IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERRY O. JOHNSON — APPELLANT

V. — NO. 2010-KA-1237

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERRY O. JOHNSON	**APPELLANT**
V.	**NO. 2010-KA-1237**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Terry O. Johnson, Appellant
3. Honorable Dewayne Richardson, District Attorney
4. Honorable Richard A. Smith, Circuit Court Judge

This the 6 day of June, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERRY O. JOHNSON — APPELLANT

V. — NO. 2010-KA-01237

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON EACH COUNT.

THE TRIAL COURT ERRED IN DENYING A JURY INSTRUCTION ON JOHNSON'S THEORY OF THE CASE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, and a judgment of conviction for the crimes of Count I - Armed Robbery, Count II - Armed Carjacking, Count III - Kidnapping, Count IV - House Burglary, and use of a firearm during commission of armed robbery, armed car jacking, and kidnapping. On Count I, Johnson was sentenced to a term of ten (10) years; on Count II, Johnson was sentenced to ten (10) years; Count III, Johnson was sentenced to ten (10) years; Count IV, Johnson was sentenced to fifteen (15) years, with ten (10) years to serve and five (5) years post release supervision. Count I, II,

III, and IV are to run concurrently in the custody of the Mississippi Department of Corrections. Finally, use of a firearm during the commission of the above felonies, Johnson was sentenced to five (5) years in the custody of the Mississippi Department of Corrections, to run consecutive to Counts I, II, III, and IV. Johnson is in the custody of the Department of Corrections following a jury trial on May 27-28, 2010, Honorable Richard A. Smith, presiding.

FACTS

On or about April 16, 2009, Terry Johnson[1] had enjoyed an afternoon at his brother-in-law's house, when he got brought into a horrible situation by Xezavion Taylor[2]. Johnson had been at a barbecue at the house of his brother-in-law, and when he decided to leave, he told Taylor that he was going to the house. Tr. 256. Johnson had decided to go to the house of Kendall Franklin[3] to get a ride home. Tr. 256-57.

According to Johnson, he went to Doolittle's house and Taylor followed him. Tr. 257. Johnson and Taylor went into Doolittle's house and asked him for a ride home. *Id.* Doolittle initially told Johnson no, but eventually decided to take Johnson home. *Id.*

Doolittle driving Johnson and Taylor to the January Apartments was about to pull onto Shelby Drive and Taylor pulled out a gun and pointed it toward Doolittle. Tr. 258. According to Johnson, Doolittle was driving, Taylor was in passenger seat next to Doolittle, and he was in the backseat. *Id.* Johnson testified that he was shocked and pretended to be asleep and laid down in the backseat. *Id.*

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[1] Terry Johnson hereinafter is Johnson

[2] Xezavion Taylor hereinafter is Taylor, and is also know as "X"

[3] Kendall Franklin was also known as Doolittle

Johnson testified that Taylor made Doolittle ride to the levee, and then Doolittle and Taylor switched places in the car. Tr. 259. Taylor then proceeded to drive to an area called Carver Circle, still pointing the gun toward Doolittle and ordering him to put his head in his lap. *Id.*

Taylor was demanding the money that Doolittle had been saving for some rims for his car. Tr. 260. As Doolittle stated he did not have any money, Taylor smacked him a couple of times with the pistol. *Id.* Taylor then shot the pistol a couple of times outside the car. *Id.* At this point, according to Johnson, he was confused and scared, because he thought that Taylor was going to kill him and Doolittle. Tr. 261.

Johnson continued to stated that Taylor was mad that Doolittle would not give him any money. Taylor then got out of the car and was talking to some other people, who had pulled up behind Doolittle's car. *Id.* Taylor ordered Johnson out of the car and the other guys little with Taylor and Doolittle. *Id.*

After about thirty to forty-five minutes, Doolittle and Taylor came back to get Johnson and took Johnson home. Tr. 262. Taylor told Johnson that if he said anything to anybody or told anybody or called the police what Taylor had done, that he was going to kill him. Tr. 262-63.

Doolittle's story is initially similar to Johnson's version of events. Doolittle lived at 540 East Alexander in Greenville, Mississippi. Tr. 107. He lived in a house structure that each individual rented a room and shared a common area, as the bathroom and kitchen. He claimed that on April 16, 2009, as he was in bed, Johnson and Taylor were knocking on his door. Tr. 109. Doolittle recognized Johnson, because he used to date Johnson's mother. Tr. 108.

Johnson asked Doolittle for a ride home and eventually Doolittle agreed to drive them home. Doolittle stated that as he was driving them home, he felt a gun on the back of his head.

Taylor, sitting in the backseat, pulled a gun and asked Doolittle where was his money and started checking his pockets. Tr. 111. After asking Doolittle for his money and realizing he did not have any money, he ordered Doolittle to drive to the levee. Tr. 112. Once they arrived at the levee, Taylor ordered Doolittle to get out of the car. He told Doolittle to get in the passenger side, Johnson got in the backseat and Taylor got in the drivers seat. Tr. 113.

Taylor was driving the car with the gun in his lap, drove away from the levee and went to Carver Circle. Taylor was still demanding money from Doolittle. *Id.* Taylor pulled over on the side of the road and hit Doolittle with the gun two times. Tr. 113-14. Taylor continued to ask Doolittle where the was money and then told Doolittle to open the door and he shot out the passenger door two of three times. Tr. 114.

Taylor then drove to some apartment by the Weddington Elementary School. Tr. 115. According to the testimony of Doolittle, Taylor exited the car and gave the gun to Johnson to keep the gun on Doolittle. Tr. 115. Once Taylor came back, Doolittle stated that Johnson gave the gun back to Taylor. Taylor then proceeded to ask Johnson if he knew of anyone that could help and Johnson said yes. Taylor then drove to the January apartments. Tr. 117.

Doolittle claims that Johnson got out of the car and went to get someone. Taylor then ordered Doolittle to keep his head down and between his legs. Tr. 118. Johnson then returned with someone and they went to Doolittle's house. *Id.* Taylor had the keys to Doolittle's house, and according to Doolittle, Johnson and this third person made two trips inside Doolittle's house bring items out and putting them in the trunk. Tr. 120.

Once they got back in the car, Taylor drove back by Weddington and met someone else. Tr. 120-21. Doolittle claimed that Johnson and third person began to take his stuff out of his

trunk and into this other vehicle. Doolittle stated that Taylor ordered Johnson to get into the other car. Tr. 121.

Taylor and Doolittle then ride out to the levee. Once they got back to the levee, Taylor ordered Doolittle get out of the car and into the trunk. Tr. 122. Doolittle stated that he rode in the trunk of the car for around ten or fifteen minutes. Tr. 123. He heard Taylor get out of the car and Doolittle heard another car that had pulled up behind his car. *Id.* Doolittle had a flashlight and a few tools inside the trunk of the car. With some pliers he was able to open the trunk. Tr. 124.

Once he got out of the trunk, Doolittle walked to his house and called the police. Tr. 125. He told them that Johnson was involved, but he did not know the others involved. *Id.* Doolittle reviewed some photos and was able to identify Taylor as being involved also. Tr. 125-26.

Doolittle stated that his wallet with $51 was taken from his room, along with speakers, and all his clothes. Tr. 126. He stated that the cd player, woofers, an amp, and his cell phone was taken from his car. Tr. 127.

Johnson was subsequently arrested and indicted for armed robbery, armed carjacking, kidnapping, house burglary, and use of a firearm during the commission of the above felonies.

SUMMARY OF THE ARGUMENT

The evidence was insufficient to warrant the convictions of armed robbery, armed carjacking, kidnapping, house burglary, and use of a firearm during the commission of a felony. All the evidence points to Taylor as the instigator of all the events that occurred during the night of April 16-17, 2009. Johnson testified that he did not have any involvement and did not even know the intentions of Taylor prior to the events in question. Johnson stated that he went to the home of Doolittle to ask for a ride home, and all events that occurred after were executed

without his prior knowledge. Johnson proclaims that he did not know Taylor very well and was in the wrong place at the wrong time. Terry Johnson states that the evidence is insufficient to find him guilty of the above crimes.

Under the theory of duress, the case ***Ruffin v. State***, 992 So.2d 1165, 1177-78 (Miss. 2008), discussed the defense of duress, stating the general rule that "where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal." Any and all actions of Johnson were under duress and the fear that Taylor was going to kill him. Johnson asks this court to review the evidence and reverse and render his conviction or in the alternative, reverse and remand for a new trial.

ARGUMENT

ISSUE NO. 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON EACH COUNT

A. Standard of Review.

The standard of review regarding the sufficiency of the evidence is well-established. Review of a motion for a directed verdict tests the sufficiency of the evidence. ***Bush v. State***, 895 So. 2d 836, 843 (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* (quoting ***Carr v. State***, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. ***Bush***, 895 So. 2d at 844 (quoting ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)).

The Mississippi Supreme Court has held that "if the facts and evidence considered in a challenge to sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the appellate court should reverse and render the jury verdict." ***Kerns v. State***, 923 So.2d 196, 199 (Miss. 2005)(quoting ***Edwards v. State***, 469 So.2d 68,70 (Miss. 1985)). *See also* ***Stewart v. State***, 909 So.2d 52, 56 (Miss. 2005); ***Randolph***, 852 So.2d at 555; ***Fair***, 789 So.2d at 820.

B. Armed Robbery

Mississippi Code Annotated Section 97-3-79 (1972) provides that "[e]very person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery. . . ." "The elements of robbery are felonious intent, force or putting in fear, and carrying away the property of another as a result of the force or fear." ***Thomas v. State***, 754 So.2d 579, 581 (Miss. Ct. App. 2000). *See* ***Glenn v. State***, 439 So.2d 678, 680 (Miss. 1983). For the crime of armed robbery, the proof must show that the exhibition of the deadly weapon, causing violence or fear of immediate injury, was the means by which the personal property of another was taken. ***Clark v. State*** 756 So.2d 730 (Miss. 1999). "Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor' and is equally guilty with the principle offender." ***Nichols v. State***, 822 So.2d 984, 989 (Miss. Ct. App. 2002) (quoting ***Gleeton v. State***, 716 So.2d 1083, 1088 (Miss. 1998)).

In ***Duckworth***, "[A] deadly weapon may be defined as any object, article or means which, when used as a weapon is, under the existing circumstances reasonably capable of or likely to produce death or serious bodily harm to a human being upon whom the object, article, or means is used as a weapon." ***Duckworth v. State***, 477 So.2d 935, 938 (Miss. 1985).

Johnson never participated or assisted Taylor in attempting to rob Doolittle. According to the testimony of Johnson, he was hiding in the backseat during the entire time that he was in the car and shocked when Taylor pulled a gun on Doolittle. Tr. 258-59. Furthermore, even Doolittle's testimony never implicates Johnson regarding the armed robbery. Doolittle testified that Taylor pulled the gun and demanded money. Tr. 112. Doolittle never claimed that Johnson was trying to obtain anything from the result of Taylor pulling the gun.

"The elements of robbery are felonious intent, force or putting in fear, and carrying away the property of another as a result of the force or fear." ***Thomas v. State***, 754 So.2d 579, 581 (Miss. Ct. App. 2000). All the elements of robbery were not present with regard to Johnson.

Johnson was just riding in the car when Taylor pulled the gun on Doolittle attempting to rob him. Nothing in the record connects Johnson to the armed robbery of Doolittle. The prosecution did not prove the elements of armed robbery pertaining to Johnson. First, Johnson did not take any property as a result of the force or fear, second, at no point in time did Johnson force or put Doolittle in fear. Johnson asks this court to reverse and rendered this conviction because the evidence was insufficient to find Johnson guilty. Accordingly, the trial court erred in not granting Johnson's motion for a directed verdict. The Appellant, Johnson, asserts that the Court should reverse and render on this issue, or in the alternative reverse and remand for a new trial.

C. Armed Carjacking

Mississippi Code Annotated *Section* 97-3-117(2) (1972) provides that "[w]hoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm . . .shall be guilty of armed carjacking."

Johnson never drove Doolittle's car nor did he ever request the car to be driven to a certain location. Johnson only asked Doolittle to drive him home, which was agreed upon by Doolittle. Whether Johnson was in the backseat as he claimed or in the passenger seat as claimed by Doolittle, Johnson never pulled the gun on Doolittle ordering him to drive somewhere.

The mere fact that Johnson introduced Taylor to Doolittle is not enough in itself to say that Johnson was a part of the events that followed. Johnson never used the pistol to take possession of the car. Johnson testified that he was shocked when Taylor pulled the gun out and point it in the direction of Doolittle. Tr. 258.

Johnson asks this court to reverse and rendered this conviction because the evidence was insufficient to find Johnson guilty. Accordingly, the trial court erred in not granting Johnson's motion for a directed verdict. The Appellant, Johnson, asserts that the Court should reverse and render on this issue, or in the alternative reverse and remand for a new trial.

D. Kidnapping

Johnson was charged with kidnaping under **Mississippi Code Annotated Section 97-3-53 (Rev. 2004)**. The Mississippi Code sets out the elements of kidnapping as "[a]ny person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any person, or shall inveigle or kidnap any other person with the intent to cause such person to be confined or imprisoned against his or her will. . . ." **Miss. Code Ann. § 97-3-53**

(Rev. 2004). "Kidnapping is not a specific intent crime. Therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnapping as opposed to the actual intent to kidnap." ***Milano v. State***, 790 So.2d 179, 187 (Miss. 2001); ***Williams v State***, 445 So.2d 798, 809 (Miss. 1984). "[T]o prove kidnapping the state must show that the defendant: (1) forcibly seized and confined or (2) inveigled or kidnapped another, with the intent to cause such a person either (a) to be secretly confined, or (b) to be deprived of liberty or in any way held to service against her will." ***Williams v. Puckett***, 283 F.3d 272, (C.A.5 (Miss.) 2002)., certiorari denied 123 S.Ct. 504, 537 U.S. 1010, 154 L.Ed.2d 411.

According to the testimony of Johnson, he was not a participant in any crimes on the night of April 16-17, 2009. He had no intentions of Doolittle other than a ride home. Tr. 258. Johnson denied any involvement with the actions of Taylor. He claimed to not know that Taylor had a gun. *Id.* Once Johnson saw Taylor with the gun, Johnson laid down in the back seat and acted like he was asleep. Tr. 258-59.

The only evidence presented to the court that Johnson was involved was Doolittle's testimony that Johnson held the gun on him during the time that Taylor exited the car. Tr. 115. However, Taylor ordered Johnson to hold the gun. *Id.* Johnson later testifies that he never held the gun and that when Taylor dropped him off he told Johnson that if he said anything about what had happened to anyone that he kill him. Tr. 262-63. Johnson did not

Johnson asks this court to reverse and rendered this conviction because the evidence was insufficient to find Johnson guilty. Accordingly, the trial court erred in not granting Johnson's motion for a directed verdict. The Appellant, Johnson, asserts that the Court should reverse and render on this issue, or in the alternative reverse and remand for a new trial.

E. House Burglary

Mississippi Code Ann *Section* 97-17-23 (1972) provides that "[e]very person who shall be convicted of breaking and entering the dwelling house or inner door or such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein." "A dwelling house is defined as '[e]very building joined to, immediately connected with, or being part of the dwelling house. . . ." ***Washington v. State***, 753 So.2d 475, ¶ 8 (Miss. App. Ct. 1999). "There are two elements that must be proven in order to convict a person for the crime of burglary. These are (1) an unlawful breaking and entering, and (2) the intent to commit some crime once entry has been gained." ***Washington***, 753 at 478, ¶ 14, (quoting ***Harrison v. State***, 722 So. 2d 681, ¶ 11 (Miss. 1998)).

Johnson testified that he had no knowledge of any items being taken from Doolittle's house. Tr. 264. He said the only time he went into Doolitte's house was when he went to ask him for a ride home. *Id.* Johnson continued to state that Taylor made him get out of the car while they were at Carver Circle. Tr. 261-62. Johnson said that Taylor, Doolittle, and some other guys left when he got out of the car, but thirty to forty-five minutes later, Taylor and Doolittle returned to pick up Johnson. *Id.* Johnson stated that he did not leave, because he was scared and did not know where he was in that part of town. Tr. 262. The first element of burglary was not met.

In examining the second element of burglary, this Court stated in ***Washington*** that "[i]ntent is an emotional operation of the mind, and it is usually shown by acts and declarations of the defendant coupled with facts and circumstances surrounding him at the time. Defendant's intention is manifested largely by the things he does." ***Washington v. State***, 753 So.2d 475, 478 (Miss. Ct. App. 1999)(*quoting* ***Newburn v. State***, 205 So.2d 260, 265 (Miss. 1967)). Also stated.

Johnson stated that Taylor threatened him, and that if he said anything to anybody, or told anybody or called the police and told them what Taylor had done, that he was going to kill Johnson. Tr. 262-63. Johnson claimed that he was not involved at all but any of his actions were out of duress.

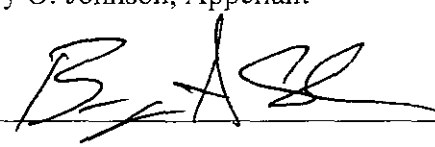
According to ***Smith v. State***, 948 So.2d 474, (Miss. App. 2007) the defense of duress is synonymous with the defense of necessity and is classified as a "justification" defense, citing ***Bain v. State***, 67 Miss. 557, 560, 7 So. 408, 409 (1890), and ***Powe v. State***, 176 Miss. 455, 461, 169 So. 763, 765 (1936), and ***Brown v. State***, 252 So.2d 885 (Miss.1971) where the court said "[i]n the final analysis the most that can be said relative to the appellant's testimony as to duress is that it presented a question for the jury to determine."

Since D-2 properly stated the law and was not covered by other instructions, Johnson is entitled to a new trial to present his theory of the case. ***Green v. State***, 884 So.2d 733, 735-38 (Miss. 2004).

CONCLUSION

Johnson asks this court to reverse and render his convictions for a new trial. The evidence was weak that connects Johnson to the conduct and crimes of Xezavion Taylor against Doolittle (Kendall Franklin). The mere association with Taylor is not enough to prove a conspiracy. ***Davis v. State***, 485 So.2d 1055, 1058 (Miss.1986). Johnson acted out of duress and his actions should be covered under the defense of duress. Johnson asks this court and reverse and render or at a minimum reverse and remand his convictions for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Terry O. Johnson, Appellant

BY: 

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Terry O. Johnson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 6 day of June, 2011.

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