IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRY O. JOHNSON, JR. — APPELLANT

VS. — NO. 2010-KA-1237

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF ISSUES

I. THE STATE PROVED EACH ELEMENT OF ARMED ROBBERY, CAR JACKING, KIDNAPPING, HOUSE BURGLARY, AND USE OF A FIREARM DURING THE COMMISSION OF A FELONY BEYOND A REASONABLE DOUBT.

II. JOHNSON WAS NOT ENTITLED TO A DURESS INSTRUCTION.

STATEMENT OF FACTS

During the late hours of April 16, 2009 Terry Johnson and Xezavion Taylor left a barbecue at the home of Johnson's brother-in-law in Greenville, MS. (T. 255). The two men went to the home of Kendall Franklin, under the guise of asking for a ride to Johnson's home. (T. 256). Although in bed and not wanting to drive the two men home, Franklin reluctantly agreed to give Johnson and Taylor a ride. (T. 110). Franklin testified that he knew Johnson because he used to date Johnson's mother but that he did not know Taylor. (T. 109).

Franklin, Johnson, and Taylor, got into Franklin's car. (T. 111). Franklin was in the driver's seat, Johnson was in the passenger's seat, and Taylor was in the back seat of the car. (T. 111). After

driving a short distance, Franklin felt a gun placed against the back of his head. (T. 111). Franklin testified that Taylor asked him for money while he held the gun to the back of his head. (T. 112). Realizing that Franklin had no money, Taylor commanded Franklin to drive to the levee. (T. 112). When Franklin arrived at the levee, Taylor ordered him out of the car. (T. 113). Taylor took over the driver seat position, Franklin was ordered into the passenger seat, and Johnson sat in the back of the car. (T. 113). While driving to Carver Circle, Taylor again asked Franklin for money. (T. 113). When Franklin denied having any, Taylor hit Franklin in the head with the pistol. (T. 113). Taylor even had Franklin open the passenger side door and fired several rounds past Franklin's body. (T. 114). When Taylor arrived at an area near Weddington Elementary in Carver Circle, he handed the gun over to Johnson to keep watch over Franklin. (T. 115). While aiming the gun at Franklin, Johnson instructed Franklin to "look forward, don't look back." (T. 115). For 10-15 minutes Johnson kept the gun pointed at Franklin until Taylor returned to the vehicle. (T. 116).

Once Taylor resumed driving, he asked Johnson if he knew of anyone who could "help." (T. 117). Johnson responded affirmatively and the men set out for the January Apartments where Johnson lived. (T. 117). After arriving at the apartment complex, Johnson exited the car and retrieved another person who Franklin could not identify. (T. 118). Taylor then drove to Franklin's home, where Johnson and the third unknown male exited the car. (T. 119). For the next 15-20 minutes Johnson and the third man made two trips walking between the car and Franklin's home. loading up all of Franklin's belongings. (T. 120). Johnson and the third person stole Franklin's wallet which contained $51, a set of speakers, all of Franklin's clothes, shoes, a car CD player, woofers, an amp, and Franklin's cell phone. (T. 126).

After loading all of Franklin's belongings into the trunk, a second vehicle met Johnson and Taylor. (T. 121). Franklin watched as Johnson and the third man loaded Franklin's belongings into

the second car's trunk. (T. 121). After loading the items, Johnson got into the second vehicle with the third person and Taylor stayed in Franklin's vehicle with Franklin. (T. 122). Franklin testified that Taylor drove him to the levee and forced him into the trunk of his own car. (T. 122). Taylor then drove Franklin's vehicle, with him in the trunk, to another location in Greenville. (T. 123). Franklin heard another car pull up behind his and heard Taylor exit his vehicle and enter the second car, leaving Franklin in the trunk. (T. 123). With tools that just so happened to be in his trunk, Franklin was able to free himself and walk home. (T. 124). When Franklin went to the police about the incident, he could only identify one suspect who was involved: Terry Johnson. (T. 125). A BOLO was put out for Johnson, although he remained at large from April 22nd until May 12th. (T. 171).

Johnson was ultimately convicted of armed robbery, armed carjacking, kidnapping, house burglary, and use of a firearm during the commission of armed robbery, armed car jacking, and kidnapping.

SUMMARY OF ARGUMENT

The State proved each element of the crimes of armed robbery, carjacking, kidnapping, house burglary, and use of a firearm beyond a reasonable doubt. The victim's testimony established that Johnson and Taylor were acting in concert during their crime spree. Therefore, even if Taylor can be viewed as the more culpable party, Johnson is equally as guilty for assisting Taylor in the commission of the crimes.

The trial court properly denied Johnson's duress instruction. Duress was never asserted as a theory of defense, and there was no evidentiary foundation for the granting of a duress instruction.

ARGUMENT

I. THE STATE PROVED EACH ELEMENT OF ARMED ROBBERY, CAR JACKING, KIDNAPPING, HOUSE BURGLARY, AND USE OF A FIREARM DURING THE COMMISSION OF A FELONY BEYOND A REASONABLE DOUBT.

In determining whether the State presented legally sufficient evidence to support a jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). Additionally, under this inquiry, "all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006).

Johnson claims that he could not be guilty of armed robbery because he was merely laying down in the back seat of the victim's car "the entire time," he never placed the victim in fear, and he never took anything from the victim as a result of the victim being placed in fear. However these claims are contrary to the victim's testimony. Franklin testified that Johnson did in fact hold a gun to his head during the encounter and that he was in fear for his life when the gun was on him. T. 126, 147, 161. During the car ride, while Franklin was held a gunpoint by both Johnson and Taylor, Taylor demanded money from the victim. T. 112-15. Although the victim insisted that he did not have money on his person, armed robbery is complete upon an attempt to take personal property from a victim. *Croft v. State*, 992 So.2d 1151, 1159 (¶33) (Miss. 2008).

It is true that the victim's testimony tends to portray Taylor as the more culpable of the co-indictees. That is, Taylor held the gun on Franklin for a longer period of time than Johnson did, Taylor was the one who verbally demanded money from Franklin, and Taylor fired shots either toward or past Franklin when Franklin stated that he had no money on his person. However, taking

the evidence in the light most favorable to the verdict, any rational juror could have found Johnson guilty of armed robbery under the accomplice liability theory of aiding and abetting.[1]

This Court has stated the following regarding the accomplice liability concept of aiding and abetting.

> [O]ur supreme court [has] ruled that in order to be held criminally liable as an aider and abetter in the commission of a felony, one must "do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime." And it has been further stated that "[i]f two or more persons enter into a combination or confederation to accomplish some unlawful object, any act done by any of the participants in pursuance of the original plan and with reference to the common object is, in contemplation of law, the act of all."

Scarborough v. State, 956 So.2d 382, 386 (¶21) (Miss. Ct. App. 2007) (internal citations omitted). Additionally, "aiding and abetting may be manifested by acts, words, signs, motions, or any conduct which unmistakably evinces a design to encourage, incite or approve of the crime, or even by being present, with the intention of giving assistance, if necessary, though such assistance may not be called into requisition." *Swinford v. State*, 653 So.2d 912, 915 (Miss. 1995).

The evidence was undisputed that Johnson knew the victim, but Taylor did not. T. 109. The evidence was undisputed that Johnson led Taylor to the victim's home. T. 255, 258, C.P. 47. The evidence also showed that it was Johnson who persuaded the victim to leave his house in the middle of the night under the guise of giving Johnson and Taylor a ride home. T. 110. The victim also testified that Johnson held a gun to his head and instructed him not to look back at him. T. 115. The victim testified that it was Johnson who enlisted a third unknown male to assist him in stealing all of Franklin's belongings from his home and loading them into the trunk of the victim's car. T. 117-120. It was also Johnson and the third unknown male who later transferred the victim's property to

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[1]Johnson's indictment alleged that he committed each count while acting in concert with Taylor. C.P. 1-3. The jury was also instructed on accomplice liability. C.P. 16-17.

the car trunk of a fourth unknown male. T. 121.

The uncorroborated testimony of a single witness is sufficient to support a jury's verdict of guilt. *Sturdivant v. State*, 745 So.2d 240, 248 (Miss. 1999). Franklin's testimony alone is sufficient to support Johnson's conviction of armed robbery.

The same holds true for Johnson's convictions of car jacking, kidnapping, burglary, and use of a firearm during the commission of a felony. The entirety of Franklin's testimony shows that Johnson and Taylor were acting in concert. During the incident in which Johnson lured Franklin away from his home, each of the co-indictees at some point in the kidnapping held the victim by gunpoint. Although the victim initially drove his own vehicle away from his home thinking he was merely giving the co-indictees a ride home, after a gun was pulled on him, he was forced from the driver's position, and Taylor took control of the vehicle. When it turned out that the victim had no money to steal on his person, Johnson enlisted the help of a third unknown male to load up all of Franklin's possessions from his home. Franklin testified that he feared for his life, he did not feel free to leave, and he only remained in the car with the pair because they carried him away by gunpoint. T. 126.

Johnson merely points to the fact that his testimony contradicted the victim's testimony. However, such an observation pertains to the weight of the evidence, not the legal sufficiency of the evidence. The jury was faced with the victim's testimony which implicated Johnson on all counts versus Johnson's denials. It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State*, 945 So.2d 414, 421 (¶21) (Miss. Ct. App. 2006) (citing *Taylor v. State*, 744 So.2d 306, 312 (¶17) (Miss. Ct. App. 1999). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* Again, the victim's testimony is enough to show that Johnson was guilty of all counts.

When the State is given the benefit of all reasonable inferences which may be drawn from the evidence, it is clear that the State presented legally sufficient evidence to support the jury's verdicts.

II. JOHNSON WAS NOT ENTITLED TO A DURESS INSTRUCTION.

When considering jury instruction issues, reviewing courts examine jury instructions as a whole with no one instruction taken out of context. *Wallace v. State*, 10 So.3d 913, 916 (¶9) (Miss. 2009). A criminal defendant is entitled to jury instructions which present his theory of the case. *Id.* However, this entitlement is limited by the trial court's discretion to refuse instructions which incorrectly state the law, are without foundation in the evidence, or which are fairly covered by other granted jury instructions. *Id.*

Johnson's proposed duress instruction was properly refused as having no foundation in the evidence. Duress was simply not Johnson's theory of defense. His defense was that he was merely present at the scene and did not participate in any way in any of the crimes charged. T. 256-66. The State recognizes that a defendant is entitled to present inconsistent theories of defense. *McCune v. State*, 989 So.2d 310, 320 (¶18) (Miss. 2008). However, "although [a] criminal defendant has a right to assert alternative theories of defense, even inconsistent alternative theories . . . there must be an evidentiary basis therefor." *Id.* (internal citations omitted). It is true that Johnson claimed that Taylor threatened him, but Johnson's claim was that Taylor threatened to kill him after the commission of the crimes if Johnson told anyone about the crimes. T. 262. Johnson never claimed that Taylor threatened to kill him if he did not actively participate in the crimes. Duress is an affirmative defense. *Smith v. State*, 948 So.2d 474, 478 (¶16) (Miss. App. 2007). If a defendant denies any involvement in a crime, there can be no evidentiary foundation for the granting of an instruction on duress or any other affirmative defense.

Deloach v. State, 977 So.2d 400 (Miss. Ct. App. 2008), is instructive. Deloach was convicted of burglary of a church. *Id.* On appeal, he argued that the trial court erred in refusing a lesser included offense instruction on vandalism, which Deloach characterized as his alternative

theory of defense. *Id.* at 403 (¶¶10-13). At trial, however, Deloach testified that he was not in the vicinity of the church at the time of the burglary. *Id.* at 403 (¶13). As such, both the trial court and this honorable Court found that there could be no evidentiary foundation for an instruction on vandalism because the defendant maintained he was not even at the church at the time of the burglary. *Id.*

The trial court properly denied instruction D-2 because duress was not Johnson's theory of defense and because there was no evidentiary foundation for the granting of a duress instruction.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Johnson's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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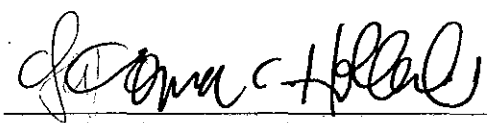
This the 25th day of August, 2011.



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