

**IN THE COURT OF APPEALS 10/01/96**

**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

BRIDGES, P.J., DISSENTING:

I respectfully dissent from the majority's decision to reverse this case for a new trial. There was no reversible error, and the jury verdict should be affirmed. The majority reversed this case because of what it referred to as a "hopeless conflict" between jury instructions. To the contrary, I believe jury instructions can be read together to determine if the jury has been properly charged.

The Mississippi Supreme Court does not review jury instructions in isolation. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 752 (Miss. 1996); *Malone v. State*, 486 So. 2d 360, 365 (Miss. 1986) (citations omitted). The court reads jury instructions as a whole; imperfections in particular instructions do not require reversal where they fairly communicate the primary rules applicable to the case. If two dissimilar jury instructions are read jointly, and they adequately inform the jury of the law, the improper instruction is harmless error. *Hornburger v. State*, 650 So. 2d 510, 515 (Miss. 1995); *Gray v. State*, 487 So. 2d 1304, 1308 (Miss. 1986) (citations omitted).

At trial, Duell confessed to the burglary of his aunt's home, but claimed that an acquaintance coerced him into committing the crime with the threat of physical harm. Based upon this testimony, the court granted Duell jury instructions D-6 and S-4. Instruction D-6 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 that 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.

Together with 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 the threatened harm.

Though the majority claims the instructions are conflicting, I would contend that the two additional elements set forth in instruction S-4, when read together with D-6, adequately charge the jury. The trial judge was within his discretion in admitting instruction S-4, and to disturb this conclusion would be beyond our scope of review. Therefore, I would affirm the trial court's decision and must respectfully dissent.

**BARBER, J., JOINS THIS SEPARATE WRITTEN OPINION.**