

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO MARCHELLO DUPREE,

Defendant-Appellant.

FOR PUBLICATION

May 28, 2009

No. 281408

Wayne Circuit Court

LC No. 06-008543-01

Advance Sheets Version

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

GLEICHER, J. (*concurring*).

I concur with the lead opinion’s conclusion that the incorrect jury instruction resulted in error requiring reversal of defendant’s conviction. I write separately to highlight the reasons that a new trial is required and to respond to the dissent.

The lead opinion holds that “a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm.” *Ante* at 9. As the lead opinion explains, the precise elements of this narrowly circumscribed defense appear in *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997). In *Lemons*, the Supreme Court specifically noted that the contours of the duress defense include that “the threatening conduct or act of compulsion must be ‘present, imminent, and impending[, that] [a] threat of future injury is not enough,’ and that the threat ‘must have arisen without the negligence or fault of the person who insists upon it as a defense.’” *Id.*, quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920).

The ability of a defendant charged with being a felon in possession of a firearm¹ to employ a defense of duress should not be a matter of great debate. Our Supreme Court recognized in *Lemons* that “[d]uress is a common-law affirmative defense” and applies in situations “where the crime committed avoids a greater harm.” *Lemons, supra* at 245-246. In *Dixon v United States*, 548 US 1; 126 S Ct 2437; 165 L Ed 2d 299 (2006), the United States Supreme Court assumed that duress constituted a viable defense to an analogous federal statute

¹ MCL 750.224f.

criminalizing the acquisition of a firearm while under indictment, 18 USC 922(n). See also *People v Hernandez-Garcia*, 477 Mich 1039, 1041, in which our Supreme Court presumed that duress could constitute a defense to a charge of carrying a concealed weapon, MCL 750.227(2), and *United States v Mason*, 344 US App DC 91, 94; 233 F3d 619 (2000) (“Both the Government and the defendant agree that there is a ‘justification’ defense to a felon’s possession of a gun in violation of [18 USC 922(g)(1)].”).²

Although defendant in the instant case labeled his defense “self-defense” rather than “duress,” he unquestionably presented to the jury a scenario entirely consistent with a classic duress defense. The initial jury instruction given by the trial court properly encapsulated a duress defense:

As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that’s the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

However, instead of giving this instruction, the trial court inexplicably informed the jury regarding the elements of “innocent possession,” a different and distinct defense.

Courts have applied the defense of temporary innocent possession in felonious weapon or drug possession contexts under circumstances that do not present an imminent threat of bodily injury or death. For example, in *Mason*, the defendant, a convicted felon, found a weapon in a paper bag near a schoolyard. He was arrested after he carried the weapon into the Library of Congress, and claimed that he intended to give the gun an officer who worked at the library. In *People v Martin*, 25 Cal 4th 1180, 1191; 108 Cal Rptr 2d 599; 25 P3d 1081 (2001), the California Supreme Court applied the innocent possession defense to the momentary or transitory possession of contraband for the purpose of disposing it. The courts recognizing an innocent possession defense generally emphasize that otherwise criminal possession of contraband may qualify as truly innocent only if a defendant promptly turns the contraband over to the police. But no court has engrafted this requirement onto the duress defense. As the dissent appears to recognize, the innocent possession defense played no role in this case.³

Despite acknowledging the irrelevance of the innocent possession instruction read by the trial court, the dissent opines that “providing the instruction was *beneficial* to defendant’s cause

² Several courts have criticized or rejected the analysis in *Mason*. See, e.g., *United States v Gilbert*, 430 F3d 215, 220 (CA 4, 2005); *United States v Mercado*, 412 F3d 243, 252 (CA 1, 2005); *United States v Baker*, 508 F3d 1321, 1325 (CA 10, 2007).

³ The dissent correctly observes that other courts have rejected the central holding in *Mason*, which permits an “innocent possession” defense under limited circumstances. But it bears emphasizing that neither the lead opinion nor this concurrence relies on *Mason*’s holding. Rather, both Judge Kelly and I recognize that the innocent possession defense was entirely inapplicable in this case.

and gave defendant an opportunity to have his misconduct (illegally possessing a firearm) excused by the jury.” *Post* at 3 (emphasis in original). I respectfully disagree. The instruction given actually *foreclosed* any possibility that the jury would excuse defendant’s brief possession of a firearm because it injected an unnecessary requirement—turning the weapon over to the police—that defendant unquestionably had not fulfilled. The trial court’s instruction was not merely imperfect, it essentially instructed the jury that defendant had failed to prove an essential element of the defense.

Furthermore, I respectfully reject the dissent’s contention that provision of the incorrect instruction “at least gave defendant some slight ability to defend against this charge, more than had no instruction been given at all.” *Post* at 4. Defendant requested, and the trial court initially gave, a self-defense instruction that justified defendant’s brief possession of the gun. When the trial court added to the instruction the requirement that defendant had to promptly turn the weapon over to the police, it negated defendant’s claim of self-defense.

When a defendant raises the duress defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress. *People v Field*, 28 Mich App 476, 478; 184 NW2d 551 (1970). Similarly, “[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). The trial court’s instruction here that defendant bore an obligation to prove that he had intended “to deliver the gun to the police at the earliest possible time” was not only incorrect under the circumstances of this case, but also impermissibly shifted the burden of proof to defendant. The injection of an inapplicable element into defendant’s self-defense or duress claim decreased the prosecution’s burden to negate these claims. Furthermore, because a defendant has a state and federal constitutional right to present a defense, “[i]nstructional errors that directly affect a defendant’s theory of defense can infringe a defendant’s due process right to present a defense.” *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002).

In my view, the incorrect instruction provided by the trial court qualified as preserved constitutional error.⁴ Preserved constitutional error requires reversal unless the error is shown to be harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The jury disbelieved all the prosecution’s witnesses and determined that defendant had acted in self-defense. While the facts are somewhat unclear with respect to whether defendant gave up possession of the weapon as soon as the claimed duress had lost its coercive force, *Lemons*, *supra* at 247 n 18, sufficient evidence supported a rational conclusion that defendant did not have a reasonable opportunity to safely escape from Damon Reeves without taking the gun. Whether defendant then possessed the gun longer than absolutely necessary inherently involves a judgment concerning defendant’s credibility, a question for the jury. Because it appears likely that the jury rested its verdict entirely on the basis that defendant lacked any intent to turn the

⁴ Regardless of whether defendant forfeited or waived more specific instructions regarding his duress defense, defendant indisputably objected to the instruction regarding his intent to deliver the gun to the police at the earliest possible time.

weapon over to the police, in my view the instructional error was not harmless beyond a reasonable doubt.

/s/ Elizabeth L. Gleicher