IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-KA-00048-COA

EBONI BENA WHITE A/K/A EBONI WHITE A/K/A EBONI B. WHITE — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	09/27/2010
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	CLAIBORNE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CYNTHIA ANN STEWART
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY
DISTRICT ATTORNEY:	ALEXANDER C. MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF MANSLAUGHTER AND SENTENCED TO TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED - 10/23/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., BARNES AND ISHEE, JJ.

BARNES, J., FOR THE COURT:

¶1. A Claiborne County jury convicted Eboni White of manslaughter, and the trial judge sentenced her to a term of twenty years in the custody of the Mississippi Department of Corrections (MDOC). White now appeals to this Court, claiming the trial court erred in: refusing to dismiss her indictment based on certain improper influences on the grand jury; prohibiting her expert witness, Jeffrey Curtis, from giving his opinion at trial on the use of

force in self-defense; refusing to instruct the jury on her theory of self-defense; and in not allowing her witness, Ricky Thompson, to testify because he was in the courtroom during Curtis's testimony. Additionally, White challenges the weight and sufficiency of the evidence to support her conviction, and argues cumulative error. This Court, however, finds no reversible error and affirms.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

¶2. Eboni White and the victim, Danielle Newsome, were students at Alcorn State University and had been friends since high school. They lived in trailer homes across the street from one another in a trailer park near Lorman, Mississippi. White lived with other roommates, and Newsome lived with her four-year-old son, Daniel. White and Newsome had a "falling out" when Newsome accused White of failing to stop for her child's school bus one morning at the end of October 2009. The bus picked Newsome's child up every morning and took him to a Head Start program. White remembers the incident as follows. That morning she was taking a football player to practice. She backed out of her driveway and stopped behind the bus. The bus's lights were on, but it had no stop sign; so White just went around the bus, to its left, and drove to Alcorn's campus. Shortly after returning home, White heard banging at her door. It was Newsome, who wanted to know if White had gone around the school bus. White said yes. Newsome exclaimed, "You almost hit my f**king baby." White responded that she came nowhere near the child. Newsome then threatened White: "If something happens to my baby, I [am] going to f**k you up." White did not think much of Newsome's threat until later when Newsome started a "campaign of harassment" against White. Newsome would call White a "b***h" every time she saw

White. Additionally, Newsome told White the police were looking for her and her vehicle because of the bus incident.

¶3. Approximately one week after the bus incident, White filed a complaint with the Claiborne County Sheriff's Office over Newsome's harassment. Martha Lott, a dispatcher with the sheriff's office, filled out the complaint form for White. White stated that on November 1, 2009, Newsome came to White's trailer door and made threats because White had driven around the school bus. Further, every time White came home, Newsome was outside waiting for her, cursing and calling White names. While normally Lott would contact the law-enforcement deputies when a complaint was filed, this time she did not because White did not ask her to.

¶4. On the morning of November 12, 2009, at approximately 8:00 a.m., White had started her vehicle, but she had to return to her trailer with a case of beer her roommate had left in her vehicle, as she could not take it to school. She then heard banging at her door and Newsome threatening, "B***h, come outside. I'm going to get you. Come on. I know you are in there . . . ain't no way out. You're going to see me today." A neighbor also testified Newsome woke her by repeated yelling at White's trailer something to the effect of: "B***h, I'm going to whoop your ass. B***h, come out of there" for approximately fifteen to twenty minutes. Another neighbor overheard the commotion and was so concerned she called the police. White stayed in the trailer for approximately an hour and one-half trying to avoid Newsome, missing a college calculus test at 9:00 a.m. White made numerous phone calls to her brother, mother, and father; however, she could not get in touch with them. White's brother had dated Newsome; so White thought "he could talk to [Newsome] and

figure out what was going on." When White finally reached her father, he told her to forget about her calculus test and go immediately to the courthouse and file a restraining order. Also, he told her to bring home her handgun, which White had bought for safety during road trips, as the trips were concluded.

¶5. At some point, White exited her trailer, with the handgun in the pocket of her backpack, heading towards the driver's door of her vehicle. Newsome came forward from her trailer across the highway, approached the driver's door of White's vehicle, and blocked White's access to her vehicle. The two exchanged words in the common driveway off the highway, where White's vehicle was parked. Witnesses recounted that Newsome again stated, "You tried to hit my baby," and asked White, "Why did you try to run over my child?" White told Newsome they had "discussed this already" and to "chill out," but Newsome responded, "No, f**k that. F**k that. We fixing to discuss it again." White stated that as Newsome was approaching her, Newsome's hand came up, and there was something silver in it, which White thought was a weapon.[1] One eyewitness testified that White was cursing Newsome as well, calling her a "b***h" and stating she was "tired." White then took her handgun from her backpack and shot Newsome several times. Law-enforcement officers arrived to hear gunshots and saw a crowd of people had gathered. Newsome fell to the ground. Officers told White to put the gun down, and she threw it towards them stating, "You can have it now." As they were arresting White, someone said, "Eboni, I told you to wait in the house. I told you to wait." White, very upset, responded,

[1] Testimony at trial showed the silver object could have been Newsome's cell phone, which White's father found lying on the windshield of her vehicle later that day.

"Y'all was taking too long . . . [Newsome] wouldn't leave me alone." Newsome died from multiple gunshot wounds.

¶6. White was indicted for murder. She filed a motion to dismiss the indictment for improper influence by the grand jury foreperson, who White claimed knew and disliked her. The trial court denied the motion. A three-day trial ensued in September 2010.

¶7. At the trial, several of White's and Newsome's neighbors testified. One neighbor testified that on the morning of the shooting, he pulled up in his vehicle to where Newsome was standing, and she told him a young lady had tried to run over her child. The neighbor told Newsome to "let it go" and return to her trailer. Newsome also tried to stop her child's bus driver, who was coming through the trailer park at the time, and tell the driver that White had tried to run over her child. Newsome then approached one of White's roommates who was outside. The roommate told Newsome she had nothing to do with the incident and to speak with White about it, and returned to her trailer.

¶8. Three neighbors testified they saw White shooting the gun. White, testifying on her own behalf, claimed she took the gun with her to take it home, on her father's advice – not to shoot Newsome. Regarding the shooting, White claimed that she had witnessed Newsome's capacity for violence in other prior instances, and felt she had to protect herself. Newsome's autopsy showed a total of five gunshot wounds: one to the head, three to the torso, and one to the thigh. No weapons were found on Newsome's body.

¶9. The jury found White guilty of the lesser-included offense of manslaughter. The trial judge sentenced her to twenty years in the custody of the MDOC. White's motion for a judgment notwithstanding the verdict (JNOV) or a new trial was denied, and White appealed.

ANALYSIS OF THE ISSUES

I. Improper Influence by Grand Jury Foreperson

¶10. White asserts that the trial court erred in refusing to dismiss her indictment because of improper influence by the grand-jury foreperson, who White claims knew and disliked her. White argues that her conviction should be reversed and the indictment dismissed, or, in the alternative, she should receive a full hearing on the issue.

¶11. The sole inquiry an appellate court can make regarding grand-jury proceedings is "whether the grand jury was subjected to improper influences." *Culp v. State*, 933 So. 2d 264, 281 (¶59) (Miss. 2005) (citing *Hood v. State*, 523 So. 2d 302, 307 (Miss. 1988)). "Absent evidence that a member of the grand jury acted with malice, hatred, or ill will, or fraud, or otherwise violated the oath taken by grand jurors, it is presumed that the grand jurors did not improperly or illegally act in returning the indictment against the accused." *Id.* (citing *Southward v. State*, 293 So. 2d 343, 344 (Miss. 1974)). The factual determinations of the trial court are reviewed only for clear error. Conclusions of law are reviewed de novo. *Id.*

¶12. Prior to trial, White filed a motion to dismiss her indictment, where she alleged that the foreperson had been an employee at her high school when White was a senior. White claims she and the foreperson had a "serious verbal confrontation" during high school that resulted in White's not being allowed entrance into an honor society. Additionally, White contends the foreperson was a personal acquaintance of Newsome, and is personal friends with the district attorney's wife. The trial court denied the motion because White did not present sufficient evidence to overcome the presumption that the grand jury acted properly.

¶13. There is no evidence in the record that there was any improper influence on the grand jury because of the relationships of the grand-jury foreperson with the victim and the district attorney, or because of the foreperson's prior interaction with White. Furthermore, White failed to provide evidence of undue influence to the trial court. Allegations in a motion cannot be considered as proof of facts; the movant must support his motion with proof. *Gordon v. State*, 349 So. 2d 554, 555 (Miss. 1977). Absent such proof, there is a presumption in favor of the correctness of the trial court's action. *Id*. Therefore, we cannot find the trial court's denial of White's motion to dismiss her indictment clearly erroneous. And, even if White had proven the allegations of her motion, there would be insufficient proof of undue influence, where malice, hatred, ill will, or fraud must be proven. The Mississippi Supreme Court requires that there must be "actual influence, not just the appearance of impropriety." *Culp*, 933 So. 2d at 282 (¶62) (citing *Southward*, 293 So. 2d at 344).

¶14. White also complains that she did not receive an "extensive hearing" on the matter, as required by *Culp*. While there is no transcript in the record of a hearing, the court's order indicates that a hearing on the motion did occur. The trial court noted that it found the evidence presented on the motion's allegations insufficient. We find no error in this ruling.

II. White's Expert Witness Jeffrey Curtis

¶15. White argues that the trial court erred in limiting the testimony of her expert witness, Jeffrey Curtis, who was to give an opinion on whether White used an appropriate level of force under the circumstances, and whether her actions were consistent with self-defense. The trial judge found this testimony would be improper, and did not allow Curtis to testify

on this subject matter.

¶16. "[T]he admission of expert testimony is within the sound discretion of the trial judge." *Bishop v. State*, 982 So. 2d 371, 380 (¶33) (Miss. 2008) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (¶4) (Miss. 2003)). The decision of the trial judge will stand "unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Id.* (quoting *McLemore*, 863 So. 2d at 34 (¶4)). Mississippi Rule of Evidence 702 governs the admissibility of expert testimony and states:

> 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.

Mississippi has adopted a modified *Daubert* standard for the trial court to perform when determining whether expert testimony is admissible under Rule 702. The analytical inquiry is two-pronged: whether the expert testimony is relevant – that is, it must assist the trier of fact; and whether the proffered testimony is reliable. *McLemore*, 863 So. 2d at 36 (¶11). The *Daubert* factors include whether: the theory or technique can be and has been tested; it has been subjected to peer review and publication; the technique has a high known or potential rate of error; and the theory enjoys general acceptance within a relevant scientific community. *Id.* at 37 (¶13) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)). "The applicability of these factors depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999)).

¶17. The defense tendered Curtis as an expert witness in the field of firearms, use of force, and defensive tactics. During voir dire, Curtis stated he had been accepted as an expert in these fields by other courts several times. Defense counsel explained Curtis would be testifying that White did not exceed an appropriate level of force under the circumstances, in order to show White's shooting the victim was consistent with her theory of self-defense. The trial judge, however, expressed skepticism that expert testimony on the use of force had been generally accepted by courts as a scientific field. Yet, the trial judge did acknowledge Mississippi Rule of Evidence 704, which states "testimony in the form of an opinion . . . [that is] otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the [jury]." Counsel responded by offering several cases in support of her position, but the trial judge found them inapplicable here because the cases dealt with governmental entities and police officers, not private individuals.[2] The State accepted Curtis as an expert witness "with regard to weapons," but objected to the defense soliciting Curtis's opinion as to whether White acted in self-defense. The trial judge agreed with the State, finding the testimony on use-of-force and self-defense, in this instance, improper. The judge stated the expert was not in a better position than the jury to determine whether White was being reasonable in using deadly force. However, the trial judge found Curtis "eminently

[2] Oftentimes, police officers are accused of using excessive force. *See, e.g., Carswell v. Borough of Homestead*, 381 F.3d 235 (3rd Cir. 2004); *Scott v. City of Goodman*, 997 So. 2d 270 (Miss. Ct. App. 2008). White offered *Scott* in support of her argument, which was a Mississippi Torts Claim Act case. In *Scott*, the expert witness for the city testified that officers may exercise discretion and judgment regarding the appropriate use of force under dangerous circumstances. *Id.* at 277 (¶16). White also cited to *Carswell* in her brief, which deals with the reasonable use of force by a police officer. *Carswell*, 381 F.3d at 243.

qualified in the field of training for firearms and combat." Curtis's testimony was ultimately limited to the caliber of White's handgun.

¶18. In her brief, White cites to several police and ballistic journal articles about use-of-force to show the area is accepted as a scientific field. Yet, at trial, she did not offer any of these articles or any studies to justify why Curtis's expert opinion would be of assistance to the jury, based on *Daubert*, and she cannot do it now. There is nothing to say Curtis's opinion would be superior to that of a layman or juror's opinion.

¶19. Therefore, we cannot find that the trial judge abused his discretion in limiting Curtis's expert testimony. White did not established the expert testimony on the use of force as generally accepted by the scientific community, under Rule 702 and *Daubert*. Therefore, the trial judge correctly ruled that expert testimony regarding whether the defendant acted reasonably in shooting Newsome was improper.

III. Jury Instructions

¶20. White argues that the trial court erred in refusing to instruct the jury on her theory of the case on self-defense, which encompassed the "Castle Doctrine" and her right to use deadly force to repel a trespasser. White claims that these two instructions were justified because there was evidence at trial that before being shot, Newsome was the aggressor and had unlawfully entered White's premises, banged on White's door, and announced her intent to assault White.[3]

[3] As the State points out, there is no transcript of the jury-instruction conference in the record, because the parties went "off the record." Therefore, the reasons the trial judge refused these instructions are not known, nor were objections made by counsel. However, this Court will consider White's arguments on this issue because the record includes the

¶21. It is well established that "jury instructions are within the discretion of the trial court." *Davis v. State*, 18 So. 3d 842, 847 (¶15) (Miss. 2009). Further, jury instructions must be considered together, not in isolation. *Rubenstein v. State*, 941 So. 2d 735, 784 (¶224) (Miss. 2006). "When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. There is no error if all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law." *Id.* at 785 (¶224) (internal quotations and citations omitted). Additionally, "[a] defendant has a right to jury instructions that present his theory of the case, but that right is not absolute. 'The court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions or is without foundation in the evidence.'" *Davis*, 18 So. 3d at 847 (¶15) (quoting *Phillipson v. State*, 943 So. 2d 670, 671 (¶6) (Miss. 2006)).

A. The Castle Doctrine Jury Instruction

¶22. White first argues that the evidence supported her instruction D-12 on the Castle Doctrine presumption, which reads:

> The court instructs the jury that a person who uses defensive forces shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon her or upon her dwelling, or against a vehicle which she was occupying, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful forcible act was occurring or had occurred.
>
> Therefore, if you find from the evidence in this case that the deceased, Danielle Newsome, had unlawfully and forcibly entered the property surrounding Eboni White's residence, or that Danielle Newsome, the deceased, was in the process of unlawfully and forcibly entering Eboni White's residence

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refused and withdrawn jury instructions, which are marked as such by handwritten notations.

> or the property surrounding Eboni White's residence, or Eboni White's vehicle, and that Eboni White was aware that such forcible entry or unlawful act by Danielle Newsome was occurring or had occurred, then you shall presume Eboni White to have reasonably feared imminent death or great bodily harm at the time of the shooting, and you must, therefore, find the defendant, Eboni White, not guilty.

This instruction tracks the language of Mississippi Code Annotated section 97-3-15(3) (Rev. 2006), which along with Mississippi Code Annotated section 97-3-15(4) (Rev. 2006), is commonly known as the Castle Doctrine.[4] White complains that, instead, the jury was given

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[4] Section 97-3-15(3) states:

> A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, *if* the person against whom the defensive force was used, was in the process of *unlawfully and forcibly* entering, *or* had *unlawfully and forcibly* entered, a dwelling, occupied vehicle, business, place of employment *or* the immediate premises thereof *or* if that person had unlawfully removed *or* was attempting to unlawfully remove another against the other person's will from that dwelling, occupied vehicle, business, place of employment or the immediate premises thereof *and* the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred. This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity . . . .

(Emphasis added).

Relatedly, section 97-3-15(4) states that:

> A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force . . . if the person is in a place where the person has a right to be, and no finder of fact shall be

the State's instruction S-9 about what constitutes a reasonable justification of force for assault with a deadly weapon.

¶23. The Castle Doctrine "creates a presumption of fear and abridges a duty to retreat in certain prescribed circumstances." *Newell v. State*, 49 So. 3d 66, 74 (¶22) (Miss. 2010). *Newell* explains the Castle Doctrine includes two prongs:

> First, under subsection (4), if the defendant is in a place where he had a right to be, is not the immediate provoker and aggressor, and is not engaged in unlawful activity, he has no duty to retreat before using defensive force. Miss. Code Ann. § 97-3-15(4) (Rev. 2006). And second, if the jury finds that any of the circumstances in subsection (3) are satisfied, the defendant who uses such defensive force is presumed to have reasonably feared imminent death or great bodily harm or the commission of a felony upon him. Miss. Code Ann. § 97-3-15(3) (Rev. 2006).

Id. White's first argument on the refusal of instruction D-12 relates to the second prong; accordingly, we must determine if the evidence presented at trial entitles White to an instruction on this presumption.[5]

¶24. White and Newsome lived across the street (Highway 552) from one another. It is undisputed that Newsome was the initial aggressor when she first entered White's immediate premises at approximately 8:00 a.m., "banging" on White's trailer door and yelling obscenities and threats. But the two women had no interaction at that point – White did not go to the door. White stayed inside her trailer for approximately one hour after Newsome's tirade. During this time, one witness testified that Newsome was yelling obscenities from

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> permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable.

[5] A "no-duty-to-retreat" rule was stated in White's own jury instruction D-4, which was given.

in front of her own trailer, across the highway, and White's roommate stated Newsome was in the street "talking all that noise." It was not until after 9:00 a.m. that White exited her trailer and headed towards her vehicle, which was parked approximately 200 to 300 feet from her trailer in a common driveway. This common driveway was an unpaved road that came off the highway and went in front of the trailers on that side of the road. Newsome came from across the highway to confront White. White testified that Newsome came toward her, moving quickly, from the area near her roommate's vehicle, which was "a good little distance" from White's vehicle. Newsome met White near the driver's door of White's car. White testified that when Newsome came as close as her driver's side tire, Newsome's hand went up, and White fired her handgun several times.

¶25. While there were no other jury instructions given that tracked the language of the Castle Doctrine presumption, it was not warranted by the evidence presented at trial. Applying our facts to the requirements of section 97-3-15(3), there is nothing to show Newsome was performing or attempting the enumerated actions that would give rise to White having a "reasonabl[e] fear [of] imminent death or great bodily harm," thereby justifying defensive force, let alone deadly force. Specifically, there is no evidence to show Newsome "unlawfully and forcibly . . . entered" or was attempting to enter White's trailer, vehicle, or "immediate premises thereof." Nor had Newsome "removed" or was attempted to remove White from her dwelling, vehicle, or the "immediate premises thereof," against her will.

¶26. When White and Newsome had their final confrontation, they were nowhere near White's "dwelling," but in the common driveway where White's vehicle was parked. Additionally, White's vehicle was actually parked in front of a trailer other than her own.

Photographs entered into evidence show that after being shot, Newsome's body lay between White's vehicle and a utility pole, at the edge of the unpaved inlet to the common driveway. Her body was not even in front of White's trailer, but another uninhabited one. Further, White was not occupying her vehicle at the time of the shooting. She had started her vehicle earlier when she retrieved the case of beer from it, but she then returned to her trailer. When White came out of her trailer approximately an hour later, she never reached her vehicle. From the testimony, photographs, and diagrams admitted at trial of the trailer park, White's vehicle, and Newsome's body, it cannot be said that Newsome was "unlawfully" in any location when she and White had their fatal confrontation. Nor does the evidence show Newsome had performed any "forcible" act in walking across the road to confront White. Further, there is no evidence that Newsome was attempting to remove White from her home or vehicle, which would justify White's using defensive force under the Castle Doctrine. Newsome was unarmed.

¶27. White cites to *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), in support of her argument. In *Westbrook*, this Court affirmed a conviction for murder, where the defendant, a bouncer, went outside to the bar's parking lot to confront a patron who had been asked to, and did, leave the bar a few minutes before. *Id.* at 831 (¶¶1-3). Although testimony conflicted about who initiated the fatal fight, one witness testified that the defendant pulled the victim out of his vehicle. *Id.* at (¶4). The defendant then struck the victim with a baseball bat, killing him. *Id.* at (¶¶4, 6). The defendant argued that his actions were justified under the Castle Doctrine, as he had a right to defend the bar's property as its employee. *Id.* at 833 (¶13). However, this Court disagreed, citing *Lester v. State*, 862 So. 2d 582, 585 (¶11)

(Miss. Ct. App. 2004)[6]: "The law contemplates, rather, that deadly force may only be employed to repel a trespasser who demonstrates the apparent purpose of assaulting or offering violence to an occupant or committing some other crime on the premises." *Westbrook*, 29 So. 3d at 833 (¶14). There was no evidence the victim was going to assault anyone at the bar or commit another crime in the parking lot. *Id.* at (¶15). Further, under the Castle Doctrine, there was no evidence to show the victim "unlawfully and forcibly entered" the bar. *Id.*

¶28. *Westbrook* is instructive here because there was no evidence that at the time of the shooting, Newsome had "unlawfully and forcibly entered" the common driveway. Nor was there any evidence that she was trespassing in the common driveway, approximately two car lengths from the roadway. The evidence showed Newsome met White at her vehicle, unarmed, and stated: "What's up Eboni? . . . You tried to hit my baby. . . . We fixing to discuss it again." Accordingly, the trial court did not err in denying jury instruction D-12 on the Castle Doctrine because there was no evidentiary basis for it under section 97-3-15(3).

B. The Right-to-Repel-a-Trespasser Jury Instruction

¶29. White also argues that the trial court should have given jury instruction D-13 on the right to employ deadly force to repel a trespasser. The instruction reads:

> The court instructs the jury that deadly force may be employed to repel a trespasser who demonstrates the apparent purpose of assaulting or offering violence to an occupant of a dwelling or committing some other crime on the premises.
>
> Therefore, if you find from the evidence in this case, that on the morning of the shooting, the deceased, Danielle Newsome, was trespassing upon the property lawfully occupied by Eboni White, and that Danielle

[6] *Lester* was handed down before the Castle Doctrine was enacted.

> Newsome had there demonstrated the apparent purpose of assaulting or offering violence to Eboni White on such property, then you shall find the defendant, Eboni White, not guilty.

White cites to *Lester* in support of her argument.

¶30. In *Lester*, this Court affirmed the defendant's conviction for murder. *Lester*, 862 So. 2d at 583 (¶1). The defendant's wife had allowed the victim, a male acquaintance, into the couple's house to apologize after the defendant and victim had an altercation earlier in the evening. *Id.* at (¶2). After telling the victim repeatedly to leave, the defendant testified the victim physically attacked him; so he shot the victim. *Id.* at 584 (¶¶2-3). The defendant argued that he should have received a jury instruction on his right to defend his habitation; however, the trial court refused this instruction because it was adequately covered elsewhere. *Id.* at 585 (¶¶9-10). This Court agreed with the trial court, noting that the defendant was given an instruction on the right to repel a trespasser from his home, as well as standard instructions on self-defense. *Id.* at 586 (¶13).

¶31. This Court noted that the law on defense of habitation does not allow the premises owner to kill an individual "if he fails to leave the property soon enough to satisfy the desires of the owner." *Id.* at 585 (¶11). Instead:

> [D]eadly force may only be employed to repel a trespasser who demonstrates the apparent purpose of assaulting or offering violence to an occupant or committing some other crime on the premises. *Bowen v. State*, 164 Miss. 225, 227, 144 So. 230, 232 (1932). . . . [T]he threat of serious bodily injury need not be as imminent in defense of habitation as in a case of individual self-defense. Thus, if it appears reasonable for the occupant to conclude that the ultimate purpose of the trespasser is to inflict such harm, then, because of the law's recognition of the sanctity of one's own residence, deadly force may be employed to end the potential danger at a stage before the actual threat becomes immediate. *Id.*

Id. at 585-86 (¶11).

¶32. The facts of *Lester* are readily distinguishable from this case. There is no evidence that, at the time of the shooting, Newsome was trespassing. And there is no evidence that Newsome did not have the right to be in the common driveway, in front of the trailer that was next to White's, and approximately two car lengths from the highway. Newsome may even have been in the highway right-of-way, as her body fell between the highway and the utility pole.

¶33. Finally, White also appears to make the argument that she should have been given a jury instruction on justifiable homicide because she cites to the relevant statutory subsections (e) and (f) of Mississippi Code Annotated section 97-3-15(1) (Rev. 2006) in her brief during her discussion of the Castle Doctrine; however, she does not cite any specific instruction on that theory offered at trial and refused by the trial court. From the record, it appears that defense instruction D-2 tracked the language of justifiable homicide in section 97-3-15(1)(f), but it was withdrawn by defense counsel. "A trial judge will not be found in error on a matter not presented to him for decision." *Howard v. State*, 945 So. 2d 326, 360-61 (¶71) (Miss. 2006) (quoting *Smith v. State*, 729 So. 2d 1191, 1205-06 (¶63) (Miss. 1998)). Thus, the issue is waived.

¶34. In conclusion, a total of five jury instructions were given relating to White's theory of self-defense – two from the State and three from the defense. From the evidence presented at trial, however, we cannot say that jury instructions on the Castle Doctrine and the right to repel a trespasser were warranted. Also, White's theory of her case was fairly covered in other instructions. Therefore, we find the trial court did not abuse its discretion in refusing

jury instructions D-12 and D-13.

IV. The Exclusion of White's Witness Ricky Thompson

¶35. White next argues that one of her witnesses, Ricky Thompson, was improperly excluded from testifying. At the beginning of the trial, the rule of sequestration was invoked by both parties. In a proffer, defense counsel explained that Thompson, who was near the scene of the shooting, would have testified for the defense about what he saw and heard during the shooting. However, the prosecution noted Thompson had been in the courtroom during the testimony of White's expert witness, Curtis. For this reason, the prosecution objected to Thompson testifying. The trial court sustained the objection. This ruling, White claims, violated her state and federal constitutional right to call witnesses, and requires a new trial.

¶36. Mississippi Rule of Evidence 615 governs witness sequestration. It provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

M.R.E. 615. "The purpose of the rule is to prevent a witness from adapting his/her testimony to previous testimony." *Kiker v. State*, 919 So. 2d 190, 194 (¶8) (Miss. Ct. App. 2005) (citing *Douglas v. State*, 525 So. 2d 1312, 1316 (Miss. 1988)). The appellate court is limited to an abuse-of-discretion standard when reviewing an alleged sequestration violation. *Whittington v. State*, 748 So. 2d 716, 719 (¶19) (Miss. 1999). "Reversal is not justified unless there is a showing of prejudice sufficient to constitute abuse of discretion on the part

of the trial judge in not ordering a mistrial or not excluding testimony." *Id.* (citing *Douglas*, 525 So. 2d at 1318). When a witness has violated the rule, the trial court has discretion as to the proper remedy. *Finley v. State*, 725 So. 2d 226, 233 (¶23) (Miss. 1998) (citing *Douglas*, 525 So. 2d at 1317). Appropriate remedies for a sequestration violation include:

> prospectively excluding the witness where prejudice will otherwise ensue; striking the witness's testimony where connivance gave rise to the testimony; striking the witness's testimony where the testimony gave rise to prejudice; or, most appropriately, allowing the other party to subject the witness to a "full-bore cross-examination" on the facts of the rule violation.

Id.

¶37. Here, there was a violation of Rule 615 because both parties agreed Thompson had been in the courtroom during Curtis's testimony, even though Rule 615 had been invoked. Accordingly, the trial court prospectively excluded the witness, Thompson, from testifying. We find no error in this regard. White claims she was not allowed to present a complete defense because of this exclusion, but we disagree. The defense called a total of fifteen witnesses during her case-in-chief to establish her claim of self-defense. Nothing in the proffer showed a significant fact that was not presented by another witness. White has not proved her defense was prejudiced in any manner from the exclusion of this witness.

V. The Sufficiency and Weight of the Evidence

¶38. White argues that there was insufficient evidence to support her conviction for manslaughter, and the verdict is against the overwhelming weight of the evidence.

¶39. Motions for a directed verdict and JNOV both challenge the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005). "[T]he critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act

charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" *Id.* (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). The reviewing court must ask "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." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

¶40. Alternatively, "[w]hen reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* at 844 (¶18). A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Id.* The evidence will be weighed in the light most favorable to the verdict. *Id.* "Any factual disputes are properly resolved by the jury and do not mandate a new trial." *Moore v. State*, 859 So. 2d 379, 385 (¶26) (Miss. 2003) (quoting *McNeal v. State*, 617 So. 2d 999, 1009 (Miss. 1993)).

¶41. Reviewing the evidence in the light most favorable to the prosecution, we find sufficient evidence to convict White of manslaughter. The jury was instructed on the elements of murder, the lesser-included offense of manslaughter, and self-defense. Manslaughter is defined as "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense . . . ." Miss. Code Ann. § 97-3-35 (Rev. 2006). Even though the evidence showed Newsome had been harassing and threatening White about the school-bus incident both on the morning of the shooting and in the weeks

previous, there was no evidence Newsome ever committed any act of violence against White. On the morning of the shooting, White was in no immediate danger when she left her trailer armed with a handgun. As annoying as Newsome's rants must have been, they were not justification for a homicide. While White claimed she acted in self-defense, believing Newsome had a weapon rather than a cellular telephone, the issue of self-defense was a question for the jury to resolve. There was sufficient evidence for the jury to find the shooting was unreasonable under the circumstances. Moreover, the verdict was not contrary to the overwhelming weight of the evidence, and does not sanction an unconscionable injustice. White was "tired" of Newsome's harassment, armed herself, and shot Newsome five times. Accordingly, the sufficiency and weight of the evidence were adequate to support White's conviction for manslaughter.

VI. Cumulative Error

¶42. Finally, White argues that even if this Court does not find any individual errors sufficiently egregious to require reversal, the accumulation of errors prevented White from receiving due process and a fair trial, requiring reversal. The cumulative-error doctrine states: "[I]ndividual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." *Ross v. State*, 954 So. 2d 968, 1018 (¶138) (Miss. 2007) (citing *Byrom v. State*, 863 So. 2d 836, 847 (¶12) (Miss. 2003)). However, if there are no individual errors, there can be no cumulative error that warrants reversal. *Harris v. State*, 970 So. 2d 151, 157 (¶24) (Miss. 2007) (citing *Gibson v. State*, 731 So. 2d 1087, 1098 (¶31) (Miss. 1998)). Such is the case here, where there were no individual errors. Therefore, this

issue is without merit.

¶43. For the above reasons, we affirm White's conviction and sentence.

¶44. **THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, MAXWELL AND FAIR, JJ., CONCUR. RUSSELL, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON, J.

RUSSELL, J., DISSENTING:

¶45. The majority finds that the trial court did not abuse its discretion by refusing to grant a Castle Doctrine jury instruction; refusing a jury instruction covering the right to repel a trespasser; and limiting the scope of the testimony of an expert witness. I would find that the court abused its discretion, resulting in White's ability to fairly and adequately present her theory of defense being significantly and adversely impacted. Therefore, I respectfully dissent.

I. JURY INSTRUCTIONS

A. Castle Doctrine

¶46. The majority finds that the trial court did not err in refusing a jury instruction covering the Castle Doctrine, because the instruction lacked an evidentiary basis. I disagree. It is well-settled law that jury instructions are generally within the discretion of the trial court, and the standard of review for the denial of a jury instruction is abuse of discretion. *Davis v. State*, 18 So. 3d 842, 847 (¶15) (Miss. 2009). Nevertheless, "[t]he defense is entitled to an instruction covering its theory of the case so long as there is evidence in the record that

would support that theory without regard to the probative value of that evidence so long as it is more than a mere scintilla of proof." *Lester v. State*, 862 So. 2d 582, 586 (¶12) (Miss. Ct. App. 2004) (citing *McGee v. State*, 820 So. 2d 700, 705 (¶9) (Miss. Ct. App. 2000)).

¶47. The instruction requested by White reads:

> The court instructs the jury that a person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon her or upon her dwelling, or against a vehicle which she was occupying, if the person against whom the defensive force was used[ ] was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle *or the immediate premises thereof* and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful forcible act was occurring or had occurred.
>
> Therefore, if you find from the evidence in this case that the deceased, Danielle Newsome, had unlawfully and forcibly entered the property surrounding Eboni White's residence, or that Danielle Newsome, the deceased, was in the process of unlawfully and forcibly entering Eboni White's residence *or the property surrounding Eboni White's residence*, or Eboni White's vehicle, and that Eboni White was aware that such forcible entry or unlawful act by Danielle Newsome was occurring or had occurred, then you shall presume Eboni White to have reasonably feared imminent death or great bodily harm at the time of the shooting, and you must, therefore, find the defendant, Eboni White, not guilty.

(Emphasis added).

¶48. The majority finds that the evidence presented at trial did not support the giving of this instruction. A determination of whether supporting evidence exists warrants a discussion of the Castle Doctrine. The Castle Doctrine, a statutory provision that justifies the use of deadly force in certain instances of self-defense, creates a presumption that the defendant reasonably feared imminent death or great bodily harm in certain prescribed circumstances. *Newell v. State*, 49 So. 3d 66, 74 (¶22) (Miss. 2010) (citing *Johnson v. State*, 997 So. 2d 256, 260

(Miss. Ct. App. 2008)). Mississippi Code Annotated section 97-3-15(3) (Rev. 2006), which embodies the Castle Doctrine, states:

> A person who uses defensive force *shall be presumed* to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used[ ] was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or *the immediate premises thereof* or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling, occupied vehicle, business, place of employment *or the immediate premises thereof* and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred. This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties;

(Emphasis added).

¶49. "In order to find that [a Castle Doctrine instruction] should have been given, we must first find that it had a factual basis in the evidence." *Thomas v. State*, 75 So. 3d 1112, 1115 (¶13) (Miss. Ct. App. 2011). To establish a factual basis under the Castle Doctrine, proof of the following two prongs from section 97-3-15 must be presented:

> First, under subsection (4), if the defendant is in a place where he had a right to be, is not the immediate provoker and aggressor, and is not engaged in unlawful activity, he has no duty to retreat before using defensive force. Miss. Code Ann. § 97-13-5(4) (Rev. 2006). And second, if the jury finds that any of the circumstances in subsection (3) are satisfied, the defendant is presumed to have reasonably feared imminent death or great bodily harm or the commission of a felony upon him. Miss. Code Ann. § 97-3-15(3) (Rev. 2006).

Thomas, So. 3d at 1115-16 (¶13) (citing *Newell*, 49 So. 3d at 74 (¶22) (Miss. 2010)).

¶50. It is undisputed that White was in a place where she had the right to be when the incident occurred. It is also undisputed that White was not the provoker and aggressor, as Newsome came onto the property surrounding White's residence displaying violent behavior by screaming obscenities and threatening White. Thus, the first prong of the Castle Doctrine is established. The second prong requires an examination of the circumstances surrounding the incident that would entitle White to a presumption of fear.

¶51. Prior to the day of the incident, Newsome repeatedly harassed White, causing White to file a complaint with the Claiborne County Sheriff's Office. White's effort at seeking refuge from Newsome's constant harassment was futile, as Newsome's actions grew incessant. On numerous occasions, when White would come home from school, she would find Newsome outside waiting for her, shouting obscenities and making threats. Despite White's attempts to avoid confrontation, Newsome continued to harass and threaten White. Over a period of two weeks, Newsome would bang on White's door, cursing and yelling for White to come outside.

¶52. On the day of the incident, Newsome, again, came onto White's property screaming obscenities and making threats, telling White she was going to "F**k [her] up." White remained inside her home for nearly an hour and a half while Newsome banged on White's door, yelling: "B***h, come outside. I'm going to get you . . . ain't no way out. You're going to see me today." White made numerous phone calls for help before finally exiting her home and walking to her vehicle to leave. Newsome met White at White's vehicle, blocking White's access to the driver's door. Newsome's violent threats continued as she approached

White with her hand raised and containing a silver object. Fearing the object was a weapon, White quickly drew her handgun from her backpack and fired.

¶53. At trial, White testified that at the moment she fired the gun she was in fear for her safety. She stated that when Newsome was approaching her with her hand raised, she thought Newsome was going to physically harm her. White stated that moments before the incident, Newsome threatened that she was going to "F**k [White] up," and, considering Newsome's history of violence,[7] White feared that when Newsome approached her, she would carry out her threat.

¶54. The majority states that there is no evidence to show that under the Castle Doctrine Newsome "unlawfully and forcibly entered" White's dwelling or vehicle, nor that Newsome was attempting to remove White from her vehicle at the time of the incident; thus, a presumption of fear does not apply in these circumstances. However, the Castle Doctrine does not require that the person using defensive force be physically inside a dwelling or vehicle in order for the presumption of fear to apply. The doctrine provides that the presumption of fear applies "if the person against whom the defensive force was used[ ] was in the process of unlawfully and forcibly entering [the property] . . . *or the immediate premises thereof* . . . and the person who used the defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred." Miss. Code Ann. § 97-3-15(3).

¶55. The incident took place in the immediate vicinity of White's home, and right next to

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[7] White stated that she saw Newsome in multiple physical fights. White also witnessed Newsome pull a gun on a woman by the name of Sherina Washington.

White's vehicle. The evidence shows that Newsome had unlawfully entered the property surrounding White's residence with the apparent intent of committing an assault on White. Newsome entered the premises, confronted White at the driver's door of White's vehicle, and while making threats, aggressively approached White with her hand raised holding an object, which according to White, appeared to be a weapon. White, while on her property, had ample reason to believe that she was in physical danger. Under these facts, the statutory presumption of fear undoubtedly applies. Based on this evidence, White was entitled to a Castle Doctrine jury instruction.

¶56. The majority states that because White was given other jury instructions relating to self-defense, her theory of the case was fairly covered elsewhere. However, no other jury instruction tracked the language of the Castle Doctrine and addressed the presumption that White reasonably feared imminent death or great bodily harm, thereby justifying her use of defensive force. In fact, one instruction given to the jury regarding self-defense even raised the standard from having a "presumption of reasonable fear" to requiring proof that defensive force was "apparently necessary." Jury instruction S-9 states:

> The Court instructs the Jury that a person may not use more force than reasonably necessary to save his life or protect himself from great bodily harm. The question of whether he was justified in using the weapon is for determination for the jury. The law tolerates no justification and accepts no excuse for an assault with a deadly weapon on the plea of self-defense except that the assault by the defendant on the victim was *necessary or apparently so to protect the defendant's own life or his person* from great bodily injury and there was an immediate danger of such design being accomplished. The danger to life or of great personal injury must be or reasonably appear[ ] to be imminent and present at the time the defendant uses force with a deadly weapon. The term "apparent" as used in "apparent danger" means such overt, actual demonstration by conduct and acts of design to take life or do some great personal injury as would make the assault necessary to self preservation.

Rather than affording White a presumption of fear that would justify her use of defensive force, the language in jury instruction S-9 placed upon White the burden of proving that her use of force was "apparently necessary" to protect her life, notwithstanding (1) Newsome's unlawful entry onto the premises and (2) Newsome aggressively approaching White with the intent to assault White. Further, the instruction states that "no justification" will be accepted other than a showing that the force was apparently necessary. Based on the evidence, White should not have been required to prove that her actions were apparently necessary. Conversely, White should have been presumed to be in reasonable fear for her safety.

¶57. The record shows that at the time of the incident, White feared for her safety and feared that Newsome would physically harm her on her property. The evidence amounts to far more than a mere scintilla of proof to support White's theory of defense. Given the circumstances, White was entitled to a presumption of fear of imminent death or great bodily harm under Mississippi law. White sufficiently established a factual basis under the Castle Doctrine, and therefore should have been given a Castle Doctrine instruction to adequately and fairly present her theory of defense. Accordingly, I find that the trial court's denial of White's request for an instruction covering the Castle Doctrine was reversible error.

B. Right to Repel a Trespasser

¶58. The majority also finds the trial court did not abuse its discretion in refusing jury instruction D-14, covering the right to repel a trespasser. The instruction requested by White reads:

> The court instructs the jury that deadly force may be employed to repel a trespasser who demonstrates the apparent purpose of assaulting or offering violence to an occupant of a dwelling or committing some other crime on the

premises.

> Therefore, if you find from the evidence in this case, that on the morning of the shooting, the deceased, Danielle Newsome, was trespassing upon the property lawfully occupied by Eboni White, and that Danielle Newsome had there demonstrated the apparent purpose of assaulting or offering violence to Eboni White on such property, then you shall find the defendant, Eboni White, not guilty.

¶59. The majority states that there is no evidence to indicate that Newsome was trespassing on White's property when the shooting occurred. However, the record shows that the incident took place in the immediate vicinity of White's home, right next to White's vehicle. In fact, after Newsome spotted White walking to her vehicle, Newsome crossed the street and arrived at the vehicle before White even reached it. White's vehicle was parked in front of her trailer in an area referred to as a "common driveway." White shared the driveway with roommates and residents of the trailer next door. Newsome, however, lived across the street, and did not share this driveway with White. Although the driveway was a "common" driveway, it was only common to those residents who shared it, which did not include Newsome. A question arises to whether Newsome was trespassing when she crossed the street, came onto the property surrounding White's residence, and prevented White from leaving by blocking White's access to her vehicle. This question should have been presented to the jury.

¶60. A review of the record shows that Newsome could have been considered a trespasser at the time she entered the driveway, and stood next to White's vehicle, albeit a driveway that White shared with other residents. The driveway being considered a common area does not dispel the fact that the area was not lawfully shared with Newsome. Newsome was not a

resident of the trailer adjacent to the driveway, and had no lawful right to be on any part of the premises surrounding White's residence, let alone next to White's vehicle, blocking White's access. In any case, whether Newsome was trespassing was a fact issue for the jury to decide. There was evidence to support this theory of defense; and accordingly, the jury should have been given jury instruction D-14 covering this issue.

¶61. While on White's premises, Newsome aggressively approached White with her hand raised, demonstrating the apparent purpose of assaulting White. Given these circumstances, the jury should have been instructed that White had a right to use deadly force to repel Newsome if it is found that Newsome was trespassing at the time of the incident. This Court has held that "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." *Thomas*, 75 So. 3d at 1115 (¶9) (citing *Giles v. State*, 650 So. 2d 846, 849 (Miss. 1995)).

¶62. The State argues that White's theory of defense was covered in other jury instructions, and an instruction on White's right to repel a trespasser was not warranted. However, the issue of whether Newsome was trespassing at the time of the incident is not discussed in any other jury instruction. This Court has held that "[a] party has the right to have his theory of the case presented to the jury by instructions, provided that there is credible evidence that supports that theory." *McGee v. State*, 820 So. 2d 700, 705 (¶9) (Miss. Ct. App. 2000) (citing *Alley v. Praschak Mach. Co.*, 366 So. 2d 661, 665 (Miss. 1979)).

¶63. As discussed above, the record shows that there was ample credible evidence to support White's theory of defense regarding the right to repel a trespasser. A jury instruction covering this right should have been given. "When serious doubt exists as to whether an

instruction should be included, the doubt should be resolved in favor of the accused." *Thomas*, 75 So. 2d at 1116 (¶14) (citing *Davis*, 18 So. 3d at 847 (¶15)). The trial court's refusal to grant the instruction on White's right to repel a trespasser hindered her ability to adequately present her theory of self-defense. Therefore, I find that the trial court abused its discretion by denying White's request for this instruction.

II. EXPERT TESTIMONY

¶64. The majority finds that the trial court did not err in limiting the expert testimony of defense witness Jeffrey Curtis. I disagree. The standard of review for the admission or exclusion of expert testimony is abuse of discretion. *Gillett v. State*, 56 So. 3d 469, 494 (¶61) (Miss. 2010) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (¶4) (Miss. 2003)). Reversal is proper when the trial court's discretion has been abused and a substantial right of a party has been affected. *Crutcher v. State*, 68 So. 3d 724, 730 (¶11) (Miss. Ct. App. 2011) (citing *Newell*, 49 So. 3d at 71 (¶9)). "[A] trial court's discretion must be exercised within the confines of the Mississippi Rules of Evidence." *Ross v. State*, 954 So. 2d 968, 996 (¶56) (Miss. 2007) (citing *Cox v. State*, 849 So. 2d 1257, 1268 (¶36) (Miss. 2003); *see also* M.R.E. 103(a)).

¶65. During trial, Jeffrey Curtis was tendered as an expert in the fields of firearms, use of force, and defensive tactics. After being thoroughly questioned about his training and experience, the trial court stated that Curtis was "eminently qualified." However, in spite of being accepted as an expert in the field of use of force and defensive tactics, Curtis was only permitted to offer testimony about the caliber of the gun used by White during the shooting. Curtis was expected to offer testimony concerning whether or not White's actions were

consistent with self-defense and reasonable under the circumstances. Curtis was also expected to offer testimony about his experience in training individuals under similar circumstances and whether it was appropriate for White to use deadly force under those conditions.

¶66. The trial court did not allow Curtis to testify as to use of force and self-defense despite Curtis being established as an expert in these fields. The trial court stated that testimony regarding whether an individual's use of defensive force is considered reasonable had no scientific basis and had never been accepted by the courts. However, such testimony is permitted under the Mississippi Rules of Evidence. The rule of evidence governing expert testimony 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.

M.R.E. 702. It was well established during trial that Curtis had extensive training and experience in self-defense. He was the founder and president of a use-of-force based training company for civilians, law enforcement, and military, and had served in law enforcement for over twenty-five years. Neither the trial court nor the State expressed doubt as to Curtis's qualifications as an expert. Curtis showed that he had specialized knowledge in the fields of self-defense and use of force; and his testimony covering these topics would have assisted the jury in determining the ultimate fact in issue: whether White's actions were consistent with self-defense.

¶67. The trial court stated that Curtis was not in a better position than the jury to determine whether White's use of force was reasonable. However, the rules of evidence permit expert witnesses to offer testimony embracing the ultimate issue, even though the issue is a factual issue. The applicable rule of evidence states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." M.R.E. 704.

¶68. This Court has held that "[t]here is no invalidity to an expert witness's testimony even if the answer is in effect also a legal conclusion, if what underlies that conclusion is within the witness's specialized area of expertise." *McBeath v. State*, 739 So. 2d 451, 454 (¶15) (Miss. Ct. App. 1999). Although the question of whether White's use of defensive force was reasonable is a question that embraces the ultimate issue, Curtis should have been allowed to offer testimony regarding this issue considering he was accepted, without objection, as an expert in the very field on which the issue is based. Prohibiting Curtis from offering this testimony obstructed White's theory of self-defense, as Curtis was the only witness at trial who was competent to testify in relation to use of force and self-defense.

¶69. It is uncontested that the admission of expert testimony is within the discretion of the trial court. But, in this case, the trial court's discretion was not exercised within the confines of the Mississippi Rules of Evidence; and, as a result, White's ability to present an adequate theory of defense was severely limited. For this reason, I find the trial court abused its discretion by limiting the expert testimony of Curtis.

CONCLUSION

¶70. I find that the trial court's refusal of White's requested jury instructions covering the

Castle Doctrine and the right to repel a trespasser, in addition to limiting the testimony of an expert witness was an abuse of discretion. Accordingly, I would reverse and remand for a new trial.

CARLTON, J., JOINS THIS OPINION.