IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2008-KA-02054-COA

CHAD BOOKER — DEFENDANT-APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

Trial Judge:

Honorable Henry L. Lackey
Circuit Court Judge
Post Office T
Calhoun City, Mississippi 38916

Attorneys for State of Mississippi:

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable Ben Creekmore
District Attorney
Post Office Box 1478
Oxford, Mississippi 38655

Honorable Kelly Luther
Assistant District Attorney
Post Office Box 298
New Albany, Mississippi 38652

Victims:

Charlotte White
430 County Road 817
Ripley, Mississippi

Keith White
420 County Road 817
Ripley, Mississippi

Defendant:

Chad Booker
819 County Road 817
Ripley, Mississippi

Defendant's Attorney:

Honorable Anthony L. Farese
Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603

THIS, this 13th day of MAY, 2009.

ANTHONY L. FARESE (MS [redacted]
Attorney for Chad Booker, Defendant-Appellant

Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229

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STATEMENT REGARDING ORAL ARGUMENT

Chad Booker, the Defendant-Appellant, respectfully requests oral argument.

This appeal is one of those rare cases which presents a legitimate factual scenario in which the *Weathersby* rule applies: David White died because he was punched in the head by Chad Booker, and White and Booker were the only persons present at the time of the incident. Chad Booker was put to trial on a charge of "deliberate design" murder, even though there was not a scintilla of evidence of the essential element of intent (or malice aforethought), and the jury returned a verdict of guilty of "heat of passion" manslaughter, even though there was not a scintilla of evidence to support the essential elements of that charge. Thus, this appeal by Chad Booker is also one of those rare cases where a directed verdict should legitimately have been granted at the close of the State's case-in-chief.

Oral argument should be granted so the Court may accurately assess both the facts and the law which are applicable to the rare and unique factual scenario of this case.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Chad Booker, who was the Defendant in the trial court and who is the Appellant in this appeal, presents the following issues for review:

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).**

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

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

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

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.**

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.**

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. 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 punch David White in the head with his fist. Based upon the undisputed and uncontradicted evidence, Chad Booker was entitled to a judgment of not guilty as a matter of law.

II. STATEMENT OF THE CASE

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

Chad Booker was indicted and charged with the "deliberate design" murder of David White in violation of MISS. CODE ANN. §97-3-19(1)(a) (Supp. 2004).[1] [R. 1; E. 11.] The indictment was docketed as Criminal Case Number TK-07-043 in the Circuit Court of Tippah County, Mississippi. [R. 1; E. 11.] A hearing on pretrial motions was conducted by the trial judge (Third Circuit Court District Judge Henry L. Lackey) on November 17, 2008. [T. 7.] Chad Booker was tried before a Tippah County jury on November 18-21, 2008, and, on November 21, 2008, the jury returned the following verdict: "We the jury find the Defendant, Chad Booker, guilty of manslaughter." [R. 244, 271; E. 74; T. 38, 793.]

Chad Booker filed the *Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict or in the alternative a New Trial* on November 26, 2008. [R. 249; E. 77]. Chad Booker filed the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the alternative a New Trial* on December 1, 2008. [R. 258; E. 86.] The trial court entered an order on December 3, 2008, denying the *Defendant's Amended Motion for Judgment of Acquittal Notwithstanding the Verdict or in the alternative a New Trial.* [R. 408; E. 95.]

Following a sentencing hearing conducted on December 3, 2008, the Circuit Court of Tippah County entered an order finding that Chad Booker was guilty of the felony criminal offense of manslaughter and sentenced Chad Booker to twenty (20) years in the custody of the Mississippi

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[1]In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number, citations to the Record Excerpts will be denominated as "E." followed by the appropriate page number, and citations to the trial Transcript will be denominated as "T." followed by the appropriate page number.

Department of Corrections with ten (10) years suspended, and a fine of Twenty-five Thousand Dollars ($25,000.00) was also imposed. [R. 272; E. 76.]

Chad Booker filed his *Notice of Appeal* on December 3, 2008. [R. 409; E. 97.]

B. *STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENT FOR REVIEW*

Chad Booker, a 27-year-old combat veteran of the Battle of the Karbala Gap (where the Third Infantry Division defeated Saddam Hussein's Republican Guard during the 2003 invasion of Iraq), grew up in the Palmer Community of Tippah County, and had an auto body shop located on the property of his parents (Bobby "Buster" Booker and Fredia Booker) at the intersection of County Road 813 and County Road 817.[2] [T. 562, 565-567, 569.] Down the road from the Booker property, David Keith White lived at 420 County Road 817, next door to his father, 61-year-old Hilburn David White, whose home was at 430 County Road 817.[3] [T. 213, 305.] The White's operated an ATV repair shop behind David White's home. [T. 305.]

After being discharged from the Army with the rank of sergeant in August 2005, Chad Booker enrolled at Northeast Community College where he studied radiology.[4] [T. 568-569.] While a student at Northeast CC, Chad met and became friends with Tyler Medlin. [T. 495.] On Saturday, March 10, 2007, Tyler Medlin stopped by Chad's shop to visit. [T. 495.] Chad had a Mustang at the shop which had a clutch problem, and Chad and Medlin took the Mustang for a drive on County Road 813 to test the clutch. [T. 496.] Chad and Medlin made two round-trips in the Mustang, driving

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[2]The Palmer community is situated approximately midway between Blue Mountain and Ripley in Tippah County.

[3]David Keith White will hereinafter be referred to as "Keith White," as he is also referred to in the trial transcript. Keith White's father, Hilburn David White, is the decedent in this case and will hereinafter be referred to as "David White," as he is referred to in the indictment and in the trial transcript.

[4]Hereinafter in this brief, Chad Booker may be referred to simply as "Chad."

from Booker's shop (located at the intersection of County Road 813 and County Road 817) to the Palmer Baptist Church, where they turned around. [T. 496, 570-571.]

According to Medlin, Chad was testing the clutch by attempting to shift through the gears but was never able to get the car past second gear because after shifting "from second to third, it would slip back down into second gear" and "every time we would go to third gear, it would slip out of third and go to second gear ...." [T. 505-506.] Chad also testified that the Mustang would not go into third gear, and, because of that, "the engine was probably revving up ...." [T. 661, 666.] Chad testified he "was trying to get the car to go into third gear" and was driving approximately 50 miles-per-hour ("Fifty, honestly.") [T. 571, 572.] Medlin testified their speed was "50 miles an hour tops." [T. 497.] Even though Chad testified that "the engine was probably revving up," in their testimony both Chad and Tyler Medlin denied that the Mustang was excessively or unusually loud. [T. 498, 662.]

Keith White, however, testified that he and his father, David White, were inside their shop when they heard the Mustang, that the Mustang "was loud," and that he believed the Mustang was traveling "70, 80 mile an hour" when it "came by the end of the driveway." [T. 217, 218, 219.] Keith White testified that "it made us mad that it went by that fast"and that his father, David White, stated he would stop the Mustang if it came back. [T. 218-219.] Keith White testified that when the Mustang came back, he and his father were in their shop, that the shop was close to the road (described as: "Probably the distance of this courtroom."), and that when they heard the Mustang that "[David White] just waved his arm and they stopped in the middle of the road." [T. 219.]

Tyler Medlin testified:

> On the second pass, [David] White came running out of his house, had mayonnaise over his face. It looked like he had just ran out of the kitchen screaming, Not on my God damn road. We slowed down to see what was wrong with the car. We figured something might have fell out of the car.

[T. 496.] Medlin testified: "We stopped in the middle of the county road. Mr. White pursued us. He was cussin', talking down to us like we were kids pretty much." [T. 496] Medlin testified that David White "just continued to cuss us." [T. 496-497.] Medlin testified:

> [David White] said, Not on my God damn road. He just kept saying it over and over again, and Mr. Booker, Chad said, Mr. White, if you have a problem, you can call the law.

[T. 497.] Medlin testified:

> [David White] was angry and frustrated. He was just cussin' and screaming at us, talking down like we had done something, and my terms, we did not really do anything that was wrong.

[T. 497.]

Keith White testified he was unable to hear any of the conversation between David White and Chad Booker. [T. 220.] Chad testified:

> Mr. White said – first he said, Slow down. Slow down. I just screeched the car and stopped, and I said, Hey, bud. What's up? He said – because I was puzzled. ... and I said, We're just test driving this old car. He said, Not on my damned road, and that's how Mr. White said it. I said, Mr. White, if you've got a problem with that, I'm not going to argue with you. Call the law because I felt that it was nothing that I had done wrong.

[T. 571.] Chad's testimony was corroborated by Medlin, who testified that Chad was "[v]ery calm, very relaxed" and that Chad "just told him Mr. White, if you have a problem, call the law." [T. 498.] Medlin testified that although David White was using profanity to Chad, that Chad did not use any profanity. [T. 515.] Notably, Keith White testified that David White would 'cuss' and use profanity when he was mad. [T. 252.] Keith White testified that after the Mustang pulled off that David Keith White went into his house "to call the law," but no law enforcement officers came out there that day – in fact, the law enforcement officers told David White they would not come out. [T. 221.]

The incident between Chad Booker and David White was not the first time the Whites had taken it upon themselves to police County Road 813. Keith White testified that on one occasion he

got onto a four-wheeler and chased a 16-year-old boy over a mile down the road to fuss at the boy for speeding. [T. 263-264] Chad Booker also testified that he'd seen "many instances" of the Whites attempting to police the road, and that "[a] few days before he stopped me, I saw a red Cavalier that [David White] pulled over and yelled at them."[5] [T. 580.]

According to Charlotte White, David White's wife of over forty (40) years, on the Sunday afternoon the day after David White confronted Chad Booker in the Mustang the Whites came home from church and received two telephone calls from Chad Booker's parents, Buster Booker and Fredia Booker, "[c]oncerning David calling the law to Chad the day before." [T. 304, 309.] Fredia Booker had seen David White stop Chad in the Mustang and had asked Chad about the incident. [T. 672, 699.] Chad's father, a truck driver, was not home at the time, but was in Texas. [T. 699-700.] Charlotte White testified that she and David White "went back to church that night" and that after they returned home later that evening:

> We talked about the phone calls that he got the day before; that he needed to apologize to Chad to keep peace in the community because we were neighbors; and he said he probably would apologize, but he didn't know when. He didn't feel that he owed him an apology.

[T. 311.] Charlotte White's testimony was admitted over the objection of Chad Booker. [T. 309-310.] An inconsistency in Charlotte White's testimony is readily apparent in that she first testified that the telephone calls from the Bookers were received on Sunday after church but minutes later Charlotte White testified that the telephone calls had been received "the day before," which would have been on Saturday, the day of the incident. [T. 308-310.] In a statement given to investigating officers, Charlotte White had stated:

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[5]On another occasion, a 62-year-old man was accosted by David White at the "Stop" sign on County Road 813 because White felt the man was driving too slow; however, the trial court excluded the testimony regarding this incident which had happened approximately three and one-half years prior to the trial. [T. 716, 719.]

> I told David, Well maybe, maybe you need to apologize. You know, it won't hurt anything. Swallow it down and apologize.

[T. 315.] According to Charlotte White, although David White told her he might apologize, she did not know if David White would actually 'swallow it down' and make an apology to Chad Booker because David White did not believe he owed Chad an apology. [T. 314, 315.]

On Monday afternoon, March 12, 2007, Chad Booker went to the Discount Auto Parts store in Ripley at approximately 4:30-5:00, where he visited with the store manager, Rickey Thrasher, as well as with two police officers, Chris McAlister and Pete Samples. [T. 543-544, 577-578.] Chad was driving and showing off a 1960s vintage Ford pick-up which Chad had recently painted University of Tennessee orange and white. [T. 576, 577, 609.] The police officers, McAlister and Samples, told Chad he'd done a "real good job" painting the truck. [T. 578.]

While at the parts store, Thrasher had a conversation with Chad "about how people do these days, how you get along with folks" and Chad told Thrasher about the incident with David White (although, according to Thrasher, Chad never mentioned David White's name and instead only referred to "his neighbor"). [T. 545.] Thrasher testified that during the conversation Chad "never had any ill manner about him whatsoever" and that Chad wasn't "serious about it" but instead thought "[h]ow funny it was somebody would do that." [T. 545.] Thrasher testified that Chad was not upset "at all," and that Chad never 'talked ugly' about David White and did not appear to have any resentment toward David White. [T. 545-546.] Thrasher testified he'd known Chad Booker for "around 20 years probably" and that he'd never heard "a bad word said about him," and that Chad had "always told me the truth." [T. 546.] Thrasher testified that Chad was "happy as a lark when he was at the store." [T. 550.]

After leaving the parts store, Chad Booker went by "the Ford place" to again show off the paint job on the vintage pick-up and then Chad saw Phillip "Possum" Nance at Nance's used car lot

("Southern Discount Motors"), and Chad stopped to visit with Possum Nance. [T. 578.] Possum Nance had known Chad since Chad "was about 16," and Nance had a fatherly, mentor type relationship with Chad. [T. 579.] Nance shared with Chad that he "was having problems with his wife, as usual" and Chad "shared with Mr. Possum that I couldn't understand why Mr. White was so angry and called the law." [T. 579-580.]

Possum Nance died on July 28, 2008, a little more than three months prior to Chad Booker's trial (which began on November 18, 2008).[6] [T. 343, 519.] Terry Cox, an investigator hired by Chad Booker, conducted a tape-recorded interview of Nance on April 30, 2007, and a redacted transcript of the tape-recorded interview was admitted into evidence as "Defendant's Exhibit # 21."[7] [T. 520.] Possum Nance knew not only Chad Booker, but also knew David White, whom he had deer hunted with "a few times."[8] Possum Nance related to Cox that Chad Booker had stopped at his car lot "close to closing time" ("probably 5:00'ish") and that, as Chad was leaving, Chad "told me that somebody had called the police on him."[9] Nance told Cox:

> ... [Chad Booker] told me that he was test driving a car that he had out at the shop. I believe he said it was a Mustang that was pretty fast, and had run it up and down the road a couple of times and that David come out in the road to flag him down and kind of jumped on him pretty good about driving the car up and down the road like that.[10]

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[6]The obituary reporting the death of Phillip "Possum" Nance appeared in the *Northeast Mississippi Daily Journal* on July 30, 2008 (section A , page 4).

[7]A redacted tape recording of the interview with Possum Nance was also received into evidence as "Defendant's Exhibit # 20." [T. 520.] The redactions were a result of the State's objection to character evidence in the statement. See discussion under Issue V, *infra.*

[8]"Defendant's Exhibit # 21," p. 3.

[9]"Defendant's Exhibit # 21," pp. 4, 6.

[10]"Defendant's Exhibit # 21," pp. 4-5.

Nance stated Chad "was just matter of factly just small talk carrying on a conversation" and that Chad "[d]idn't seem agitated at all or anything like that."[11] Nance stated that Chad was 'bewildered' as to why David White would call the police, but Nance said Chad was not aggravated or agitated about the incident.[12]

Another statement given by Possum Nance was also received into evidence as "State's Exhibit # 9" without objection from Chad Booker. [T. 355.] John Hillhouse, a State Trooper assigned to the Mississippi Bureau of Investigation ("M.B.I."), interviewed Nance on May 3, 2007. [T. 342, 343.] Hillhouse did not make a recording of his interview with Nance, but after the interview Hillhouse prepared a hand-written statement which Nance signed. [T. 344.] In his statement to Hillhouse, Nance said "Chad never made any comments about getting even or threatening Mr. White," and that "Chad seemed 'cool as a dollar bill.'"[13] In the statement by Nance to Hillhouse, Nance purportedly said:

> 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.[14]

Chad Booker specifically denied he made the statement "I can step out of this car and we can settle this like two men" to Nance. [T. 573.] In the Nance statement written by Hillhouse, it is reported that "a short time later the law showed up," but this statement is contradicted by the testimony of Keith White, who testified that no law enforcement officers came out in response to David White's call and, in fact, the law enforcement officers told David White they would not come out that day. [T. 221.]

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[11]"Defendant's Exhibit # 21," p. 5.

[12]"Defendant's Exhibit # 21," p. 6.

[13]"State's Exhibit # 9."

[14]"State's Exhibit # 9."

After talking with Possum Nance at around 5:00 p.m. on Monday, March 12, 2007, Chad Booker went home, parked the vintage Ford truck in his carport, and then drove from his house to his shop in his own pick-up, a red Chevrolet Z-71. [T. 581, 582, 584.] At the shop, Chad had a small Nissan pick-up truck parked outside his gate, along side his fence and between the fence and the shallow road ditch, which Chad referred to as his "garbage truck," explaining: "I put my garbage in it and I put it there outside the gate so that we can ... put our garbage in it and stuff."[15] [T. 583.] Although the Nissan truck was between the fence and the road, the truck was on the Booker property and not on the right-of-way of the county road. [T. 583.] Chad testified that the Nissan truck is never locked but that he disconnects the battery cable. [T. 583.]

After arriving at his shop, Chad went out to the Nissan "garbage truck" and raised the hood to connect the battery cable preparing to "pick up the loose garbage," and, while he was doing this, Keith White and David White drove by on County Road 813. [T. 584.] Chad saw the Whites and waved to them as they drove by, and Keith White waved back: "... I knew Mr. Keith [waved] because I made direct eye contact with him, but I do not know if his father did, Mr. David."[16] [T. 584.] Keith White testified that "[b]oth of us waved." [T. 227.] Chad testified, "I was just glad one of them spoke," and explained that later that week he was supposed to take a vehicle to "the car auction" for Keith White. [T. 585.] After the Whites drove by, Chad testified he went back to "picking up my garbage out of the back of the truck." [T. 585.]

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[15]"State's Exhibit # 2" is a photograph which provides a good depiction of Chad Booker's Nissan "garbage truck" and its location.

[16]In the statement Chad Booker gave to investigating officers at 11:03 p.m. on March 12, 2007, Chad stated he and Keith Whites "spoke" to each other. See "State's Exhibit # 12," p. 6. During his testimony, Chad explained that by "spoke" he meant "I threw up my hand" and Keith White threw up his hand. [T. 584.]

When the Whites arrived at their ATV shop, they backed into the driveway to unload a four-wheeler they had picked up for repair. [T. 228.] Keith White testified that after unloading the four-wheeler, David White told him he was going to go and apologize to Chad Booker for the confrontation which had occurred on Saturday, March 10, 2007. [T. 228.] According to Keith White, as David White was leaving to go apologize "he was calmer than I would have been." [T. 228.] David White was known to have a bad temper and to get mad, which was admitted by his wife, Charlotte White, during her testimony.[17] [T. 313.]

Keith White testified he watched his father drive over to the Booker property in a Yamaha Rhino: "I watched him until he got over there and saw that he had pulled up right there."[18] [T. 230.] Keith White gave a recorded statement to M.B.I. investigator Mickey Baker on March 13, 2007, and, during the trial in November 2008, Keith White prepared a written statement which he wrote out in longhand and gave to the assistant district attorney. [T. 257.] Keith White, in the statement given to Baker, stated that as David White drove to the Booker property on the Rhino, he 'only watched a minute,' that 'everything seemed normal' and, notably, that he heard the motor of the Rhino cut off. [T. 257-258.] White testified:

Q. ... When I went back in the shop, the Rhino cut off?

A. Right.

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[17]Keith White, in his testimony, tried to minimize his father's temper, testifying that his father had had a temper only "in his earlier years." [T. 250.] Charlotte White, however, readily admitted that David White had a bad temper: "Yes, he did." [T. 313.] She had also expressed her doubt that David White would be able to 'swallow it down and apologize' to Chad Booker. [T. 315.]

[18]A Yamaha Rhino is known as a "side-by-side" ATV ("all-terrain vehicle") which has four wheels and on which the driver and a passenger ride on seats which are abreast of each other. Side-by-side ATVs are made by different manufacturers, including the John Deere Gator and the Kawasaki Mule. Throughout the trial, different witnesses referred to the White's Rhino as a Rhino, a Gator, or a Mule.

Q. That's what you wrote, isn't it?

A. Right.

Q. ***So you heard the Rhino cut off and you went back in the shop?***

A. ***Right.***

Q. The Rhino your daddy had just ridden across there?

A. Right.

Q. ***Safe to assume [David White] turned the Rhino off, isn't it?***

A. ***Yes, sir.***

Q. Okay. So your previous answer that you don't know how it was turned off, you told the State it was turned off?

A. It was turned off.

[T. 258 (emphasis added.]

Keith White also testified:

Q. In your own handwriting, you say the Rhino is cut off?

A. Right.

Q. And then it's cut back on and your father is found in the Rhino?

A. Right.

[T. 260.]

Chad Booker testified:

I looked up and I saw Mr. David coming in real fast in his Yamaha Rhino. I turned around and it startled me because, you know, after he yelled at me, I was kind of puzzled why he was coming to my property.

[T. 585.]

Chad Booker 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.] Notably, Chad testified that when David White parked the Rhino it was not in the 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 (emphasis added).]

Chad testified that he did not want to fight with David White, but that David White threw the first punch, and that when David White grabbed at him "I reacted" to "keep him from hitting me" and that he only acted to protect himself. [T. 587.] Later that night, when Chad was questioned by M.B.I. investigators Mickey Baker and Alan Thompson, Chad and Thompson re-enacted the incident and the re-enactment was video-recorded on a DVD. The DVD of the re-enactment was received into evidence during the trial as "State's Exhibit # 13" and was shown to the jury. [T. 389.] Two things are readily apparent from viewing the DVD re-enactment: Chad Booker's cat-like quickness and his raw strength.[19]

Chad testified that he did not think David White was hurt, that White did not drop to the ground, and that:

> I turned him loose and he stumbled and I remember him standing on his feet and going to his Rhino to get back on it, and I turned around and I started walking down the road because I got scared and wondered what was fixing to happen next. I was upset.

[T. 588.]

Chad testified that even though he did not know whether David White had a gun in the Rhino, he turned his back to White because "[w]hen you're in the military, you're trained to break

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[19]At the time of the altercation, David White was 5 feet, 9 inches tall, and weighed 190 pounds, while Chad Booker was 5 feet, 11 inches tall, and weighed 174 pounds. [T. 397.] Mickey Baker testified that Chad Booker was in "really good physical condition," that Chad "had very clear muscular lines and you could tell he worked out," and that "the street term would be pumped up, I guess." [T. 397.]

Chad testified he "could bench press 405" pounds while wearing a "bench press shirt" and explained on re-direct that a "bench press shirt" is "a very tight-fitting shirt that gives you a spring effect when you're coming off. You practice that. There's meets where they call them raw and then they call them with a bench press shirt. It gives you anywhere from 60 to 100 extra pounds." [T. 659, 714.]

In closing argument, the State observed that in the DVD re-enactment with Alan Thompson, Chad Booker was "swinging him around like a rag doll." [T. 784.]

contact and, you know, kind of diffuse the situation and get away from it" and that is what he intended to do. [T. 588-589.] Chad testified that he did not get on top of White and he did not kick White. (T. 589.] Chad testified David White "was standing up getting into his Rhino" when Chad left him. [T. 589.] Chad testified that he walked down the road and called his cousin, Wendell Booker, "because I looked at my phone and he was the first person in my phone and he was an older cousin of mine" and Chad called him, "told him to come get me" because "I had been in a bad situation" and because "I didn't know what Mr. White and them were going to do." [T. 591.] Shortly after Wendell Booker picked him up, Chad received a telephone call from his mother and Chad and Wendell Booker drove "to the back of my shop" where Chad met some Tippah County Sheriff's deputies (Gerald Lewellen, Chris McAlister, and Pete Samples), was put into handcuffs, and placed into the back of a patrol car. [T. 592, 593, 594.]

Other than Chad Booker and David White, no one was present at the altercation and no one observed the altercation. Keith White, the person who was closest to the location, testified that he did not see or hear anything that happened between Chad Booker and David White. [T. 256.] Keith White had gone inside his own shop when he heard the Rhino's motor cut off. [T. 258.] Keith White testified:

Q. You didn't see what happened, did you?

A. No, sir.

Q. You didn't hear what happened, did you?

A. No, sir.

Q. You don't know what happened, do you?

A. No, sir.

[T. 257.]

Keith White testified:

Q. You can't contradict the defendant's version of the events, can you, because you weren't there?

A. Right.

[T. 260.]

David White was found slumped over in the Rhino by Brenda Morgan. [T. 461.] Morgan, who has been a licensed nurse since 1981, resides on County Road 813 and was on her way home from her job as a nurse at the Benchcraft plant in Blue Mountain. [T. 458, 459.] Morgan testified she stopped at the intersection of County Road 813 and County Road 817, and then turned her vehicle onto County Road 813 when she saw "somebody slumped over" in the Rhino, which caused her to slow down, back up, and then pull her vehicle in right behind the Rhino and park. [T. 461-462.] Morgan went to the person slumped in the Rhino (who was David White) and "tried to get a response from him, and when I didn't, I knew he was unconscious so I ran back to my car and got my phone and called 911 to get somebody out there." [T. 463.] When Morgan first approached the Rhino, the motor was running. [T. 470.]

Morgan testified she was unable to detect any pulse and that after she was unable to get a carotid pulse she and another individual – "a gentleman that pulled up into the shop" – helped get David White out of the vehicle so they could perform CPR on him.[20] [T. 464.] Morgan observed that "some blood that was coming out of his ear canal on the left, and there was blood on the gear shift console in the [Rhino]." [T. 466.] Morgan testified the blood "was coming from the ear canal on the left side" and that White's injuries were "to the left side of his head." [T. 466, 469.]

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[20]Morgan testified that she also worked as a home health nurse and had some emergency medical equipment in her car at the time. [T. 476.]

Jeff Butler, a 28-year-old welder from Blue Mountain and who is a friend of Chad Booker, testified that he had turned off of Mississippi Highway 15 onto County Road 817 and then had come to the intersection of County Road 813. [T. 533, 534, 535.] Butler testified Brenda Morgan ("a lady in a black like nursing outfit") flagged him down and "come running up to the truck, and she said, This man is unconscious. Can you help me?" [T. 535.] Butler said he pulled over and "jumped out" of his truck and:

> ... I come up on the passenger side. ***The [Rhino] was still running***, and she said, Do you know, how to operate this thing? I said, Yes, ma'am. ***I put it into neutral, turned the key off***, and she said, We've got to get him off here.[21]

[T. 535 (emphasis added).]

Butler testified that David White "was leaned up on the steering wheel like with his body weight forward, and when she leaned him back, he was pretty much unconscious" and he and Morgan "had to sort of wrestle to try to get him out of there." [T. 536.] Butler testified he did not recall seeing any blood, and testified "I didn't have any shirt on, and when I wrestled to get him off, I didn't have no blood on me." [T. 536.]

Chris McAlister was a Deputy Sheriff for Tippah County on March 12, 2007, and heard the radio report of an individual slumped over in an ATV and went to the scene.[22] [T. 357.] When he arrived, David White was lying on the ground behind Chad Booker's Nissan "garbage truck." [T. 358.] McAlister testified that there wasn't any blood at the scene, except for the small amount of blood found inside the Rhino. [T. 369-370.] McAlister testified that "State's Exhibit # 3-A" was a photograph depicting some eyeglasses which were found in the roadway in the vicinity of the Rhino,

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[21]On cross-examination, Butler again testified: "Sir, ***I put it in neutral and I turned the key off***." [T. 542 (emphasis added).]

[22]At the time of the trial, Chris McAlister was an agent with the Mississippi Bureau of Narcotics. [T. 357.]

but McAlister admitted the eyeglasses were damaged, that they may have been run over by vehicles at the scene, and that the eyeglasses did not necessarily come to rest in the roadway as a result of the altercation between Chad Booker and David White. [T. 362, 373, 374.] With regard to the physical findings at the scene, M.B.I. investigator Mickey Baker testified: "It wasn't much of a crime scene left after all those folks had been there and things had been moved around ...." [T. 409.]

Mickey Baker interviewed Chad Booker around 11:00 the night of the incident. [T. 426.] During the interview, Chad drew a diagram of the area showing his home, his shop, as well as the White's house and shop, and the diagram was admitted into evidence as "State's Exhibit # 15." [T. 390.] Notably, on a diagram which was hand-drawn by Chad Booker and depicted the area where he'd lived his entire life, the roads were mislabeled (reversed) by Chad Booker: County Road 813 is shown as "817," while County Road 817 is shown as "813."[23] [T. 390.]

Baker testified that Chad Booker "turned himself in to Deputy Lewellen," and that when the law enforcement officers saw Chad's hands, "we stopped looking for a weapon."[24] [T. 393, 399.] Baker testified that although fingernail scrapings were taken from Chad Booker and his clothing was seized, neither the fingernail scrapings or the clothing were ever submitted to the Mississippi Crime Laboratory for examination and testing. [T. 417, 420.] Baker testified:

> ... I could see his fist and his hands and the swelling and the knuckles, and it was pretty evident that he had hit something or somebody, and I knew Mr. White had taken some real serious licks. He said he used his fist. I could see evidence on his fist. I could see no need to look further [for any type of weapon].

[T. 426.] Baker testified that no witnesses to the incident were located. [T. 431.] Baker testified:

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[23]See "State's Exhibit # 15."

[24]Although Mickey Baker testified a photograph was taken of Chad Booker's right hand, the photograph was never turned over to the defense and was purported to have been lost. [T. 427-428.] A close-up view of Chad Booker's hand is contained on the DVD which is "State's Exhibit # 13."

> He provided [sic] with an ample amount of information so that we knew that his fist made contact with Mr. White and that's what resulted in Mr. White's death. You know, beyond that, we know that much. That makes perfect sense, but as to how it happened and how it come up, all we have to rely on is his word.

[T. 432.] Baker further testified:

> ... what he told us about the event, how the physical act actually occurred, the part about his fist striking Mr. White on his head fit. It fits the wounds, the injuries to Mr. White. The damage to his fist would be consistent with that type of damage, so that point I'm pretty sure of. The rest of it is Mr. Booker's version of what happened.

[T. 434.] Booker also testified: "After Mr. Booker told us that he struck Mr. White three times with his fist, that looked pretty much like it fit with what we saw there." [T. 442.]

Steven Timothy Hayne testified that he was a forensic pathologist and had performed an autopsy on Hilburn David White on March 13, 2007. [T. 270, 271, 274.] Dr. Hayne testified:

> Cause of death was blunt force trauma producing closed head injury. There was injury on the outside surface 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 to the left ear.

[T. 275.]

Dr. Hayne testified that the actual mechanism of death, "temporal herniation," was "a product of blunt force trauma and the trauma was delivered to the left side of the head of the decedent." [T. 276.] Dr. Hayne testified that David White's death had been caused "by one or more blows to the left side of the head," but that it was not possible to determine the number of blows. [T. 277, 278, 287.] Dr. Hayne testified that "[t]he major injury is located to the area of the ear, and then also immediately forward to the ear," and the injuries "would be consistent with a blow or blows to the head using a person's fist, yes, sir." [T. 278, 286.] Dr. Hayne testified:

> Q. Based on your observation of Mr. White, would you expect that a person in a standing position who received this amount of force to the head could remain standing when receiving that lick?

A. It would be unlikely, Counselor, unless he was supported by some means. If there's more than one blow, then I would expect the person to fall unless supported.

[T. 280.]

Dr. Hayne testified that, in his opinion, he did not "think you would see the types of injuries to the brain" as found in David White "if the person's head were in a fixed position where it could not move and the injury is delivered," and Dr. Hayne testified:

> If the head is unsupported, it's not fixed, it's not braced against something, that's when you're going to get rapid movement of the head producing the injuries [as found in David White], so I would strongly favor that the head itself was not supported when the force was delivered to the head.

[T. 281.] Dr. Hayne testified:

> I would also think that looking at the types of injuries that the person would be incapacitated very quickly and maybe only for a short time, and then regaining a period of lucidity or consciousness, and then going into unconsciousness or death.

[T. 282.]

Notably, Dr. Hayne testified:

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).]

Dr. Hayne further testified:

> Q. ... my question to you is this: If we have testimony that Mr. White got out of his vehicle and accosted the defendant, grabbed him and swung at the defendant, and the defendant caught his hand, the swing by Mr. White, and he grabbed Mr. White and pulled him to him and hit him three times and released him, and that Mr. White did not go down but Mr. White went back and got in his vehicle, ***you can't contradict that that occurred, can you, if that's what the proof shows?***
>
> A. ***I cannot exclude that,*** Counselor, but again, I would not favor that scenario.

[T. 288 (emphasis added).] Dr. Hayne admitted in his testimony that his medical findings could not exclude the scenario as described above, but he felt "they would lean strongly against it," and Dr. Hayne also admitted in his testimony that White could have remained conscious "for a very short period of time" and could have been "lucid." [T. 289.] Dr. Hayne admitted that he could not swear under oath that the incident had not occurred as described by Chad Booker. [T. 289.]

Notably, Dr. Hayne testified that in his physical examination of David White's body he observed "a small bruise located on the back of the third finger of the right hand" which occurred "at or about the time of death." [T. 276, 289.] Dr. Hayne testified:

> Q. Would that be consistent with throwing a blow?
>
> A. It would be consistent with it, Counselor.

[T. 290.]

Dr. Hayne was the second witness presented in the State's case-in-chief. [T. 270.] Brenda Morgan was the ninth, and last, witness presented in the State's case-in-chief. [T. 458.] Morgan testified that she had "worked in the emergency room" at the Ripley hospital and had also "worked in ICU for several years." [T. 459.] During Morgan's testimony, the following occurred:

> Q. 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?

BY MR. FARESE: 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. You may continue.

BY MR. LUTHER: When you first got there and saw who you later determined was Mr. White, based on the injuries that you saw, do you believe that the person who received those injuries would have ever been able to move?

A. No, sir.

[T. 469-470.]

On cross-examination, Morgan was asked:

Q. You don't know where Mr. White was when he received his injuries, do you?

A. (No response)

Q. Honestly, to this jury you can't say where he was, whether he was inside or outside the Gator – or Rhino?

A. No, sir.

[T. 476.]

On re-direct, Morgan testified:

Q. Based on what you observed that day, do you think there's any way that Mr. White received those injuries anywhere else from right where he was sitting?

BY MR. FARESE: Objection, your Honor.

BY THE COURT: Overruled. Overruled.

A. From the extent of the injury to his head, no, sir. I mean, from the looks of what I saw, it happened where he was sitting.

BY MR. FARESE: Objection, your Honor. She just said she couldn't say how it happened, and now to allow the State to elicit that, that contradicts what she just previously said.

[T. 477.] Chad Booker's objection was overruled. [T. 477.]

It should be noted that Morgan also testified that "my husband and David [White] were real good friends" and that "[w]e fished together." [T. 460.]

III. SUMMARY OF THE ARGUMENT

1. The first assignment of error. This appeal by Chad Booker presents a legitimate *Weathersby* rule situation: Chad was the only eyewitness to the incident, and his version of the events, because it is both reasonable and is not contradicted by any substantial facts, must be accepted as true. Therefore, the trial court committed reversible error when it denied Chad Booker's motion for a directed verdict at the close of the State's case-in-chief and when it denied Defendant Chad Booker's motion for judgment of acquittal at the close of the Defendant's case-in-chief. Chad Booker was convicted of "heat of passion" manslaughter, but under the undisputed and uncontradicted facts of this case, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The forensic pathologist testified that Chad Booker's version of the incident was "possible" and could not be excluded. Chad Booker was entitled to a directed verdict, and/or a judgment of acquittal notwithstanding the verdict, under the "excusable homicide" statute.[25]

2. The second assignment of error. The jury was not properly instructed. The case was submitted to the jury on the charge of "deliberate design" murder, but the trial court also presented the jury with an instruction regarding "heat of passion" manslaughter under MISS. CODE ANN. § 97-3-35 (1972). The essential elements of manslaughter under Section § 97-3-35 require that the killing occur "in the heat of passion" and "in a cruel or unusual manner, or by the use of a dangerous weapon." No evidence whatsoever was presented at any point during the trial to support a finding that Chad Booker either used "a dangerous weapon" or acted "in a cruel and unusual manner." The

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[25]MISS. CODE ANN. § 97-3-17 (Supp. 1985).

substantial credible evidence indicated that Chad Booker struck David White on the left side of his head with his fist. Because there was no evidentiary support for the instruction, the trial court erred in granting the instruction. Furthermore, the trial court did not instruct the jury regarding "excusable homicide" under MISS. CODE ANN. § 97-3-17 (Supp. 1985), and the trial court refused instructions offered by Chad Booker which would have properly instructed the jury regarding both justifiable and excusable homicide. Under Mississippi law, in a homicide case the failure of the court to instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence is reversible error..

3. The third assignment of error. The trial court allowed a nurse, Brenda Morgan, to give "expert" opinion testimony. Chad Booker objected to the admissibility of the testimony, but the objection was overruled and Morgan was allowed to give her opinion testimony without the trial court conducting the two-pronged inquiry required by the modified *Daubert* rule adopted in *Mississippi Transp. Com'n v. McLemore*. The trial court's admission of Brenda Morgan's "expert" opinion testimony was clearly erroneous and constituted an abuse of discretion which rises to the level of reversible error.

4. The fourth assignment of error. Over the objection of Chad Booker, the trial court allowed testimony from Shade White even though he had not been listed as a witness in the State's discovery and his statement had not been produced in discovery, and even though his testimony was more prejudicial than probative and should have been excluded under Rule 403 of the Mississippi Rules of Evidence.

5. The fifth assignment of error. Rule 404 of the Mississippi Rules of Evidence enables defendants to prove that the victim was the initial aggressor and that the defendant acted in self-defense. The trial court excluded evidence Chad Booker sought to introduce under Rule 404

testimony relating to David White's propensity for aggressiveness (from Wayne Hogue, concerning an incident similar to the incident involving Chad Booker's Mustang, and from Noel Jackson, regarding a confrontation between Jackson's family and David White) as well as evidence relating to Chad Booker's propensity for peacefulness. Under well-established Mississippi, the character of the victim is relevant where the defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense, and the exclusion of such evidence is reversible error.

6. The sixth assignment of error. The State violated Rule 9.04, and the violation of this rule rises to the level of reversible error.

ARGUMENT

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).[26]

In the appellate courts of the State of Mississippi, the cases are legion wherein a criminal defendant claims on appeal that a directed verdict should have been granted, but rare are the cases wherein the appellate court concludes that the facts and the evidence, or lack of evidence, demonstrate that a directed verdict actually should have been granted. This appeal by Chad Booker is one of those rare cases where a directed verdict should legitimately have been granted. Also, it has been observed: "Defendants have often cited and argued application of the *Weathersby* Rule, but

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[26]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).

seldom have they prevailed." *Buchanan v. State*, 567 So.2d 194, 196 (Miss. 1990). This appeal by Chad Booker presents a legitimate *Weathersby* rule situation, and, based upon the facts and the evidence, Chad Booker is entitled to a judgment reversing his conviction and discharging him from further proceedings.

In *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (Miss. 1933), the Mississippi Supreme Court stated:

> 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.

The Mississippi Supreme Court applied the *Weathersby* rule in the recent case of *Johnson v. State*, No. 2007-KA-00159-SCT, 987 So.2d 420 (Miss. 2008), wherein the defendant's conviction for manslaughter was reversed and the defendant was discharged, noting: "The applicability of the *Weathersby* rule is a determination for the court ...." *Johnson*, 987 So.2d at 425 (¶ 10). This is because it is the duty of the trial court to determine "whether in a criminal prosecution the accused is entitled to a judgment of acquittal as a matter of law." *Jackson v. State*, 551 So.2d 132, 136 (Miss. 1989). See also *Johnson*, 987 So.2d at 425 (¶ 10) (citing *Jackson*).

Chad Booker was indicted and charged with the "deliberate design" murder of David White under MISS. CODE ANN. §97-3-19(1)(a) (Supp. 2004) 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).]

During the trial of Chad Booker the State of Mississippi never produced a scintilla of evidence which tends to indicate (let alone prove) that Chad Booker ever had any intent or "deliberate design" to kill David White. During the presentation of the State's case-in-chief, through the direct examination and cross-examination of the witnesses, and through other evidence, the following undisputed and uncontradicted facts were demonstrated:

1) The decedent, David White, was ill-tempered and resorted to 'cussing' and profanity when angry. [T. 252.]

2) On Saturday, March 10, 2007, David White became angry when Chad Booker was 'test driving' a Mustang. [T. 218-219.]

3) David White flagged down the Mustang and cursed at Chad Booker. [T. 219, "State's Exhibit # 12," and "State's Exhibit # 13."]

4) Over the weekend, David White remained angry and his wife, Charlotte White, told him he should "Swallow it down and apologize," but David White never believed he owed Chad Booker an apology. [T. 311, 314-315.]

5) On March 12, 2007, Chad Booker was on his own property, minding his own business, as David White and Keith White drove by. [T. 227.]

6) Chad Booker waved a friendly greeting to the Whites. [T. 227.]

7) David White got into his Yamaha Rhino and drove from his shop to Chad Booker's property. [T. 229.]

8) The only witnesses to the incident which occurred on Chad Booker's property on March 12, 2007, were Chad Booker and David White. [T. 431-432.]

9) At the time of the incident, David White was 5 feet, 9 inches tall, and weighed 190 pounds, while Chad Booker was 5 feet, 11 inches tall, and weighed 174 pounds. [T. 397.]

10) The night of the incident, Chad Booker gave a statement to law enforcement officers in which Chad described the altercation he had with David White, and Chad re-enacted the incident with Alan Thompson for a video-recording. ["State's Exhibit # 12" and "State's Exhibit # 13."]

11) Keith White gave two separate statements prior to the trial in which he stated he heard the motor of the Rhino cut off when David White got to Chad Booker's property, and Keith White testified on cross-examination during the trial that he heard the Rhino's motor cut off when David White got to the Booker property. [T. 258-260.]

12) Keith White admitted in his testimony that he could not contradict Chad Booker's version of the incident. [T. 260.]

13) When David White was found slumped over in the Rhino by Brenda Morgan, the motor of the Rhino was running and the Rhino was in gear. [T. 470.]

14) There was very little blood at the scene. [T. 369-370.]

15) David White did not have any fractures, but died as a result of a closed head injury caused by blunt force trauma to the head which was consistent with one or more blows from another person's fist. [T. 279, 286, 287.]

16) Mickey Baker testified that, at the time of the incident, Chad Booker was in "really good physical condition," that Chad "had very clear muscular lines and you could tell he worked out," and that "the street term would be pumped up, I guess." [T. 397.]

17) Twisting of David White's head as he sustained the blows caused blood vessels to tear, resulting in internal bleeding. [T. 281.]

18) Dr. Hayne, the forensic pathologist, testified he did not "think you would see the types of injuries to the brain" as found in David White "if the person's head were in a fixed position where it could not move and the injury is delivered ...." [T. 281.]

19) Photographs of the Rhino introduced into evidence depict the Rhino as having head rests which would have supported David White's head if White had been sitting in the Rhino when the blows were delivered. ["State's Exhibit # 1" and "State's Exhibit # 2."]

20) Dr. Hayne, the forensic pathologist, found "a small bruise located on the back of the third finger of the right hand" of David White, and the bruise is consistent with David White having thrown a punch. [T. 290.]

21) Mickey Baker, the investigating officer, testified: "[Chad Booker] provided [sic] with an ample amount of information so that we knew that his fist made contact with Mr. White and that's what resulted in Mr. White's death. You know, beyond that, we know that much. That makes perfect sense, but as to how it happened and how it come up, all we have to rely on is his word." [T. 432.]

22) Baker further testified: "Mr. Booker told us that he struck Mr. White three times with his fist, that looked pretty much like it fit with what we saw there." [T. 442.]

23) Physical evidence at the scene cannot be used to contradict Chad Booker's version of the events, because, as Mickey Baker testified, "It wasn't much of a crime scene left after all those folks had been there and things had been moved around ...." [T. 409.]

24) David White's eyeglasses were found out in the roadway, but appeared to have been run over and were not necessarily resting in the location they had been in following the altercation between Chad Booker and David White. [T. 362, 373, 374.]

25) Chad Booker, after initially leaving the scene, returned to the scene while law enforcement officers were present and turned himself in. [T. 358.]

26) In Chad Booker's statement, Chad stated that David White spoke roughly to him, that he asked David White to leave his property, that David White got out of the Rhino and cursed at him, and that David White grabbed and swung at Chad Booker. ["State's Exhibit # 12."]

27) In the re-enactment with Alan Thompson, Chad Booker demonstrated how he grabbed David White's wrist and twisted David White's wrist and body downward while, at the same time, he rapidly struck the left side of David White's head three times with his fist. ["State's Exhibit # 13."]

28) By grabbing, holding, and twisting David White's wrist downward, Chad Booker effectively immobilized David White's torso, while, at the same time, David White's head remained mobile. By holding David White's wrist, Chad Booker also would have prevented David White from falling to the ground. ["State's Exhibit # 13."]

29) Dr. Hayne testified: "... if the torso is immobilized, but the head remains mobile, then you could achieve the types of injuries sustained" by David White. [T. 281.]

30) Dr. Hayne testified he "could not exclude" the scenario as explained by Chad Booker in Booker's statements, and Dr. Hayne testified that it was possible

that David White remained on his feet and got back into the Rhino before losing consciousness. [T. 282, 287-288.]

31) Brenda Morgan, on cross-examination, admitted she could not 'honestly' testify that David White was sitting in the Rhino when he sustained the blows to his head, thus her testimony comports with Dr. Hayne's testimony that it was possible that David White was standing outside the Rhino when he sustained his injuries . [T. 476.]

Each of the denominated items aforesaid are taken exclusively from evidence and testimony presented in the State's case-in-chief and the evidence was undisputed and uncontradicted. None of this evidence is conflicting and none of this evidence required a determination regarding weight and credibility of any particular witness, which would be the province of a jury. See, *e.g.*, *Moore v. State*, No. 2005-KA-00610-SCT, 933 So.2d 910, 922 (¶ 43) (Miss. 2006) ("The jury determines the weight and credibility to give witness testimony ...."); and, *Johnson v. State*, No. 2003-KA-02139-SCT, 904 So.2d 162, 167 (¶ 10) (Miss. 2005).

Additionally, other evidence presented in the Defendant's case-in-chief (which also was undisputed and uncontradicted) is:

1) Although David White was angry and was cursing and using profanity toward Chad Booker when White stopped Booker's Mustang, Chad did not use any profanity in response to White and remained calm throughout the incident. [T. 496-498, 515.]

2) Neither Rickey Thrasher or Possum Nance recalled Chad Booker being upset about the incident, talking ugly about David White, or making any threats against David White. [T. 545-546, "Defendant's Exhibit # 21."]

3) David White spun around and did a U-turn in Chad Booker's driveway before bringing the Rhino to a stop. [T. 585.]

4) Jeff Butler placed the Rhino into neutral and turned off the motor. [T. 535, 542.].

5) Jeff Butler did not have any transfer blood on his body after he came into contact with David White while wrestling David White out of the Rhino. [T. 536.]

Again, the State never produced a scintilla of evidence indicating Chad Booker ever had any intent or "deliberate design" to kill David White. Because Chad Booker, the defendant, was the only eyewitness to the incident, under the *Weathersby* rule Chad's "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*, 147 So. at 482. The physical facts of the incident fail to contradict Chad Booker's version in any material particular. Dr. Hayne, the forensic pathologist, specifically testified that Chad Booker's version was possible and that he could not exclude it. Furthermore, the bruise located on the back of the third finger of David White's right hand was, according to Dr. Hayne, consistent with David White having thrown a punch (which is consistent with Chad Booker's statement).

The Mississippi Supreme Court has stated:

> In a criminal proceeding, motions for a directed verdict and judgment notwithstanding the verdict (JNOV) challenge the legal sufficiency of the evidence supporting the guilty verdict. [Citations omitted.] The standards of review for a denial of directed verdict and JNOV are identical. [Citation omitted.] Reversal can occur only when, after viewing all the evidence in the light most favorable to the verdict, one or more of the elements of the charged offense is such that "reasonable and fair-minded jurors could only find the accused not guilty." [Citations omitted.] Because each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. [Citation omitted.]

Croft v. State, No. 2007-KA-01331-SCT, 992 So.2d 1151, 1157 (¶ 24) (Miss. 2008). The Court has also 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 utterly failed to prove all of the necessary elements to establish "deliberate design" murder and, under the facts of this case, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Notably, the jury rejected the murder charge; however, the jury did return a verdict of guilty of manslaughter.[27]

The jury instruction on manslaughter presented by the State contains this language: "... 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." ["Instruction No. S-2-A." R. 201, E. 70.] From giving the aforesaid instruction, it would appear that the trial court believed that the case should be submitted to the jury for consideration of a manslaughter charge under MISS. CODE ANN. § 97-3-35 (1972), which 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." While there may well be evidence that Chad Booker struck David White "in the heat of passion," there is not a scintilla of evidence that Chad Booker 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 (1972). The undisputed and uncontradicted evidence indicates that Chad Booker struck David White on the left side of the head three times with his fist. [T. 279, 286, 287.] There is no evidence that David White fell to the ground and was struck by Chad Booker while laying on

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[27]Because the case was submitted to the jury on the charge of murder, the verdict of guilty of manslaughter may have been a compromise verdict by jurors who believed that since the case was submitted as a murder case the case was too important to return a verdict of not guilty.

the ground, or that Chad Booker kicked or stomped David White. The act of striking another person with a fist does not fall within the required elements of MISS. CODE ANN. § 97-3-35 (1972).[28]

Neither the essential elements of "deliberate design" murder or the essential elements of "heat of passion" manslaughter were proved by the State, and, therefore, when Chad Booker brought his motion for a directed verdict at the close of the State's case-in-chief, when Chad Booker renewed his motion at the close of the Defendant's case-in-chief, and when Chad Booker brought his motion for JNOV, the trial court should have invoked the provisions of 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.

Chad Booker would respectfully state and show unto this Court that when the undisputed facts of the case *sub judice* are compared with the specific language of Section 97-3-17, Chad Booker was entitled to a directed verdict of not guilty, a judgment in his favor, and to be completely

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[28]Compare *Miller v. State*, No. 97-KA-00072 COA, 733 So.2d 846, 850 (¶ 14) (Miss. App. 1998) (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."; manslaughter by culpable negligence conviction reversed because "the wilful act of striking another person cannot, by any definition, be considered as an act of negligence.") with *Shirley v. State*, No. 2005-KA-00184-COA, 942 So.2d 322, 328 (¶¶ 9, 21) (Miss. App. 2006) (elements of culpable negligence may exist where defendant was standing over the decedent, who was on the ground, hitting him; conviction of culpable negligence affirmed).

discharged from all criminal charges in the death of David White.[29] Therefore, the trial court committed reversible error when it denied Chad Booker's motion for a directed verdict at the close of the State's case-in-chief, the trial court committed reversible error when it denied Defendant Chad Booker's renewed motion for judgment of acquittal at the close of the Defendant's case-in-chief, and the trial court committed reversible error when it denied the motion for JNOV. 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.

ISSUE II: The trial court committed reversible error by failing to properly instruct the jury.[30]

For the discussion of this issue, Chad Booker hereby adopts and incorporates all of the statements of fact and statements of law set forth in the discussion of "Issue I," *supra*. As discussed, *supra*, the trial court granted "Instruction No. S-2-A" (which was submitted by the State) which stated, in pertinent part, 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 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.] This instruction is based upon MISS. CODE ANN. § 97-3-35 (1972), which defines manslaughter as 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." The essential elements of manslaughter under MISS.

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[29]Defendant Chad Booker requested jury instructions based upon MISS. CODE ANN. § 97-3-17 (Supp. 1985), to-wit: "D # 3," "D # 5," and "D # 6." [R. 222, 224, 225; E. 71, 72, 73.]

[30]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).

CODE ANN. § 97-3-35 require that the killing occur "in the heat of passion" ***and*** "in a cruel or unusual manner, or by the use of a dangerous weapon." No evidence whatsoever was presented at any point during the trial to support a finding that Chad Booker either used "a dangerous weapon" or acted "in a cruel and unusual manner." The evidence indicated that Chad Booker struck David White on the left side of his head with his fist, an act which simply is not "cruel and unusual" as contemplated by the statute. See, *e.g.*, *Miller v. State*, No. 97-KA-00072 COA, 733 So.2d 846, 850 (¶ 14) (Miss. App. 1998) (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."). Because there was no evidentiary support for the instruction, the trial court erred in granting the instruction. See, *e.g.*, *McKee v. State*, No. 1999-KA-00676-SCT, 791 So.2d 804, 810 (¶ 19) (Miss. 2001) ("... this Court has also held that a jury instruction may be denied if it misstates the law, is covered by other instructions, or is without foundation in the evidence."); *Heidel v. State*, 587 So.2d 835, 842 (Miss. 1991) (a trial judge may refuse instructions which are "without foundation in the evidence"); and, *Murphy v. State*, 566 So.2d 1201, 1206 (Miss. 1990) ("... a trial judge may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions.")

Meanwhile, the trial court did not instruct the jury regarding MISS. CODE ANN. § 97-3-17 (Supp. 1985), which provides that the "killing of any human being ... shall be excusable" where the killing is "committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation" or where the killing is "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." 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. Refusing these instructions was error, because a defendant in a criminal trial "is entitled to have jury instructions given which present his theory of the case ...." *Heidel v. State*, 587 So.2d at 842. See also, *e.g.*, *Cleveland v. State*, No. 2000-KA-01700-COA, 801 So.2d 812, 815 (¶ 4) (Miss. App. 2001) ("A defendant is entitled to have the jury instructed as to his theory of the case so long as the defense is one recognized in the law and there is some evidence in the record to support the defense.").

Furthermore, if the instructions as offered by Chad Booker were "not properly drafted," the trial court had a "duty ... to amend the instruction to conform to the applicable law." *Cleveland*, 801 So.2d at 815 (¶ 6). See *Harper v. State*, 478 So.2d 1017, 1018 (Miss.1985) (a trial judge has the responsibility either to reform and correct the proffered instruction that is inadequate in form or content or afford counsel a reasonable opportunity to prepare a corrected instruction.). See also, *e.g.*, *Busby v. Anderson*, No. 2003-CA-02699-COA, 978 So.2d 670, 679 (¶ 35) (Miss. App. 2006) ("It is the trial judge's duty to properly instruct the jury on controlling principles of Mississippi law.").

The Mississippi Supreme Court has stated:

> 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). Chad Booker was entitled to have the jury properly and fully instructed on the law of justifiable and excusable homicide, and Chad Booker submitted jury instructions (specifically including "D # 3," "D # 5," and "D # 6") which would have fully and properly instructed the jury regarding justifiable and excusable

homicide, but these instructions were refused by the trial court. The trial court committed reversible error in refusing Chad Booker's jury instructions, and specifically in refusing instructions "D # 3," "D # 5," and "D # 6." Therefore, because the jury was not properly instructed, this Court should enter an order reversing the judgment of the trial court.

ISSUE III: The trial court committed reversible error when it allowed Brenda Morgan to offer opinion evidence over the objection of Defendant Chad Booker.[31]

As previously mentioned, *supra*, the State's theory of the case was succinctly stated in the State's closing argument:

> 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).] However, in the statement Chad Booker gave to M.B.I. investigator Mickey Baker at 11:03 p.m. on March 12, 2007, Chad stated that David White had gotten out of the Rhino and was standing when the altercation occurred, and that after the altercation David White stumbled away and got back into the Rhino.[32] The second witness in the State's case-in-chief was Steven Timothy Hayne, the forensic pathologist who performed the autopsy on David White.[33] Dr. Hayne was specifically asked about Chad Booker's version of the events, and testified:

> 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?

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[31]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).

[32]See "State's Exhibit # 12," pp. 7, 9, and "State's Exhibit # 13" (the DVD). Here in should be remember that Chad Booker gave his statement to Baker within about six hours after the incident.

[33]In *Edmonds v. State*, No. 2004-CT-02081-SCT, 955 So.2d 787, 792 (¶ 8) (Miss. 2007), this Court observed, in dicta, that "Dr. Hayne is qualified to proffer expert opinions in forensic pathology ...."

A. ***I couldn't exclude that***, Counselor, but I think that would be very unlikely.

....

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).] Dr. Hayne also stated that he could not swear under oath that the incident had not occurred as described by Chad Booker. [T. 289.]

Brenda Morgan was the ninth, and last, witness presented in the State's case-in-chief. [T. 458.] Morgan testified that she was a licensed nurse, that she had worked in the Ripley hospital emergency room, and had "worked in ICU for several years." [T. 459.] The State posed this question to 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 immediately objected, but the trial court overruled the objection. [T. 469-470.] Morgan was then allowed to testify as follows:

Q. When you first got there and saw who you later determined was Mr. White, based on the injuries that you saw, do you believe that the person who received those injuries would have ever been able to move?

A. No, sir.

[T. 470.] On cross-examination, Morgan admitted that she could not testify whether David White was inside or outside of the Rhino when he sustained his injuries. [T. 476.] Then, on re-direct, Morgan was asked, again over the objection of Chad Booker, "do you think there's any way that Mr. White received those injuries anywhere else from right where he was sitting?" to which Morgan testified:

> From the extent of the injury to his head, no, sir. I mean, from the looks of what I saw, it happened where he was sitting.

[T. 477.]

The testimony given by Brenda Morgan was opinion testimony. Under the Mississippi Rules of Evidence, opinion testimony may be admissible as either "Lay Witness" opinion under Rule 701 or as "Expert" opinion under Rule 702. With regard to "Lay Witness" opinion, Rule 701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) ***not based on scientific, technical, or other specialized knowledge*** within the scope of Rule 702.

(Emphasis added.) With regard to "Expert" witness opinion, Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

When the trial court overruled Chad Booker's objections to Morgan's testimony, the trial court did not state on the record whether the testimony was being admitted as "Lay Witness" opinion under either Rule 701 or as "Expert" witness opinion under Rule 702; however, the initial question to Morgan asked her to give her opinion "as a human being and as a nurse," and therefore sought to obtain testimony based upon Morgan's "knowledge, skill, experience, training, or education." Testimony of this type is defined by Rule 702 as "expert" testimony. Furthermore, the Mississippi Supreme Court has stated:

> To be clear, the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.

Palmer v. Volkswagen of America, Inc., No. 2001-CT-00875-SCT, 904 So.2d 1077, 1092 (¶ 64) (Miss. 2005). See also *Cotton v. State*, 675 So.2d 308, 311 (Miss. 1996) (citing *Sample v. State*, 643

So.2d 524, 530 (Miss.1994); *Sample v. State*, 643 So.2d 524, 529-530 (Miss. 1994) ("... where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Miss.R.Evid. 702 opinion and not a Rule 701 opinion.").

Notably, the question posed to Morgan was "based on the injuries that you saw, do you believe that the person who received those injuries would have ever been able to move?" Thus, the question probed Morgan's opinion regarding the extent, severity, and seriousness of David White's injuries, and whether, in her opinion, David White could have been ambulatory. To express an opinion regarding the extent, severity, and seriousness of such injuries, and whether such injuries were debilitating, requires that the witness must possess some experience or expertise beyond that of the average, randomly selected adult. Therefore, Morgan presented "expert" testimony as defined by Rule 702; however, because the State did not offer any evidence regarding the three (3) factors Rule 702 requires for "expert" opinion testimony to be admissible, and because the State specifically did not offer any evidence regarding the "facts or data" supporting Morgan's opinion, Morgan's testimony was inadmissible as "expert" testimony under Rule 702, and the trial court erred in allowing the testimony.

The admission of "expert" opinion testimony is within the exercise of the "sound discretion of the trial judge." *Bishop v. State*, No. 2006-KA-01957-SCT, 982 So.2d 371, 380 (¶ 33) (Miss. 2008) (citing *Mississippi Transp. Com'n v. McLemore*, No. 2001-CA-01039-SCT, 863 So.2d 31 (Miss. 2003)). A trial court's decision to admit "expert" opinion testimony will not be reversed unless the trial court's exercise of its discretion was arbitrary, clearly erroneous, and amounted to an abuse of discretion. *Bishop*, 982 So.2d at 380 (¶ 33) (citing *Puckett v. State*, No. 96-DP-00867-SCT, 737 So.2d 322 (Miss. 1999). However, 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). See also *Bishop*, 982 So.2d at 380 (¶ 33) (quoting *McLemore*).

In the case *sub judice*, Chad Booker specifically objected that the State had not presented the proper predicate upon which it could permissibly elicit "expert" opinion testimony from Brenda Morgan. [T. 469-470.] The objection was overruled, and Morgan was allowed to give her opinion testimony without the trial court conducting the two-pronged inquiry required by the modified *Daubert* rule adopted by the Mississippi Supreme Court in *Mississippi Transp. Com'n v. McLemore*. Therefore, the trial court's admission of Brenda Morgan's "expert" opinion testimony was clearly erroneous and constituted an abuse of discretion.

Furthermore, the erroneous admission of Brenda Morgan's "expert" opinion testimony was not harmless, but constituted reversible error. The Mississippi Supreme Court has stated: "An error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty." *Forrest v. State*, 335 So.2d 900, 903 (Miss. 1976). The Mississippi Court of Appeals noted in *Young v. State*, No. 2005-KA-02036-COA, 981 So.2d 308, 313 (¶ 17) (Miss. App. 2007) (citing *Gray v. State*, No. 1999-KA-02036-SCT, 799 So.2d 53 (Miss. 2001)) that an error is harmless when it is trivial, formal, or merely academic, when it is not prejudicial to the substantive rights of the party, and where it does not affect the outcome of the case. See also *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So.2d 216, 221 (Miss. 1969).

As previously discussed, *supra*, the State's theory of the case was that David White was seated in the Rhino and that Chad Booker "assaulted him unmercifully, hitting him in the head until he was dead." [T. 751.] Chad Booker's version was that David White stepped out of the Rhino, grabbed and swung at him, that he grabbed David White's wrist and struck White with three quick fist punches to the left side of White's head. [T. 586-587; "State's Exhibit # 12" and "State's Exhibit # 13."] Morgan's impermissible "expert" opinion testimony was, therefore, addressed to one of the most critical issues in the trial. Furthermore, Morgan's testimony contradicted the legitimately admitted "expert" opinion testimony of the forensic pathologist, Dr. Hayne.[34]

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 Booker'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 Booker'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 "expert" opinion testimony 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,

[34]There can be no doubt that the State intended Morgan's testimony to be "expert" opinion testimony. In the State's closing argument, the State proclaimed: "Brenda Morgan, I've been a nurse for 30 years. I worked in the emergency room." [T. 789.] The State certainly was not relying upon Morgan for "Lay Witness" opinion testimony.

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.[35]

When the State decided to put Chad Booker to trial on a charge of murder under MISS. CODE ANN. §97-3-19(1)(a) (Supp. 2004), the State found itself in need of some evidence to prove that when Chad Booker struck David White that Chad acted with malice aforethought, premeditated design, or the "deliberate design to effect the death of David White."[36] *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). Not only did the State not have any eyewitnesses to the incident from whom to elicit testimony that Chad Booker was the initial aggressor, which might possibly show malice aforethought or deliberate design, but the State also found itself confronting the *Weathersby* rule.[37] 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, the grandson of David White, which implied that Chad Booker engaged in an act of intimidation directed toward the Whites.

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[35]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).

[36]See Indictment. [R. 1. E. 11.]

[37]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).

he admitted he could not testify that Chad Booker was driving the truck that night, and he testified he was not trying to 'represent to the jury' that Chad Booker was 'trying to aggravate' the White family that night. [T. 338, 339.]

Shade White was never listed as a witness for the State, and Shade White's statement was never produced as discovery by the State. [T. 319, 320, 322.] The State's position on the discovery violation was that:

> There is a statement in David Keith White's statement saying this is what my son heard and saw. I don't think there could be any surprise ....

[T. 320]. Chad Booker objected to the admission of Shade White's testimony as both a discovery violation and under Rule 403 of the Mississippi Rules of Evidence.[39] [T. 324.] However, the trial court, in allowing the testimony of Shade White over the objection of Chad Booker, stated:

> Common experience tells us that vehicles out in the country, and being a country boy I understand that, can be identified by sound. Now, who was driving it is a different question .... Whether or not the defendant was driving it is a question for the jury to determine, whether or not they believe he was or if he wasn't.

[T. 324-325.]

The standard of review regarding the admission or exclusion of evidence is abuse of discretion, and any error in the admission or exclusion of evidence is not grounds for reversal unless the error adversely affected a substantial right of a party. See, *e.g.*, *Flaggs v. State*, No. 2006-KA-01702-COA, 999 So.2d 393, 405 (¶ 35) (Miss. App. 2008); *Morris v. State*, No. 2005-KA-02016-COA, 963 So.2d 1170, 1175 (¶ 15) (Miss. App. 2007); *Yoste v. Wal-Mart Stores, Inc.*, No. 2000-CA-00732-SCT, 822 So.2d 935, 936 (¶ 7) (Miss. 2002); and, *Lynch v. State*, No.

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[39]Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

1998-DP-01149-SCT, 877 So.2d 1254, 1281 (¶ 86) (Miss. 2004). Reversible error occurs where the erroneous admission of evidence or testimony is prejudicial to a defendant in a criminal case and may have affected the outcome of the case. See, *e.g.*, *Carter v. State*, No. 97-KA-00760-SCT, 722 So.2d 1258, 1262 (¶ 14) (Miss. 1998).

The admission of Shade White's testimony permitted the jury to speculate that Chad Booker was driving the vehicle (even though Shade White, himself, admitted he could not testify that Chad Booker was driving the truck that night), and allowed the jury to base its verdict upon speculation that Chad Booker had engaged in an act of intimidation of the Whites. Because Chad Booker was convicted of "heat of passion" manslaughter under MISS. CODE ANN. §97-3-35 (1972), allowing the jury to consider highly questionable evidence which implied that Chad Booker engaged in threatening behavior directed toward the Whites was prejudicial to Chad Booker and may have affected the outcome of the case; therefore, the admission of the testimony was reversible error. See, *e.g.*, *Williams v. State*, No. 97-CT-01429-SCT, 761 So.2d 149, 154 (¶ 18) (Miss. 2000) (the test is not whether the jury considered the improper evidence, but whether the evidence was "unimportant" in relation to everything else the jury considered, citing *Yates v. Evatt*, 500 U.S. 391, 392, 111 S.Ct. 1884, 1886, 114 L.Ed.2d 432, 448 (1991) and *Wilcher v. State*, 635 So.2d 789, 798 (Miss.1993)).

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. [40]

Rule 404 of the Mississippi Rules of Evidence provides for the admission of evidence of "a pertinent trait" of the character of the accused either by the accused or by the prosecution, and Rule 404 further provides for admission of "a pertinent trait of the character of the victim of the crime

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[40]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).

Possum Nance, a used car dealer, had employed Chad Booker to perform repossessions and his statement related directly to how Chad Booker reacted in situations quite similar to the incident with David White on March 12, 2007, and, according to Nance, Chad Booker was "always ... calm, cool" and never "overstepp[ed] the boundaries." [T. 27-31; E. 53.] Chad Booker was entitled under Rule 404 (a)(1) to have this evidence presented to the jury.

Furthermore, the Mississippi Court of Appeals has stated:

> Evidence of a victim's character is ordinarily irrelevant. M.R.E. 404(a). The victim's character becomes relevant in cases where the defendant asserts an arguable claim of self-defense. *McGilberry v. State*, 797 So.2d 940, 941 (¶ 7) (Miss.2001). Evidence of a victim's bad character is relevant where it is unclear which party was the initial aggressor. *Id.*

Savannah v. State, No. 2001-KA-00553-COA, 840 So.2d 717, 719 (Miss. App. 2002). Under the State's theory of the case *sub judice*, the crucial issue was whether Chad Booker was the initial aggressor. For this reason, evidence regarding the character of David White was extremely relevant, and it was reversible error for the trial court to exclude the testimony of Wayne Hogue and Noel Jackson. See *Moore v. State*, No. 1999-KA-01730-COA, 791 So.2d 849, 852 (¶ 10) (Miss. App. 2001) (the character of the victim is relevant where "the 'defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense.'" quoting *Edwards v. State*, No. 97-KA-01562 COA, 726 So.2d 274, 277 (¶ 16) (Miss. App. 1998)); *Newsom v. State*, 629 So.2d 611, 14 (Miss. 1993) (error to exclude evidence of victim's character offered in the form of specific past acts); *Green v. State*, 614 So.2d 926, 934 (Miss. 1992) (reversible error to exclude proof of specific instances of conduct when character is an essential element of the accused's defense); and, *Heidel v. State*, 587 So.2d 835, 845 (Miss. 1991) (an accused, claiming self-defense, is allowed to offer evidence of a pertinent trait of character of the victim of the crime).

In the case *sub judice*, reasonable jurors could have found Chad Booker not guilty, and, therefore, the trial court's exclusion of character evidence relating to either Chad Booker or David White and their propensity for aggression and violence was prejudicial to Chad Booker may have affected the outcome of the case. See, *e.g.*, *Carter v. State*, No. 97-KA-00760-SCT, 722 So.2d 1258, 1262 (¶ 14) (Miss. 1998). Thus, the erroneous exclusion of the aforesaid evidence was 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.[41]

Rule 9.04(5) of the Mississippi Rules of Circuit and County Court Practice requires the State to disclose "[a]ny physical evidence ... relevant to the case ...." The State elicited testimony from Keith White that David White wore a cap "everyday," that David White was wearing a cap when he went to seen Chad Booker on March 12, 2007, and that the cap was later found inside the Rhino. [T.238, 242.] Chad Booker objected because evidence relating to the cap was never provided in discovery, but the objection was overruled. [T. 238- 240.] Thereafter, the State argued that the cap's presence in the Rhino was physical proof which contradicted Chad Booker's version of the incident. [T. 786.] Obviously, it was the State's position that the location of the cap was a crucial piece of physical evidence which contradicted Chad Booker's version of the incident; therefore, under Rule 9.04, the State was required to give notice of this evidence to Chad Booker, and failure to do so constitutes both a clear discovery violation and prosecutorial misconduct.

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)

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[41]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).

(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.

V. 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 punch David White in the head with his fist. Reviewing the four corners of the record, the trial court made notable errors in both admitting and excluding testimony and evidence, and it cannot be objectively stated that Chad Booker was not prejudiced by these errors. Furthermore, based upon the undisputed and uncontradicted evidence, 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. 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 13th day of MAY, 2009..

CHAD BOOKER, *Defendant-Appellant*

By: _____

ANTHONY L. FARESE (MS # 5133)
Attorney for Chad Booker
Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing **BRIEF OF CHAD BOOKER, THE DEFENDANT-APPELLANT** together with three (3) copies of same and an electronic disk containing the text of the brief in Word Perfect 12.0, in the regular United States Mail, postage pre-paid, addressed to:

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 13th day of MAY, 2009.

ANTHONY L. FARESE (MS [redacted])
Attorney for Chad Booker, Defendant-Appellant

Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229