IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HANCE CHATAVIUS WEST — APPELLANT

VS. — NO. 2006-KA-1353-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HANCE CHATAVIUS WEST **APPELLANT**

VS. **NO. 2006-KA-1353-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The focal points in this criminal appeal from convictions of aggravated assault and failure to stop a motor vehicle are the denial of a continuance sought the morning of trial and the admission into evidence of testimony from the victim allegedly describing a prior altercation.

West argues with great vigor he was entitled to a continuance the morning of trial because of a discovery violation. He also argues that testimony concerning the prior altercation " . . . was admitted strictly to show prejudice against West and to show that he acted in conformity therewith on a particular occasion, not to show motive." (Brief of the Appellant at 12)

HANCE CHATAVIUS WEST, a non-testifying, twenty-four (24) year old African American male, single father of three (3) children, and resident of Greenville (R. 80, C.P. at 8, 11, 49, 306-09), prosecutes a criminal appeal from the Circuit Court of Washington County, Mississippi, W. Ashley Hines, Circuit Judge, presiding.

West, in the wake of a two count indictment returned on May 23, 2006, was convicted of aggravated assault (Count I) and failing to stop his motor vehicle during a post-assault pursuit by

a law enforcement officer.

The indictment, omitting its formal parts, alleged in Count I

> "[t]hat . . . HANCE CHATAVIUS WEST . . . on or about [the] 8th Day of January, 2006, in Washington County, did unlawfully, willfully and feloniously cause or attempt to cause bodily harm to Laurence Clay by shooting him with a deadly weapon, to-wit: a hand gun.

It charged in Count II

> "[t]hat HANCE CHATAVIUS WEST, on or about [the] 8th Day of January, 2006, did willfully, unlawfully and feloniously, while driving a motor vehicle, fail to stop the vehicle in compliance with a visible and/or audible signal given by a law enforcement officer acting in the lawful performance of duty and who had a reasonable suspicion to believe that the driver had committed a crime, to wit: Aggravated Assault, *et cetera* . . ." (C.P. at 3-4)

Following trial by jury conducted on July 19-20, the jury returned dual verdicts finding the defendant guilty of aggravated assault as charged in count #1 and guilty of failure to stop a motor vehicle as charged in count #2 of the indictment. (C.P. at 45-46)

On July 21, 2006, Judge Hines, following a brief hearing during which West. via family members, presented testimony in extenuation and mitigation of his sentence (R. 305-16), sentenced West to serve twenty (20) years in the custody of the MDOC for the crime of aggravated assault charged in Count I and to serve five (5) years, consecutive to Count I, for the crime of failing to stop his motor vehicle charged in Count II. (R. 304-15; C.P. at 47-48)

Two (2) issues, articulated by West as follows, are raised on appeal to this Court:

1. "The trial court erred in denying West's motion for continuance after the State failed to comply with discovery rules by not providing medical records requested until the morning of the trial." (Brief of the Appellant at i, 1, and 5)

2. "The trial court erred in overruling West's objection to exclude character evidence of prior

bad acts in violation of Rules 403 and 404 of the Mississippi Rules of Evidence." (Brief of the Appellant at i. 1, and 10)

STATEMENT OF FACTS

West has penned a fair and accurate recitation of the salient facts involved in this case. (Brief of the Appellant at 2-4) Accordingly, we decline to re-plow that ground in great detail here.

It is enough to say that during the daytime hours on January 8, 2006, Hance West shot Laurence Clay, a 26 year old Greenville resident employed by UPS, in the posterior left shoulder near the top of Clay's scapula. Clay was seen and treated in the emergency room of the Delta Regional Medical Center in Greenville where it was determined the bullet did not enter the chest cavity. Although no surgical operation was required, Clay, nevertheless, was admitted to this medical treatment facility for observation where he remained as an inpatient from January 8, 2006, to January 10, 2006.

Immediately following the shooting, West, who was the target of a BOLO, refused to stop while being pursued by Greenville police officers. West subsequently abandoned his motor vehicle and was captured following a brief foot pursuit.

Seven (7) witnesses testified on behalf of the State during its case-in-chief, including the victim, **Laurence Clay** (R. 81-125), who testified that West fired seven to nine shots at him while Clay was running from West in hasty retreat. (R. 95-96) We quote:

> Q. Now, Laurence, while he was shooting those seven times, what were you doing?
>
> A. Running and looking back.
>
> Q. What was he doing?
>
> A. Shooting.

Q. Were you ever hit?

A. Yes.

Q. Do you know with what shot?

A. Huh?

Q. Do you know with what shot you were hit?

A. I think it was the shot before the last shot.

Q. The shot before the last shot?

A. Uh-huh.

Q. And when you were hit, tell the jury what you felt.

A. It felt like - - it felt like thunder. It hurt me so bad. It hurt me. I couldn't even hold my arm up.

Q. And once you were shot, what did you do? What did you do?

A. Kept running. I looked - - after I felt I was shot, I looked back to see how close he was to me. Then he shot again, and I just kept running. (R. 96-97)

* * * * * *

Q. What type of gun was he shooting?

A. Could have been a 9-millimeter or a .45.

Q. Do you know if it was an automatic or revolver?

A. Automatic.

Q. Do you know what color the gun was?

A. Black. (R. 98)

* * * * * *

Q. Laurence, on January 8 - - on January the 8th, 2006, the

man that shot you, do you see him in the courtroom?

A. Yes.

Q. Would you point to him and tell the jury what he is wearing?

A. He's wearing that purple shirt right there with a necktie – with that tie on right there.

MR. RICHARDSON. Your Honor, for the record - - if the record will so reflect the witness has iden tified the defendant.

THE COURT: Let the record so reflect. (R. 102)

The identity of the shooter was corroborated by Clay's sister, Algea, who was an ear and eye witness to the entire affair. (R. 131-32, 152)

At the close of the State's case-in-chief, West, pointing to various inconsistencies in the testimony, moved for a directed verdict of acquittal of all charges on the ground that " . . . no reasonable or fair-minded juror could take the evidence that has been presented as far as yesterday and today and find in favor of the State considering the standard beyond a reasonable doubt." (R. 251-53)

Following brief arguments by the litigants, this motion was overruled. (R. 254-55)

After being personally advised of his right to testify or not, West chose not to testify in his own behalf. (R. 256-57) No witnesses were presented in defense of the charges; rather, West rested his case at the close of the State's case-in-chief. (R. 272)

At the close of all the evidence, West's request for peremptory instruction was denied. (R. 261; C.P. at 37)

Following closing arguments, the jury retired to deliberate at 12:55 p.m. (R. 300) One hour

later, at 1:55 p.m., it returned with the following verdicts:

"As to Count One, we, the jury, find the defendant guilty of aggravated assault as charged in Count One of the indictment." (R. 301) "As to Count Two, we, the jury, find the defendant guilty of failure to stop a motor vehicle as charged in Count Two of the indictment." (R. 301)

A poll of the jury reflected the verdicts returned were unanimous. (R. 301-02) Sentencing was deferred until the following day. (R. 302)

Following a hearing conducted on July 21, 2006, during which the trial judge heard testimony from West's mother, step-father, and aunt, Judge Hines sentenced West to serve twenty (20) years in the custody of the MDOC for aggravated assault and five (5) years in the custody of the MDOC for the crime of failure to stop a motor vehicle. (R. 314-15; C.P. at 47-48) The latter was to run consecutive to the former.

On July 21, 2006, West delivered to the district attorney a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. at 50-51) A claim conspicuously absent from the motion was the denial of a continuance.

The motion was overruled on July 21, 2006. (C.P. at 52)

Carol White-Richard and Derrick Simmons, practicing attorneys in Greenville and the office of the Washington County Public Defender, represented West very effectively during trial. (C.P. at 9)

After Mr. Simmons perfected West's direct appeal to this Court, Benjamin A. Suber, a lawyer with the Mississippi Office of Indigent Appeals, drafted and filed the brief on behalf of West. Mr. Suber's representation on appeal has been equally effective.

SUMMARY OF THE ARGUMENT

ISSUE NO. 1. Continuance.

West's argument is devoid of merit for no fewer than four (4) reasons.

First, appellant's claim that a continuance should have been granted is incapable of being reviewed on appeal to this Court because the denial of a continuance was not assigned as a ground in West's motion for a new trial. **Crawford v. State,** 787 So.2d 1236 (Miss. 2001).

Second, this Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. The decision to grant or deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice." **Coleman v. State,** 697 So.2d 777 (Miss. 1997).

We agree wholeheartedly with the circuit judge that the medical records were not crucial to any aspect of the case. (R. 3)

Counsel for West stated prior to trial that " . . . customarily in an aggravated assault charge where bodily injury is one of the things that the State has to prove, they always provide medical records." (R. 3) In this case, however, proof of bodily injury or the seriousness thereof was not even remotely contested.

Third, the two lawyers for West were afforded a "reasonable opportunity . . . to examine the newly produced documents." Both were given 20-25 minutes prior to the beginning of trial to examine the medical dossier (R. 4) which was ultimately admitted into evidence without objection by the defendant or his counsel. (R. 246)

In addition to this, before the State called its first witness, the trial judge declared a 20 minute recess (R. 41), later a 30 minute recess (R. 57), and subsequently the court gave the parties an hour and 45 minutes for lunch. (R. 69) That's nearly three (3) hours for four (4) eyes to review

the medical dossier, the content of which is not particularly complicated.

Ms. White-Richard, one of West's two lawyers, obviously had a sufficient amount of time to study the medical reports. During cross-examination of Clay the following colloquy took place.

> Q. So that Sunday – hadn't you been at the house smoking a little weed?
>
> A. No, I do not smoke. They drug test me every day at UPS. We have random drug test.
>
> MS. WHITE-RICHARD: May I approach the witness, Your Honor.
>
> THE COURT: You may.
>
> Q. *Mr. Clay, this is out of the medical records that you had.* It says, patient, Laurence Clay, if I'm reading this correctly, you let me know. Twenty-six years old, the account number and the date that you were there. It says January the 8th of '06, correct?
>
> A. Uh-huh.
>
> Q. *From marijuana it shows greater than one- point - - one hundred thirty-five; is that correct? Do you know what that means?*
>
> *A. Uh-uh, what it mean?*
>
> *Q. The presence of marijuana. You know how that would have shown up in your system? I'm asking you.*
>
> A. Could have been around somebody [that] was smoking. (R. 120-21) [emphasis ours]

Counsel for the defense was able to cover the proverbial waterfront with respect to the revelation, if any, in the medical dossier concerning Clay's marijuana use.

During defense counsel's cross-examination of Iris Stacker, an administrator with the Delta Regional Medical Center, counsel elicited testimony that Clay's chemistry profile reflected

"marijuana in urine greater than 135-point-0" which was above the normal range. (R. 248-49) A continuance for the purpose of amplifying this matter was neither justified nor required.

Fourth, counsel stated that a continuance was required because " . . . we don't know whether or not there's something in there that we could use." (R. 2)

There wasn't.

It was a futile fishing expedition, if you please. At best, the records contained only impeaching evidence as opposed to any substantive matters beneficial to West's defense. (Brief of the Appellant at 7) Given the facts and circumstances found in this case, 175 minutes (20 + 20 + 30 + 60 + 45 minutes) was a reasonable time for review of the records which, quite frankly, contain nothing that would have really benefitted West in defense of the charges.

Accordingly, no abuse of judicial discretion or manifest injustice has been demonstrated here.

ISSUE NO. 2. Prior Bad Acts.

The trial judge did not abuse his judicial discretion in admitting the testimony criticized here. A cautionary charge targeting the earlier altercation was granted. (C.P. at 26)

"Appellate courts assume that juries follow the [trial court's] instructions." **Clemons v. State,** 535 So.2d 1354, 1361 (Miss. 1988).

ARGUMENT

ISSUE NO. 1.

THE DENIAL OF A CONTINUANCE IS NOT SUBJECT TO APPELLATE REVIEW BECAUSE SUCH WAS NOT ASSIGNED AS A GROUND FOR A NEW TRIAL.

IN ANY EVENT, NO MANIFEST INJUSTICE ENSUED. THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING A CONTINUANCE.

We opine at the outset that the target of West's appellate complaint is the denial of a continuance and not belated discovery. (Brief of the Appellant at i., 4, 8, 9, 10) West asserts he " . . . was entitled to a continuance of the proceedings against him and failure to do so was prejudicial error which entitles a reversal and remand to the trial court." (Brief of the Appellant at 10)

In ruling on the motion, voiced *ore tenus* prior to trial, Judge Hines stated:

> THE COURT: Well, I'm going to deny the motion, because, I don't know, I just don't see that the medical records are that crucial to the - - you know, to any aspect of the case, but I"ll give you a little recess to look at them. How thick is it?
>
> MR. RICHARDSON: This is the copy we had made of what she has. She has them.
>
> MS. WHITE-RICHARD: It's pretty thick.
>
> THE COURT: Well, I'll give y'all a little recess to look over that, if you want. (R. 3-4)

The trial judge was eminently correct. The nature of Clay's injuries and the extent and duration of his treatment at the medical center are not issues in this appeal. In short, West was neither ambushed nor surprised.

West argues that "[t]estimony from Clay that he did not smoke marijuana could have been contradicted by an expert reviewing these records." (Brief of the Appellant at 7)

West majors on the minors.

Assuming Clay's occasional marijuana use was admissible, such was merely impeaching evidence excruciatingly insufficient to undermine the integrity of Clay's version of the shooting and his identity of West as the shooter. As pointed out in our summary of the argument, counsel for the defense cross-examined Clay concerning a notation in the medical records that marijuana was present in Clay's system. (R. 121-22)

West's complaint is devoid of merit for this reason, if for no other.

West states in his brief that "[t]he trial court only allowed West a few minutes to view the document." (Brief of the Appellant at 4)

This claim is somewhat misleading.

We pointed out in our summary of the argument, that the four eyes of dual counsel had a total of nearly three (3) hours to review the medical dossier. While the right hand was doing one thing, the left hand could have been leafing through the medical dossier. No expert was needed to analyze the records because the documents were penned in plain and ordinary English.

In accordance with Rule 9.04 of the Uniform Rules of Circuit and County Court Practice, " . . . the defense [was given] a reasonable opportunity . . . to examine the newly produced documents . . ."

West argues that "[a] motion for continuance would have allowed West a proper defense and a reasonable opportunity to review the records." Regrettably, West has yet to identify that "proper defense." Accordingly, the "interest of justice" did not require a continuance.

More importantly, however, the denial of a continuance is not an issue capable of being reviewed on appeal where, as here, the denial of the continuance is not assigned as a ground for a new trial in the defendant's post-trial motion for a new trial. (C.P. at 50-51)

On motion for a new trial, certain errors must be brought to the attention of the circuit judge so that he may have the opportunity to pass upon their validity before the Supreme Court, a reviewing tribunal, is called upon to review them. **Shelton v. State,** 853 So.2d 1171, 1182 (Miss. 2003), citing **Metcalf v. State**, 629 So.2d 558 (Miss. 1993), and **Farris v. State,** 764 So.2d 411, 423 (Miss. 2000). One of those errors is the denial of a continuance in the trial court which is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial

on this ground. **Crawford v. State,** 787 So.2d 1236 (Miss. 2001).

We go no further than the following language found in **Pool v. State,** 483 So.2d 331, 336 (Miss. 1986), which is dispositive of West's complaint:

> Finally, Pool is procedurally barred from raising this issue on appeal, as it was not listed as grounds in his motion for a new trial.
>
> > The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion.
> >
> > *Colson v. Sims,* 220 So.2d 345, 347, n. 1 (Miss. 1969); *see also Jackson v. State,* 423 So.2d 129 (Miss. 1982).

See also **Morgan v. State,** 741 So.2d 246, 255 (Miss. 1999)["Morgan's motion for new trial and for judgment notwithstanding the verdict made no mention of the denial of a continuance. Because the issue was not properly preserved, and because the trial court did not have the opportunity to rule on this claimed error, this issue is not properly before this Court and is procedurally barred."]; **Reeves v. State,** 825 So.2d 77 (Ct.App.Miss. 2002)[Denial of a continuance in the trial court is not reviewable in the appellate court unless the party whose motion for a continuance was denied makes a motion for a new trial on this ground.]

There is no reference to the denial of a continuance in West's motion for a new trial. (C.P. at 50-51) West has failed to demonstrate the issue was preserved for appellate review. Regrettably, all of this is fatal to his present complaint. **Johnson v. State,** 926 So.2d 246 (Ct.App.Miss. 2005), reh denied.

Counsel for West has not stated how West's defense to the shooting and failure to stop would have been any different had he had additional time to review the medical reports. No prejudice to West has been seriously alleged or demonstrated.

Regrettably, there is nothing in the present record demonstrating that Judge Hines abused his broad discretionary powers in failing to grant a continuance. Stated differently, there is nothing in this record demonstrating the denial of a last minute continuance resulted in a "manifest injustice."

This Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. **Payton v. State,** 897 So.2d 921 (Miss. 2003) citing Rule 9.04, Uniform Circuit and County Court Rules; **Smiley v. State,** 815 So.2d 1140 (Miss. 2002), reh denied; **Richardson v. State**, 722 So.2d 481 (Miss. 1998); **Wilson v. State**, 716 So.2d 1096 (Miss. 1998), citing Miss.Code Ann. Section 99-15-29; **Greene v. State**, 406 So.2d 805 (Miss. 1981), citing section 99-15-29, Mississippi Code 1972 Annotated (1973); **Clay v. State,** 829 So.2d 676 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245; **Gilbert v. State,** 934 So.2d 330 (Ct.App.Miss. 2006), reh denied; **McFadden v. State,** 929 So.2d 365 (Ct.App.Miss. 2006), reh denied.

Unless the trial court abuses its discretion to the prejudice of the defendant, its action will not be held error. *See* **Carter v. State**, 473 So.2d 471 (Miss. 1985); **Greene v. State**, *supra*; **Woods v. State**, 393 So.2d 1319 (Miss. 1981); **Norman v. State**, 385 So.2d 1298 (Miss. 1980).

Moreover, the decision to grant or to deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice." **Coleman v. State**, 697 So.2d 777 (Miss. 1997); **Atterberry v. State**, 667 So.2d 622 (Miss. 1995); **Lambert v. State,** 654 So.2d 17 (Miss. 1995), appeal after remand 724 So.2d 392; **Johnson v. State**, 631 So.2d 185 (Miss. 1994); **McGee v. State,** 828 So.2d 847 (Ct.App.Miss. 2002); **Peters v. State,** 920 So.2d 1050 (Ct.App.Miss. 2006).

One of this Court's many expressions on the subject matter is found in **Jackson v. State**, 538

So.2d 1186, 1188-89 (Miss. 1989), where we find the following:

> The standards our courts employ when one criminally accused requests a continuance may be found in Miss.Code Ann. Section 99-15-29 (1972). [footnote omitted] The granting or denial of a continuance rests within the sound discretion of the trial judge. [citations omitted]
>
> Our dispositive inquiry is whether denial of Jackson's motion for a continuance resulted in substantial prejudice to his right to a fair opportunity to prepare and present his defense. Indeed, the last line of Section 99-15-29 reads
>
> > [D]enial of continuance shall not be grounds for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.

West has failed to demonstrate that a "manifest injustice" resulted from the denial of a last minute continuance the day trial was to begin. (R. 6)

ISSUE NO. 2.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ADMITTING TESTIMONY CONCERNING A PRIOR ALTERCATION.

West argues the trial judge erred in admitting testimony concerning a prior altercation between him and Clay taking place approximately a month prior to the incident at bar.

The testimony proffered by the State, outside the presence of the jury, is quoted as follows:

> Q. [BY PROSECUTOR:] Okay. Now, what happened? How did this [prior] altercation transpire?
>
> A. It all started because his sister - - me and his sister was talking or whatever, and she had gave me a sexual disease.
>
> Q. Okay. Now, was she there that night?
>
> A. Yeah. She the one what got me and brought me to it.
>
> Q. Did you have an altercation with the sister?
>
> A. No, she said a few words, and I ignored her. [T]hat was it.

Q. Okay and how did Hance - - how did you and Hance have an altercation?

A. She went and got him and brought him over there to where I was.

Q. And what happened when he came over there?

A. Well, he hit – he waited - - we had a few words, told me don't disrespect his sister or whatever. I still didn't say nothing to him. I ignored him, didn't say nothing to him. As I was trying to leave, he hit me from behind with a bottle.

Q. And did you do anything in return?

A. No. (R. 87)

West argued in the court below, and argues on appeal as well, this evidence " . . . was offered to show that the accused acted in conformity therewith, not to show motive" and that it " . . . was more prejudicial than probative." (Brief of the Appellant at 4, 14)

The prosecutor, in turn, argued that

" . . . this testimony is indeed necessary as to the - - give the jury - - to paint the picture of the entire event or set of circumstances as they relate to this case. This prior altercation in fact happened just a month prior or less than a month, considering this was January 8, '06, when the victim was shot . . . " (R. 89-90)

Judge Hines voiced the following ruling outside the hearing and presence of the jury:

THE COURT: Well, I think it's relevant as to motive, which is one of the exceptions to the 404, which I'll give you a limiting instruction on it. But as far as this testimony that he's offered here, I think that that's admissible, so I'll overrule the objection.

MS. WHITE-RICHARD: Okay, Your Honor. Motive as to?

THE COURT: Well, I think it goes as to motive as to the motive for him to do whatever he did that they allege he did on - -

MS. WHITE-RICHARD: The next date. Okay.

THE COURT: - - January 8th. (R. 90-91)

We point out that a cautionary charge targeting this evidence was granted in the form of jury instruction number 13 (CR–6). It reads, in its entirety, as follows:

> The Court instructs the Jury that during the course of this trial you have heard offers of proof that an earlier altercation occurred between Mr. West and Mr. Clay. Proof of this incident is offered solely as evidence of motive. You should not consider this evidence for any other purpose. *You should not consider this prior evidence as proof of Hance West's actions on January 8, 2006.* (C.P. at 26) [emphasis ours]

We also invite the attention of this Court to the following paragraph found in jury instruction number 1:

> The production of evidence in court is governed by rules of law. *From time to time during the trial, it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourself with the reasons for the Court's rulings since they are controlled and governed by the rules of law. You should not infer from any rulings by the court on these motions or objections that the court has any opinion on the merits favoring one side or the other.* You should not speculate as to possible answers to questions which the court did not require to be answered. Further, you should not draw any inference from the content of these questions. (C.P. at 20-21) [emphasis ours]

"Appellate courts assume that juries follow the instructions." **Clemons v. State,** 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State,** 475 So.2d 1136, 1142 (Miss. 1985).

Judge Hines found as a fact and concluded as a matter of law that evidence of the prior altercation was relevant. We respectfully submit, it passes the test required for relevancy.

Miss.R.Evid. 401 defines relevant evidence as " . . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." If the evidence has any probative value at all, Rule 401 favors its admission. *See* Comment to Rule 401.

Clay testified that he and West's sister, Odelia, " . . . were having [a] relation, and she gave me a sexual disease and I told her about it, and she got offended." (R. 91) This conversation with Odelia, with whom Clay had had an "on and off" relationship for eight (8) years (R. 85), took place a week prior to the night of the beer bottle altercation. (R. 116)

The night of the beer bottle incident, Odelia went and got West, and both of them confronted Clay. West told Clay not to disrespect his sister. (R. 87, 91-92)

A reasonable, fairminded juror could have found from the prior altercation involving West's sister, Odelia, that West's hostility toward Clay carried over to the following weeks. In other words, West carried a grudge because Clay, in the mind of West, had offended and been disrespectful to his sister.

In a scene that in former years only took place in the wild West where gunslingers roamed the streets with near impunity, West pursued Clay on foot with his pistol blazing. No fewer than nine (9) shots were fired at Clay who was attempting to either dodge or outrun a hail of speeding bullets. (R. 96-97, 113, 131, 169)

"Generally, evidence of crimes other than the one for which the accused is on trial is inadmissible in a criminal prosecution. * * * The reason for the rule is to preclude the State from raising the 'forbidden inferential sequence,' that the accused has committed other crimes and is therefore more likely to be guilty of the offense charged." **Robinson v. State,** 497 So.2d 440, 442 (Miss. 1986). There are, however, exceptions to the general rule.

The following language found in **Davis v. State,** 530 So.2d 694, 697 (Miss. 1988), is applicable to West's complaint:

> Mississippi follows the general rule that proof of a crime distinct from that alleged on the indictment should not be admitted in evidence against the accused. *Eubanks v. State*, 419 So.2d 1330, 1331 (Miss. 1982); *Loeffler v. State*, 396 So.2d 18 (Miss. 1981); *Massey v. State*, 393 So.2d 472 (Miss. 1981). However, there are certain well established exceptions to this rule. **Where the other crime admitted into evidence is connected with the one charged in the indictment, and proof of such other crime sheds light upon the motive of the defendant for the commission of the crime charged in the indictment, or where the fact of the commission of such other crime forms a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its general parts, then evidence of other crimes is admissible.** *Tanner v. State*, 216 Miss. 150, 157, 61 So.2d 781, 784 (1953).
>
> **The trial judge committed no error because the other crimes mentioned were part of the *res gestae* of the crime in the appellant's indictment and therefore admissible.** This assignment of error is without merit. [emphasis supplied]

See also **Collins v. State,** 513 So.2d 877, 879 (Miss. 1987), where this Court said:

> On a different note, this Court has also held that evidence may be introduced as part of the *res gestae* /2 of a crime if it was an inseparable part of the entire transaction. *Woods v. State*, 393 So.2d 1319, 1324 (Miss. 1981).
>
> The admission of *res gestae* evidence is largely left to the sound discretion of the trial judge. *Hemingway v. State*, 483 So.2d 1335, 1337 (Miss. 1986).

> /2 The whole of the transaction under investigation and every part of it.

See also **Wheeler v. State,** 536 So.2d 1347, 1352 (Miss. 1988), and the cases cited therein.

The admissibility of *res gestae* evidence is largely within the discretion of the trial judge. **Carter v. State**, 310 So.2d 271 (Miss. 1975). No abuse of judicial discretion has been demonstrated by West. This Court has recognized that evidence of a defendant's other crimes or misconduct is admissible where, as here, it is "integrally related in time, place and fact." **Hampton v. State,** 910

So.2d 651, 655 (Ct.App.Miss. 2005) quoting from **Neal v. State,** 451 So.2d 743, 759 (Miss. 1984). This Court has further recognized the State's legitimate interest in telling "a rational and coherent story" with respect to the crime charged. **Neal v. State,** *supra,* 451 So.2d at 759. *See also* **Simmons v. State,** 813 So.2d 710 (Miss. 2002) [Evidence of other crimes admissible to tell complete story so as not to confuse jury.]; **Underwood v. State**, 708 So.2d 18, 32 (Miss. 1998) ["Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the jury."] quoting from **Ballenger v. State** 667 So.2d 1242, 1257 (Miss. 1995); **Anderson v. State,** 811 So2d 410 (Ct.App.Miss. 2001) [State has a legitimate interest in telling the complete story of the crime.]

Accordingly, Clay's testimony describing statements made by West, the acts and conduct of West, and hostility exhibited by West a month prior to the incident at bar reflects they were within the *res gestae* of the assault itself. Stated differently, there was an apparent relation or connection between the act proposed to be proved and the act charged. Each was a part and parcel of the "whole story" of the crime charged.

But even if not, the criticized testimony would have been admissible under Miss.R.Evid. 404(b) to demonstrate motive, opportunity, intent, preparation, plan, and absence of mistake or accident.

The rule reads, in its pertinent parts, as follows:

> **Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes**
>
> * * * * * *
>
> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of **motive,**

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Without this evidence the jury would have had a "distorted view" of the entire picture which involved words that Clay had with West's sister, Odelia West, a week before the altercation where Clay was hit from behind in the head with a beer bottle. (R. 116) A jury could have found that West's anger and hostility carried over to the following month. Testimony describing the barroom incident had some relevancy with respect to West's motive for assaulting Clay on a subsequent day.

Finally, this Court has held time and again that the "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Parker v. State,** 606 So.2d 1132, 1136 (Miss. 1992), citing numerous cases. *See also* **Eskridge v. State,** 765 So.2d 508 (Miss. 2000) reh denied; **Tanner v. State,** 764 So.2d 385 (Miss. 2000); **Jones v. State,** 740 So.2d 904 (Miss. 1999); **Edwards v. State,** 737 So.2d 275 (Miss. 1999); **Johnston v. State,** 567 So.2d 237 (Miss. 1990); Miss.R.Evid. 103(a). That discretion, although "considerable," [**Edwards,** *supra*], must be exercised within the boundaries of the Mississippi Rules of Evidence. **Zoerner v. State,** 725 So.2d 811 (Miss. 1998), reh denied.

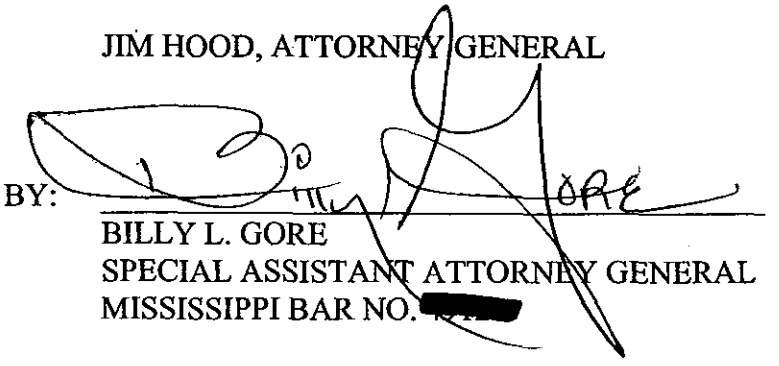
We note that defense counsel cross-examined Clay in some detail with respect to this prior incident. (R. 91-92) In the final analysis, no abuse of judicial discretion or prejudice to West has been demonstrated here. Accordingly, this assigned error is devoid of merit.

CONCLUSION

Appellee respectfully submits no reversible error took place during the trial of this cause. Therefore, the judgments of conviction for aggravated assault and failure to stop a motor vehicle and the sentences of twenty (20) years and five (5) years, respectively, imposed by the trial judge to run consecutively, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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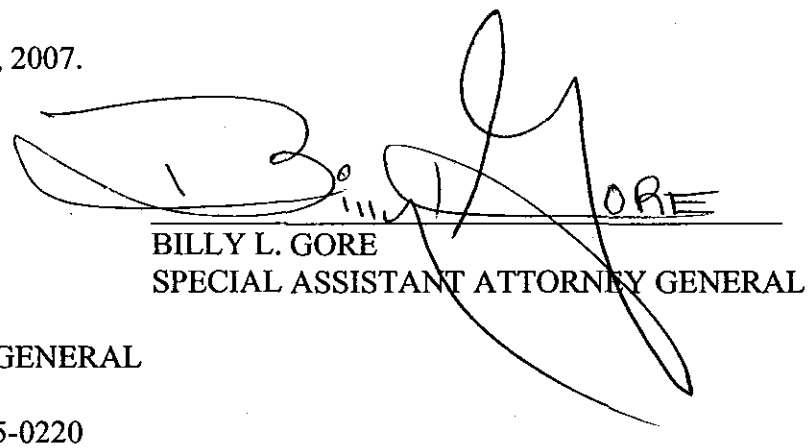
This the 30th day of May, 2007.



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