IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2008-KA-02054

CHAD BOOKER **DEFENDANT-APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

Appeal from the
Circuit Court of the Tippah County, Mississippi
Criminal Case No. TK-07-043

REPLY BRIEF OF CHAD BOOKER, THE DEFENDANT-APPELLANT

Oral Argument is Requested

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

I. INTRODUCTION

This is an appeal from a conviction of "heat of passion" manslaughter. Chad Booker, the Defendant-Appellant, was indicted for the "deliberate design" murder of David White, but was convicted of the lesser offense of "heat of passion" manslaughter.[1] The uncontradicted and undisputed evidence at the trial demonstrated that David White went upon the property of Chad Booker, that there was a brief exchange of words, that there was an extremely short altercation in which Chad punched David White with his fist three times in rapid succession, and that David White died from the injuries related to the punches.

The *Brief for the Appellee* filed herein by the State of Mississippi is often deceptive in the manner in which it discusses the evidence and the proceedings in the trial court. Chad Booker is not claiming that the deceptiveness of the State's brief is due to any wrong-doing by the State or due to any intentional plan of the State to willfully mislead this Court. Yet the fact remains that the *Brief for the Appellee* can be misleading. As an example, Chad Booker would point out that Jeff Butler, who assisted in moving David White's body at the scene of the altercation, testified he did not recall seeing any blood at the scene, and testified "I didn't have any shirt on, and when I wrestled to get [David White] off [the Rhino ATV he was occupying], I didn't have no blood on me," and Chris McAlister, Deputy Sheriff for Tippah County, testified that there wasn't any blood at the scene, except for the small amount of blood found inside the Rhino ATV occupied by David White. [T. 369-370, 536.] Thus, the actual trial testimony demonstrates that there was little blood found at the scene. The State's *Brief for the Appellee*, however, makes at least twenty-three (23) specific references to "blood" or "bleeding" in its ten-page recitation of the facts. After reading the State's

[1]Chad Booker, the Defendant in the trial below and the Appellant before this Court, may hereinafter also be referred to as "Chad."

Statement of the Facts one is left with the impression that there was a bloody crime scene, when the actual trial testimony clearly demonstrates that this was not the case.

Another example of how the State's *Brief for the Appellee* is misleading is found in the State's summary of the testimony of Keith White, wherein the State recites "Keith testified that the Rhino was not running when he arrived."[2] This is misleading because it ignores Keith White's trial testimony that he heard David White shut off the Rhino while Jeff Butler testified that the Rhino was running when he arrived and that Butler turned the motor off (facts which support Chad Booker's version of he events, that David White turned the Rhino off and then, after the altercation, got back into the Rhino and cranked it up to drive away). [T. 258.] The State's brief completely ignores ***any*** of Jeff Butler's testimony.

Another example of how the State's *Brief for the Appellee* is misleading is found in the State's summary of the testimony of Charlotte White, the wife of David White. The State's brief recites: "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)."[3] This description suggests a depressed skull fracture, yet the forensic pathologist who performed the autopsy on David White specifically testified that David White suffered a "closed head injury" and that there were "no fractures to the skull." [T. 279.]

Another example is discussed under Issue II, *infra*, in a discussion of the jury instructions where the State claims in its brief that Chad Booker, through counsel, agreed to an amendment of a jury instruction so as to state that the killing of David White was ***not*** accidental.[4] To support that contention, the State cites to a specific page in the Transcript (*i.e.*, T. 736), whereas a fair and

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[2] *Brief for the Appellee*, p. 4.

[3] *Brief for the Appellee*, p. 7,

[4] *Brief for the Appellee* (at pp. 24-25) (emphasis added).

objective reading of the Transcript (pp. 735-736, 746-747) reflects that Chad Booker's counsel did not agree that the killing was not accidental, but, instead, only agreed that Chad did not strike David White accidentally – which is a distinction with a magnitude of difference.

Chad Booker asserts that this case should be controlled by the *Weathersby* rule, and, in the *Brief of Chad Booker, the Defendant-Appellant* previously filed herein, Chad Booker fairly and objectively enumerated thirty-six (36) specific ***uncontested*** and ***uncontradicted*** facts (with specific references to the transcript and the exhibits) which, when considered collectively, demonstrate that the death of David White was not a matter of "heat of passion" manslaughter but was, instead, an "excusable" homicide which occurred as a result of "misfortune, in the heat of passion, upon any sudden and sufficient provocation" and which occurred "upon ... sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."[5]

* * * * * *

[5]See MISS. CODE ANN. § 97-3-17 (Supp. 1985), which states *in toto*:

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 upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

II. REPLY TO THE STATE'S ARGUMENTS CONCERNING THE ISSUES

ISSUE I: The trial court committed reversible error when it denied Defendant Chad Booker's motion for a directed verdict at the close of the State's case-in-chief, and the trial court committed reversible error when it denied Defendant Chad Booker's motion for judgment of acquittal at the close of the Defendant's case-in-chief, and the trial court committed reversible error when it failed to grant a judgment of acquittal notwithstanding the verdict (JNOV).[6]

Chad Booker was indicted and charged with the "deliberate design" murder of David White under MISS. CODE ANN. §97-3-19(1)(a) which provides:

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
>
> (a) When done with deliberate design to effect the death of the person killed, or of any human being; ....

Throughout the trial, the State's theory of the case (which was succinctly stated in the State's closing argument) was as follows:

> David White said, Look. I'm going to go down there and apologize. [David White] gets in his Rhino. He drives down the street. Chad Booker is outside, and ***make no mistake about it, David White did not get out of the Rhino.*** He did not get out of the Rhino. When he drove up, Chad Booker assaulted him unmercifully, hitting him in the head until he was dead.

[T. 751 (emphasis added).]

Chad Booker's version of the events which led to the death of David White was set forth in Chad's testimony. Chad testified that David White came "flying down [County Road] 813 in that little Rhino and kind of spun like he was going to do a U there" into Chad's driveway before he parked the Rhino. [T. 585.] Chad testified that when David White parked the Rhino it was not in the

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[6]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶¶ 9, 11, and 15).

location where the Rhino is depicted in photographs of the scene which were admitted into evidence (such as "State's Exhibit # 2"). [T. 585-586.] Chad also testified that David White turned off the motor on the Rhino. [T. 586, 590.] Chad testified:

Q. Did he get out of the Rhino?

A. Yes, sir, real quick, and he said, Hey, I got to talk to you.

Q. ... Did he turn that Rhino off or not?

A. Yes, sir.

Q. After he turned the Rhino off, what happened?

A. He got right off of it and he said, Hey, I got to talk to you.

Q. How did he say it?

A. He said it just like that, sir. Rough. I said, Mr. White, I don't want to talk to you.

...

A. I said, Mr. White, I don't want any problems with you. Just leave. Leave my property. I don't want any problems with you (Demonstrating).

Q. What did he say?

A. He said, Hell, naw. You're gonna talk to me.

Q. And what did you do then?

A. He reached up to grab my collar, and when he did, he went to punch me with his other hand; and I caught his wrist and twisted it like that right there and I punched him three times and turned him loose. I was bad upset over the whole deal (Demonstrating).

Q. Bad upset over what?

A. That I had a confrontation with Mr. White.

[T. 586-587.]

The State presented one witness – Dr. Steven Timothy Hayne – who was ***qualified*** by training and experience to present an "expert" opinion on the mechanism that caused David White's death. Dr. Hayne is the forensic pathologist that performed the autopsy on David White. [T. 270, 271, 274.] The State of Mississippi, in its *Brief for the Appellee*, asserts that the testimony of Dr. Hayne established "facts in substantial and material contradiction of Chad's version of events."[7] This claim by the State directly contradicts Dr. Hayne's actual testimony, to-wit:

> Q. ***Is it possible for Mr. White to have received a blow or blows and received a concussion and still remained on his feet and gotten back into his vehicle?***
>
> A. ***I couldn't exclude that,*** Counselor, but I think that would be very unlikely. In these type of injuries, I would expect the person to suffer a concussion, which you cannot see medically; but statistically, it's far more probable that the individual suffered a concussion which by definition a person losses consciousness. It may only be for a very short period of time. It may be a second or two three seconds, and then regain consciousness, and then subsequently lose consciousness again before death.
>
> Q. ***So he could have received a concussion, been out on his feet, not gone down, regained consciousness, and gotten in his vehicle?***
>
> A. ***It would be possible, Counselor. I couldn't exclude that.***

[T. 287-288 (emphasis added).]

The State has its theory of what happened (*i.e.*, that "David White did not get out of the Rhino" but was in fact set upon by Chad Booker as White sat in the Rhino) and Chad's version is completely different (*i.e.*, that David White got out of the Rhino, approached him, grabbed and swung at him, and that Chad grabbed White and struck him three times in rapid succession). Dr. Hayne's testimony favors the State's theory but does not exclude Chad's version as a possibility. In this case, had there been two separate witnesses, one witness presenting the State's theory and a

[7] *Brief for the Appellee*, p. 18.

second witness presenting Chad's version, then there would have existed a fact question to be resolved by a jury (*i.e.*, which witness to believe), and fact questions must be resolved by the jury. However, there is only one ***credible*** and ***qualified*** witness upon whom the State's case rests, and that witness, Dr. Hayne, never equivocated in agreeing that Chad's version was possible. Because the State's own expert witness concluded and testified that Chad's version was possible (even assuming, *arguendo*, that Chad's version was "unlikely"), then the State's theory of Chad Booker's guilt established, at most, a ***probability*** and did not rise to the level of ***beyond reasonable doubt***.

The Mississippi Supreme Court has stated:

> It is ***fundamental*** that convictions of crime cannot be sustained on proof which amounts to ***no more than a possibility*** or even when it amounts to a ***probability***, but it must rise to that height which will ***exclude every reasonable doubt***; that when in any essential respect the state relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis than that the contention of the state is true, and that throughout the burden of proof is on the state. It is our duty here to maintain these principles.

Westbrook v. State, 202 Miss. 426, 432-433, 32 So.2d 251, 252 (Miss. 1947) (emphasis added). See also *Kolberg v. State*, No. 2000-KA-00786-SCT, 829 So.2d 29, 39 (¶ 7) (Miss. 2002); *Steele v. State*, 544 So.2d 802, 808 (Miss. 1989); *Hester v. State*, 463 So.2d 1087, 1093 (Miss. 1985); and, *Hemphill v. State*, 304 So.2d 654, 655 (Miss. 1974).

Because Dr. Hayne could not exclude the possibility of Chad Booker's version of the events, the death of David White falls within the provisions of the "excusable" homicide statute, MISS. CODE ANN. § 97-3-17, which states, in pertinent part, as follows:

> The killing of any human being by the act, procurement, or omission of another shall be excusable:
>
> ...
>
> (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;

> (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Furthermore, Chad Booker asserted to the trial court that this case falls squarely within the "*Weathersby* rule," to-wit:

> It has been for some time the established rule in this state that 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 state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 147 So. 481, 482 (Miss. 1933) (emphasis added). As previously noted, the only ***credible*** and ***qualified*** witness – Dr. Hayne – did not equivocate in admitting that Chad Booker's version was, at the very least, possible; therefore, Chad's version was ***not*** "substantially contradicted" and the *Weathersby* rule should have been invoked by the trial judge and this case should have never been submitted to the jury.

The standard of review under this assignment of error is as follows:

> To determine whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that ***every element of the offense existed***; and where the evidence fails to meet this test it is insufficient to support a conviction." *Carr v. State*, 208 So.2d 886, 889 (Miss.1968). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact ***could have found the essential elements of the crime beyond a reasonable doubt.***

Jones v. State, No. 2003-CT-00083-SCT, 904 So.2d 149, 153-154 (¶ 12) (Miss. 2005) (emphasis added).

Chad Booker's case was submitted to the jury under the "deliberate design" indictment even though the State never produced a scintilla of evidence indicating Chad ever had any intent or "deliberate design" to kill David White. The jury, having been given a "heat of passion"

manslaughter instruction (*i.e.*, Instruction No. S-2-A, which, in part stated: "... while the defendant was angry, acting in the heat of passion, and not in necessary self-defense, then you shall find the defendant guilty of manslaughter." [R. 201, E. 70.]), returned a verdict of guilty of manslaughter. The "heat of passion" manslaughter statute, MISS. CODE ANN. § 97-3-35, states *in toto*:

> The 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, shall be manslaughter.

By its very language, Section 97-3-35 requires that the killing occur "in the heat of passion" and "in a cruel or unusual manner, or by the use of a dangerous weapon." Chad Booker may well have struck David White "in the heat of passion," at no time in the trial did the State of Mississippi produce a scintilla of evidence that Chad either used "a dangerous weapon" or acted "in a cruel and unusual manner," which are essential elements which must be present to support a conviction of manslaughter under MISS. CODE ANN. § 97-3-35. The undisputed and uncontradicted evidence indicates that Chad struck David White on the left side of the head three times in rapid succession with his fist. [T. 279, 286, 287.] It has been stated that a "blow with a fist would not, in the normal circumstance, be expected to produce a death" and "striking of another with a fist, in the normal circumstance, [does not] rise to the level of a felony." *Miller v. State*, No. 97-KA-00072 COA, 733 So.2d 846, 850 (¶ 14) (Miss. App. 1998).

The Mississippi Supreme Court has stated:

> To determine whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the ***critical inquiry*** is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that ***every element of the offense existed***; and ***where the evidence fails to meet this test it is insufficient to support a conviction.***" *Carr v. State*, 208 So.2d 886, 889 (Miss.1968). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact ***could have found the essential elements of the crime beyond a reasonable doubt.***

Jones v. State, No. 2003-CT-00083-SCT, 904 So.2d 149, 153-154 (¶ 12) (Miss. 2005) (emphasis added).

> The State, in its *Brief for the Appellee* (at pp. 19-20), argues:
>
> 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.

What is listed in the *Brief of Chad Booker, the Defendant-Appellant* (at pp. 27-30) are thirty-six (36) separate undisputed and uncontradicted facts (with citations to the Record, to the Transcript, and to the exhibits) which, when considered objectively, demonstrate that the physical facts of the incident fail to contradict Chad Booker's version in any material particular. Rather than being "'bits' of testimony taken out of context" (as described by the State), the aforesaid undisputed and uncontradicted facts demonstrate that no fair, reasonable, and "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Therefore, the trial judge erred in failing to grant either Chad Booker's motion for a directed verdict or his motion for judgment notwithstanding the verdict (JNOV).

* * *

ISSUE II: The trial court committed reversible error by failing to properly instruct the jury.[8]

As was mentioned, *supra*, the jury was given a "heat of passion" manslaughter instruction, Instruction No. S-2-A, which, in pertinent part, stated as follows:

> If you find from the evidence in this case beyond a reasonable doubt that on March 12, 2007, in Tippah County, Mississippi, the deceased, David White, was a living person, and he died as a result of Chad Booker striking him in the head by the use of

[8]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶¶ 12, 13, and 14).

> deadly force, and while defendant was angry, acting in the heat of passion, and not in necessary self-defense, then you shall find the defendant guilty of manslaughter.

[R. 201, E. 70.] The trial court, however, did not instruct the jury regarding "excusable" homicide under MISS. CODE ANN. § 97-3-17, which states, in pertinent part, as follows:

> The killing of any human being by the act, procurement, or omission of another shall be excusable:
>
> ...
>
> (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;
>
> (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Furthermore, Chad Booker offered several jury instructions, specifically including "D # 3," "D # 5," and "D # 6," which would have fully instructed the jury regarding justifiable and excusable homicide, but these instructions were refused by the trial court.

The State, in its brief, claims:

> By the defendant's own admission an instruction on subsections A and B of [MISS. CODE ANN. § 97-3-17] 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 [sic] 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.[9]

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[9] *Brief for the Appellee* (at pp. 24-25) (emphasis added).

The State has misconstrued the record in this case. Chad Booker never admitted that "an instruction on subsections A and B of [MISS. CODE ANN. § 97-3-17] would be inappropriate" as claimed by the State. Proposed Instruction D-3 contained this language: "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." The undisputed and uncontradicted fact is that Chad intentionally struck David White with his fist; the actual blow was not an accident. However, Chad never had any intent to kill David White, and the fact that David White died from the blow is an accident which occurred "in the heat of passion, upon any sudden and sufficient provocation" as contemplated by MISS. CODE ANN. § 97-3-17(a). Chad Booker never agreed to remove any language relating to the ***cause*** of David White's death being an accident. Furthermore, even after Chad's counsel agreed to delete the language which could have been read as suggesting the blow was accidental, the State objected to the instruction. Thereafter, Chad Booker requested the instruction as presented, but the instruction was amended by the trial court by deleting most of its language and given as "Instruction D-3-A." [R. 157, 207; T. 735-736, 746-747.] Chad Booker did not agree to the instruction as amended. The State's claim that "Booker cannot come back at this time and argue that the jury should have been instructed as to accidental killing" ignores what actually transpired during the trial.

The entirety of the record reflects that instructions which would have addressed "excusable" homicide under MISS. CODE ANN. § 97-3-17 are Instruction D-5 and Instruction D-6, and both instructions were refused by the trial court. [T. 737-783.] The rule in Mississippi is that:

> In a homicide case, as in other criminal cases, the court should instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence, and ***a failure to do so is error requiring reversal of a judgment of conviction***. [Citations omitted.] Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court.

> [Citation omitted.] Where ***a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error***. [Citations omitted.]

Hester v. State, 602 So.2d 869, 872 (Miss. 1992) (emphasis added).

Because of the failure of the trial court to properly instruct the jury, the conviction of Chad Booker should be reversed.

* * *

ISSUE III: The trial court committed reversible error when it allowed Brenda Morgan to offer opinion evidence over the objection of Defendant Chad Booker.[10]

The State, in its brief, argues:

> 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.[11]

The State has not properly stated either the facts or the rule. In *Carter v. State*, No. 97-KA-00760-SCT, 722 So.2d 1258 (Miss.1998), evidence of the defendant's prior criminal conduct (evidence which is not admissible under Rule 404(b) of the Mississippi Rules of Evidence) was admitted over the defendant's objection. At the trial, the defendant objected to the evidence "on grounds of relevancy and lack of proper foundation." On appeal, the State argued that the defendant was procedurally barred from raising Rule 404(b) because the defendant had not made Rule 404(b)

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[10]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶8).

[11]*Brief for the Appellee*, p. 28.

the specific grounds of the objection during the trial. The Mississippi Supreme Court held that the defendant was not procedurally barred from raising the issue on appeal:

> "[O]bjection on one ground at trial waives all other grounds for objection on appeal." *Lester v. State*, 692 So.2d 755, 772 (Miss.1997). However, Rule 404(b) is an issue of relevancy, and Carter objected on grounds of relevancy. Where the specific grounds for objection are apparent from the context, a general objection is sufficient to preserve the error for appeal. *Barnette v. State*, 478 So.2d 800, 803 (Miss.1985).

Carter, 722 So.2d at 1261-62 (¶ 13).

Brenda Morgan was the first person to find David White after the altercation between David White and Chad Booker, and, as such, her presence as a witness was not unexpected at the trial. [T. 461-463.] What was not expected was that the State would attempt to elicit "expert" witness testimony from Morgan, which was done in an obvious attempt by the State to shore up the fatal flaw in the State's case left by Dr. Hayne's testimony that Chad Booker's version of the altercation was, in fact, possible and could not be excluded. [T. 287-288.]

To be admissible at trial, opinion testimony is only admissible as either "Lay Witness" opinion under Rule 701 or as "Expert" opinion under Rule 702 of the Mississippi Rules of Evidence. Under the clear language of Rule 701, testimony "based on scientific, technical, or other specialized knowledge" is not "lay" opinion but is, in fact, "expert" opinion which is governed by Rule 702. Furthermore, before "expert" opinion testimony may be admitted, the trial court must act as a "gate keeper" and:

> ... perform a two-pronged inquiry in determining whether expert testimony is admissible under Rule 702. [Citation omitted.] The modified *Daubert* rule is not limited to scientific expert testimony – rather, the rule applies equally to all types of expert testimony. [Citation omitted.] First, the court must determine that the expert testimony is relevant – that is, the requirement that the testimony must " 'assist the trier of fact' means the evidence must be relevant." [Citation omitted.] Next, the trial court must determine whether the proffered testimony is reliable. [Citation omitted.] Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one.

Mississippi Transp. Com'n v. McLemore, No. 2001-CA-01039-SCT, 863 So.2d 31, 38 (¶ 16) (Miss. 2003).

Thus, before "expert" opinion testimony may be received, the proponent must lay a proper predicate and satisfy the two-pronged inquiry of Rule 702 as mandated by *McLemore* (which adopted *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as modified in *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). See *McLemore*, 863 So.2d at 35-40 (¶¶ 5-25).

At the trial of Chad Booker, the State posed this question to Brenda Morgan:

> Based on your observations and your experience as a human being ***and as a nurse***, do you think Mr. White would have ever been mobile after receiving those injuries?

[T. 469 (emphasis added).] Chad Booker's attorney immediately objected:

> Objection, your Honor. I don't think he's got the proper predicate. The proper predicate has not been laid to ask that question, and we would so move to object.
>
> BY THE COURT: Overruled. ....

[T. 469-470.]

As previously discussed, in *Carter* the defendant did not specifically mention Rule 404(b) when making an objection to evidence of prior crimes, but instead stated "relevancy"as the grounds, and the Mississippi Supreme Court stated that where the "grounds for objection are apparent from the context, a general objection is sufficient ...." *Carter*, 722 So.2d at 1261-62 (¶ 13). Similarly, although Chad Booker's counsel did not specifically mention Rule 702 when the objection was made during the trial, the grounds for Booker's objection "are apparent from the context" since both prongs of the two-pronged modified *Daubert* test require that a proper predicate be laid before an expert's opinion may be placed before a jury:

> Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. [Citation omitted.] First, the witness must be qualified by virtue

> of his or her knowledge, skill, experience or education. ... Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.

See *McLemore*, 863 So.2d at 35 (¶ 7). Furthermore, in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the alternative a New Trial* (at ¶ 8) Chad Booker specifically stated: "The Defendant would show that Ms. Morgan did not have the underlying basis of knowledge nor training to offer [her opinion] as an expert in the field of medicine nor did she possess the knowledge as a lay witness to give that testimony." [E. 91; R. 263.] Thus, this assignment of error was presented to the trial court and is not procedurally barred.

The State also argues that "it is clear that the question asked of Ms. Morgan was a question that any lay person could answer based on their experience."[12] Again, the question was this:

> Based on your observations and your experience as a human being ***and as a nurse***, do you think Mr. White would have ever been mobile after receiving those injuries?

[T. 469 (emphasis added).]

The State's argument that "any lay person" could render an opinion on the question of whether "Mr. White would have ever been mobile after receiving those injuries" is ridiculous and absurd. The State took great care in its presentation of Brenda Morgan's testimony to place before the jury her background as not only a licensed nurse but as a former ICU nurse. [T. 459.] The State posed its question to Morgan based upon her "experience ... as a nurse." [T. 469.] And the State, in its closing argument, proclaimed:

> Brenda Morgan, I've been a nurse for 30 years. I worked in the emergency room. I saw David White. He hadn't moved from where he was struck at.

[T. 789.] Chad Booker believes it is obvious that the State was seeking to bolster its case with "expert" testimony from Brenda Morgan and that to claim otherwise is ridiculous.

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[12] *Brief for the Appellee*, p. 28.

The State, in its *Brief for the Appellee*, argued that Dr. Hayne's testimony substantially and materially contradicted Chad Booker's version of the event because, as the State explains in detail:

> The head would rock back and force [sic] and would also twist, tearing the small bridge blood vessels that goes [sic] from the inner surface fo [sic] the skull to the outer surface of the brain. Once the blood vessels are torn, the [sic] start bleeding due to the brain rotated [sic] back and forth in the skull. (Tr. 277) The head bouncing back from one side to the other inside the school [sic] 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)[13]

The thrust of Dr. Hayne's testimony was that while Dr. Hayne thought it was unlikely it is possible that David White remained on his feet after being struck. [T. 288.] Dr. Hayne admitted that after being struck by Chad Booker there was "certainly a distinct possibility" that David White could have been conscious and lucid for a short period of time. [T. 289] This testimony, of course, is consistent with Chad Booker's version of the events wherein after the altercation David White got back onto the Rhino and cranked it.

Dr. Hayne's opinion was based upon his training, his experience, and the findings of the autopsy he performed on David White's body. Brenda Morgan's testimony was based solely upon her observation of David White's external injuries. Furthermore, Morgan's external observations were not made until after significant swelling had occurred:

Q. You indicated you said, Sir, sir. Did you recognize the person in that vehicle?

A. Initially, I did not, no.

Q. Did you know David White?

A. Yes, sir.

Q. Why did you not recognize him?

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[13] *Brief for the Appellee*, pp. 18-19.

A. Well, the part that I could see, the left side of his face and, you know, he was slumped over like this, and this part was against the column. ***That was really swollen and disfigured almost it was so bad*** (Indicating).

[T. 464 (emphasis added).]

Brenda Morgan testified that "my husband and David [White] were real good friends" and that "[w]e fished together." [T. 460.] Thus, from the testimony of Brenda Morgan, when she first observed David White, a person whom she knew quite well, the swelling of his face was such that she did not immediately recognize him. Notably, Brenda Morgan was not present when the altercation occurred, she had no way of knowing how long David White had been sitting in the Rhino when she arrived, and she had no time-frame whatsoever upon which she could base her opinion that David White could not have "ever been mobile" in the first moments after the altercation. [T. 470.] A requirement for admission of "lay" opinion testimony under Rule 701 is that such testimony be "rationally based on the perception of the witness." Without possessing any knowledge whatsoever of how long David White had been sitting in the Rhino, there is no 'rational basis' to support Morgan's testimony, and, on these facts it is absurd for the State to suggest that "any lay person" could render an opinion on the question of whether "Mr. White would have ever been mobile after receiving those injuries."

The jury returned a verdict of guilty of manslaughter against Chad Booker. The crucial element of the State's theory of the case was that David White never got out of the Rhino, but was assaulted by Chad Booker as he sat in the Rhino. Chad's version of the incident is that David White had stepped out of the Rhino, and then grabbed and swung at him and that he grabbed White's wrist while White was standing and hit White three times with his fist. Dr. Hayne had testified that he could not "exclude" Chad's version, and that it "would be possible." Brenda Morgan's testimony, however, supported the State on the crucial element of the State's theory. Chad Booker would state

and show unto this Court that, on the face of the record, it cannot objectively be said that a fair minded jury could have arrived at no verdict other than that of guilty, and that, therefore, the admission of the opinion testimony – termed as either "expert" or "lay" opinion – from Brenda Morgan was reversible error. See, *e.g.*, *Palmer v. Volkswagen of America, Inc.*, No. 2001-CA-00875-COA, 905 So.2d 564, 585, 589 (¶¶ 63, 83) (Miss. App. 2003), and *Palmer v. Volkswagen of America, Inc.*, No. 2001-CT-00875-SCT, 904 So.2d 1077, 1092 (¶ 66) (Miss. 2005).

* * *

ISSUE IV: The trial court committed reversible error in admitting the testimony of Shade White.[14]

Chad Booker objected to the admission of the testimony of Shade White on two grounds: (1) Chad Booker asserted that Shade White had not been identified as a witness in violation of the discovery rule (*i.e.*, Rule 9.04 of the Mississippi Uniform Rules of Circuit and County Court Practice); and, (2) the probative value of the testimony was outweighed by the danger of unfair prejudice (under Rule 403 of the Mississippi Rules of Evidence). [T. 324.]

Here it must be remembered that the State put Chad Booker to trial on a charge of "deliberate design" murder under MISS. CODE ANN. §97-3-19(1)(a), and, to support the charge, the State needed some evidence to prove that Chad acted with malice aforethought, premeditated design, or the "deliberate design to effect the death of David White" when Chad struck David White.[15] The State did not have any eyewitnesses to the incident from whom to elicit testimony that Chad was the initial

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[14]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶ 7).

[15]See Indictment. [R. 1. E. 11.] See also *Hawthorne v. State*, No. 2001-KA-01712-SCT, 835 So.2d 14, 19 (¶ 21) (Miss. 2003) (citing *Windham v. State*, 602 So.2d 798, 801 (Miss.1992), for the proposition that malice aforethought, premeditated design, and deliberate design all mean the same thing).

aggressor, which might possibly show malice aforethought or deliberate design, and the State also found itself confronting the *Weathersby* rule.[16] Faced with the need to prove malice aforethought, and faced with the *Weathersby* rule, the State, over the objection of Chad Booker, resorted to introducing testimony from Shade White which implied that Chad engaged in an act of intimidation directed toward the Whites.

The State, in its brief, makes the claim that Shade White's testimony "is clearly very relevant" and argues:

> Booker had a souped up truck that made a distinctive sound. Chase [sic] 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 [sic] 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 [sic] 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 [sic] 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 [sic] its ***probative value outweighed its prejudicial effect***.[17]

The State's argument is breathtaking! The State's position is that testimony about a truck which the witness admittedly did not see, and the driver of which is admittedly unknown, "is clearly very relevant."[18] How can this testimony possibly have a scintilla of "probative value"? How can the admission of testimony which has no "probative value" whatsoever ***not*** be an abuse of discretion by the trial court?

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[16]As the only eyewitness to the incident, Chad Booker's version of the incident "if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (Miss. 1933).

[17]*Brief for the Appellee*, p. 32 (emphasis added).

[18]*Brief for the Appellee*, p. 32.

The admission of Shade White's testimony was reversible error. Allowing the jury to consider highly questionable evidence which implied – without any substantive basis – that Chad Booker engaged in threatening behavior directed toward the Whites was prejudicial to Chad and it cannot be said that the outcome of the case was not affected by the evidence. Because Chad Booker was put to trial on a charge of "deliberate design" murder and was convicted of "heat of passion" manslaughter under MISS. CODE ANN. §97-3-35, Shade White's testimony implying threatening conduct by Chad Booker was undoubtedly prejudicial and should have been excluded under Rule 403.

* * *

ISSUE V: The trial court committed reversible error by refusing to admit evidence Chad Booker sought to introduce under Rule 404 of the Mississippi Rules of Evidence. [19]

The Mississippi Supreme Court has often stated: "A criminal defendant is not entitled to a perfect trial, only a fair trial." See, *e.g.*, *McGilberry v. State*, No. 97-DP-00213-SCT., 741 So.2d 894, 924 (¶ 126)(Miss. 1999) (citing *Sand v. State*, 467 So.2d 907, 911 (Miss.1985).

Chad Booker was denied a fair trial.

The Court has also stated it "may reverse a conviction and/or sentence based upon the cumulative effect of errors that independently would not require reversal." *McGilberry v. State*, No. 97-DP-00213-SCT., 741 So.2d 894, 924 (¶ 126)(Miss. 1999) (citing *Jenkins v. State*, 607 So.2d 1171, 1183-84 (Miss.1992); *Hansen v. State*, 592 So.2d 114, 153 (Miss.1991)). This assignment of error is one of those situations where cumulative mistakes by the trial court rise to the level of reversible error.

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[19]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶¶ 2, 10).

The trial court permitted the State to introduce testimony from Shade White that a truck that Shade White did not see, the driver of which Shade White also did not see and could not identify, stopped in the road outside the White residence and revved its engine in the middle of the night. [T. 330, 332.] The trial court allowed Shade White to testify, over the objection of Chad Booker, that the unseen truck belonged to Chad Booker. [T. 330, 333.] The trial court also allowed Shade White to testify that he's never seen anyone other than Chad Booker driving Chad's truck, which by implication obviously meant that the unseen driver revving the unseen truck outside the White residence in the middle of the night was Chad Booker. [T. 333.]

The intended purpose of this testimony from Shade White was to portray Chad as having malice toward the Whites, and David White in particular. The State needed to be able to show malice on the part of Chad to support its charge of "deliberate design" murder.

Shade White's testimony was extremely prejudicial toward Chad Booker. Essentially, the testimony indicated threatening behavior against the Whites by Chad Booker. If a criminal trial is supposed to play out on a level field, Shade White's testimony significantly tilted the field.

In an attempt to re-balance and re-level the field, Chad Booker sought to introduce evidence and testimony regarding previous incidents involving David White in which David White had lost his temper. This testimony was relevant to the issue of whether David White had been the initial aggressor in the altercation with Chad Booker as described by Chad. Chad Booker also sought to introduce evidence contained in the recorded statement from Possum Nance relating to Chad's propensity for peacefulness. [T. 27-32; 33-36; 716-719; 720-721.] The trial court did not allow Chad Booker to present this evidence and testimony.

The State argues that "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."[20] The State cites *Rice v. State*, No. 1999-KA-02099-COA, 782 So.2d 171 (Miss. App. 2001), as support for its argument, but the State's reliance on *Rice* is misplaced. In *Rice* the defendant came home to find another man with his "common law" wife and, as the man escaped through a bathroom window, the defendant shot and wounded the interloper. The defendant, charged with aggravated assault, claimed he shot the man because the man had threatened his life, but there was no evidentiary support for the claim.

It must be remembered that Chad Booker asserts that this case is governed by the *Weathersby* rule, to-wit:

> ... 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 state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 147 So. 481, 482 (Miss. 1933). Under the *Weathersby* rule the crucial test is whether the defendant's version is reasonable. Therefore, any evidence having any tendency to make the existence of the fact of David White being the initial aggressor (as claimed by Chad Booker) more probable or less probable is relevant evidence under Rule 401, and evidence which demonstrates a character trait of a "victim" (such as David White) for either peacefulness or aggression is specifically admissible under Rule 404.

Without the proposed evidence and testimony relating to David White's aggressive tendencies, the jury was left with Shade White's testimony of implied threats against the Whites by Chad Booker. The jury was also left with testimony from David White's wife, Charlotte, that David

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[20] *Brief for the Appellee*, p. 35.

White had come home Sunday night from church at the Ripley Church of Christ and had concluded that even though he did not personally believe he owed Chad Booker any apology that he needed to apologize, and would apologize, to Chad Booker.[21] [T. 308-311.] The implication left with the jury was that David White went to do the Christian thing and apologize to Chad Booker and that Chad beat David White to death for no reason.

Under this state of the evidence which the trial court allowed to be presented to the jury, Chad Booker did not receive a fair trial, and the denial of the Rule 404 evidence offered by Chad Booker, coupled with the fact that the State was allowed to introduce improper and highly prejudicial evidence through Shade White, rises to the level of reversible error.

* * *

ISSUE VI: The trial court committed reversible error by admitting testimony from Keith White relating to David White's cap which was found inside the Rhino.[22]

A discovery violation is harmless error only where there is no prejudice to the defendant. See, *e.g.*, *Gray v. State*, No. 2004-KA-01915-COA, 926 So.2d 961, 971 (¶ 25) (Miss. App. 2006) (citing *Jones v. State*, 669 So.2d 1383, 1392 (Miss. 1995)). The jury returned a verdict of guilty of manslaughter against Chad Booker, even though there was no evidentiary support for essential elements of that charge. From the four corners of the record, it cannot be objectively stated that Chad Booker was not prejudiced by the State's discovery violation; therefore, the discovery violation rises to the level of reversible error. If the discovery violation, standing alone, is insufficient to

[21]The apology would have been for David White's behavior directed at Chad Booker on Saturday, March 10, 2007, when White had accosted Chad Booker while Chad and Tyler Medlin were test driving the Mustang with the clutch problem on County Road 813. [T. 495-497.]

[22]This assignment of error was presented to the trial court in the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶4).

warrant reversal, then the cumulative effect of this error combined with other errors in the trial does, in fact, warrant reversal. *McGilberry v. State*, No. 97-DP-00213-SCT., 741 So.2d 894, 924 (¶ 126)(Miss. 1999) (the appellate court "may reverse a conviction and/or sentence based upon the cumulative effect of errors that independently would not require reversal.").

* * *

III. CONCLUSION

Chad Booker was found guilty of "heat of passion" manslaughter, even though there was no evidence whatsoever to establish essential elements of the offense – the undisputed and uncontradicted evidence merely establishes that Chad Booker punched David White in the head with his fist and that David White's death was an "excusable" homicide. Chad Booker was entitled to a judgment of not guilty as a matter of law pursuant to MISS. CODE ANN. §97-3-17 (the "excusable" homicide statute), and the failure of the trial court to render either a directed verdict or a judgment notwithstanding the verdict (JNOV) in favor of Chad Booker was reversible error. Furthermore, the trial court made serious errors in both admitting and excluding testimony and evidence, and, more significantly, the trial court failed to fully and properly instruct the jury (a failure which, standing alone, constitutes reversible error).

Therefore, this Court should enter an order reversing the judgment of the trial court and discharging Chad Booker from all criminal charges in the death of David White.

RESPECTFULLY SUBMITTED, this, the 20th day of SEPTEMBER, 2009.

CHAD BOOKER, ***Defendant-Appellant***

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this date served a true and correct copy of the above and foregoing **REPLY BRIEF OF CHAD BOOKER, THE DEFENDANT-APPELLANT** upon the following named persons by placing same in the regular United States Mail, postage prepaid, addressed as stated:

Trial Judge:

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing **REPLY BRIEF OF CHAD BOOKER, THE DEFENDANT-APPELLANT**, together with three (3) copies of same and a CD-ROM of the aforesaid brief stored in the Adobe Portable Document Format (PDF) as required by Rule 28(m) of the Mississippi Rules of Appellate Procedure, in the regular United States Mail, postage pre-paid, addressed to:

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
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THIS, this 26th day of SEPTEMBER, 2009.

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