IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ARCHIE BRUCE — APPELLANT

VS. — NO. 2008-KA-1748

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

ARCHIE BRUCE **APPELLANT**

vs. **CAUSE No. 2008-KA-01748-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Coahoma County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **DRIVE BY SHOOTING**.

STATEMENT OF FACTS

The Appellant does not challenge weight or sufficiency of the evidence of his felonies. It is therefore unnecessary to set out the evidence of his guilt in detail.

Stated briefly, the evidence showed that Appellant, on 6 December 2005, at a little past midnight, drove his red Ford Explorer automobile into a left turn lane and next to a vehicle being driven by one Anthony Allen. A Tracy Wide, known at the time of trial as Tracy Bruce, was with Allen in his vehicle, she having been in a relationship with Allen at the time. The Appellant pulled his vehicle somewhat ahead of Allen's vehicle, and then pointed a gun toward Allen's car. Two shots were fired; Allen's rear window shattered. Allen then made a right turn and "took off."

As Allen was driving, he noticed a police car. He got the policeman's attention by honking his horn and waving his hand. As Allen slowed, the Appellant drove into the rear of

Allen's car. Allen lost control of his car; his car left the road and struck a tree. Allen was not injured, but Wide-Bruce, who was pregnant at the time, complained of pain in her side. They were assisted by the policeman.

Allen testified that he feared for his life when the Appellant shot into his car. Allen stated that he did not know why the Appellant fired at his car. Allen and Wide -Bruce were on their way to a motel when the Appellant fired upon them. They were in a good mood up until that point.

Allen was aware, though, that the Appellant had begotten three children upon Wide-Bruce, though he stated that he was not aware that the child she was carrying at the time of the shooting was also sired by the Appellant. Allen stated that he was also unaware that the Appellant had purchased the car Allen was driving at the time of the shooting. However, he had heard tell that Wide-Bruce married the Appellant subsequent to the shooting. (R. Vol. 2, pp. 30 - 45).

The officer on patrol corroborated Allen's testimony regarding the Appellant's act of striking Allen's vehicle and driving it off the road. (R. Vol. 2, pp. 22 - 30).

Officer Ramel Matthews was despatched to the scene. When he arrived, he observed a Taurus automobile and a Ford Explorer or Expedition in a ditch. He photographed the vehicles.

The Taurus had come to rest against a tree. The car suffered extensive damage, including a broken windscreen. There were also two bullet holes on the left side of the car, at least one being to the driver's door. A .45 caliber pistol was found inside the Ford vehicle. That was photographed as well and then taken as evidence.

The Appellant gave a statement. He stated that, while he did recall hitting "them" with his car, he did not recall shooting at "them." He did opine that it was a big mistake on his part

and that he had let his family down. (R. Vol. 2, pp. 46 - 85; State's Exhibit 4).

The Appellant testified on behalf of the defense. He stated that he had purchased the Taurus for his wife, Tracey Wide Bruce. On the night of the shooting, the Appellant was expecting money from Wide Bruce. At about midnight, he decided to look for her. As he was driving, he saw her car. He pulled up to it and saw that there was a man driving it and that Wide Bruce appeared to be slumped over. He thought something was wrong with her. He became suspicious of the man driving the Taurus. He thought the man was turning toward him, so he fired the gun, shooting out the back window. The next thing he remember, he said, was climbing up the hill, speaking to a police officer, and being placed under arrest for aggravated assault. The Appellant claimed that he shot at the car to protect his pregnant wife. He stated that he had no intent to harm Allen or cause his wife bodily injury.

The Appellant testified that his wife, at the time of trial, was at a "undisclosed location." (R. Vol. 2, pp. 94 - 126).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN ADMITTING TESTIMONY AND EVIDENCE CONCERNING THE AUTOMOBILE WRECK THAT OCCURRED JUST AFTER THE SHOOTING?

2. DID THE TRIAL COURT ERR IN ADMITTING STATE'S EXHIBIT 1A INTO EVIDENCE?

3. DID THE TRIAL COURT ERR IN ADMITTING STATE'S EXHIBIT 1B?

4. DID THE TRIAL COURT ERR IN ADMITTING STATE'S EXHIBIT 4?

5. DID THE TRIAL COURT ERR IN EXCLUDING TESTIMONY DURING THE DEFENSE CASE -IN -CHIEF CONCERNING THE APPELLANT'S REPUTATION FOR PEACEFULNESS?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY AND EVIDENCE ABOUT THE AUTOMOBILE WRECK THAT OCCURRED JUST AFTER THE SHOOTING

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 1A AND 1B[1]

3. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING STATE'S EXHIBIT 4, THE APPELLANT'S STATEMENT TO LAW ENFORCEMENT

4. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT THE APPELLANT'S GRANDMOTHER TO GIVE REPUTATION TESTIMONY

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY AND EVIDENCE ABOUT THE AUTOMOBILE WRECK THAT OCCURRED JUST AFTER THE SHOOTING

In the First Assignment of Error, the Appellant asserts that it was error to permit the State to prove that the Appellant, immediately subsequent to shooting into the Allen vehicle, struck Allen's vehicle and forced it off the road. The Appellant claims that such testimony and evidence should have been excluded under M.R.E. 403. The Appellant raised this issue, firstly, during the testimony of the police officer who witnesses the Appellant's actions in this regard. (R. Vol. 2, pg. 23). The State asserted that the evidence was relevant to its case, and admissible in order to present a complete account of the Appellant's actions; in the end, the trial court ruled that the evidence was more probative than prejudicial to the Appellant. (R. Vol. 2, pp. 24 - 25).

It should be recalled that the witness Allen testified that as soon as the Appellant fired at or into Allen's vehicle, Allen immediately turned and drove off. The Appellant followed him. As Allen attempted to obtain assistance from the police officer, the Appellant struck Allen's car

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[1] We will respond to the Appellant's Second and Third Assignments of Error in this response.

with a force sufficient to drive Allen's vehicle and his vehicle off the road.

There was no "break in the action," so to say, between the shooting and the ramming of Allen's vehicle. The two events were closely related, if not in fact one continuous transaction. As such, the act of ramming the Allen vehicle was relevant and admissible. *McGowan v. State*, 859 So.2d 320, 332 (Miss. 2003).

Moreover, we submit the evidence was relevant under M.R.E. 404(b) in that it was evidence of the Appellant's motive or intent. It should be recalled that the Appellant attempted to establish self - defense, or, perhaps, defense of another. Yet, the act of ramming the Allen vehicle with a force sufficient to drive it off the road, thereby endangering both Wide and Allen, at a time when the Appellant was under no threat of immediate injury, is inconsistent with the defense position.

The Appellant recognizes these rules of law (Brief for the Appellant, at 15), but attempts to avoid their application in the case at bar by asserting that he was never charged with a crime in consequence of having rammed the Allen's car. Perhaps the Appellant was not so charged, but the Appellant wholly fails to demonstrate that the admissibility of the fact of his having done so hung upon whether he was charged with some crime for having done so. The Appellant cites no authority for this notion, and we are not aware that admissibility of this kind of evidence has ever depended upon whether an actual charge had been made.

The trial court ruled that the evidence was admissible in order to permit the State to present a rational and coherent story of the crimes. The Appellant recognizes that the law is well settled on the point that the State has a legitimate interest in telling a rational and coherent story. It is well settled that evidence of other criminal activity is admissible where it is substantially necessary to present the complete story of the crime. However, the Appellant asserts that such

was not necessary here. (Brief for the Appellant, at 16).

The Appellant asserts that it was not necessary because the shooting and the wreck were separate events, that the shooting did not cause the wreck and had nothing to do with the wreck. The Court is then given the Appellant's opinion that the State was attempting to prove something about the Appellant's character.

As we have said above, the shooting and the wreck were part of a continuous course of conduct. They were not separate events: After the Appellant shot into the car being driven by Allen, Allen drove off, the Appellant following. The Appellant continued his attack by driving into the car. The shooting and the wreck were clearly connected and inseparable. Evidence of the wreck was thus admissible for that reason. It was also admissible under Rule 404(b) because it showed that the Appellant's act of shooting into the car was willful.

The trial court did consider M.R.E. 403 in the course of its ruling. It found that the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice. (R. Vol. 2, pg. 25). The trial court did not abuse its discretion in this ruling. *Stallworth v. State*, 797 So.2d 905 (Miss. 2001).

The Appellant then appears to suggest that the trial court was required to give a limiting instruction *sua sponte*, once it decided to allow the testimony about the wreck, citing *Jasper v. State*, 759 So.2d 1136 (Miss. 1999). (Brief for the Appellant, at 17). Whatever may have been the law for a brief time, it is no longer the law that a trial court is required to grant such an instruction *sua sponte*. *Brown v. State*, 890 So.2d 901, 912 (Miss. 2004).

The Appellant cites *McCullough v. State*, 750 So.2d 121 (Miss. 1999) in support of his notion that the trial court erred in admitting evidence of the wreck. However, the facts in *McCullough* are easily distinguishable. There, in an aggravated assault case arising from a

shooting, the trial court indicated that it would permit the State to prove that the defendant in that case had shot someone else some years before. There was no connection whatsoever between the two shootings. None of the exceptions in Rule 404(b) were applicable.

The facts of the case at bar are profoundly different. The act of ramming the Allen car was part and parcel of the act of shooting into it. The acts of shooting into the car and ramming it were not events separated by a number of years. Nor, as in *McCullogh*, were there different victims.

It is true that the Court in *McCullough*, in addition to finding error in the admission of the prior shooting, also found error in the failure of the trial court to consider the application of Rule 403. This is of no moment in the case at bar since the trial court here did consider that rule. Beyond this, it seems peculiar to us that the Court would have found error on the Rule 403 issue in *McCullough*. The fact of error in admitting the evidence to start with would have made it unnecessary to consider the 403 issue. Rule 403 presumes relevance.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 1A AND 1B[2]

Exhibit 1A was a photograph of the Allen vehicle after it had been rammed off the road. Exhibit 1B was a photograph of bullet holes to the driver's door of that vehicle.

As for Exhibit 1A, the Appellant asserts here that that photograph should not have been admitted for the same reason that the testimony about how Allen's car came to be in the ditch should not have been admitted. (Brief for the Appellant at 13). In response, we adopt the arguments we have made above as to why that testimony was properly admitted. Because that

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[2] In this response we will respond to the Appellant's Second and Third Assignments of Error.

testimony was properly admitted, the photograph of the car was properly admitted. It served to corroborate the testimony. The trial court did not abuse its discretion in admitting the photograph for this purpose. *Lee v. State*, 944 So.2d 56 (Miss. Ct. App. 2005).

As for Exhibit 1B, the Appellant at trial asserted that that photograph should not be admitted because the victim had testified that his rear window shattered upon the firing of the shots and because there was no testimony as to when the driver's door was shot into. However, the defense did concede that the holes were bullet holes by its characterization of the holes as bullet holes. (R. Vol. 2, pg. 55). The trial court, while noting that there had been no definite evidence that the bullet holes in the door were not present when the Appellant shot into the car Allen was driving, also noted that the photograph had been offered to show that the bullet holes were consistent with the testimony presented. It admitted the photograph on this basis, holding that it was for the jury to decide whether the holes were cause by the Appellant. (R. Vol. 2, pg. 57).

Here, the Appellant claims that Exhibit 1B was "incompetent evidence" because there was no proof that he fired the shots that caused the bullet holes. The Appellant says that the witness Allen testified that the Appellant shot out the back window.

Allen did not, however, testify that the Appellant fired into the rear window. What he did say was that he saw the Appellant point his gun at the car, noticed the shots as they were fired, and that the glass in the rear window shattered. Allen's testimony also demonstrates that the Appellant was not behind Allen's car when the shots were fired, but beside it. (R. Vol. 2, pg. 33).

The photograph was not "incompetent evidence." While it may be that there was no testimony to show that the Appellant's bullets struck the door of the car, it was quite clear from

Allen's testimony that the Appellant was firing at the car. There was no testimony that the holes were already in the door at the time of the shooting, and there was no testimony that the Appellant fired shots into the car on a prior occasion. It is quite possible that one or both bullets initially struck the driver's door and ricocheted into the rear window.

It is a matter left to the discretion of a trial court whether to admit a photograph to evidence. "Some probative value" is the only requirement for the admission of a photograph. *Selders v. State*, 794 So.2d 281 (Miss. Ct. App. 2001). There was some probative value in the picture in that it supplemented the State's testimony and demonstrated that the car had been shot into. The trial court did not abuse its discretion in admitting the photograph. What weight and worth to give the picture was a matter for the jury to determine.

It should also be recalled that the Appellant never denied having fired upon the car. He admitted having done so. (R. Vol. 2, pg. 99). In view of his admission, the Appellant's quibble with the photograph is neither here nor there. There was no issue as to whether he shot into the car, only whether his act of doing so was in necessary defense of self or another. Consequently, whether the bullets first struck the door or never struck the door is a matter of insignificance. There was no prejudice to the Appellant in the admission of the photograph since it was admitted that he had shot into the car. Consequently, there is no basis here to find reversible error in the admission of it. *Halderman v. State*, 964 So.2d 1163 (Miss. Ct. App. 2007) (To warrant reversal on an issue, a party must show error and resulting injury).

The Appellant then rambles on with a notion of his that it would be improper for this Court to consider the strength of the evidence in support of the verdict, leaving aside the photograph. There is no need to consider this idea of the Appellant's. There was a sufficient evidentiary predicate to allow admission of the photograph. But even if not, the admission of it

was surely harmless in light of the Appellant's admission.

The Second and Third Assignments of Error are without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING STATE'S EXHIBIT 4, THE APPELLANT'S STATEMENT TO LAW ENFORCEMENT

In the Fourth Assignment of Error, the Appellant asserts that the trial court committed error in admitting his statement to law enforcement into evidence. It is said that the statement was not recorded and that what of it that was revealed to the jury was incomplete.

The Appellant was given his *Miranda* rights, which he waived; he then made a statement, which the officer typed. The Appellant was permitted to review what the officer typed. The appellant made no changes and signed the statement.

The statement was not recorded on audio or video tape. As to the typed statement, the officer did not type his questions to the Appellant, only the Appellant's responses. (R. Vol. 2, pp. 59 - 68).

The Appellant moved to exclude the statement because they typed statement did not include the questions put by the officer to the Appellant. The Appellant alleged that the statement was incomplete without the questions. (R. Vol. 2, pp. 68 - 70).

First of all, to the extent that the Appellant suggests that there was an obligation on the part of the officer to record the statement by audio or video tape, there is no such requirement. *Brown v. State*, 983 So.2d 1059 (Miss. Ct. App. 2008). Indeed, there is no requirement that a confession be reduced to writing. *Cobb v. State*, 734 So.2d 182 (Miss. Ct. App. 1999).

As to whether the statement was incomplete because the questions put to the Appellant were not included in it, the Appellant presents no authority to demonstrate that there was any requirement to include such questions. Certainly we are not aware of any such authority. It

seems to us, though, that it would be unnecessary to include such questions. The questions themselves established nothing; the Appellant's statements in response to those questions were the important things. It is difficult to conceive of a reason why it would be necessary to include the questions in the statement. In an event, since the Appellant presents no authority to support the notion that a written statement or confession must include the questions asked, that claim of error is not before the Court. *Duncan v. State*, 939 So.2d 772 (Miss. 2006).

The Appellant also appears to claim that the statement was incomplete because it did not include certain statements allegedly made by the Appellant. However, we find no support in the record to show that some of the Appellant's statements about the case were not included in the typewritten statement. That portion of the officer's testimony cited by the Appellant at page 68 of the record does not support that claim. It is true that the officer did not transcribe statements the Appellant made that were irrelevant to the case (R. Vol. 2, pg. 66), but those statements were irrelevant. On the other hand, if the Appellant thought they were relevant, he could have testified to them in the course of his testimony. The Appellant did not testify that some answers were not included in the statement. Nor did he testify as to any such answers that were supposedly left out. There is no support for the claim that there were statements made to the officer that might have exonerated the Appellant, and no explanation as to why the Appellant could not himself have testified to such statements, assuming they existed.

The Appellant was given the statement to read and given the opportunity to correct or add to the statement. He did not indicate that what was type written was inaccurate or incomplete, but he did sign the statement. That fact rather clearly shows that he found the typewritten statement to be a correct statement of what he told the officer.

The Appellant cites *Cobb v. State*, 743 So.2d 182 (*sic*)[3], evidently for the proposition that it is error to admit a written statement of confession against one criminally accused where the statement or confession is not adopted by the confused. It is unclear to us why the Appellant should cite this decision since it is clear that, in the case at bar, the Appellant did adopt his statement by signing it.

The Fourth Assignment of Error is without merit.

4. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT THE APPELLANT'S GRANDMOTHER TO GIVE REPUTATION TESTIMONY

The Appellant wished to present testimony concerning his reputation for peace of violence through his grandmother. The State objected to such testimony, noting that it had not presented any character evidence concerning the Appellant. The trial court, noting that the Appellant's reputation or character had not been put into issue by the State, sustained the State's objection. (R. Vol. 2, pp. 88 - 89). The Appellant then made an proffer. The Appellant's grandmother, had she been permitted to testify, would have testified that the Appellant had never been violent to her. She did not, however, state whether she knew of his reputation in the community for peace and violence. (R. Vol. 2, pg. 93).

Here, the Appellant appears to claim that he should have been permitted to prove his reputation for peace and violence because the trial court permitted the State to prove what the Appellant did immediately after shooting into the car Allen was driving. The Appellant suggests that the act of ramming the car was in some wise character evidence. The Appellant then natters on about the ruling with respect to the ramming of the car, something we do not believe we need address again.

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[3] The correct citation is *Cobb v. State*, 734 So.2d 182 (Miss. Ct. App. 1999).

M.R.E. 404(a)(1) provides that an accused may present evidence a pertinent trait of his character. There is nothing in the text of the rule, however, to indicate that the right of an accused to present evidence of a pertinent trait of his character is dependent upon that trait having first been put into issue by the prosecution. Nor does the case law concerning this rule indicate that. Case law does hold that an accused may, as a matter of right, introduce evidence of general reputation of his good character. *Winters v. State*, 449 So.2d 766, 768 - 769 (Miss. 1984)

M.R.E 405(a) provides that in all cases in which evidence of character or a trait of character of a person is admissible, such proof may be made testimony as to reputation or by testimony in the form of an opinion.

To the extent that the trial court erred in refusing to admit the Appellant's character evidence, any such error, if error, was harmless at most, for three reasons.

The first reason lies in the fact that the Appellant's witness, his grandmother, did not demonstrate that she would have testified as to the Appellant's reputation in the community. She simply said that the Appellant had never been violent with her and that, so far as she knew, he had never been violent. (R. Vol. 2, pg. 93). This testimony was nothing more that her personal opinion of the Appellant – it was not testimony concerning the Appellant's general reputation in the community for peacefulness or violence. *Winters, supra.*

The second reason why any such error in this issue is harmless is because the verdict in the case at bar would have been the same even had the Appellant's reputation evidence been admitted. It should be recalled that the Appellant admitted firing his gun at the car Allen was driving. His defense of self or defense of another defense was exceedingly weak. In light of these considerations, no reasonable juror would have given the character evidence much weight at all. Reputation evidence is, at best, of minimal probative value. *Winters*, at 769. In the case

at bar, there was no question as to whether the Appellant fired the shots. As we have said, the case turned on whether there was justification or excuse for having done. This character evidence was of negligible value, and it is inconceivable that a reasonable juror would have given it weight. There was no prejudice to the Appellant's defense for reason of the exclusion of the character evidence. Any error here was thus harmless. *Rollins v. State*, 970 So.2d 716 (Miss. 2007).

Finally, we point out the obvious, that being that the evidence overwhelmingly showed the Appellant's guilt. However the Appellant may have treated his grandmother, the plain fact remains that he did shoot twice into the car Allen was driving. He had no reasonable ground to suppose that Allen was about to subject him to an imminent risk of serious bodily injury or death, or that Allen was about to do so with respect to Wide. This character evidence, had it been admitted, would not have made a difference in the outcome of the trial. Any error in the exclusion of the evidence was harmless. *Delashmit v. State*, 991 So.2d 1215 (Miss. 2008).

The Appellant appears to believe that the character evidence was admissible in light of the State's evidence of what transpired immediately after the shootings. However, the Appellant was not charged with a crime for having rammed the vehicle Allen was driving. He was charged with having shot in that car. In view of the Appellant's admission with respect to the shooting, the character evidence proposed to be admitted was of very little significance. As for the ramming of the car, the Appellant testified that it was an accident, that it was in fact Allen who "drifted" back at him. (R. Vol. 2, pg. 100). The character evidence was of no significance with respect to the collision. The state did not present that evidence as "character evidence."

The Fifth Assignment of Error should is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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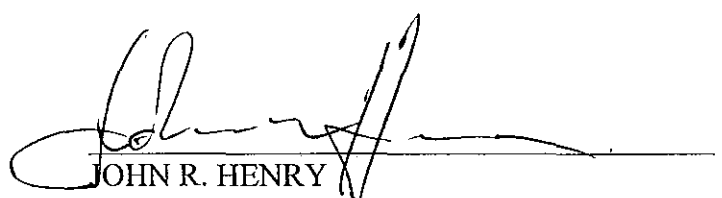
This the 16th day of September, 2009.



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