol that he had given to Stokes on a previous day.

Stokes testified that Chauncey Williams had, in fact, given him a pistol on September 28, 1994, which he had used to protect his home. However, Stokes claimed that he returned the weapon to Williams on September 30, 1994. Stokes testified that he had no weapon in his possession on October 6, 1994,

until he took the weapon from Sharp in order to defend himself. According to Stokes, he struck Sharp with the weapon in self-defense, and after Sharp fell from the blow, he (Stokes) placed the gun on the ground and left the scene. Stokes further stated that he did not leave the scene of the incident but remained to assist in putting out a house fire occurring in the neighborhood. Thus, Stokes claims that he acted in self-defense when he took the weapon from Sharp.

## B. ANALYSIS

### I. DID THE TRIAL COURT ERR IN REFUSING TO ALLOW STOKES TO CROSS-EXAMINE THE STATE'S WITNESSES REGARDING THEIR DRUG ACTIVITY, AND CONCERNING THEIR CREDIBILITY, BIAS, AND ABILITY TO PERCEIVE THE INCIDENTS?

In presenting this assignment of error, Stokes actually challenges four rulings the trial court made during the course of the trial: (1) the trial court's ruling that it would not allow Stokes to make the jury aware, through cross-examination, of Clarence Gober's prior conviction of illegal possession of a controlled substance; (2) the trial court's ruling that it would not permit Stokes to cross-examine Sharp concerning his alleged prior sale of drugs on October 6, 1994, to Stoke's wife for the sum of \$50; (3) the trial court's ruling that Stokes could not cross-examine Sharp pertaining to the nature of the disagreement between Sharp and Lester and why Sharp owed money to Lester; and (4) the trial court's ruling that Stokes could not cross-examine Sharp or offer medical testimony to prove Sharp's use of cocaine on the day in question and that he could not explore whether such use affected Sharp's ability to perceive what actually happened during his confrontation with Stokes. We will address each of these rulings separately, and in sequence, keeping in mind the following statement of our Mississippi Supreme Court in *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990):

The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused . . . . Unless the trial judge's discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling. (citations omitted).

However, "[t]he discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence." *Johnston*, 567 So. 2d at 238.

#### A. CLARENCE GOBER'S PRIOR CONVICTION.

Mississippi Rule of Evidence 609(a)(1) states that evidence of a witness's prior conviction is admissible for the purpose of attacking his credibility only if (1) the offense was punishable by death or imprisonment of more than one year; and (2) if the trial court determines that "the probative value of admitting this evidence outweighs its prejudicial effect on a party . . . ." A second category of felony convictions -- those that involve dishonesty or false statements -- are also admissible to attack the credibility of a witness. M.R.E. 609(a)(2). This category of convictions is not applicable in this instance. *See also* M.R.E. 403.

Prior to the admission of such evidence, the trial court must make an on-the-record determination

that the probative value of the conviction outweighs the prejudicial effects of its admission pursuant to the guidelines set forth in *Peterson v. State*, 518 So. 2d 632, 636-37 (Miss. 1987).

In the case *sub judice*, the State presented the court with a motion in limine to prevent Stokes from attempting to impeach the State's witness through the use of Gober's prior conviction in January 1995, for the illegal possession of crack cocaine. The trial court specifically ruled that the prejudicial effect of allowing this evidence outweighed its probative value. Stokes contended that Gober and Sharp were in the business of selling illegal drugs and that Gober had a motive to corroborate the testimony of Sharp and Sharp's version of the events of October 6, 1994. The trial court rejected this argument, and we cannot say that the trial court abused its discretion in denying the admission of Gober's prior conviction. Thus, we rule that Stokes' claim of reversible error on this issue has no merit.

#### B. SHARP'S ALLEGED SALE OF ILLEGAL DRUGS TO THE APPELLANT'S WIFE ON THE MORNING OF OCTOBER 6, 1994, PRIOR TO THE INCIDENT IN QUESTION.

Mississippi Rule of Evidence 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*

(emphasis added). However, our supreme court has stated on a number of occasions that prior to the admission of such wrongs or actions pursuant to Rule 404(b), the evidence must still pass through the "ultimate filter" of Mississippi Rule of Evidence 403, which excludes relevant evidence where its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *Smith v. State*, 656 So. 2d 95, 99 (Miss. 1995).

Consistent with its earlier ruling, the trial court excluded any evidence of Sharp's prior drug dealings with Stokes' wife, apparently on the ground that Stokes, a convicted felon, was charged with the unlawful possession of a deadly weapon, and that the admission of such evidence would confuse the issues of the case and mislead the jury. The trial court repeatedly questioned the relevance of such evidence, given the offense with which Stokes was charged, and voiced its concern that the jury would be misled into thinking that drugs had "anything to do with this case." Stokes contended at trial that he should be allowed to bring out Sharp's dealings with Stokes' wife in order to show Sharp's motive and bias in claiming that Stokes approached him with a gun in his possession. Stokes further contended at trial that such testimony would provide an explanation as to why Stokes was trying to collect the sum of \$50 from Sharp.

Once again, we cannot say that the trial court abused its discretion in ruling the proffered evidence to be inadmissible on the ground that such evidence, collateral in nature, would be confusing and misleading to the jury. The simple issue to be decided was whether Stokes, as a convicted felon, was in possession of a firearm at the time and place in question. *Ellis v. State*, 661 So. 2d 177, 183-84 (Miss. 1995). As such, we affirm the trial court's ruling on this point, although we are mindful of Mississippi Rule of Evidence 616 and the prior rulings of both state and federal courts that evidence of a witness' bias towards a defendant may be sufficiently probative to warrant its admission into

evidence. *United States v. Abel*, 469 U.S. 45, 49-50; 105 S. Ct. 465, 467-68 (1984); *Tillis v. State*, 661 So. 2d 1139, 1142 (Miss. 1995).

C. THE TRIAL COURT'S RULING THAT STOKES COULD NOT CROSS-EXAMINE SHARP ABOUT HIS DISAGREEMENT WITH CARL LESTER.

During Stokes' cross-examination of Sharp, the following exchange took place concerning the altercation between Sharp and Lester, as Stokes approached Sharp at the playground:

Q. Okay. Did you have any problem with Carl Lester Smith?

A. Yes, sir.

Q. And what was the problem that you had with Carl Lester Smith?

A. Well, we had a misunderstanding, that's all.

Q. About what?

A. About what?

BY MS. CLARK: Your Honor, I object to the relevance of that.

BY THE COURT: I don't see the relevance. It doesn't matter what --

BY MR. FELTON : -- May I approach the bench?

BY THE COURT: I beg your pardon?

BY MR. FELTON: May we approach the bench, Your Honor?

BY THE COURT: For what reason? It's not relevant.

BY MR. FELTON: I'm going to explain to the Court why its relevant.

BY THE COURT: All right. Come on.

(BOTH COUNSEL AND THE COURT REPORTER APPROACHED THE BENCH AND THE FOLLOWING CONFERENCE WAS HELD:)

BY MR. FELTON: Your Honor, I know you have ruled that I cannot introduce into evidence about Clarence Gober's prior drug conviction. But we intend to -- as a defense that all of this has to do with drugs and the problem he had with Carl Lester Smith also stems from drugs. It's solely for impeachment purposes.

BY MS. CLARK: Your Honor, again, under Rule 403 evidence is admissible only if it's relevant and this is not relevant to the crime charged against this defendant.

BY MR. FELTON: It is relevant as far as impeaching --

BY THE COURT: -- It would be relevant to a crime if he were charged with aggravated assault or

something like that but what's the relevance to possession?

BY MR. FELTON: Your Honor, it is relevant to impeach the credibility of the defendant [sic] by showing his ongoing and continuous engagement in an illegal activity.

BY THE COURT: Well, even that, what's relevant about that?

BY MR. FELTON: For impeachment purposes, Your Honor. To impeach the credibility of this witness. And I don't hear the State saying --

BY THE COURT: -- Illegal act? He was convicted, is that what you're saying?

BY MR. FELTON: He wasn't convicted of anything.

BY MS. CLARK: He hasn't been charged with anything, Judge. He's just making allegations against him here in Court, trying to impeach his credibility and it's irrelevant. I mean it's just totally irrelevant under the rules.

BY THE COURT: -- I sustain the objection.

(FOLLOWING THE BENCH CONFERENCE)

BY MR. FELTON:

Q. Mr. Sharp, did you give a statement of Officer J. B. Kirk surrounding the incident that took place?

A. Yes, sir.

Q. And in that statement didn't you also indicate that Carl Lester Smith jumped on you?

A. Yes, Sir.

Q. And, Mr. Sharp, why did Carl Lester Smith jump on you?

A. Because I had owed him some money.

Q. And why did you owe him some money?

BY MS. CLARK: Objection, Your Honor. Same thing.

BY THE COURT: Sustained.

Thus, it is obvious that Stokes hoped to discredit Sharp by showing that Sharp and Lester were drug dealers fighting over money derived from drug sales. Stokes contended that the trial court's refusal to allow him to cross-examine Sharp on these issues violated Mississippi Rule of Evidence 616 and substantially affected his right to impeach the credibility of Sharp's story that Stokes approached him with a deadly weapon. Otherwise, Stokes contends the jury could have viewed Sharp as an innocent victim of a pistol whipping. The trial court obviously viewed these matters as collateral issues that were not relevant to the proceedings before the court and that the prior drug dealings of the witnesses had nothing to do with whether or not Stokes was carrying a gun with him when he

accosted Sharp.

Rule 616 states: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." As stated in *Tillis*, "Rule 616 was added as a result of the United States Supreme Court's decision in *United States v. Abel*, 469 U. S. 45, 105 S. Ct. 465, 83 L.Ed. 2d 450 (1984)." *Tillis*, 661 So. 2d at 1142. The *Abel* case held that while there was at the time no specific rule in the Federal Rules of Evidence allowing impeachment to show bias, prejudice or interest, our longstanding common law practice dictated that such cross-examination should be allowed. *Abel*, 469 U.S. at 45.

In *Johnson v. State*, 655 So. 2d 37, 41-42 (Miss. 1995), the Mississippi Supreme Court gave us the test to determine whether or not the evidence of Sharp's prior and current drug dealings dealt with a collateral matter, unrelated to the pending charges against Stokes. According to *Johnson*:

The *Price* test for determining if an issue is collateral is whether the cross-examining party would be able to prove the matter in their case-in-chief . . . (citing *Price v. Simpson*, 205 So. 2d 642, 643 (Miss. 1968)).

Even if the evidence does not pass the test set forth in *Price*, '[a party] ha[s] the right to contradict [a witness] and impeach [them] if in so doing he was attempting to show *bias, motive, or intent* as affecting the credibility of the testimony of [the witness].' (citations omitted).

A witness may be cross-examined on collateral circumstances which in some way affect the transaction so long as these circumstances have some relevant relationship with testing the *veracity, memory, bias or accuracy* of the witness.

*Johnson*, 655 So. 2d at 41-42 (emphasis added). Nevertheless, relevancy and admissibility are primarily within the discretion of the trial court, and reversal shall not occur unless that discretion is clearly abused. *Id.* at 41; *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992).

Whether or not Sharp and Lester were fighting over drug money when Stokes approached them clearly has no relation to Sharpe's veracity, memory, or to the accuracy of the testimony. Whether or not such evidence would tend to show Sharp's bias, motive or intent in claiming Stokes approached him with a deadly weapon is a closer question, but is still speculative. Thus, we conclude that the trial court did not clearly abuse its discretion in ruling that evidence of Sharp's drug dealings, as well as the drug dealings of Gober and Lester, should not be considered by the jury.

#### D. EVIDENCE OF SHARP'S PRIOR DRUG USAGE ON OCTOBER 6, 1994.

During his cross-examination of Sharp, Stokes attempted to question the witness concerning his use of narcotics on the day in question:

Q. Did you go to the hospital that day, Mr. Sharp?

A. Yes, sir.

Q. And at the hospital were you asked about the use of any narcotics.

BY MS. CLARK: Your Honor, I object to this.

BY THE COURT: Sustained.

BY MS. CLARK: I would ask that the jury be instructed to disregard that.

BY THE COURT: The jury is so instructed to disregard it and I am warning Defense counsel of my ruling and do not persist on it.

BY MR. FELTON: -- May we approach, Your Honor?

BY THE COURT: No, sir. I have already told you what is relevant in this case. This is not a case where anyone is charged with aggravated assault or any crime of violence. This is possession of a firearm by a convicted felon.

BY MR. FELTON: But, Your Honor, it goes to the circumstances --

BY THE COURT: -- Don't argue with me, Mr. Felton.

At a later point in the cross-examination, counsel for Stokes once again raised the question of Sharp's drug use and whether it affected Sharp's ability to recall what happened:

Q. Is your memory affected by any drug use?

A. No.

BY MR. FELTON: May we approach the bench, Your Honor?

(BOTH COUNSEL AND THE COURT REPORTER APPROACHED

THE BENCH AND THE FOLLOWING CONFERENCE WAS HELD:)

BY MR. FELTON: I think the relevance has been borne out now for impeachment purposes because he testified that his memory is not affected by any drug use and the doctor's report will show that at the time of the incident he was using cocaine. He, by his own words, has opened the door for me to impeach him.

BY THE COURT: Keep your voice down. Keep your voice down. My ruling is still the same. That's the end of that. You deliberately set it up.

I will not let you get away with that. That's it.

Thereafter, counsel for Stokes attempted to offer testimony from Dr. Karl Hatten, a physician who examined John Sharp at the hospital after Sharp had been struck on the head by Stokes. Dr. Hatten testified, outside the presence of the jury, that he saw Sharp in the hospital upon referral from the emergency room physician. He stated that a routine check was performed to determine if Sharp had any history of drug use, since it could affect the patient's mental status. Although Sharp denied any drug usage, the physical examination revealed a positive test for cocaine in Sharp's urine.

This evidence was deemed inadmissible on the ground of relevancy by the trial court, even though Sharp had earlier denied that his memory of his confrontation with Stokes had been affected by his



drug usage. In addition, the trial court ruled that Stokes had failed to disclose Dr. Hatten to the State as a potential witness until the morning of the trial. In response to the State's objection to Dr. Hatten's testimony on the ground of late discovery, Stokes stated that Dr. Hatten's testimony was substantially the same evidence as was shown in the medical records of Sharp provided by the State to Stokes prior to trial. Stokes then suggested that the court allow the prosecutor the opportunity to question Dr. Hatten prior to making its ruling. However, this invitation was declined, and Dr. Hatten's testimony was held to be inadmissible, both on the grounds of relevancy and because of Stokes' failure to advise the State in timely fashion that Dr. Hatten was a potential witness.

On the relevancy issue, it is difficult to comprehend how evidence of Sharp's physical and mental condition on the day in question prior to his confrontation with Stokes would not be relevant to these proceedings. Under the guidelines set forth in *Johnson*, whether Sharp was under the influence of cocaine at the time of the incident could clearly have affected his ability to remember how the incident with Stokes took place and whether or not his recollection of the event was accurate. Thus, cross-examination on this issue should have been allowed.

Our ruling is consistent with the result reached in *Isonhood v. State*, 274 So. 2d 685, 691 (Miss. 1973), where our supreme court stated:

From these facts it appears to us that cross-examination relating to the witness's use of drugs or alcohol on the day he allegedly conferred with the appellant in the hospital with regard to the planning of the robbery was very material and that a mandate from the court that no cross-examination would be permitted upon this issue constitutes reversible error.

Moreover, one accused of a crime has the right to "broad and extensive cross-examination of the witnesses against him, and especially is this so with respect to the principal prosecution witness." *Suan v. State*, 511 So. 2d 144, 148 (Miss. 1987). In fact, pursuant to our federal and state constitutions, an accused has a fundamental right to cross-examine witnesses against him subject to reasonable limits. U. S. Const. amend. VI; Miss. Const. art. 3, 626; *Sayles v. State*, 552 So. 2d 1383, 1387 (Miss. 1989).

The State argued at trial, nevertheless, that Dr. Hatten's testimony should have been excluded pursuant to then existing Rule 4.06. The successor to Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice is Rule 9.04 of the Uniform Circuit and County Court Rules. of the Uniform Criminal Rules of Circuit Court Practice, which gave the trial court considerable discretion in ruling on the admissibility of evidence that had not been timely disclosed. In accordance with Rule 4.06, the trial court had the option to (1) grant the prosecution a reasonable opportunity to interview a newly discovered witness; or (2) either exclude the evidence or grant a continuance if the State claimed unfair surprise or undue prejudice absent unusual circumstances. In the case *sub judice*, the evidence which Stokes attempted to introduce through Dr. Hatten was that Sharp had a positive test for cocaine in his urine, once he reached the hospital after his confrontation with Stokes. As shown in the record, this information was known to the State and was, in fact, actually furnished to Stokes by the State prior to trial. Thus, the prosecution suffered no surprise as a result of Dr. Hatten's testimony.

Consequently, following the principles set out in *Tucker v. State*, 647 So. 2d 699, 700-01 (Miss 1994), we hold that it was error for the trial court to exclude Dr. Hatten's testimony based upon untimely discovery principles, since the trial court did not follow the guidelines set out in Rule 4.06

and make an evaluation or analysis of the facts as applied to the guidelines, prior to excluding Dr. Hatten's testimony. Instead, the trial court simply excluded the evidence, even though the State did not claim surprise or seek a continuance or mistrial. As in the *Tucker* case, no unfair tactical advantage would have been gained by Stokes if the court had allowed Dr. Hatten to testify. Thus, we rule that the trial court abused its discretion in refusing to allow the jury to consider Dr. Hatten's testimony. *See also Barrett v. State*, 329 So. 2d 67, 71 (Miss. 1976).

## II. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S SELF- DEFENSE INSTRUCTION?

We hold that it did. We further hold Instructions S-2 and D-4, both given by the trial court and considered by the jury, are irreconcilable, thereby requiring a reversal in this case.

Instruction S-2 reads as follows:

The Court instructs the jury that 'self-defense' is no defense to the charge of possession of a firearm by a convicted felon: and if you believe from the evidence beyond a reasonable doubt that the defendant, Hill Stokes, was previously convicted of a felony crime and possessed a firearm after such conviction, then you shall find the defendant guilty as charged.

On the other hand, Instruction D-4 states:

The Court hereby instructs you that a person convicted of a felony is not prohibited from possessing a firearm if the firearm is in his possession at that time to prevent that particular firearm from being used against him.

Our Mississippi Supreme Court has, on occasion, affirmed criminal convictions where conflicting instructions have been given but, when read together, adequately informed the jury of the law, thereby making the improper instruction a harmless error. *Hornburger v. State*, 650 So. 2d 510, 515 (Miss. 1995); *Gray v. State*, 487 So. 2d 1304, 1308 (Miss. 1986). However, the supreme court has also stated:

We again say to the bench and bar that an instruction estopping one from asserting self defense is never proper except in the few rare cases where all the elements of estoppel are clearly present. The reason for permitting a self defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right.

*Thompson v. State*, 602 So. 2d 1185, 1190 (Miss. 1992). In *Thompson*, the supreme court condemned conflicting instructions in regard to the doctrine of self-defense and reversed the conviction rendered at the trial court level. *Id.* at 1190-91. Additionally, in *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992), the Mississippi Supreme Court stated:

Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. (Citations omitted). Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.

There is no doubt but that an appellant such as Stokes may defend a felon in possession of a firearm case by pleading self-defense or some other defense of necessity where there is some support for such a defense in evidence before the trial court. *See United States v. Panter*, 688 F.2d 268, 272 (5th cir. 1982), which states:

We hold today that where a convicted felon, reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself, he is not guilty of violating 1202(a)(1). In *Panter*, the appeals court was referring to 18 U.S.C. 1202(a)(1) which was a federal statute similar to Miss. Code Ann. 97-37-5 (1972). *Panter*, 668 F.2d at 269, n.1.

In *Panter*, the United States Court of Appeals for the Fifth Circuit emphasized that possession of a firearm is only authorized during the time when the convicted felon is endangered and that possession either before or for any "significant period" after the danger had passed remains a violation. *Panter*, 688 F.2d at 272. *See also United States v. Perez*, 86 F.3d 735, 787 (7th Cir. 1996) and *Osborne v. State*, 404 So. 2d 545, 546-47 (Miss. 1981), which likewise adopts the view that self-defense can be legitimately raised as a defense in a felon in possession of a firearm case, if there is some evidence to support such a defense.

In the case *sub judice*, Stokes objected to Instruction S-2, which flatly stated that self-defense could not be raised in a case such as this. The trial court granted Instruction S-2. On the other hand, the trial court also granted Instruction D-4, which stated that Stokes could possess the firearm in order to prevent it being used against him. Thus, the question is raised as to whether Instructions S-2 and D-4, when read together, adequately informed the jury of the law, thereby making the improper Instruction (S-2) a harmless error.

In *Panter*, the United States District Court of Appeals for the Fifth Circuit held similar instructions in a case such as this to be irreconcilable, requiring a reversal of the conviction rendered in the district court, and further stated: "(T)he charge, considered as a whole (was) so clearly erroneous as to result in a likelihood of a grave miscarriage of justice." *Panter*, 688 F. 2d at 272 (citation omitted). Likewise, our Mississippi Supreme Court in *Stoop v. State*, 531 So. 2d 1215, 1219 (Miss. 1988), as well as in *Smith v. State*, 463 So. 2d 1028, 1030-31 (Miss. 1984), reached a similar result where conflicting instructions concerning self-defense were given.

For all of the reasons mentioned above, we have no choice but to reverse and remand the case *sub judice* for a new trial consistent with this opinion.

**THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY IS REVERSED AND REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**