PAUL M. NEESE APPELLANT

VS. NO. 2007-KA-1070-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

STATE STATUTES

PAUL M. NEESE **APPELLANT**

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STATEMENT OF THE CASE

On November 7, 2006, Paul Neese, a forty-seven (47) year old handicapped resident of the Coldwater community in Neshoba County, shot and killed Jamal Peebles and Lakendrick Boyd, two 16-year-old youths and students at Philadelphia High School. (R. 162-65)

By his own admission, Neese was high on cocaine at the time of the shooting. (R. 97, 104, 57-58, 178-79)

Neese, who admitted at trial he shot the two youths, claimed he did so in lawful self-defense. Neese testified he " . . . was certain they was going to shoot me. There's no doubt about it." (R. 165)

The jury didn't buy this theory and convicted Neese of double murder less than capital. (R. 214; C.P. at 43-44) Neese, in a case of murder or justifiable homicide, was subsequently sentenced to serve two life sentences in the custody of the Mississippi Department of Corrections. (R. 216; C.P. at 45-44)

During a two (2) day trial by jury conducted on March 5-6, 2007, Neese was convicted of dual murders in the wake of an indictment returned on January 3, 2007, which states, in its pertinent parts

> " That PAUL M. NEESE . . . on or about the 7th day of November . . . 2006, as part of a continuing series of acts together and constituting one with the others parts of a common design, scheme and plan,
>
> COUNT ONE
>
> did wilfully, unlawfully, feloniously, without authority of law and with deliberate design to effect the death of the person killed, or of any human being, did kill and murder one Jamal Peebles, a human being, contrary to and in violation of Section 97-3-19(1)(a), Miss. Code of 1972, as amended,
>
> COUNT TWO
>
> did willfully, unlawfully, feloniously, without authority of law and with deliberate design to effect the death of the person killed, or of any human being, did kill and murder one Lakendrick Boyd, a human being, contrary to and in violation of Section 97-3-19(1)(a), Miss. Code of 1972, as amended, . . .

After the verdicts were in, and following a poll of the individual jurors (R. 214-15), Judge Gordon sentenced Neese to two terms of life imprisonment. (R. 216)

Three (3) issues are raised on appeal to this Court.

I.) The trial judge erred in failing to conduct an evidentiary hearing on the voluntariness of Meese's initial confession made prior to his arrest in the wake of general on-the-scene questioning.

II.) The trial judge erred in denying Meese's request for a directed verdict or peremptory instruction based upon the defendant's version of the homicide as examined through the lens of the sole eyewitness rule of the *Weathersby* Case. *See* **Weathersby v. State**, 165 Miss. 207, 209, 147

STATEMENT OF FACTS

Jamal Peebles and Lakendrick Boyd, two 16-year-old students at Philadelphia High School, are dead as a result of single gunshot wounds to their head. (R. 128, 134)

Paul Neese, a forty-seven (47) year old middle age man with a physical disability, freely admitted, both prior to and during trial, he shot young Peebles and Boyd with Boyd's pistol after both men beat him, robbed him, and held him hostage in an abandoned mobile home with no utilities in Neshoba County. (R. 164-65) According to Neese, who testified in his own behalf, he had on prior occasions purchased cocaine indirectly from the two youths, and he owed them over $200. (R. 167-68) G7

Neese claims the trial judge should have granted his motion for a directed verdict or peremptory instruction because his version of the homicide, if accepted as true, made out a case of self-defense or justifiable homicide.

The only eyewitness to the shooting and any altercations preceding it was the defendant himself.

Six (6) witnesses testified for the State of Mississippi during its case-in-chief, including **Dr. Steven Hayne**, the State's pathologist who, with the aid of photographs of both the victims and their wounds, testified the wound to Peebles was a near contact, perforating wound to the left side of the head (R. 134) while Boyd died from a gunshot wound to the right side of the head. (R. 128)

It was the position of the prosecution that both wounds were consistent with the theory the two youths were sleeping when they were shot and not engaged in the act of reaching for a weapon as claimed by Neese.

Q. [BY PROSECUTOR:] I want to call your attention, Sergeant Holland, to around 6:00 in the morning on that date, November the 7th, and ask if you - - uh - - answered a call to the area of Lewis Avenue?

A. [BY HOLLAND:] I did.

Q. What was the nature of the call?

A. Uh - - we received a call from dispatch that there was a white male standing outside of a residence on - - uh - - north Lewis Avenue - - uh - - banging on the door saying that - - uh - - uh - - some people had been shot.

Q. And where did you go in response to that?

A. I went to 272 North Lewis Avenue.

Q. What was the situation when you got there?

A. When I pulled up I observed a - - a white male wearing a camouflage jacket and blue jeans walking towards me down the driveway. Uh - - I stopped my car and got out and - - uh - - as he approached, I asked him what was going on.

Q. Okay. That white male, was it the defendant here, Paul Neese?

A. It was.

Q. Uh - - you asked him what was going on?

A. I did.

Q. Uh - - this was about 6:00 in the morning?

A. Shortly after. Yes, sir.

Q. Okay. Was - - was it daylight yet?

A. Almost.

much sense, but he responded, if I take my jacket off - -

BY MR. MANGUM: Your Honor, I object to what the defendant said.

BY THE COURT: Beg your pardon?

BY MR. MANGUM: I'm going to object as to what Mr. Neese said.

BY THE COURT: Overruled.

Q. What did he say?

A. He said, if I take my jacket off, you're going to arrest me. I just shot two people and the gun is in my back pocket. (R. 51-53)

At the close of the State's case-in-chief, the defendant made a motion for a directed verdict based upon the failure of the State to prove beyond a reasonable doubt the essential elements of murder. (R. 152-53)

Judge Gordon, applying the correct legal standard, overruled the motion. (R. 153)

The defendant, forty-seven (47) year old Paul Neese, testified in his own defense. He admitted shooting the two youths but claimed he did so only after he was beaten, robbed, intimidated, and virtually held hostage in an abandoned mobile home with few furnishings and no utilities. Drugs were sold from this location which, by defense counsel's own admission, was basically "a crack house." (R. 159, 168, 172, 197) According to Neese, when the shooting occurred he " . . . couldn't think because I had done got scared then." (R. 162) He felt the men would kill him if he tried to run out the door. (R. 163)

Neese's version of the incident is quoted as follows:

dice and - - uh - - the guy on the couch, he - - he - - he laid - - he rolled back and laid the gun across his chest, and - - and was chilling out, you know? And - - uh - - the guy on the mattress, he was just sitting there talking with him the whole time. Well - - uh - - his phone rang, but his phone was laying on the other side of the mattress so he turned over to the phone and - - uh - - I don't know what, you know. He never did answer it but he was just punching buttons, you know. I didn't know what - - you know, but I - - I spied the corn - - the handle of the gun was sticking out from under him right here because he had done rolled over. (Inaudible) was over there I guess. It was - - and I seen the handle of the gun. I told myself that if I could get hold of that gun I could make them let me leave. So that's the only reason I couldn't leave, because they - - like I said, they - - every time I - - you know, talked - every time I had tried, I got trouble out of it.

Q. Did you - - did you feel that they would kill you if you ran out the door?

A. Yes, sir. They had done talked about that.

Q. Okay. Well, let me - - and let me back up just a little bit. You're - - you're disabled aren't you?

A. Yes, sir.

Q. Okay. And what's your disability?

A. My upper right extremity and lower left extremity are disabled. I don't have full function of my right arm and my lower left leg.

Q. Okay. All right. Have you had problems with your back also?

A. Yes, sir.

Q. So it would be difficult for you to fight - - uh?

A. Oh, impossible. I - - I've never been able to fight period. I've never - - I've never been an aggressive person.

from me at that time.

Q. Okay. Then what happened?

A. I seen the butt of that gun and I convinced myself if I could get hold of that gun, I could walk out of there.

Q. Okay. And what did you do then?

A. I reached and grabbed the gun.

Q. Okay.

A. In one motion, I just reached over there and got it. When I went to stand up, I stumbled and fell back and I fell across the front of the chair I was sitting in.

Q. Okay. So you were - - were you sitting on the ground, or were you - - were you leaning?

A. I was leaning - - my arm was into the - - sitting in the chair. I left - - I fell down in front of the chair.

Q. Okay. What did he do?

A. He looked across his shoulder. He was - - like I said, he was laying on his left side, messing with the phone. He looked across his shoulder and - - uh - - when he looked across his shoulder he seen I had the gun. Well, he rolled on over and reached toward the couch. Well I knowed he was going for a gun, you know. I mean, I ain't stupid.

Q. You - - you know a gun was there?

A. Yes, sir.

Q. Okay.

A. They knew it was there too. They pushed it back up under there with their feet when they was rolling dice.

have time to think that much because I knew - - I know he was going - - they was going - - I was going to get shot.

Q. So you shot at that one?

A. So I shot him.

Q. Okay. Then what did the other guy do?

A. Immediately, he - - he - - he looked over across his shoulder like this and seen - - and seen me, and then he reached - - and the gun that was on his shoulder - - on his chest, I guess it fell off because he reached and started digging beside - - the couch and - - to get that - - to get the gun, and I shot him too.

Q. Okay.

A. I was certain they was going to shoot me. There's no doubt about it. (R. 163-66)

Neese admitted using cocaine supplied by another man while waiting inside the trailer for the return of Buckshot. (R. 157-58, 178)

Q. [CROSS EXAMINATION BY THE DISTRICT ATTORNEY:] Could it - - could it be maybe that cocaine was affecting your judgment that morning?

A. [BY NEESE:] I can't - - I don't - - I'm just trying to tell you that - - uh - - I knew I had done it - - done the cocaine.

Q. But anyway, you're saying you were real scared?

A. Yes, sir. Extremely. (R. 179)

At the close of all the evidence, peremptory instruction was denied. (R. 181; C.P. at 24-25)

The jury retired to deliberate at 9:10 a.m. (R. 213) and returned dual verdicts of "guilty of murder" two and a half hours later at 11:40 a.m. (R. 212-14; C.P. at 43-44)

(C.P. at 47-48) This motion, although assailing the denial of a directed verdict and peremptory instruction, contained no reference to the *Weathersby* rule.

The motion met the usual result - denied. (C.P. at 51)

Neese apparently seeks reversal and discharge. (Brief For Appellant at 11)

Jason Mangum and Chris Collins, felony indigent counsel, and practicing attorneys in Decatur and Union, respectively, represented Neese very effectively during the trial of this cause.

The representation of Edmund Phillips on direct appeal, as always, has been equally effective and proficient.

SUMMARY OF THE ARGUMENT

I.) The trial judge did not err in failing to conduct an evidentiary hearing for the purpose of litigating the voluntariness of Neese's initial and oral statement to law enforcement authorities. Neese's statement was practically volunteered but, even if not, it was the product of general on-the-scene questioning and was patently admissible. Officer Holland was " . . . attempting to resolve an ambiguous situation. The mere possibility of incrimination does not mean that a custodial interrogation occurred in violation of *Miranda*." **Drake v. State,** 800 So.2d 508, 514 (Miss. 2001).

In any event, Neese later gave an oral and voluntary second confession to Investigator Reid that said practically the same thing. Following a suppression hearing, the trial judge ruled that the oral confession reduced to writing by Reid was admissible. (R.91-93) That ruling is not an issue in this appeal.

harmless beyond a reasonable doubt.

II.) The well-worn *Weathersby* rule is inapplicable here because Neese's own version of the incident is inconsistent with the physical facts and his claim of self-defense. The defendant's explanation is substantially contradicted in material particulars by testimony, the physical facts and/or by facts of common knowledge.

In this posture, Neese's guilt or innocence was an issue exclusively for the jury.

III.) The trial court did not err in refusing to grant jury instruction D-12 or any other manslaughter instruction because a manslaughter instruction was not supported by the evidence.

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ERR IN FAILING TO CONDUCT AN EVIDENTIARY HEARING FOR THE PURPOSE OF LITIGATING THE VOLUNTARINESS OF NEESE'S FIRST INCULPATORY STATEMENT.

Neese contends the circuit judge erred in failing to conduct an evidentiary hearing to determine the voluntariness of Neese's first statement made to police officer John Holland who had been dispatched to Neese's location at a house on North Lewis Street. As Neese was approaching Holland's motor vehicle, Officer Holland got out of his car and asked Neese what was going on - general on-the-scene questioning in a non-custodial setting, if you please.

Defense counsel objected to Neese's response and presumably to anything else Neese

two people and the gun is in my back pocket." (R. 53)

Judge Gordon thereafter excused the jury whereupon the following took place:

> BY THE COURT: Officer - - the officer was about to make a statement - - uh - - objection was made and, of course, Mr. Mangum did not state the reason for his objection, but I - - I recognize that it was because of the *Miranda* case. Uh - - this is not a case where first, there must be a - - a hearing conducted out of the presence of the jury because he [Neese] was not in custody. It was not custodial interrogation. It was - - uh - - your on site statement, unsolicited - - that statement being unsolicited by Officer Holland, so your objection [is] overruled. (R. 53)

Neese's complaint, as we understand it, is that he was entitled to a hearing to determine whether or not his statement to Holland should be suppressed as involuntary, not in the sense of traditional voluntariness but in the *Miranda* sense.

This question is controlled by the following language found in **Tolbert v. State,** 511 So.2d 1368, 1375 (Miss. 1987), where we find the following language:

> First, *Miranda* is never brought to bear where the interrogation is investigatory and non-custodial. Where the interrogation is part of the "general on-the-scene investigation," *Miranda* warnings are not a prerequisite to the admissibility of the defendant's statements. *Pennington v. State,* 437 So.2d 37, 41 (Miss. 1983); *Fornett v. State,* 392 So.2d 1154, 1155-56 (Miss. 1981); *Yazzie v. State,* 366 So.2d 240, 243 (Miss. 1979); *Norman v. State,* 302 So.2d 254, 258-59 (Miss. 1974); *Ford v. State,* 226 So.2d 378, 381 (Miss. 1969); *Nevels v. State,* 216 So.2d 529, 530 (Miss. 1968); *see also Miranda,* 384 U.S. at 477, 86 S.Ct. at 1629, 16 L.Ed.2d at 725. The constitutionally mandated warnings followed by the defendant's waiver are prerequisites to a confession's admissibility only where the "accusatory stage" has been reached or the interrogation is "custodial."

> and was a part of Officer Whitehead's general on-the-scene investigation. The stage at which law enforcement authorities had formally focused the accusation process upon Tolbert had not then been reached. The statement was admissible, as the Circuit Court correctly held.

See also **Luster v. State,** 515 So.2d 1177, 1179 (Miss. 1987), where a police officer asked, "Can you tell me anything about it?" And the defendant replied, "I shot her." Citing **Tolbert,** *supra*, the Court " . . . repeated the well established rule under such circumstances, that where the interrogation is part of the "general on-the-scene investigation," *Miranda* warnings are not a prerequisite to the admissibility of the defendant's statements."

Prior to Neese's response to Holland's question, Neese was not under arrest, was not in police custody, and the sole question asked by law enforcement was abbreviated, investigatory, and non-interrogative in nature. It was not asked for the purpose of eliciting incriminating statements from the defendant; rather, Holland was simply responding to a dispatch advising him that a white male was outside a residence saying that some people had been shot. Holland was not aware a crime had actually been committed much less having knowledge that Neese committed it.

"It is well settled that a *Miranda* warning is applicable only where there is a custodial interrogation." **McDerment v. Mississippi Real Estate Commission**, 748 So.2d 114, 120 (Miss. 1999). *See also* **Wilson v. State,** 936 So.2d 357 (Miss 2006); **Levine v. City of Louisville,** 924 So.2d 643 (Ct.App.Miss. 2006).

Accordingly, Neese's voluntary statements to law enforcement, both before and after

So.2d 816 (Miss. 1998); **Dancer v. State**, 721 So.2d 583 (Miss. 1998); **Hunt v. State**, 687 So.2d 1154 (Miss. 1996).

"The threshold question in a *Miranda* rights analysis is whether the defendant was in custody and being interrogated when the statement in question was made." **Miller v. State**, 740 So.2d 858, 867 (Miss. 1999).

"Neither general on the scene questioning, nor voluntary statements made by a defendant are enough to trigger the requirements of *Miranda*." **Miller v. State**, *supra*, 740 So.2d at 867.

The following language found in **Hunt v. State**, *supra*, 687 So.2d 1154, 1160 (Miss. 1996), also recites the law governing the facts found in this case:

> * * * * * * The test for whether a person is in custody is whether a reasonable person would feel that she was in custody. That is, whether a reasonable person would feel that she was going to jail - - and not just being temporarily detained. *Compton v. State*, 460 So.2d 847, 849 (Miss. 1984). *See also, Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The officer's subjective intent is irrelevant. *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).
>
> **Whether a reasonable person would feel that she was "in custody" depends on the totality of the circumstances. Factors to consider include: (a) the place of interrogation; (b) the time of interrogation; (c) the people present; (d) the amount of force or physical restraint used by the officers; (e) the length and form of the questions; (f) whether the defendant comes to the authorities voluntarily; and (g) what the defendant is told about the situation.** *See People v. Goyer*, 265 Ill.App.3d 160, 202 Ill.Dec. 744, 747-48, 638 N.E.2d 390, 393-94 (1994). [emphasis supplied]

Let's examine the factors applicable to the question of whether a reasonable person would feel he was "in custody."

b. The time of interrogation.

Early morning. Not yet daylight. (R. 52)

c. The people present.

Officer Holland and Neese. (R. 52)

d. The amount of force or physical restraint.

None. Nada. No force, no handcuffs or other forms of physical restraint whatsoever. Only words in the form of short, abbreviated question with respect to "what was going on." (R. 52)

This is not indicative of police "custody."

e. The length and form of questions.

Short and abbreviated. Propounded for the purpose of resolving an ambiguous situation. *See* **Drake v. State,** *supra*, 800 So.2d 508, 514 (Miss. 2001).

f. Whether the defendant comes voluntarily with the officers.

He did.

g. What the defendant is told about the situation.

Holland simply inquired, "What is going on?" (R. 52)

Assuming the above test is even applicable here, it is clear a reasonable person would not have considered himself in police custody under these circumstances.

In any event, any error was certainly harmless beyond a reasonable doubt. Neese freely admitted at trial he shot the two youths but claimed he did so only in self-defense. The identity of the shooter was a non issue. Accordingly, any error in admitting Neese's statement

THE *WEATHERSBY* RULE IS INAPPLICABLE HERE BECAUSE THE DEFENDANT'S OWN VERSION OF THE INCIDENT, EVEN IF REASONABLE. WAS SUBSTANTIALLY CONTRADICTED IN MATERIAL PARTICULARS BY TESTIMONY, THE PHYSICAL FACTS AND BY FACTS OF COMMON KNOWLEDGE.

NEESE WAIVED HIS MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF WHEN HE TESTIFIED IN HIS OWN BEHALF.

In this appeal involving the shooting of two high school students, the focus is upon the applicability of the well-worn *Weathersby* rule to the facts brought out at trial. The defendant's version of the dual homicides was placed before the jury during the State's case-in-chief via Neese's oral statement given to chief investigator Reid the day following the shooting. This statement was transcribed by Reid in Reid's own handwriting. (R. 84-85)

The defendant also supplied his version of the shooting by testifying in his own behalf.

The *Weathersby* rule requires the trial judge to direct a verdict of acquittal for the defendant in the event the defendant is the only eyewitness to the homicide and his version of the killing is reasonable and not contradicted by other witnesses, physical facts, or facts of common knowledge. *See* **Weathersby v. State**, *supra*, 165 Miss. 207, 209, 147 So. 481, 482 (1933).

Neese contends the trial court erred when it denied his motion for a directed verdict of acquittal made at the conclusion of the State's evidence and his requests for peremptory instruction made at the close of all the evidence. (R. 152-53, 181; C.P. 24-25) Neese appears to suggest his version of the facts, as the only eyewitness, was not "substantially contradicted"

The well-worn *Weathersby* rule, a rule of law, states that where the defendant or the defendant's witnesses are the only witnesses to the homicide, their version, if reasonable, must be accepted as true, *unless substantially contradicted in material particulars by a credible witness or witnesses for the State or by the physical facts or by the facts of common knowledge.* **Weathersby v. State,** *supra*, 165 Miss. 207, 147 So. 481 (1933) *See also* **Green v. State,** 614 So.2d 926 (Miss. 1992); **Walters v. State,** 720 So.2d 856 (Miss. 1998); **Mullins v. State**, 493 So.2d 971 (Miss. 1986); **Fuller v. State**, 468 So.2d 68 (Miss. 1985); **Flanagin v. State**, 473 So.2d 482 (Miss. 1985); **McWilliams v. State,** 338 So.2d 804 (Miss. 1976). *See also* **Bullard v. State,** 923 So.2d 1043(Ct.App.Miss. 2005), reh denied, cert denied; **Kiker v. State,** 919 So.2d 190 (Ct.App.Miss. 2005), reh denied, cert denied.

The defendant's explanation may be contradicted either " . . . directly or by fair inference." **Kinkead v. State,** 190 So.2d 838, 839 (Miss. 1966).

A defendant who falls within the contours of the rule is entitled, upon request, to a directed verdict of acquittal. **Blanks v. State**, 547 So.2d 29, 33 (Miss. 1989).

Insofar as we can tell, Neese, at the close of all the evidence, did not renew his motion for a directed verdict made at the close of the State's case-in-chief.

Neese waived - forfeited, if you please - appeal of the denial of his motion for a directed verdict made at the close of the State's case-in-chief when he thereafter testified in his own behalf and gave his second version which, admittedly, is reasonably consistent with the first version given to chief investigator Reid.

> verdict, the defendant has waived the appeal of that directed verdict.

See also **Esparaza v. State**, 595 So.2d 418 (Miss. 1992); **Harris v. State**, 576 So.2d 1262 (Miss. 1991).

Although Neese subsequently moved, post-trial, for a new trial there is no reference therein to the *Weathersby* Rule. Moreover, it does not appear that Neese moved for judgment of acquittal notwithstanding the verdict. In this posture, we respectfully suggest the *Weathersby* issue has been waived and/or forfeited for the purpose of appellate review. The truth of the matter is the circuit judge was never given a fair opportunity to rule on this particular issue after the defendant, via his testimony, presented his own version of the homicide to the jury. This, we suggest, is fatal to Neese's complaint.

"[M]otions for a directed verdict must be specific and not general in nature." **Banks v. State,** 394 So.2d 875, 877 (Miss. 1981). "In the absence of such specificity, the trial court will not be put in error for overruling same." **Id.** We note with interest Judge Gordon's response to Neese's excruciatingly general motion for a directed verdict, *viz.*, "Is that all your motion?" (R. 152)

Neese did, on the other hand, request peremptory instruction but not on the basis of the *Weathersby* Rule. We think this should bar review of the issue.

Assuming, on the other hand, we are wrong and the issue has been preserved for appellate scrutiny, we respectfully submit that *Weathersby* does not apply here because Neese's version of the shooting was substantially contradicted by the physical facts and facts

with the idea the two youths were lunging or reaching for their weapons at the time that Neese, allegedly acting in lawful self-defense, fired two shots into their heads. *Cf.* **Pool v. State,** 809 So.2d 697 (Ct.App.Miss. 2001), reh denied, cert denied [Defendant's contention that shooting was an accident held contrary to testimony of officer and physician who suggested that victim's injury was inconsistent with accidental gun discharge.]

The prosecution's theory of the case was that Neese walked up behind Boyd and Pebbles while they were lying asleep on the mattress and couch, respectively, and executed them by firing two bullets into their heads. (R. 207) The motive was either money scooped up by Neese immediately after the shooting or the fact Neese was under the influence of cocaine which he had purchased and consumed in the trailer shortly before the homicides. (R. 208)

The Supreme Court " . . . has warned repeatedly that where circumstances are shown in the evidence which *materially contradict* the

defendant's version of self-defense, the jury is not required to accept his version of self-defense along with the conflicting evidence and any unfavorable inferences therefrom." **Pritchett v. State,** 560 So.2d 1017, 1019 (1990), citing **Harveston v. State,** 493 So.2d 365, 371 (Miss. 1986).

"In those cases in which the defendant is the only eyewitness to the slaying, and in which the *Weathersby Rule* is inapplicable, it then becomes a jury issue as to whether to believe or not believe the defendant's testimony of how the slaying occurred and to either convict or acquit." **Id.,** quoting from **Blanks v. State,** 547 So.2d 29, 33-35 (Miss. 1989).

circuit judge in determining whether a defendant is entitled to a directed verdict." **Blanks v. State,** *supra*, 547 So.2d 29, 34 (Miss. 1989) citing **Harveston v. State,** 493 So.2d 365 (Miss. 1986). We agree with Neese it is essentially a test of the sufficiency of the evidence applied upon proper motion or request. **Green v. State,** *supra*, 614 So.2d 926, 931-32 (Miss. 1992).

The present case is clearly within the contingencies which remove the necessity for the trial judge to accept as true the defendant's version and direct a verdict of acquittal. As stated previously, Neese's version of the incident is inconsistent with his claim of self-defense. *See* **Tran v. State,** 681 So.2d 514, 520-21 (Miss. 1996).

In the case at bar, there are physical facts which tend to substantially contradict Neese's claim the shootings were done in self-defense. The following facts brought home to the jury during the State's closing argument point unerringly to the inapplicability of the *Weathersby* rule to the facts in this case. (R. 203-09)

We point specifically to the following: **1)** the use of unreasonable or excessive force; **2)** the trajectory of the bullets and the distance they traveled; **3)** the position of Neese prior to the shooting; **4)** the position of the bodies after the shooting; **5)** the location of the guns; **6)** the imminency of the danger; **7)** the number of gunshots; **8)** the location of the victim's wounds; and **9)** the defendant's disability and **10)** the role and influence of cocaine. More on all this later.

The gist of Neese's appellate complaint is that he was entitled to a favorable ruling on his motion for a directed verdict and/or request for peremptory instruction because under the

State or by the physical facts or by facts of common knowledge. Neese suggests that no reasonable hypothetical juror could have found the shooting of Boyd and Peebles was anything other than justifiable homicide pursuant to Mississippi Code Ann. § 97-3-15.

We acknowledge there is no substantial contradiction in Neese's statements before and during trial. His versions of the incident, both in Reid's handwritten transcription and in Neese's trial testimony, are not conflicting. Nevertheless, a reasonable and fairminded juror could have found that even if Neese's versions were reasonable, there were still substantial and material contradictions brought about by credible witnesses for the state, the physical facts, and by facts of common knowledge.

First, a reasonable, fairminded, and hypothetical juror could have found the danger to Neese was not imminent and that excessive and unreasonable force was used to repel any assault then in the making. *See* **Griffin v. State,** 292 So.2d 159, 163 (Miss. 1974) where we find the following language:

> Finally, appellant urges that the trial court was in error in failing to apply the *Weathersby* rule and grant his request for a peremptory instruction. We find no merit in this contention. We have had the occasion hereto fore to point out that it is a rare case that meets the requirements of the *Weathersby* rule. The rule is where the defendant or the defendant's witnesses are the only eye witnesses to a homicide, their version, if reasonable must be accepted as true, unless substantially contradicted by a credible witness or witnesses for the state or by the physical facts or by facts of common knowledge. **Appellant admits striking the deceased several times with a tire tool, his justification was that the deceased was advancing on him with a knife. He never explained why it was necessary for him to beat her to death in order to protect himself. Therefore, under his own version, it was**

a cushion on the couch and the hunting rifle was found underneath the couch where it had been pushed. (R. 73, 165) These are locations that were not easily accessible to Boyd and Peebles.

Although Neese repeatedly testified he was scared and afraid of the two youths (R. 162, 179), it is the law in this State that " . . . one does not have the right to kill another merely because he is afraid of him; nor may one kill another because he is afraid that he will receive some bodily harm." **Shinall v. State,** 190 So.2d 251, 259 (Miss. 1967).

Second, a reasonable, hypothetical juror could have rejected Neese's claim he shot in self-defense where, as here, Neese testified that after he grabbed the pistol he stumbled and fell across a chair. Yet Neese managed to put two perfectly aimed shots into the heads of the two youths. Couple this observation with Neese's self-described disability - Neese testified he did not have full function of his right arm and his lower left leg - and one can reach the conclusion that Neese was either an exceptional marksman or he shot the youths while they were sleeping. Neese's version is simply farfetched and contrary to both logic and common sense.

Third, the physical facts and facts of common knowledge contradict any conclusion the shooting was justifiable or excusable. We point to the position of the victims as they were found by law enforcement officers. Note the position of their legs and their feet in State's exhibits 3 and 4 which negates the idea the youths were attempting to rise up while attempting to retrieve a weapon. Boyd's feet are propped on the arm rest of the couch while Peebles feet

tentacles of *Weathersby*.

Fourth, the pistol that Neese claims was laying on Boyd's chest was found tucked underneath a cushion on the couch. (R. 111) This negates the idea that Boyd was "digging beside the couch to get the gun" at the time that Neese shot Boyd. (R. 165, 173-74)

Fifth, Dr. Hayne, who performed the autopsies on Boyd and Peebles, described the two gunshot wounds in great detail. (R. 122-134) The wound to Boyd was a near contact wound caused by a gun muzzle that was only six (6) inches away from Boyd's head. (R. 131, 133) A significant amount of tattooing was found beneath Boyd's skin. (R. 129-30)

The wound to Peebles was a wound inflicted from a distance of only 2 to 2 ½ feet. (R. 125) These are physical facts contradicting Neese's claim of self-defense.

Sixth, Neese testified he was scared of the two youths who had threatened him and refused to allow him to leave until he payed them what he owned. Yet Neese fired only two shots when he had five shots available. (R. 54) A reasonable and fairminded juror could have found that a normal person in the seemingly perilous situation described by Neese - two assailants going for weapons - would have kept pulling the trigger until the gun didn't shoot any more.

Once again, a juror could have found that Neese was either a great marksman/sharpshooter or he shot the two youths at close range while they were asleep. Both Officer Holland and investigator Reid testified that it appeared to them the two youths were sleeping. (R. 66,147-48, respectively)

Moreover, Neese himself testified the two men were not "completely asleep" and that

coupled with his stumbling and falling over a chair immediately preceding the shooting, are physical facts and facts of common knowledge negating his version of self-defense. The nature and location of the two head wounds strongly suggests they were deliberately inflicted with astounding accuracy and pinpoint precision.

Eighth, the killings took place while Neese was high on cocaine. By his own admission he had smoked over $100 worth of dope. (R. 104)

Ninth, although Neese claimed in his oral statement he was "steadily trying to get out of there without getting shot" (R. 105), the record reflects Neese had ample opportunities to complain to others, including his cousin, Mike, or to even leave the mobile home but made no attempt to do so. (R. 105)

Tenth, prior to leaving, Neese scooped up the loose money, over $130. (R. 107)

A reasonable, hypothetical juror could have found the State successfully proved beyond a reasonable doubt Neese did not act in self-defense. (Jury instructions S-4 and D 8 at C.P. 35, 39)

In **Sartain v. State,** 311 So.2d 343, 345 (Miss. 1975), quoting from **Murphy v. State,** 232 Miss. 424, 99 So.2d 595 (1958), the Supreme Court opined:

> The *Weathersby* case has been almost worn threadbare by the efforts of defendants to come within its rule. **It is a rare case that meets all of the requirements of the rule.** This, in our opinion, is not one of the rare cases . . . [emphasis ours]

Nor is the case *sub judice*. Neese's guilt or innocence of the crime charged was properly left for the determination of the jury.

fairminded hypothetical jury could have found Neese guilty of murder. Whether the killing was murder or justifiable homicide was a question for the jury in the wake of proper jury instructions. *See* instruction number S-4 and D-8 at C.P. 35 and 39, respectively.

The jury is the final judge of whether a defendant acted in justifiable self-defense. **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973); **Yarber v. State**, 230 Miss. 746, 93 So.2d 851, 852 (1957). Put another way, "[i]t is for the jury to determine the reasonableness of the ground upon which the defendant acts." **Robinson v. State**, 434 So.2d 206, 207 (Miss. 1983).

In **Cooley v. State**, 391 So.2d 614, 616-17 (Miss.1980), we find an informative collation of cases succinctly explaining the law of self-defense.

> Insulting words can never justify a homicide, unless they are of such nature as to cause defendant to believe he is threatened with grave, impending danger.
>
> [*Reed v. State*, 197 So.2d 811, 814 (Miss. 1967)].
>
> Be that as it may, there is no principle of criminal law better settled - none more necessary to the peace of society, and the safety of human life - than that threats, however deliberately made, do not justify the taking the life of the party making them. That is excused when done in the necessary defense of one's own life, or to escape great bodily harm. [T]he law tolerates no justification, and accepts no excuse for the destruction of human life, on the plea of self-defense, except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life, or of great personal injury, must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life.

alleged threats and apprehension of threats there must be a demonstration by the party making the threat which would induce a reasonable man to believe that there was danger of such threat being immediately executed.

[*Molphus v. State*, 124 Miss. 584, 598, 87 So. 133, 135 (1921)].

The instruction requested by appellant is clearly erroneous. By it the appellant sought to have the court charge the jury that appellant had the right to kill the deceased because he knew deceased had threatened his life. This is not the law. It took more than a threat by deceased against the life of appellant to justify the latter in killing the deceased. There must have been in addition, at the time of the homicide, an overt act on the part of the deceased indicating a purpose to carry out such threat.

[*James v. State*, 139 Miss. 521, 524, 104 So. 301, 302 (1925)].

To make a homicide justifiable on the grounds of self-defense, danger to slayer must be either actual, present, and urgent, or slayer must have reasonable grounds to apprehend design on part of deceased to kill him or to do him some great bodily harm, and in addition to this, to apprehend that there was imminent danger of such design being accomplished; mere fear, apprehension, or belief, however sincerely entertained by one person that another designs to take his life or to do him some great bodily harm will not justify former taking life of the latter.

[*Bright v. State*, 349 So.2d 503 (Miss. 1977)].

And, in **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973), we find this language:

The apprehension of such danger must be real and such as would or should, under the circumstances, be entertained by a reasonably well-disposed man of average prudence; and **whether the accused has, in a particular case, measured up to that standard of conduct is a question to be submitted to, and decided by, the jury . . .** [emphasis supplied]

by physical facts and facts of common knowledge.

III.

THE TRIAL JUDGE DID NOT ERR IN REFUSING TO GRANT JURY INSTRUCTION D-12, A MANSLAUGHTER INSTRUCTION, BECAUSE A MANSLAUGHTER INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE.

In an argument consisting of only nine (9) lines, Neese argues the circumstances found in this case entitled him to a manslaughter instruction. (Brief For Appellant at 10-11) Although Neese cites to several decisions as authority for his position, he has yet to identify a theory upon which a manslaughter instruction would be based, e.g., heat of passion, culpable negligence, *et cetera.*

Jury instruction D-12, Neese's requested manslaughter instruction, is of little help. It reads, in its entirety, as follows:

> The Court instructs the jury that in event that you do not find the Defendant guilty as charged of murder, but do believe from the evidence beyond a reasonable doubt, that the Defendant, Paul M. Neese, at the time of the difficulty, used more force than was reasonably necessary under the circumstances then and there existing to defend herself, then you may return a verdict finding the Defendant, Paul M. Neese, guilty of manslaughter in either or both counts. (C.P. at 27)

Disregarding the reference to "herself", D-12 was properly refused because it is an incomplete, if not erroneous, statement of the law and because a manslaughter instruction was not supported by the evidence.

In assessing the propriety of granting this instruction, the following colloquy between

> he either - - he either was in self-defense or he wasn't. If you use too much force in defending yourself. then you're guilty of murder, not manslaughter. To give a manslaughter instruction he's got to - - you know, there's got to be evidence supporting one of the manslaughter statutes - - you know, sudden heat of passion, manslaughter by culpable negligence, or whatever the case may be.
>
> BY THE COURT: I've got another question to ask. To be entitled to a manslaughter instruction, when did - - when did he become entitled to kill these two persons and be guilty of manslaughter? Because he was there all night and they'd done beat up on him two or three times. What was it, that very moment of killing those two, caused him to in the heat of passion kill? And I say that because of the testimony that all night long people would come and go and he never tried to escape. He never asked for help. He never asked for them to come to his assistance. He never slipped them a - - tried to run out the door when they left. It was a trailer. One door in and out. I'm going to refuse it. Personally, I don't think - - you haven't given me an instruction of - - uh - - definition of manslaughter. Second, I don't think the facts justifies granting that one. (C.P. at 185-86)

The observations made by the district attorney as well as the circuit judge were both judicious and correct.

First, D-12 furnished no definition of manslaughter. It was incomplete and properly refused for this reason, if for no other. We agree with the district attorney that if Neese used more force than was reasonably necessary under the circumstances and did not shoot in self-defense, he was guilty of murder, not manslaughter.

We, likewise, agree with the circuit judge that " . . . you haven't given me an instruction of . . . [a] definition of manslaughter." (R. 186)

Second, we agree wholeheartedly with the circuit judge that neither D-12 nor any other

facts that both victims were asleep when two bullets fired at close range tore into their brains. If the testimony of Dr. Hayne is to be believed, one of the shots was fired from a distance of only six (6) inches (R. 131) while the shot that killed Boyd was fired " . . . no closer than approximately two to two and a half feet." (R. 125)

Neither Peebles nor Boyd were doing anything at the time by words, acts, or deeds to precipitate an emotional state of mind characterized by uncontrollable passion on the part of Neese. Rather, Neese's own testimony tends to negate passion, negligence, or accident and misfortune.

By virtue of the evidentiary facts found in this case, and considering all the evidence, including the testimony of Dr. Hayne, in a light most favorable to the defendant, malice murder or justifiable homicide were the only viable theories reasonably supported by the evidence. *Cf.* **Tran v. State**, *supra*, 681 So.2d 514 (Miss. 1996) [Where in a prosecution for murder the only theory of the defense was self-defense and the jury was properly instructed on this theory, there was no requirement that the trial court instruct the jury as to other *possible* theories under which the jury could have found the homicide to have been justifiable, excusable, or manslaughter.]

A reasonable and fairminded juror could have found malice aforethought. It is clear that malice, i.e., a deliberate design to kill another, may be formed very quickly and perhaps only moments before the fatal act consummating the required intent. **Fears v. State,** 779 So.2d 1125 (Miss. 2000), reh denied; **Kelly v. State,** 783 So.2d 744 (Ct.App.Miss. 2000), reh denied, cert denied.

defense.

Mississippi case law does not permit the granting of a jury instruction that is devoid of credible evidence supporting its premise. **Holland v. State**, 705 So.2d 307 (Miss. 1997). Stated differently, jury instructions are not given unless there is an evidentiary basis in the record for them. **Terry v. State**, 718 So.2d 1115 (Miss. 1998); **Hooker v. State**, 716 So.2d 1104 (Miss. 1998); **Yates v. State**, 685 So.2d 715 (Miss. 1996); **Catchings v. State**, 684 So.2d 591 (Miss. 1996); **Hicks v. State**, 580 So.2d 1302 (Miss. 1991); **Fairchild v. State**, 459 So.2d 793 (Miss. 1984); **Neal v. State**, 451 So.2d 743 (Miss. 1984); **Coburn v. State**, 431 So.2d 1111 (Miss. 1983).

While a criminal defendant is entitled to an instruction embracing his theory of the case, the trial judge may refuse an instruction which either incorrectly states the law, is without an evidentiary foundation, or is stated elsewhere in the instructions. **Terry v. State**, *supra*, 718 So.2d at 1125 quoting from **Murphy v. State**, 566 So.2d 1201, 1206 (Miss. 1990).

And while all doubts should be resolved in favor of the accused, " . . . a lesser-included offense instruction should never be granted on the basis of pure speculation." **Fairchild v. State**, *supra*, 459 So.2d 793, 801 (Miss. 1984).

"Instructions unsupported by the evidence need not, and **should not** be given." **Norman v. State**, 385 So.2d 1298, 1301 (Miss. 1980), and the cases cited therein. [emphasis ours] Rather, "[i]nstructions should be given only if they are applicable to the facts developed in the case being tried." **Pittman v. State**, 297 So.2d 888, 893 (Miss. 1974).

> instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case. *However, the trial judge may also properly refuse these instructions if he finds them* to *incorrectly state the law* or to repeat a theory fairly covered in another instruction or *to be without proper foundation in the evidence of the case*. **Humphrey v. State**, 759 So.2d 368, 380 (Miss. 2000) (citing **Heidel v. State**, 587 So.2d 835, 842 (Miss. 1991) (citations omitted) [emphasis ours]

It is clear to us neither a heat of passion nor culpable negligence nor any other manslaughter instruction was proper in this case because such lacked evidentiary support. It was true in **Fairchild v. State,** *supra*, and it is equally true here, there was no evidence in the record that Neese's actions were without malice aforethought and in the heat of passion.

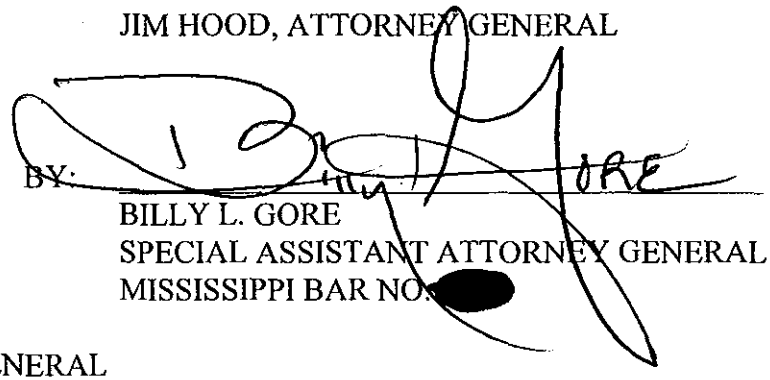
The bottom line is this. No reasonable, hypothetical juror could have found Neese not guilty of murder and convicted him of heat of passion manslaughter under any theory of the case. In this posture, the circuit judge did not err in denying jury instructions D-12 or any other instruction proffering manslaughter for the jury's consideration.

Neese's guilt or innocence was properly submitted to the jury for its determination because the fact finder could have found his version of the shooting substantially contradicted in material particulars by testimony, the physical facts and/or by facts of common knowledge.

Appellee respectfully submits that no reversible error took place during the trial of this cause and the judgments of conviction of murder and the life sentences imposed in their wake should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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This the 20th day of November, 2007.

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