IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHAD BOOKER — APPELLANT

VS. — NO. 2008-KA-2054

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. The trial court correctly denied Booker's Motion for Directed Verdict at the close of the State's case, the trial court correctly denied Booker's Motion for Acquittal at the close of the defendant's case-in-chief, and the trial court correctly denied Booker's Motion for JNOV.

II. The trial court correctly instructed the jury.

III. The trial court correctly allowed the opinion testimony of Brenda Morgan.

IV. The trial court was within it's discretion to admit the testimony of Shade White.

V. The trial court correctly refused to admit Booker's evidence . . .

VI. The trial court correctly admitted testimony from Keith White regarding David White's cap which was found inside the Rhino.

STATEMENT OF THE FACTS

Testimony of David Keith White

David Keith White testified that on March 12th, 2007, he and his father, Hilburn David White were working at their ATV shop on County Road 817. (Tr. 213) He testified that the driveway almost in line with his driveway and coming off County Road 817 leads to Chad and Buster Booker's shop. Keith White testified that his father, David White, was killed beside the Booker's shop on Highway 813 on the corner. (Tr. 215) Keith and David White had worked together full-time at their ATV shop for about five weeks prior to David's death. (Tr. 216)

On Saturday, March 10, 2007, Keith and his father were working on four-wheelers in their shop. A 90's model black mustang came by the end of their driveway going approximately 70-80 miles per hour. (Tr. 217) Keith testified that it was unusual for someone to come down County Road 813 that fast. Keith testified that due to people, kids and dogs in the neighborhood, it made them made that it went by that fast. David White told his son that if the car came back going that fast, he was going to stop it. They heard it coming back, loud and fast, and David White ran out to the side of the road and flagged them down. (Tr. 219) Keith White said he remained at the shop door watching. His father had a conversation with the driver of the car, Chad Booker, but it was not loud enough for him to hear. (Tr. 220) David White came back in the house and called the police. Keith testified that his father never went to sign charges against the driver, but he wanted law enforcement to come out and ask them to slow down. (Tr. 221) Booker later drove his red truck up and down the road , putting it in neutral at the end of the driveway and revving up the pipes, and looking into the shop at Keith and his father, David White. (Tr. 222) Booker made about four passes in this manner in front of the White's shop.

(Tr. 223) When Booker went south the last time, David White was on the porch. Keith testified that Booker yelled, "F– you" at his father. (Tr. 224)

Keith White testified that on March 12th, 2007, he and his father worked together most of the day. That afternoon they went and picked up a four-wheeler they were getting to work on. As they were coming back they got to Booker's shop's driveway and Chad Booker was there. Booker was out opening the gate and had his truck parked there as he opened the gate. (Tr. 227) Both David and Keith White waved at Booker and Booker returned the greeting. (Tr. 227) Keith and David White took the four-wheeler to their shop and to unload it for repair. (Tr. 228) David White told his son he was going to apologize to Chad Booker for the confrontation they had on the 10th. (Tr. 228) David described his father as calm and testified that his father wanted to make peace in the neighborhood. (Tr. 229)

David White drove his Yamaha Rhino over to the Booker's house to apologize to Chad. (Tr. 229) Keith White testified that he did not go with his father because he never thought that anything would happen. (Tr. 229) Keith White testified that the Booker's house is two to three hundred yards from the White's shop. He watched his father drive over until he pulled up at the Booker's house. Keith saw Booker standing on the side of the pickup, assumed everything was going to be ok, and went back in the shop. (Tr. 230)

A few minutes after his father went to the Booker's house, a neighbor, Clinton Bryant, drove by very slowly and then turned around and came back. Bryant went to the scene and then came and told Keith that something was wrong with his father. (Tr. 232) When Keith got there, Brenda Morgan was there and a young man named Jeff Butler was there. (Tr. 232) David White was inside the Rhino, leaned over toward the inside of the vehicle, slumped over the shifter. (Tr.

232-3) David White was unconscious. He was badly beaten on the left side of his head, bleeding and swelled on the left side of his head and his ear. (Tr. 234) Keith found his father's glasses laying in the center of the road. Keith White testified that David White always wore a cap. The cap was found inside the Rhino in the floor board of the passenger side. Keith White testified that a Rhino is a side by side ATV with a cab and a windshield. The shifter is located in the middle. (Tr. 242) Keith testified that the Rhino was not running when he arrived. The left side of his father's head was badly beaten and he had blood coming from the side of his head and from his nose. (Tr. 243) Keith and Brenda Morgan, a nurse, attempted CPR, but David White never showed any sign of life. (Tr. 244)

Keith White testified that there was blood inside the Rhino and that there was no sign of struggle and no blood outside the Rhino. (Tr. 246) He did not see any injuries to his father other than the injuries to his head. Keith White testified that if his father had received the injuries outside the Rhino, he would never have been able to get back in the vehicle due to the severity of the injuries. (Tr. 246)

Testimony of Dr. Steven Hayne

Dr. Hayne, a forensic pathologist, testified that the cause of death was blunt force trauma producing closed head injury. (Tr. 275) He testified that there was injury on the outside service of the body, most severely located to the left side of the head including the left ear, where there was a large contusion or bruise. There was also a scraping of the skin immediately forward of the left ear and there were small cuts fo the left ear. (Tr. 275)

Dr. Hayne testified that there was extensive bleeding underneath the scalp, and upon the opening of the skull itself, there was brain swelling or edema. (Tr. 275) Dr. Hayne testified that

there was bleeding into the space between the inner surface of the skull and the outer surface of the brain to a large volume. It measure approximately 190 cc's of blood. There was also bruising to both the right and left cerebral hemispheres of the brain. (Tr. 275)

Dr. Hayne testified that there was a subsequent physiological process that occurred at the time that resulting in death due to bleeding around the brain and also the swelling of the brain. Dr. Hayne testified that once the brain starts swelling, and the space inside the skull is also decreased by the bleeding, it pushes the brain downward creating a temporal herniation and causing death. He testified that David White's death was ultimately the product of blunt force trauma and the trauma was delivered to the left side of the head of the victim. (Tr. 276) The only other injury to Mr. White was a small bruise on the back of the third finger of his right hand which may have occurred at or about the time of death. (Tr. 276)

Dr. Hayne testified that the bleeding both inside and outside of Mr. White's brain was due to force being applied to the left side of the head. The head would rock back and force and would also twist, tearing the small bridge blood vessels that goes from the inner surface fo the skull to the outer surface of the brain. Once the blood vessels are torn, the start bleeding due to the brain rotated back and forth in the skull. (Tr. 277) The head bouncing back from one side to the other inside the school produced bleeding to the right and left hemisphere. (Tr. 277) The brain rotated and moved back and forth desynchronously from the movement of the head. This was caused by one or more blows to the left side of the head producing slugs of force that created the observed injuries. (Tr. 278)

Dr. Hayne testified that the major injury suffered by David White was in the area of the left ear and immediately forward to the ear. There was also a large area of bleeding or

contusional bruise located on the left side of the scalp. Cause of death was closed head injuries to the brain but no fractures to the skull as the by product of blunt force trauma to the head. Dr. Hayne testified that he ruled the death a homicide. (Tr. 279)

Dr. Hayne testified that it would be unlikely for a person receiving the blows that caused David White's injuries to remain in a standing position unless he was supported by some means. Dr. Hayne testified that these injuries could be sustained where the torso was seated in a fixed position and the head was unsupported. The person receiving the injuries would be incapacitated very quickly, possibly regain lucidity or consciousness for s short period and then going into unconsciousness or death. (Tr. 282) Dr. Hayne testified that the injuries were consistent with a blow or blows to the head using a fist. (Tr. 286)

Dr. Hayne testified that it would be very unlikely for a person to receive the blows, suffer a concussion and remain on his feet and get back into his vehicle. Dr. Hayne testified that he would not favor that scenario at all. Dr. Hayne testified that the bruise on David White's finger could have been caused by any number of things, but that there was no aging to the injury and ruled it at about the time of death. (Tr. 291)

Testimony of Charlotte White

Charlotte White, the victim's wife, testified that on Sunday after the incident between Chad Booker and her husband, they received two phone calls from Buster Booker and Fredia Booker. The phone calls concerned David White calling the police regarding Chad the day before. Mrs. White testified that it was unusual for Buster Booker to call her home. (Tr. 309)

Mrs. White testified that she and her husband talked about the phone calls he had gotten the day before and that he needed to apologize to Chad to keep peace in the community because

they were neighbors. (Tr. 310) Mr. White said that he would probably apologize, but that he did not know when. He did not believe that he owed Booker an apology. (Tr. 311)

On Monday, March 12, Mrs. White learned of the injury to her husband when somebody came to her house beating on the door. By the time she go to the door, they had gone around back to the shop to get her son and grandson. (Tr. 311) When Mrs. White went to the scene in front of Mr. Booker's shop, her husband was sitting in the Rhino. There were no signs of life, and Mr. White appeared dead. He had blood on the left side of his face. Mrs. White testified that there was swelling and a sunken in place on Mr. White's head and the side of his face was bruised. (Tr. 312) Mrs. White testified that the last thing she heard her husband say was, "I'm going to apologize." (Tr. 317)

Testimony of Shade White

Shade White, Keith White's son and David White's grandson, testified that on the Saturday night before his grandfather's death, he got home a few minutes before his 11:00 curfew. He called his girlfriend to let her know he was home and got ready for bed. He has laying in the bed and heard a vehicle going down the road. It stopped in front of his house and seemed to have been put in park and the motor revved. Shade testified that it would rev it up and let off and rev it up again and let off. This seemed to have happened four or five time and then the vehicle proceeded on down the road or the Booker's driveway.

Shade White testified that he had heard this vehicle before and that it was Chad Booker's truck. He testified that the Booker's truck has a distinct sound and is very recognizable. The truck, a red Chevrolet Z-71, had been modified and was very loud and has a distinct sound. Shade testified that he did not see the vehicle that was outside his home revving the engine that

night. He did not see who was driving the truck. He testified that based on hearing the truck for the last five or six years, he believed that the truck he heard that night was Chad Booker's and that he had know another person to drive that truck very few times. (Tr. 334)

Shade testified that he told his father about the truck incident on Sunday morning before his grandfather's death. He told his father in order to find out if there was any way to stop because he was trying to sleep. (Tr. 335)

Testimony of John Hillhouse

State trooper John Hillhouse testified that he came and took statements after the death of David White. (Tr. 342) He took one statement from Phillip Nance, who passed away since giving the statement. (Tr. 343) Trooper Hillhouse read into the record the state of Mr. Nance, which was taken on May 3rd, 2007. The statement reads:

> "Chad Booker came by my business late that afternoon [March 12, 2007]. He wanted to show me the truck he was working on. It was a Tennessee orange and white '60's model Ford truck. We just small talked about the truck and the kind of work Chad was capable of doing. As he was leaving, Chad mentioned that David White had flagged him down Sunday after noon and, "jumped my ass" because he thought that Chad was driving too fast. Chad told me that he said, I can step out of this car and we can settle this like two men or you can call the law. Chad left and a short time later the law showed up. Chad seemed puzzled that Mr. White made such a big deal about the driving too fast thing. To me, Chad seemed cool as a "dollar bill." Chad never made any comments about getting even or threatening Mr. White. Chad said that, in quotations, "I had the law called on me last night," when he first started telling me about the day before and it was in a casual way." (Tr. 345)

Testimony of Agent Chris McAlister

Chris McAlister testified that at the time David White was killed, he worked for the Tippah County Sheriff's Department. He received a call on the radio dispatched out about an individual sitting an ATV vehicle, slumped over and bleeding. Agent McAlister went to the

scene which was the corner of County road 817 and 813. When he arrived at the scene he found David White lying on the ground behind a Nissan pickup, and there were several individuals trying to perform CPS on him. The ATV was on the county right-of-way. David White did not exhibit any signs of life. (Tr. 358) Agent McAlister then began to look for Chad Booker who had returned to the scene. He rode back up with his cousin, Wendell Booker, at the back of his father's shop. Agent McAlister instructed Chad Booker to pull up behind the shop area where there wouldn't be anymore commotion out front. Agent McAlister took Booker into custody at that time. (Tr. 361)

Agent McAlister testified that he examined the scene and that David White's glasses were laying in the road where the passenger seat of the Rhino was and parallel to the Rhino, about two and a half to three feet out from the Rhino. There was a cap lying in the middle of the front seats of the Rhino. The only blood Agent McAlister saw was on the inside of the Rhino. Toward the middle part, around the gearshift area and in the floorboard. (Tr. 364) There was no blood on the ground beside the Rhino. There was a small amount on Chad Booker's hand. (Tr. 364) The helicopter came for Mr. White, however, he was pronounced dead, loaded in the coroner van, transported to the hospital and then to Jackson.

Agent McAlister learned that Chad Booker had walked away from the scene but that Wendell Booker brought him back. (Tr. 365) A nurse worked on Mr. White to try to revive him. He had swelling around his head and his ear was swollen on the inside. Because of the extent of Mr. White's injuries, Agent McAlister prepared a search warrant to look for a weapon since the injuries appeared that they could possible have come from a weapon. Agent McAlister testified that he did not believe a weapon was used. (Tr. 367)

Testimony of Agent Mickey Baker

Mickey Baker, an agent with the Mississippi Bureau of Investigation received a request to come and assist in the investigation of David White's death. Baker drove to the scene and arranged for the Nissan pickup truck and the Rhino to be towed to the MBI substation in New Albany so that they could be stored for the crime scene unit to process them the next day.

Baker asked Captain Alan Thompson to meet him at Guntown to interview Chad Booker. (Tr. 385) Booker gave a statement. A recording was made of the statement give to the two officers by Chad Booker in the presence of his attorney. Booker's fist was swollen and he had difficulty writing.

A recording of the statement was played to the jury. Booker told the officers that as he was getting the leftover garbage from the Nissan truck he was driving, David White pulled up in the mule (Rhino). According to Booker's statement, the following exchange took place, "And uh, . . . he said, I gotta talk to you and I said, "I don't wanna talk to you. Just leave." And uh, that's when he said, 'hell naw, you're goanna talk to me.' And he reached out like he was getting up to grade my shoulder and when he grabbed my shoulder I grabbed him by the wrist and twisted it." Booker stated that he thought he grabbed and twisted White's right wrist. He stated that White stepped out of the Rhino and that White was coming towards him and kind of swung his arm out. Booker stated, ". . . I caught his wrist like that. And uh, I pulled him to me and I struck him three times and I left."

After interviewing Mr. Booker and seeing his hands, investigators stopped looking for a weapon. (Tr. 393) When the Nissan was searched, no cell phone was found in the vehicle. Booker left the scene on foot and shortly after that he was picked up by his cousin, Wendell

Booker. (Tr.394) The Rhino was parked a foot or two off the edge of the highway and the Nissan pick up was parked between a fence and the Rhino. (Tr. 395)

Baker testified that David White was 61 years old and was 5'9" tall. Booker was 5'11" and 174 pounds. Baker testified that even though Booker was lighter, he was in really good physical condition. He lifted weights and had very clear muscular lines. (Tr. 397) Baker testified that there was no evidence of alcohol use by either party. Booker was going to Northeast Community College and was studying in either the nursing or paramedic program. (Tr. 399)

The phone call regarding the death of Mr. White came in at about 5:19 p.m. and Booker was taken into custody at 6:20 p.m. Baker was unable to determine where Booker was for the intervening hour. (Tr. 399)

Baker testified that Booker was asked to come back to the scene by his mother to meet Deputy Lewellen. He returned, riding with his cousin, Wendell Booker. Booker stated that he left walking and that he met Wendell Booker because Wendell Booker was bringing some tapes back to his house. (Tr. 400)

Testimony of Brenda Morgan

Brenda Morgan, a registered nurse of 26 years, who came upon the scene on her way home from work, attempted to revive David White. She saw the Rhino on the side of the road and saw someone slumped over in the vehicle. (Tr. 461) She pulled in behind the two vehicles next to the driveway and. Morgan went between the two vehicles and found David White laying there slumped over in the car. White was so swollen and disfigured that she did not recognize him at first. (Tr. 464) She attempted to get a response from him, but determined that he was unconscious. (Tr. 463) Morgan took his radial and carotid pulse and did not feel anything. (Tr.

463) A man arrived and pulled up to the shot. He assisted Morgan in getting White out of the car to find a solid place to do CPR. They did not get any signs of life or response from Mr. White. The ambulance service arrived and hooked Mr. White to the monitor and Morgan continued CPR. They got a little heart response, but were not able to revive Mr. White.

Morgan testified that there was some blood coming out of his ear canal on the left and there was blood on the gear shift console in the car. The blood came from the ear canal and there was blood on his forehead. Morgan did not see any blood outside on the ground. (Tr. 466.) Morgan testified that there was blood coming from the right ear canal as well. Morgan testified that Mr. White's injuries were to the left side of his head. She testified that anytime you clear liquid or blood coming from a cavity, it indicates that a severe trauma has occurred. (Tr. 469)

After the ambulance drivers arrived she continued CPR alternating with one of the ambulance drivers until the helicopter arrived on the scene and they took over. Moran testified that she had a fairly good amount of time to observe White and that based on her observations, she did not think Mr. White would ever have been mobile after receiving those injuries. (Tr. 469) Booker's counsel objected to this testimony on the grounds that the prosecutor had not laid the proper predicate. (Tr. 470)

Morgan testified that the Rhino was still running when she arrived. She testified that David White was still warm when she touched him and the blood was still wet. There was not any cyanosis in his hand, any blueness in his fingers or anything that would indicate a longer period of time with him without oxygen. His fingers were still warm and dry and no cyanosis in his hands. She testified that the fingers were usually where you see the lack of oxygen first. (Tr. 470)

She testified that she gave Keith White the breathing barrier to operate, told him what to do and then started compressions while Keith White did the breaths in to the breathing barrier. (Tr. 475) Morgan testified that from her observations, from the extent of the injury to White's head, the injury happened where White was sitting in the Rhino. Defense counsel objection and the objection was overruled.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Booker's Motion for Directed Verdict at the close of the State's case, the trial court correctly denied Booker's Motion for Acquittal at the close of the defendant's case-in-chief, and the trial court correctly denied Booker's Motion for JNOV.

In *Blanks*, the court noted that the Weathersby Rule is not a jury instruction, but a guide for the circuit judge in determining whether a defendant is entitled to a directed verdict. *Id.* at 34. It is for the judge to determine whether or not a jury issue has been created. In the case at bar, the trial court considered that Booker's version of the events was "substantially contradicted in material particulars by a credible witness or witnesses for the [S]tate, or by the physical facts or by the facts of common knowledge." The trial court was well within it's discretion in the instant case, to determine that the *Weathersby* rule does not apply.

Booker argues that the trial court was obliged to amend his instructions to conform to the applicable law. However, as argued above, the trial court did instruct the jury as to the defendant's theory of his case, including his defense of justifiability due to acting in self-defense. Booker's jury was properly and fully instructed in the law of justifiable and excusable homicide to the extent that the facts of the case supported such instruction.

This issue is procedurally barred since Booker did not contemporaneously object on the

specific grounds of M.R.E 701 or 702 at trial. Further, should this court reach the merits, it is clear that the question asked of Ms. Morgan was a question that any lay person could answer based on their experience. Here was a man who was completely non-responsive. He did not move or show any signs of life. His head, by all accounts, was badly injured on the left side, swollen, with blood oozing out his ear. The trauma was evident for anyone to see and it was apparent, that after being injured in such a manner, David White was never mobile again. The testimony was also offered by a lay witness, Keith White, and an expert witness, Dr. Steven Hayne, without objection from the defense.

The testimony of Shade White came as no surprise to the defense. Booker was well aware of Shade's existence and his story through the statement of Keith White which was timely and correctly provided by the State to the defense. Further, Booker did not ask for a continuance or a mistrial. The purpose of the rules of discovery is to prevent unfair surprise. There was no unfair surprise as the defense was clearly aware of the substance of the testimony. Further, the defense did cite Rule 9.04 in it's brief and primarily argues that the testimony is irrelevant pursuant to M.R.E. 403.

Under Rule 9.04, Booker was entitled to certain relief if a discovery violation occurred, however, for the testimony to be excluded or, in the alternative, for a proffer or for an opportunity to interview the witness. (Tr.320) The proffer was made and Booker did not ask for any further relief, such as a continuance based on the allegedly surprising testimony. Booker is therefore procedurally barred from this argument on appeal, since at trial he did not ask for the appropriate relief pursuant to Rule 9.04.

The evidence offered by Booker was more prejudicial than probative. It was not

probative as the likelihood that White was the aggressor, since the incident in question did not involve any acts or threats of a violent nature. The only actions on the part of White, according to the proffer of Hogue's testimony, was that he cursed and confronted Hogue about his driving. There was no evidence whatsoever of physical acts or threats against Hogue. The evidence served only to attack White's character for rudeness and use of bad language and did not make it more likely that White was the aggressor.

Booker alleges that the failure of the State to explain exactly how it was going to argue its case relative to the cap, i.e. that the position of the cap was important to its argument, was a clear discovery violation and prosecutorial misconduct. Rule 9.04 certainly does require that physical evidence relevant to the case be disclosed to the defense. In the case at bar, the physical evidence, the cap, and it's position in the vehicle was provided to the defense in two separate reports. The prosecution is not required to disclose it's trial strategy to the defense. The trial court correctly overruled the objection.

ARGUMENT

I. The trial court correctly denied Booker's Motion for Directed Verdict at the close of the State's case, the trial court correctly denied Booker's Motion for Acquittal at the close of the defendant's case-in-chief, and the trial court correctly denied Booker's Motion for JNOV.

When reviewing the denial of motion for a directed verdict on an objection to the legal sufficiency of the evidence, Mississippi Appellate Courts examine the evidence in a light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So.2d 836, 843 (Miss.2005) (citation omitted). A motion

for JNOV challenges the sufficiency of the evidence presented to the jury. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). "[T]he critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.' " *Bush v. State*, 895 So.2d 836, 843 (Miss.2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). An appellate court's standard of review is to analyze "the evidence in the light most favorable to the prosecution, [and decide if] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citations omitted). The appellee receives "the benefit of all favorable inferences that may be reasonably drawn from the evidence." *McClendon v. State*, 852 So.2d 43, 47 (Miss.Ct.App.2002) (citing *Baker v. State*, 802 So.2d 77, 81(¶ 13) (Miss.1995)). Furthermore, all credible evidence supporting the verdict will be accepted as true. *Walker v. State*, 881 So.2d 820, 831 (Miss.2004). Mississippi appellate courts will reverse on the issue of legal sufficiency of the evidence when the facts favor the appellant to such an extent that "reasonable men could not have found appellant guilty." *McClendon*, 852 So.2d at 47. However, appellate courts are required to affirm the judgment of the trial court on the sufficiency of the evidence "where substantial evidence of such quality and weight exists to support the verdict and where reasonable and fair minded jurors may have found appellant guilty." *Id.*

Alternatively, unlike a motion for JNOV, a motion for a new trial challenges the weight, not the sufficiency, of the evidence. *Purnell v. State*, 878 So.2d 124, 129 (Miss.Ct.App.2004) (citing *Smith v. State*, 802 So.2d 82, 85-86 (Miss.2001)). Appellate courts will review the trial court's denial of a motion for a new trial under an abuse of discretion standard. *Johnson v. State*, 904 So.2d 162, 167 (Miss.2005). Appellate court's "will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So.2d

836, 844 (Miss.2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). The evidence will be analyzed "in the light most favorable to the verdict." *Id.*

Booker bases his argument on the *Weathersby* rule, which states: "where the defendant or the defendant's witnesses are the only eyewitnesses 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 [S]tate, or by the physical facts or by the facts of common knowledge." *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933).

Booker relies on *Johnson v. State*, 987 So.2d 420 (Miss. 2008) to support the claim that the Weathersby rule should have been applied in his own case. However, the Court in *Johnson* opined:

> Conversely, we are fully cognizant that there can be circumstances when the defendant and/or defendant's witnesses are the only eyewitness to the homicide and the *Weathersby* rule would not apply. For example, if the defendant or the defendant's eyewitnesses' testimony satisfies all the elements of murder or manslaughter, the defendant would not be entitled to a directed verdict of acquittal, as their testimony would be the basis for a valid conviction. Furthermore:
>
> this rule has no application where the defendant's version is patently unreasonable, or contradicted by physical facts. Where the defendant is the only eyewitness to a slaying, his version must be reasonable and credible before he is entitled to an acquittal under the rule.
>
> And, there is still another circumstance which still precludes the application of the Weathersby rule, and that is where the accused, following the slaying, gives conflicting versions of how the killing took place, or initially denies the act....
>
> In those cases in which the defendant is the only eyewitness to the slaying, and in which the Weathersby rule is inapplicable (i.e., the defendant does not secure a directed verdict of acquittal), 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.
>
> *Blanks v. State*, 547 So.2d 29, 33-34 (Miss.1989) (citations omitted).

In *Blanks*, the court noted that the Weathersby Rule is not a jury instruction, but a guide for the

circuit judge in determining whether a defendant is entitled to a directed verdict. *Id.* at 34. It is for the judge to determine whether or not a jury issue has been created. In the case at bar, the trial court considered that Booker's version of the events was "substantially contradicted in material particulars by a credible witness or witnesses for the [S]tate, or by the physical facts or by the facts of common knowledge." The trial court was well within it's discretion in the instant case, to determine that the *Weathersby* rule does not apply.

In response to Booker's Motion for Directed Verdict, the trial court denied the motion, stating, "The Court is of the opinion that the medical personnel that opined that it would be unlikely for Mr. White to have suffered the injuries like he has suffered and to have gotten back into that ATV would have been unlikely contradicts the defendant's version of what happened and the material particulars." The trial court correctly held that a jury issue was created and that the *Weathersby* rule therefore did not apply.

There are numerous physical facts and circumstances inconsistent with the statements and testimony given by Chad Booker. The testimony of Dr. Hayne, a forensic pathologist, established the following facts in substantial and material contradiction to Chad Booker's version of events. The only other injury to Mr. White was a small bruise on the back of the third finger of his right hand which may have occurred at or about the time of death. (Tr. 276)

Dr. Hayne testified that the bleeding both inside and outside of Mr. White's brain was due to force being applied to the left side of the head while it was unsupported. The head would rock back and force and would also twist, tearing the small bridge blood vessels that goes from the inner surface fo the skull to the outer surface of the brain. Once the blood vessels are torn, the start bleeding due to the brain rotated back and forth in the skull. (Tr. 277) The head bouncing back from one side to the other inside the school

produced bleeding to the right and left hemisphere. (Tr. 277) The brain rotated and moved back and forth desynchronously from the movement of the head. This was caused by one or more blows to the left side of the head producing slugs of force that created the observed injuries. (Tr. 278)

Dr. Hayne testified that it would be unlikely for a person receiving the blows that caused David White's injuries to remain in a standing position unless he was supported by some means. Dr. Hayne testified that these injuries could be sustained where the torso was seated in a fixed position and the head was unsupported. The person receiving the injuries would be incapacitated very quickly, possibly regain lucidity or consciousness for s short period and then going into unconsciousness or death. (Tr. 282) Dr. Hayne testified that the injuries were consistent with a blow or blows to the head using a fist. (Tr. 286)

Dr. Hayne testified that it would be very unlikely for a person to receive the blows, suffer a concussion and remain on his feet and get back into his vehicle. Dr. Hayne testified that he would not favor that scenario at all. Further, Booker's testimony indicated that he grabbed Mr. White him up close, thus holding him stable. The testimony of Dr. Hayne clearly established that White was unsupported and that his brain and head moved desynchronously causing the severe injuries to his brain. Dr. Hayne testified that the injuries were consistent with the victim being seated in the vehicle with his head unsupported. This is in direct contradiction to Bookers statements and testimony. Dr. Hayne's testimony about the nature of the injuries and the way they were sustained was sufficient to create a jury issue and to take this case outside the realm of Weathersby. The trial court correctly denied Booker's Motions for Directed Verdict, Acquittal and JNOV.

Booker also argues that the State of Mississippi did not meet it's burden to prove that Booker had the intent to kill David White. (Appellant's Brief, p. 27) Booker lists a series of references to the record that he alleges support his argument. However, on review, the State is entitled to all favorable inferences

and the testimony is to be viewed in the light most favorable to the State. This selected list of "bits" of testimony taken out of context is inconsistent with the standard of review.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997) (citing *Thornhill v. State*, 561 So.2d 1025, 1030 (Miss.1989)). During such an inquiry, we afford the State "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." *King v. State*, 857 So.2d 702, 731 (Miss.2003) (citing *Branch v. State*, 347 So.2d 957, 958 (Miss.1977)). Reversal on these grounds is appropriate only when "the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Johnson v. State*, 642 So.2d 924, 928 (Miss.1994) (citing *McNeal v. State*, 617 So.2d 999, 1009 (Miss.1993)).

In the instant case, Chad Booker, a weight lifter, using his military training (by his own admission), punched the victim three times in the side of the head around the ear. These punches were so brutal that the blood vessels between the brain and skull were torn by the desynchronous movement of the head and brain. In other words, David White's head rocked back and forth in one direction from the impact of the punches and his brain rocked and rotated within his skull from the impact of the punches. Large quantities of blood pooled and the brain swelled, forcing the herniation of the brain that killed White. These punches were not a "single blow with a fist" nor were these "normal circumstances" where the three punches were delivered in rapid success by a trained soldier in excellent condition. These were killing punches by

someone trained to kill.

Jackson v. State, 594 So.2d 20, 24 (Miss.1992) holds that even bare hands may constitute a deadly weapon if the jury determines them to be a "means likely to produce serious bodily injury." While it is certainly true that an attack with bare hands and closed fists is sufficient to sustain a charge for aggravated assault, such an issue is a matter for a jury to decide and is "to be resolved according to the circumstances of each case." *Jackson*, 594 So.2d at 23; see also *Reynolds v. State*, 776 So.2d 698, 700 (Miss.Ct.App.2000) (holding that whether the use of a telephone could constitute a deadly weapon if used with means or force likely to produce death involves a question of fact to be decided by the jury in light of the evidence); *Pulliam v. State*, 298 So.2d 711, 713 (Miss.1974). Finally, in *Pulliam v. State*, 298 So.2d 711, 713 (Miss.1974), a case also decided under the former aggravated assault statute, the court held:

> While the use of feet and fists ordinarily would not constitute the use of a deadly weapon, they can constitute a deadly weapon if used with means or force likely to produce death. Whether they are so used is for the jury to determine from the evidence.

Id. at 713.

Booker did not at any time ask the trial court for an instruction on the use of fists as a deadly weapon, and in fact, Booker has waived any objection on these grounds. This issue is procedurally barred as it was not raised at trial and the trial court did not have the opportunity to rule on the issue.

Further, there is ample evidence in the record to support the instruction given to the jury on the elements of manslaughter and Booker's conviction. There was testimony that Booker responded with an offer to fight when White flagged him down to ask him to slow down on the road through their community. There was testimony that Booker continued to attempt to taunt White by repeatedly driving past the White's shop and on at least one occasion yelling "F– you." He further manifested his great anger

by speeding up and down the road in the middle of the night and pausing to rev his souped up engine in front of White's house. Booker continued to express hostility about his encounter with Mr. White up until just an hour or so before the incident occurred, telling that Mr. Nance that David White had flagged him down Sunday after noon and, "jumped my ass" because he thought that Chad was driving too fast. Nance reported that Chad told him that he told Mr. White, "I can step out of this car and we can settle this like two men or you can call the law."

The evidence further showed that Booker had no reason to fear White. White was an older man who simply asked him to talk. There was no indication that White had a weapon of any kind or posed any real physical threat to Booker. The record reflects that Booker harbored anger over the previous incident wherein White flagged Booker down to tell him to stop speeding on the road through their neighborhood. He acted out of anger and punched Booker brutally three times in the side of the head leaving him dead in his vehicle. Booker then walked away without offering any assistance and left White to die.

The trial court correctly denied Booker's Motions for Directed Verdict, Acquittal and JNOV. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

II. The trial court correctly instructed the jury as to the elements of manslaughter and the defendant's theory of the case.

On appellate review of the trial court's grant or denial of a proposed jury instruction, the reviewing court's primary concern is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Rester v. Lott*, 566 So.2d 1266, 1269 (Miss.1990)). The question for the appellate court is whether the instruction at issue contained a correct statement of law and was warranted by the evidence. *Beverly Enters. v. Reed*, 961 So.2d 40, 43-44 (Miss.2007) (citing *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss.1986)). Mississippi appellate courts will reverse based on the denial of an

instruction only upon a showing that the granted instructions, taken as a whole, do not fairly present the applicable law. *Mariner Health Care*, 964 So.2d at 1156 (citing *Whitten v. Cox*, 799 So.2d 1, 16 (Miss.2000)). Thus, "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Purina Mills, Inc. v. Moak*, 575 So.2d 993, 996 (Miss.1990)). In analyzing the aggregate jury instructions, "[d]efects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly - although not perfectly - announce the applicable primary rules of law." *Burton v. Barnett*, 615 So.2d 580, 583 (Miss.1993)).

Manslaughter is defined by Mississippi Code Annotated section 97-3-35 (Rev.2006) as "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense[.]"

Booker complains that the trial court erred in granting Instruction S-2-A, which stated in its original form, S-2:

> If you find that the State has failed to prove any one of more of the essential elements of the crime of murder, you must find the defendant not guilty of murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of the lesser crime of manslaughter.
>
> If you find from the evidence in this case beyond a reasonable doubt that on March 12, 2007, in Tippah County, Mississippi, the decease, David White, was a living person, and he died as a result of Chad Booker striking him in the head by the use of deadly force, and while the defendant was angry, acting in the heat of passion, and not necessarily in self-defense, then you shall find the defendant guilty of manslaughter.
>
> . . .
>
> If warranted by the evidence you may find the defendant guilty of the lesser crime of manslaughter. However, notwithstanding this right, it is your duty to accept he law as given you by the court, and if the facts and the law warrant a conviction of the crime of murder, then it is your duty to accep the

> law as given you by the court, and if the facts and the law warrant a conviction of the crime of murder, then it is your duty to make such a finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does not justify a verdict for the lesser crime of manslaughter.
>
> (C.P. 201)

At trial, Booker objected to the use of the term "deadly force" in the instruction. The trial court ruled that this was a proper statement of the law. Booker further objected to the last paragraph of the instruction which was subsequently withdrawn by the prosecution. (Tr. 728-9)

Booker then complains that the trial court did not instruct the jury regarding Miss. Code Ann. § 97-3-17 (Supp. 1985) which provides:

> The killing of any human being by the act, procurement, or omission of another shall be excusable:
>
> (A) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;
>
> (B) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;
>
> (C) When committed on any sudden combat, without due advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner.

By the defendant's own admission an instruction on subsections A and B of the above statute would be inappropriate, since there was no evidence at trial of any accident. In the arguments before the trial court regarding proposed jury instruction D-3, language stating "if you believe from the evidence that David White died as a result of a blow to the head and that the fatal blow was delivered either accidently

or in self defense, then you must find Chad Booker, not guilty," was amended to remove the words "accidently or." The trial court noted on the record that there was no evidence that Booker was killed accidently. Counsel for Booker then suggested that he would be satisfied if the instruction were given without the language regarding accidental cause. (Tr. 736) Booker cannot come back at this time and argue that the jury should have been instructed as to accidental killing. Further, Section (C) of Miss. Code Ann. § 97-3-17 (Supp. 1985), is covered elsewhere in the instructions. The only theory that Booker put forth at trial that the killing of David White was justifiable, was the theory of self-defense. Jury Instruction S-4 fairly states the law as to justifiable killing as it is applicable to the facts in the instant case, stating:

> The court instructs the jury that to make a killing justifiable on the grounds of self-defense, the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm; and, in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

(C.P. 204)

Booker argues that the trial court erred in refusing instructions D-3, D-5 and D-6. (Appellant's Brief, p. 37) Instruction D-5 stated:

> The Court instructs the jury for the defendant that when a person is assailed by another person whose conduct indicates the intention and ability to imminently do the assailed person some great bodily harm, and the person assailed had good reason to believe and does believe that he is in imminent danger of being killed or suffering great bodily harm, [then] (sic) the person assailed is justified under the law , even to the taking of the life of his assailant in protecting his own life or limb or that of another.

(C.P. 224)

The above instruction, C-5, offered by the defense and refused by the trial court, was clearly

covered in other instructions. As noted above, S-5 was given and addressed the issue of the reasonable apprehension of the intention of the victim or kill or do the defendant great bodily harm as a justification for the killing of the victim. Further, jury instruction D-7 was given which correctly states the law regarding justifiable killing on the ground of self defense. (C.P. 208) S-5 and D-7 are correct statements of the law. Further, "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Purina Mills, Inc. v. Moak*, 575 So.2d 993, 996 (Miss.1990)). Additionally, the trial court properly refused D-5 as an improper comment on the evidence. (Tr. 224)

Finally, Booker complains that the trial court erred in refusing offered instruction D-6. D-6 stated as follows:

> If the jury finds that the Defendant, Chad Booker, was alwfully on his own property and was not the aggressor prior to the assault on his person by David White, and the Defendant, Chad Booker, defended himself in a manner calculated to subdue the immediate threat of harm to his person in a manner consistent with that of a reasonable person, and David White died as a result of this lawful resistance in the form of a tragic accident, then you must find the Defendant Chad Booker, not guilty.

(C.P. 225)

Again, this point of law is fairly covered in granted instructions S-5 and D-7. The issues of justifiability and self-defense are correctly stated in S-5 and D-7. Indeed, "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Purina Mills, Inc. v. Moak*, 575 So.2d 993, 996 (Miss.1990)).

Booker further argues that he was entitled to an instruction that addressed his contention that he was lawfully on his own property and therefore was justified in his actions. The trial court held that the ownership of the property where the killing occurred did not change the legal analysis of whether or not Booker had the right to repel the actions of Mr. White. The trial court further noted that there was no

evidence to show that the killing of David What was a "tragic accident." The trial court's rulings correctly noted the flaws in the instruction and it was correctly refused.

Booker argues that the trial court was obliged to amend his instructions to conform to the applicable law. However, as argued above, the trial court did instruct the jury as to the defendant's theory of his case, including his defense of justifiability,due to acting in self-defense. Booker's jury was properly and fully instructed in the law of justifiable and excusable homicide to the extent that the facts of the case supported such instruction.

III. The trial court correctly allowed the opinion testimony of Brenda Morgan.

Brenda Morgan, a registered nurse of 26 years, who came upon the scene on her way home from work, attempted to revive David White. She saw the Rhino on the side of the road and saw someone slumped over in the vehicle. (Tr. 461) She pulled in behind the two vehicles next to the driveway and. Morgan went between the two vehicles and found David White laying there slumped over in the car. White was so swollen and disfigured that she did not recognize him at first. (Tr. 464) She attempted to get a response from him, but determined that he was unconscious. (Tr. 463) Morgan took his radial and carotid pulse and did not feel anything. (Tr. 463) A man arrived and pulled up to the shot. He assisted Morgan in getting White out of the car to find a solid place to do CPR. They did not get any signs of life or response from Mr. White. The ambulance service arrived and hooked Mr. White to the monitor and Morgan continued CPR. They got a little heart response, but were not able to revive Mr. White.

Morgan testified that there was some blood coming out of his ear canal on the left and there was blood on the gear shift console in the car. The blood came from the ear canal and there was blood on his forehead. Morgan did not see any blood outside on the ground. (Tr. 466.) Morgan testified that there was blood coming from the right ear canal as well. Morgan testified that Mr. White's injuries were to the

left side of his head. She testified that anytime you clear liquid or blood coming from a cavity, it indicates that a severe trauma has occurred. (Tr. 469)

After the ambulance drivers arrived she continued CPR alternating with one of the ambulance drivers until the helicopter arrived on the scene and they took over. Moran testified that she had a fairly good amount of time to observe White and that based on her observations, she did not think Mr. White would ever have been mobile after receiving those injuries. (Tr. 469) Booker's counsel objected to this testimony on the grounds that the prosecutor had not laid the proper predicate. (Tr. 470)

On redirect, Morgan testified that from her observations, from the extent of the injury to White's head, the injury happened where White was sitting in the Rhino. Defense counsel objected, arguing that Morgan had testified on cross examination that she couldn't say how the injury happened and that this testimony contradicted her testimony on cross examination. The trial court ruled that her testimony, based on her observation, was that he got the injuries where he was seated in the Rhino and did not address *how* he got the injuries, and the objection was overruled. (Tr. 477)

Booker now argues that the trial court committed reversible error by allowing Morgan to offer opinion testimony. Booker argues that the testimony was inadmissible as either "Lay Witness" opinion under Rule 701 or as "Expert" opinion under Rule 702. Neither of these arguments was made contemporaneously before the trial court. The record reflects that Booker failed to make a contemporaneous objection on the grounds raised here on appeal. Furthermore, an objection on one specific ground waives all other grounds not specified. *Carter v. State*, 722 So.2d 1258, 1261 (Miss.1998). This issue is procedurally barred.

Further, should this court reach the merits, it is clear that the question asked of Ms. Morgan was a question that any lay person could answer based on their experience. Here was a man who was completely

non-responsive. He did not move or show any signs of life. His head, by all accounts, was badly injured on the left side, swollen, with blood oozing out his ear. The trauma was evident for anyone to see and it was apparent, that after being injured in such a manner, David White was never mobile again.

In addition, this testimony was offered by Dr. Steven Haynes as well, who testified that it would be unlikely for a person receiving the blows that caused David White's injuries to remain in a standing position unless he was supported by some means. Dr. Hayne testified that these injuries could be sustained where the torso was seated in a fixed position and the head was unsupported. The person receiving the injuries would be incapacitated very quickly, possibly regain lucidity or consciousness for s short period and then going into unconsciousness or death. (Tr. 282) Dr. Hayne testified that the injuries were consistent with a blow or blows to the head using a fist. (Tr. 286) Dr. Hayne testified that it would be very unlikely for a person to receive the blows, suffer a concussion and remain on his feet and get back into his vehicle. Dr. Hayne testified that he would not favor that scenario at all.

Further, Keith White offered lay testimony, to which the defense did not object, that if his father had received the injuries outside the Rhino, he would never have been able to get back in the vehicle due to the severity of the injuries. (Tr. 246) The evidence Booker finds objectionable from Ms. Morgan was admitted into evidence through other witnesses, as both lay and expert testimony, with no objection from the defense. If any error did occur, it is harmless.

This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

IV. The trial court was within it's discretion to admit the testimony of Shade White.

Shade White, Keith White's son and David White's grandson, testified that on the Saturday night before his grandfather's death, he got home a few minutes before his 11:00 curfew. He called his girlfriend to let her know he was home and got ready for bed. He has laying in the bed and heard a vehicle

going down the road. It stopped in front of his house and seemed to have been put in park and the motor revved. Shade testified that it would rev it up and let off and rev it up again and let off. This seemed to have happened four or five time and then the vehicle proceeded on down the road or the Booker's driveway.

Shade White testified that he had heard this vehicle before and that it was Chad Booker's truck. He testified that the Booker's truck has a distinct sound and is very recognizable. The truck, a red Chevrolet Z-71, had been modified and was very loud and has a distinct sound. Shade testified that he did not see the vehicle that was outside his home revving the engine that night. He did not see who was driving the truck. He testified that based on hearing the truck for the last five or six years, he believed that the truck he heard that night was Chad Booker's and that he had know another person to drive that truck very few times. (Tr. 334)

Shade testified that he told his father about the truck incident on Sunday morning before his grandfather's death. He told his father in order to find out if there was any way to stop because he was trying to sleep. (Tr. 335)

Booker objects that Shade White was not on the list of witnesses provided by the prosecution on April 29, 2008 and that Shade White's statement was never produced in discovery to the defense. (Tr. 322) The prosecution made an offer of proof of Shade White's testimony. (Tr. 323) The trial court ruled that since the proffered testimony of the witness was included in a statement given by his father several months ago, and there was no substantive difference in the testimony to be offered and what was provided to the defense in the father's statement, that the testimony was not a surprise to the defendant. The trial court therefore overruled the motion. Booker asked only for the relief that the testimony be excluded and did not ask for the opportunity to interview the witness. (Tr. 324) The prosecution then

asked to offer a rebuttal witness who had been in the courtroom for the duration of the trail. The trial court stated that it would allow the rebuttal testimony and excused the rebuttal witness from the rule.

The testimony of Shade White came as no surprise to the defense. Booker was well aware of Shade's existence and his story through the statement of Keith White which was timely and correctly provided by the State to the defense. Further, Booker did not ask for a continuance or a mistrial. The purpose of the rules of discovery is to prevent unfair surprise. There was no unfair surprise as the defense was clearly aware of the substance of the testimony. Further, the defense did cite Rule 9.04 in it's brief and primarily argues that the testimony is irrelevant pursuant to M.R.E. 403.

Under Rule 9.04, Booker was entitled to certain relief if a discovery violation occurred, however, for the testimony to be excluded or, in the alternative, for a proffer or for an opportunity to interview the witness. (Tr.320) The proffer was made and Booker did not ask for any further relief, such as a continuance based on the allegedly surprising testimony. Booker is therefore procedurally barred from this argument on appeal, since at trial he did not ask for the appropriate relief pursuant to Rule 9.04 and he does not cite the discovery rule in his brief on appeal. "[F]ailure to cite any authority may be treated as a procedural bar, and we are under no obligation to consider the assignment [of error]." Turner v. State, 721 So.2d 642, 648 (Miss.1998)

Further, "[f]or a discovery violation to require reversal there must be a showing of prejudice and the non-disclosed material must be more than simply 'cumulative.' " *McCoy v. State*, 811 So.2d 482, 484 (Miss.Ct.App.2002) (citing *Prewitt v. State*, 755 So.2d 537, 541 (Miss.Ct.App.1999); *Buckhalter v. State*, 480 So.2d 1128, 1128 (Miss.1985)). Booker was not prejudiced by Shade White's testimony, since he was above to cross examine the witness fully as to the extent of his knowledge of whose truck he heard and who was driving it.

Booker argues that the evidence is irrelevant and inadmissible pursuant to M.R.E. 403. However, it is clear that the testimony tends to make facts of consequence to the determination of this case more probable. First, the evidence of Booker's loud forays up and down the road that night, stopping to rev his engine at the White's house, makes it more likely that David White would sense that the situation was escalating and determine to apologize in order to "keep peace in the neighborhood." Further, it goes to Booker's "heat of passion," since it makes more probably Booker's continuing anger about White's actions in flagging him down to ask him to drive slower in the neighborhood. This evidence is clearly very relevant.

The evidence is easy to understand and not in the least bit confusing. Booker had a souped up truck that made a distinctive sound. Chase White had heard it many times and knew the sound of that truck as it came by their house regularly since the Booker's driveway was directly across the highway from his own. That night, Chase heard the distinctive sound of that vehicle pass up and down the highway in front of his house, stopping to rev its engine at the end of the driveway. Chase was clear in his testimony that he did not see the truck that night and that he did not see who was driving the truck. The jury could clearly evaluate the testimony and weight it's credibility. The testimony did not create unfair or undue prejudice, since the witness would be subjected to cross examination. The trial court correctly allowed the testimony as more its probative value outweighed its prejudicial effect. It is well settled that "[t]he admissibility of evidence rests within the discretion of the trial court, and reversal is appropriate only when a trial court commits an abuse of discretion resulting in prejudice to the accused." *Ross v. State*, 954 So.2d 968, 992 (Miss.2007) (citing *Irby v. State*, 893 So.2d 1042, 1047 (Miss.2004)).

V. The trial court correctly refused to admit Booker's offered evidence of the character of the victim, David White.

At trial, Booker attempted to introduce evidence that David White "has always had a bad temper" and that "[h]e's always been overbearing" and that therefore, he was the aggressor. (Tr. 33) The defense argued that this was evidence of a pertinent trait or character or the victim offered by the accused to show that the victim was the aggressor pursuant to 404(a)(2). The defense offered the testimony of Noel Jackson, a neighbor, who alleged that David White, "dog cussed his daddy over a land situation." (Tr. 34) Further testimony was offered by Wayne Hogue who "had a run-in when David White ran a beer store in Potts Camp." (Tr. 34) Hogue further was to testify that he was accosted by White three and a half years before on the road at a stop sign because he was driving too slow. (Tr. 35) The statement of Noel Jackson was a report from 12 to 13 years prior to trial about at incident which occurred with Mr. Jackson's father. (Tr. 35)

Wayne Hogue's statement included an incident from the mid 197's when Hogue alleged that he went in to David White's beer store. According to the statement, Mr. White said, "What the hell are you doing in here?" Hogue allegedly replied and said, "Well, I'm trying to buy beer." Hogue then got mad and left. The second encounter Hogue allegedly had with David White was three-and-a-half years before at Palmer Church. The defense offered that Hogue would testified that he stopped at a stop sign and that Mr. White got out and said, "What are you doing on my damn road, you son-of-a-bitch?" Hogue submits that David White thought he was going too slow." (Tr. 716)

Counsel for Booker stated that he was prepared to offer Mr. Hogue not about the beer store incident but about the incident on the road in order to show who the aggressor was in the incident with Chad Booker. (Tr. 717) The State objected, since there was no evidence in the incident offered under

404(a) that David White attempted to or did, in fact, physically assault anyone at the time. To put on evidence that White was someone who speaks roughly to people does not go to the issue of self defense. The incident offered does not make it more likely that White attempted to grab or hit Booker so that Booker was forced to act in self-defense, since in the alleged incident with Hogue, there was no allegation of any physical attack or physical threat against Hogue. That White spoke roughly to someone three-and-a-half years ago is simply irrelevant in a case where the issue is self-defense.

The trial court correctly held that since there was no testimony or evidence before the court that would show that David White was violent. It showed only that he used bad language and fussed at people, but it did not rise to such a level that the court could consider it a violent act. The trial court sustained the motion to exclude.

Demonstrating that the victim of an alleged assault was a violent person such that the defendant would have good cause to defend himself is . . . covered by Rule 404(a)(2)." *McNair v. State*, 814 So.2d 153 (Miss.Ct.App.2001). Generally, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." M.R.E. 404(a). However, there are exceptions to that general rule. According to Rule 404(a)(2), the following evidence is admissible:

> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor.

M.R.E. 404(a)(2).

The evidence offered by Booker was more prejudicial than probative. It was not probative as the likelihood that White was the aggressor, since the incident in question did not involve any acts or threats

of a violent nature. The only actions on the part of White, according to the proffer of Hogue's testimony, was that he cursed and confronted Hogue about his driving. There was no evidence whatsoever of physical acts or threats against Hogue. The evidence served only to attack White's character for rudeness and use of bad language and did not make it more likely that White was the aggressor.

Further, any demonstration of David White's tendency to behave violently could only be relevant to Booker's self-defense claim if Booker was aware of that tendency. In other words, in order to be relevant in a claim of self-defense, the victim's nature as a potential aggressor must not only be demonstrated, but it must also be shown that the defendant was aware of that nature, since only that combination of facts affects the reasonableness of the defendant's alleged fear of harm at the victim's hands-which is a relevant source of inquiry by the jury in assessing a claim of self-defense. *Rice v. State*, 782 So.2d 171 (Miss.Ct.App.2001)).

The trial court correctly excluded the proffered testimony by Hogue. This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

VI. The trial court correctly admitted testimony from Keith White regarding David White's cap which was found inside the Rhino.

Booker argues that the testimony the State elicited from KeithWhite that David White wore a cap every day and that David White was wearing a cap when he went to see Chad Booker on March 12, 2007, and that the cap was later found inside the Rhino should have been excluded because evidence relating to the cap was never provided in discovery. (Appellant's Brief, p. 49)

During that State's examination of Keith White, the following colloquy took place:

Q. Do you recall what your father was wearing that day?

A. Uh, seems liek he might have been wearing a flannel shirt, blue jeans, and a cap, tennis

shoes.

Q. The cap, did he normally wear a cap?

A. Yes, sir. Everyday.

Q. Some people wear caps every day and some people don't. Was he a cap wearer?

A. Yes, sir. Everyday.

(Tr. 238)

Defense counsel interposed an objection that the State was trying to elicit testimony regarding the cap to try to physically contradict the defendant's version of the events. Booker alleged that this was never provided in discovery to the defense. (Tr. 239) However, defense counsel stated that there was a report from the crime scene unit saying there's a hat in the Rhino. (Tr. 239) Defense counsel asked that the testimony regarding the hat be excluded as a discovery violation and because it damaged the defendant's claim that this was a Weathersby case and that there was no physical evidence to contradict the defendant's version of the events. (Tr. 239)

Defense counsel stated that whether the hat was outside or inside the Rhino physically contradicted the defendant's version of events. He alleged that the prosecution had "hidden" the information about this "important piece of evidence" in the report by the crime scene unit. (Tr. 240) The State noted that there was also a report of the cap in Sheriff's Deputy McAlister's report on his investigation of the crime scene, as well as a report of the glasses laying in the road just north of the Rhino.

Booker alleges that the failure of the State to explain exactly how it was going to argue its case relative to the cap, i.e. that the position of the cap was important to its argument, was a clear discovery violation and prosecutorial misconduct. Rule 9.04 certainly does require that physical evidence relevant to the case be disclosed to the defense. In the case at bar, the physical evidence, the cap, and it's position in

the vehicle was provided to the defense in two separate reports. The prosecution is not required to disclose it's trial strategy to the defense. The trial court correctly overruled the objection.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The assignments of error presented by the Appellant are wholly without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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