

IN THE COURT OF APPEALS 10/1/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01214 COA

KEVIN DUELL

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOPA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

J. DOUGLAS SMITH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: GLENN WATTS

DISTRICT ATTORNEY: J. KENNEDY TURNER

NATURE OF THE CASE: CRIME AGAINST PROPERTY

TRIAL COURT DISPOSITION: CONVICTED OF THE BURGLARY OF A DWELLING AND
SENTENCED TO SERVE 8 YEARS IN THE CUSTODY OF THE MDOC

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

KING, J., FOR THE COURT:

Duell was convicted for the burglary of a dwelling, and the Circuit Court of Neshoba County sentenced him to serve eight years in the custody of the Mississippi Department of Corrections. Aggrieved, Duell appeals and assigns the following as errors of the trial court:

- I. DENIAL OF THE MOTION FOR NEW TRIAL;
- II. DENIAL OF THE MOTION TO SUPPRESS CONFESSION;
- III. THE GRANT OF AN IMPROPER JURY INSTRUCTION AND;
- IV. THE ADMISSION OF HEARSAY TESTIMONY

Issue III is dispositive of this case; therefore, we do not reach the merits of the remaining assignments of error.

DISCUSSION

At trial, Duell confessed to the burglary of his aunt's home, but stated that an acquaintance, Glenn Roberson coerced him into committing the crime with threats of physical harm. Based upon this testimony, the court granted Duell jury instruction D-6, which read:

Evidence has been presented that the defendant acted under duress in committing the crime. "Duress is the exercise of unlawful force upon a person by another whereby that person is compelled to do some act that he otherwise would not have done." In order for duress to be a defense to a criminal charge, the compelling danger must be present, imminent and impending, and of such a nature as to induce in that person a well-grounded apprehension of death or serious bodily harm if the act is not done. A person lacking a reasonable opportunity to avoid committing the crime without undue exposure to death or serious bodily harm may invoke duress as a defense.

If the State has failed to prove from the evidence in this case beyond a reasonable doubt that the defendant acted voluntarily in committing the crime and not under duress, then you shall find the defendant not guilty.

In addition to instruction D-6, the court granted jury instruction S-4, which read:

The Court instructs the jury that in order to establish a defense of justification due to coercion to the charge of burglary, the defendant must show: (1) that he was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he

would be forced to choose the criminal conduct; (3) that the defendant had no reasonable, legal alternative to violating the law; and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of threatened harm.

The court erred when it gave instruction S-4. Instruction S-4 delineates the elements required to be proved by a defendant seeking to establish justification as a defense to a charge of violating 18 U.S.C.A. app. § 1202(a)(1). In order to establish the defense of justification to a charge of violating 18 U.S.C.A. app. § 1202(a)(1), the defendant must show (1) that he was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that he had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) that he had no reasonable, legal alternative to violating the law, and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm. *United States v. Harper*, 802 F.2d 115, 116-17 (5th Cir. 1986). Duell was not charged with receiving, possessing or transporting a firearm in violation of 18 U.S.C.A. app. § 1202(a)(1). Therefore, it was error for the court to require Duell to establish the elements of the justification defense.

Moreover, instruction D-6 correctly delineates the elements required to establish the defense of duress. In order to establish the defense of duress, a defendant need only show (1) that an impelling danger was present, imminent, and impending and (2) the danger could not be avoided at the time the crime was committed. *Brown v. State*, 252 So. 2d 885, 889 (Miss. 1971) (citing *Powe v. State*, 176 Miss. 455, 460 169 So. 763, 767 (1936)).

Instruction S-4 conflicts with instruction D-6 because it requires the defendant to show two additional elements--(1) that he had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct and (2) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm. When a jury is given instructions which are irreconcilable, this Court is compelled to reverse because it cannot be said that the jury verdict was founded on correct principles of law. *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984). Therefore, we reverse and remand this cause for a new trial

THE JUDGMENT OF THE CIRCUIT COURT OF NESHOPA COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO NESHOPA COUNTY.

FRAISER, C.J., THOMAS, P.J., COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

**BRIDGES, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
BARBER, J.**