IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-KA-01722-SCT

TED W. STONE a/k/a TED STONE

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	10/07/2010
TRIAL JUDGE:	HON. JAMES SETH ANDREW POUNDS
COURT FROM WHICH APPEALED:	ITAWAMBA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RICHARD SHANE MCLAUGHLIN
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA HOGAN TEDDER SCOTT STUART
DISTRICT ATTORNEY:	JOHN RICHARD YOUNG
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 06/28/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, JUSTICE, FOR THE COURT:

¶1. Ted W. Stone was convicted of the aggravated assault of Carolyn Stone and was sentenced to twenty years' incarceration and a $4,000 fine. Having carefully considered the record and the briefs filed on behalf of Ted Stone and the State, we discern no error. Accordingly, we affirm Stone's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2. Ted Stone ("Stone"), Kay Stone Hill, and Carolyn Stone are the children of Seretha Stone. A grand jury indicted Stone for the aggravated assault of Carolyn Stone on July 26, 2010. Stone's jury trial began on October 5, 2010, in Itawamba County Circuit Court. Due to prior threats and assaults, Carolyn previously had obtained a restraining order requiring Stone to stay off her property. However, on June 7, 2010, Stone entered Carolyn's house.

¶3. Carolyn, Kay, and Seretha testified to the following events: Stone pushed his way past Seretha and into the house. Once in the house, he sat in a chair in the living room. Carolyn then entered the room and stood behind a recliner. Seretha left the room to avoid interfering in the conversation between Carolyn and Stone. Without provocation, Stone began beating Carolyn with his walking cane. Upon hearing a noise in the living room, Seretha returned to see Stone beating Carolyn. Seretha grabbed the cane and tried to take it away from Stone. As she was pulling on the cane, the rubber tip came off. Kay attempted to thwart the attack by striking Stone with a cordless telephone. Stone pushed her into a chair. Kay ran outside and called the police. Seretha testified that, after the scuffle, Stone "turned around and left and we called 911[,]" but that the police were already on their way because of Kay's call.[1] Carolyn testified that, when Stone stopped beating her, she ran from the living room into a bedroom and attempted to call the police, but was too dazed to operate the phone. Carolyn

[1]A 911 call, in which Kay told the operator that she, her sister, and her mother had been attacked, was played for the jury.

testified that Stone then walked into the bedroom and told her: "I will visit my mother in this house any time I want to. Do you understand?" and then left.

¶4. Stone offered a different account at trial. He testified that Seretha allowed him to enter the house. He sat in a chair in the living room, and was talking with Kay when Carolyn entered the room and began berating Seretha for allowing Stone to enter the house and arguing with Stone about the ownership of the house. Carolyn initiated the violence when she picked up the cordless phone and began striking Stone with it. He told her to stop, but she continued. He hit a footstool with his cane, at which point he conjectured that the cane's rubber tip must have fallen off. He then hit Carolyn "as hard as [he] could" in an attempt to get her away from him. He then agreed to leave, and, as he was limping out with his cane, Carolyn pushed him. As he was falling, he again hit her with the cane, this time causing her head to bleed. He testified that he awoke on the floor some time later and left the house immediately.

¶5. Carolyn also testified that, between 2002 and 2005, Stone had slapped her; hit her in the face with a flyswatter; held a baseball bat over her head while she was in bed while threatening to "beat [her] to a pulp" and kill her; and threatened to stalk, kill, and beat her with a hammer. In January 2005, Carolyn obtained a restraining order prohibiting Stone from entering her property. She testified that she and her mother actively avoided Stone – locking their doors and staying out of the front yard to avoid seeing Stone if he drove by – and, thus, hadn't seen much of Stone for the five months before the assault. As a result, Carolyn was surprised and scared when she saw him in her living room on June 7.

¶6. At trial, the State sought to introduce into evidence Stone's multiple threats and attacks of Carolyn to prove motive, intent, preparation, plan, knowledge, and absence of mistake or accident. The State asserted that evidence of these threats and prior assaults was necessary to reveal the complete story of the crime for which Stone was being tried. The trial court agreed, and, after determining that the evidence was more probative than prejudicial, allowed the State to introduce evidence of Stone's prior bad acts. After the State had presented its case in chief, Stone's counsel moved for a directed verdict, arguing only that the State had not proven that Stone had manifested indifference to human life. The trial judge denied the motion for a directed verdict. After receiving proper instruction from the court, the jury returned a guilty verdict of aggravated assault. Stone was sentenced to twenty years, with four years suspended, and a fine of $4,000. The court denied Stone's motion for judgment notwithstanding the verdict.

ISSUES

¶7. Stone's appellate counsel raised the following issues:

> (1) Whether the trial court erred in denying Stone's motion for a directed verdict, because the State did not present sufficient evidence for the jury to find Stone guilty of aggravated assault.
>
> (2) Whether the trial court erred in admitting evidence of Stone's prior bad acts.

¶8. Subsequently, Stone filed an inartful pro-se supplemental brief. Stone apologized "to the Court . . . for [his] inclusion of facts which may be deemed inadmissible in consequence of their absence from the record . . . ." The supplemental brief raised four issues:

(1) "Ineffectual Assistance of Counsel" for trial counsel's failure to seek a change of venue, failure to challenge an ex-parte order excusing Assistant District Attorney Dennis Farris from testifying, failure to subpoena several witnesses that Stone had requested be called, and failure to subpoena Stone's medical records.

(2) A claimed ***Miranda***[2] violation related to Stone's apology to Carolyn during his preliminary hearing, a recording of which was admitted at trial and played for the jury.

(3) "There was no use of a 'deadly weapon' nor intent to inflict 'serious bodily injury.'"

(4) "Illegal and disparate sentence."

ANALYSIS

I. Standards of Review

¶9. "This Court reviews the denial of a motion for a directed verdict de novo." ***Parker v. State***, 30 So. 3d 1222, 1231 (Miss. 2010) (citation omitted). This Court applies an abuse-of-discretion standard when reviewing a trial judge's decision regarding the admission or exclusion of evidence. ***Hargett v. State***, 62 So. 3d 950, 952 (Miss. 2011).

¶10. First, we direct our attention to the pro-se claims.

II. Stone's ineffective-assistance claim contains numerous facts outside the record.

¶11. We decline to address Stone's ineffective-assistance claim, because it contains numerous allegations outside the record. This Court has long held that it cannot consider that which is not in the record. *See, e.g.,* ***State v. Cummings***, 203 Miss. 583, 591, 35 So. 2d 636,

[2] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

639 (Miss. 1948) ("[b]eing an appellate court, we take the record as it comes to us, and receive no new evidence here.") (citations omitted); ***Pratt v. Sessums***, 989 So. 2d 308, 309-10 (Miss. 2008) ("[w]e cannot consider evidence that is not in the record.") (citation omitted). As Stone's ineffective-assistance claim contains numerous allegations outside the record, we find that such claims are more properly the subject of a petition for post-conviction relief.

III. Stone's claim of a *Miranda* violation is procedurally barred, because he never asserted it at trial.

¶12. Stone never asserted a ***Miranda*** violation at trial. "[T]his Court has . . . consistently held that errors raised for the first time on appeal will not be considered . . . ." ***Stockstill v. State***, 854 So. 2d 1017, 1023 (Miss. 2003) (citations omitted). As Stone raised his claim of a ***Miranda*** violation for the first time on appeal, it is procedurally barred. Alternatively, the claim is without merit, as Stone's apology to Carolyn was not the product of custodial interrogation. *See* ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (providing that "the prosecution may not use statements . . . *stemming from custodial interrogation of the defendant* unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.") (emphasis added).

IV. Stone's sentence of twenty years' imprisonment with four years suspended and a $4,000 fine was not illegal.

¶13. Imposing a sentence of twenty years' imprisonment with four years suspended and a $4,000 fine was within the trial court's statutory authority for the crime of which Stone was convicted. Mississippi Code Section 97-3-7(2) provides that a defendant convicted of

aggravated assault "upon a person who is sixty-five (65) years of age or older or a person who is a vulnerable adult," may be punished by a fine of up to $5,000 and up to thirty years' imprisonment. Miss. Code Ann. § 97-3-7(2) (Rev. 2006). As the record reveals that Carolyn was seventy-three years old at the time of the aggravated assault, Stone's sentence was within the statutory limits for the aggravated assault of a person who is sixty-five years of age or older. Accordingly, this argument is without merit.

V. The pro-se argument that there was no use of a deadly weapon or intent to inflict serious bodily injury is repetitive of an issue raised by appellate counsel.

¶14. The pro-se argument that there was no use of a deadly weapon or intent to inflict serious bodily injury is essentially the same as the argument of Stone's counsel that the trial court erroneously denied a directed verdict for the State's failure to prove all elements of aggravated assault. Therefore, our analysis of this pro-se argument is merged with our analysis of appellate counsel's argument in the following section. *See infra* ¶¶ 15-17.

VI. The trial court did not err in denying Stone's motion for a directed verdict, because sufficient evidence presented at trial supports the verdict.

¶15. We find that the trial court did not err in denying Stone's motion for a directed verdict, because the evidence was more than sufficient for the jury to find Stone guilty of aggravated assault. Stone argues on appeal that the State failed to prove the essential elements required for an aggravated-assault conviction. He asserts that the walking cane with which he beat Carolyn is not a deadly weapon, her injuries were not serious enough for an aggravated-

assault conviction, and the State offered no evidence of circumstances manifesting extreme indifference to human life.[3]

¶16. Stone's claims are without merit. Stone relies on ***Brooks v. State***, 360 So. 2d 704 (Miss. 1978), for his arguments that a walking cane is not a deadly weapon and that Carolyn's injuries were not sufficiently severe to support his aggravated-assault conviction. In ***Brooks***, the defendant struck a woman with a school book and a notebook in close proximity (in a car), and her "injuries consisted of a few bruises and marks on the left side of her neck." ***Id***. at 705. The ***Brooks*** Court found that, because the victim's injuries were not serious, it could not conclude that the books were deadly weapons, but could "only surmise as to what would have resulted had the attack continued and . . . the mere probability of the guilt of a particular crime cannot support a verdict of guilty." ***Id***. at 707. ***Brooks*** is immediately distinguishable from the case before us, because the physical forces generated by swinging a metal walking cane are inherently greater than those generated by a typical school book or notebook. Further, unlike the ***Brooks*** victim's bruises and marks, the serious head wounds inflicted upon Carolyn were documented and exhibited to the jury. Photos of Carolyn, taken by paramedics after the assault, depict a missing clump of hair, multiple scalp lacerations, and Carolyn's shirt soaked with blood from her head wounds. A doctor testified that Carolyn's head wounds were caused by "dangerous force" serious enough that he was concerned about "internal injuries[,]" and that "[s]he was very lucky she just sustained a

[3]At trial, Stone argued only that the State had not proven circumstances manifesting extreme indifference to human life.

laceration to her head." Unlike ***Brooks***, this case did not require anyone to surmise as to the probability of guilt for the crime charged, for Carolyn's injuries were quite severe. An analysis of the facts in ***Brooks*** offers no guidance for our decision today.

¶17. A case more closely analogous is ***Simmons v. State***, in which the court found that a pen used to stab a victim in the neck was a deadly weapon. ***Simmons v. State***, 568 So. 2d 1192, 1202 (Miss. 1990). Like Stone, "Simmons claim[ed] that there was 'nothing in the record to show an assault in a manner to produce serious bodily injury or by means likely to produce death.'" ***Id***. To the contrary, we found that a pen could be deadly and quoted witness testimony that the victim in ***Simmons*** – like Carolyn Stone – "had been badly beaten up. She was bleeding. Her hair was cut off and matted with blood. She was scratched and bleeding." ***Id***. We recognize that, like a pen, a walking cane used for its designed purpose is not considered a deadly weapon. The ***Simmons*** Court found that an object that is not ordinarily considered a deadly weapon can become a deadly weapon when used to inflict injuries like the ones we see today. Just as Simmons used a pen as a deadly weapon to inflict serious head wounds, Stone used a metal walking cane to beat Carolyn, inflicting lacerations, bruises, and whelps on her head and back. "Whether an item which is not inherently dangerous may become a deadly weapon based upon its use is a question of fact to be determined by the jury." ***Rushing v. State***, 753 So. 2d 1136, 1146 (Miss. Ct. App. 2000) *cert. denied* (Apr. 27, 2000). We find that there was sufficient evidence for the jury to determine that Stone's metal walking cane was used as a deadly weapon, thus fulfilling the elements required for a conviction of aggravated assault. Finding that the State presented sufficient evidence to show

aggravated assault using a deadly weapon, we need not address whether circumstances manifesting extreme indifference to human life were proven. We conclude that the trial court did not err in denying Stone's motion for a directed verdict on the aggravated-assault charge.

VII. The trial court did not err in admitting evidence of Stone's prior threats and assaults of Carolyn.

¶18. We find that the trial judge did not abuse his discretion in admitting evidence of Stone's history of threats and violence directed toward his sister "for motive, for opportunity, for his intent, his preparation, his plan and what he was going to do, and knowledge, he's the one that did it for the purpose of his identity and certainly absence of mistake or accident on his part." All relevant evidence is generally admissible, absent an exception. Miss. R. Evid. 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401. This definition is extremely broad, so that evidence is relevant and should be admitted "if the evidence has *any probative value at all*." ***Adcock v. Miss. Transp. Comm'n***, 981 So. 2d 942, 947 (Miss. 2008) (emphasis added). However, "[a]lthough 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 . . . ." Miss. R. Evid. 403 (emphasis added). Evidence of prior bad acts is inadmissible to prove a defendant's character, though it is admissible for other purposes, as follows:

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

> It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Miss. R. Evid. 404(b). To determine whether evidence of prior bad acts is admissible under these rules, we use a two-pronged analysis: "[t]he evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the probative value of the evidence must outweigh the prejudicial effect . . . [as] required by Mississippi Rule of Evidence 403 . . . ." ***Welde v. State***, 3 So. 3d 113, 117 (Miss. 2009) (citations omitted). Therefore, the evidence was admissible at trial if it was relevant to a noncharacter issue and its probative value outweighed its prejudicial effect.

¶19. We find that the trial court did not abuse its discretion in finding that the evidence of Stone's prior threats and assaults of Carolyn was relevant to prove noncharacter issues, including an element of aggravated assault with a deadly weapon.[4] To convict a defendant of aggravated assault, the following elements must be proven:

> (1) the defendant attempted to cause or *purposely or knowingly* caused
> (2) bodily injury to another
> (3) with a deadly weapon or other means likely to produce death or serious bodily harm.

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[4]That the multiple instances of aggression toward Carolyn occurred some years prior to the assault does not affect their relevance. We have provided that, "where the competency of evidence is doubtful because of remoteness[,] the better practice is to admit the evidence[,] leaving it to the jury to determine its credibility and weight." ***Gore v. State***, 37 So. 3d 1178, 1186 (Miss. 2010) (citations omitted). Thus, the remoteness of the prior acts goes to the credibility and weight of the evidence, not to its relevance, and the jury was the proper authority to determine the proper weight to give such evidence.

Miss. Code Ann. § 97-3-7(2) (Rev. 2000) (emphasis added). Evidence of other threats and assaults of Carolyn before the assault at issue was probative in determining that Stone purposely or knowingly acted on this occasion. The evidence was also probative for other noncharacter purposes, including Stone's intent, motive,[5] and common plan or scheme.[6] Because the evidence was probative of these noncharacter issues, it met the relevance threshold.[7]

¶20. We likewise find that the trial court did not abuse its considerable discretion in finding that the probative value of the evidence outweighed its prejudicial effect. The question on review is not whether this Court would have admitted the evidence, but whether the trial court abused its discretion in doing so, for "the exclusion of prejudicial evidence is permissive; that is, if a trial court determines that the prejudicial effect of evidence substantially outweighs its probative value, it is *not obligated to exclude the evidence*, but

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[5]"Motive" has been defined as "some inner drive, impulse, intention, etc. that causes a person to do something or act in a certain way . . . ." *See* ***Powers v. Vista Chem. Co.***, 109 F. 3d 1089, 1094 (5th Cir. 1997) (quoting *Webster's New World Dictionary* 866 (3d College ed. 1994)). Evidence of prior threats and assaults of Carolyn was probative of whether Stone was driven by an inner impulse to assault her on this occasion.

[6]Evidence of prior threats and assaults of the same victim, Carolyn, could support an inference of a common plan, scheme, or system that Stone used repeatedly to control, abuse, and assault Carolyn. *See* ***People v. Sabin***, 614 N.W. 2d 888, 901 (Mich. 2000) ("[o]ne could infer from the[ ] common features [of the assaults and abuses perpetrated by defendant] that defendant had a system that involved taking advantage of the parent-child [sibling] relationship, particularly his control over his daughters [sister], to perpetrate abuse.").

[7]We note that, while Justice Chandler does not address Rule 401, he seems to agree that the evidence was relevant under that rule, but faults the trial court for its Rule 404(b) and Rule 403 analysis.

may do so at its discretion." ***Ross v. State***, 954 So. 2d 968, 993 (Miss. 2007) (emphasis added). Accordingly, "the weighing and balancing task required by rule 403 . . . asks only that a [trial] judge rely on his/her own sound judgment."[8] ***Jones v. State***, 920 So. 2d 465, 476-77 (Miss. 2006) (citations omitted). After hearing argument from both sides, the trial judge applied the Rule 403 balancing test and found as follows:

> it appears to me they're offering it for all of them, for motive, for opportunity, for his intent, his preparation, his plan and what he was going to do, and knowledge, he's the one that did it for the purpose of this identity, and certainly absence of mistake or accident on his part. I think it goes to show all of them. And it's not being offered to show character.
>
> Looking at Rule 403 and 404 and performing a balancing test the Court finds that since it is the same victim that the State is alleging in this case that was assaulted that the bad acts all resulted against the same victim before, the Court finds that it is more probative than prejudicial and the Court is going to allow the prior bad acts in.

Thus, the trial judge conducted the Rule 403 balancing test and relied on his own sound judgment to reach the conclusion that the evidence was admissible. As trial courts are not required to exclude evidence upon applying the test and finding that the prejudicial impact of the evidence outweighs its probative value, we cannot conclude that the judge abused his extensive discretion in admitting evidence of Stone's prior bad acts.

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[8]While Justice Chandler maintains that the trial court was required to identify the exception that applies and "find that the evidence is probative of each 404(b) exception it finds applicable[,]" our caselaw reveals that failure to identify and separately evaluate evidence for each 404(b) other purpose does not require reversal. *See* ***Gore v. State***, 37 So. 3d 1178, 1186 (Miss. 2010) ("[u]nder *one or more of the exceptions* listed in Rule 404(b), the circuit court did not abuse its discretion in admitting evidence . . . .") (emphasis added).

¶21. Moreover, even if the trial court had erroneously admitted the evidence, its error would not warrant reversal. "Unless this judicial discretion is so abused as to be prejudicial to the accused, we will not reverse [the trial judge's] ruling." ***Irby v. State***, 49 So. 3d 94, 100 (Miss. 2010) (citations omitted). An error does not require reversal "when it is apparent on the face of the record that a fair minded jury could have arrived at no other verdict than that of guilty." ***Forrest v. State***, 335 So. 2d 900, 903 (Miss. 1976). The evidence against Stone at trial was overwhelming. Stone admitted at a bail hearing – the tape of which was played at trial – and at trial that he had attacked Carolyn and had struck her with his cane as hard as he could. Both Kay Hill and Seretha Stone witnessed Stone attack Carolyn, and all three women identified Stone as the perpetrator of the crime. The doctor who examined Carolyn shortly after the assault testified that her injuries were consistent with being struck by a metal walking cane, that they were caused by "dangerous force[,]" and that "[s]he was very lucky she just sustained a laceration to her head" with no internal injuries. Pictures of Carolyn's injuries were admitted into evidence, showing a missing clump of hair, blood dripping down her face, and her shirt soaked with blood. A 911 call, in which Kay told the operator that she, her sister, and her mother had been attacked, was played for the jury. Faced with this copious evidence of Stone's aggravated assault of Carolyn, a fair-minded jury could have arrived at no other verdict than that of guilty. Thus, even if we were to find that the trial judge abused his discretion – which he did not – in admitting the prior-bad-acts evidence, we could not find that his error prejudiced Stone to require reversal.

CONCLUSION

¶22. Finding no error by the trial court, we decline to reverse Stone's conviction. Accordingly, we affirm Stone's conviction and sentence in the Itawamba County Circuit Court.

¶23. **CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FOUR (4) YEARS SUSPENDED, WITH CONDITIONS, AND A FINE OF $4,000.00, AFFIRMED. APPELLANT SHALL BE GIVEN CREDIT FOR TIME SERVED.**

WALLER, C.J., CARLSON, P.J., LAMAR AND PIERCE, JJ., CONCUR. DICKINSON, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED IN PART BY LAMAR AND CHANDLER, JJ. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, JJ.; DICKINSON, P.J., JOINS IN PART.

DICKINSON, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶24. As stated by the majority, Carolyn Stone testified "that between 2002 and 2005, Ted Stone had slapped her; hit her in the face with a flyswatter; held a baseball bat over her head while she was in bed while threatening to 'beat [her] to a pulp' and kill her; and threatened to stalk, kill, and beat her with a hammer." The trial judge held these prior bad acts were admissible

> for motive, for opportunity, for his intent, his preparation, his plan and what he was going to do, and knowledge, he's the one that did it for the purpose of his identity and certainly absence of mistake or accident on his part.

¶25. The problem here, as Justice Chandler points out in his dissent, is that Ted's prior bad acts were obviously not admissible for all these purposes. For instance, I find irrational the argument that Ted's "motive" for hitting Carolyn with the cane in 2010 was that he had hit

her eight years before. While proof that *Carolyn* had hit *Ted* on a prior occasion might have provided Ted with a motive, I cannot imagine the prosecutor attempting to persuade the jury that his reason for wanting to hit Carolyn with the cane was that he had hit her before.

¶26. Lawyers frequently attempt to persuade judges to admit character evidence by saying something similar to the following: "Judge, we're offering this under 404(b) for motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake." Unfortunately, many judges are persuaded by this improper argument without first requiring the proffering lawyer to identify and explain the alternative purpose of the evidence. As stated in an excellent law school evidence text:

> Contrary to actual practice, by some attorneys and judges, [the Rule 404(b)] list [of potential alternative purposes] is not a mantra, the formulaic chanting of which magically opens the door to the introduction of otherwise inadmissible character evidence at trial.[9]

¶27. That clearly is exactly what happened here. The prosecutor chanted the mantra, the door magically opened, and the trial judge admitted the improper character evidence.

¶28. What should have been done here is not complicated. Each noncharacter purpose listed in Rule 404(b) "has a particular set of proof requirements that must be met before evidence can be introduced under that category."[10] The importance of requiring the lawyer

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[9]Christopher W. Behan, *Evidence and the Advocate: A Conceptual Approach to Learning Evidence* 173 (2012).

[10] *Id*.

who offers impermissible character evidence to demonstrate a legitimate noncharacter purpose is substantial.

> If Rule 404(b) is used as a pretext for the introduction and misuse of character evidence at trial, the potential prejudice to the accused is substantial. The jury could decide the case based on propensity evidence, short-circuiting the burden of proof and effectively holding the accused liable for all his past misdeeds. The constraints posed by Rule 404(a) and Rule 405 could, moreover, prevent the accused from mounting an effective defense by first requiring him to identify a pertinent character trait to defend and then limiting him to proof by reputation or opinion testimony.[11]

¶29. While I believe the trial judge committed error in failing to require the prosecutor to identify and explain the particular noncharacter purpose of the evidence before admitting the evidence of Ted's prior bad acts, the evidence of Stone's guilt was overwhelming, so the error was harmless. I therefore join the majority's result, but not its reasoning.

LAMAR AND CHANDLER, JJ., JOIN THIS OPINION IN PART.

CHANDLER, JUSTICE, DISSENTING:

¶30. I respectfully dissent. I would find that the trial court's admission of Stone's prior bad acts under Mississippi Rules of Evidence 404(b) and 403 constituted an abuse of discretion. The State made no effort to specify which Rule 404(b) exception applied, and then the trial court erroneously found that all of them applied. For this reason, the trial court's balancing of prejudice with probative value under Rule 403 was flawed. The error in admitting Stone's prior bad acts was not harmless because Stone was forced to testify to attempt to mitigate the prior-bad-acts evidence. Therefore, I would reverse and remand for a new trial.

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[11] *Id*.

¶31. I restate the evidence of Stone's prior bad acts that was admitted at his trial. While the crime occurred in 2010, all of the prior bad acts occurred in 2005 or earlier. The victim, Stone's sister Carolyn, testified that she and Stone had begun to have problems in 2002 or 2003. She testified that, at that time, Stone had made threats that he was going to stalk her and beat her with a hammer; that he had behaved in an angry and explosive manner; and that he had destroyed her property, including a painting. His other sister, Kay, testified that Stone had made threatening phone calls. Kay and Carolyn testified about an incident in which Carolyn was in bed, and Stone had threatened to "beat her to a pulp" with a baseball bat. Stone retreated when Kay approached him wielding an iron skillet. According to Kay, this incident had occurred five or six years earlier; Carolyn said it had occurred in 2003. Carolyn also testified that, about four or five years ago, Stone had slapped her in the face, once with his hand and another time with a flyswatter.

¶32. I further observe that repeated reference was made throughout the trial to a restraining order which Carolyn asserted she had taken out against Stone. Kay, Seretha, and Carolyn all testified that Stone's 2010 visit had violated this restraining order. A copy of the "restraining order" was admitted into evidence. A review of this document shows that the order actually consisted of Stone's January 24, 2005, conviction for trespass and suspended sentence of six months, with the condition that he refrain from entering upon any of the lands or buildings of Carolyn, except for his own residence. Obviously, this six-month suspended sentence no longer was in effect in 2010, and Stone's 2010 visit was not in violation of a restraining order.

¶33. The State filed a motion to allow evidence of Stone's prior bad acts under Mississippi Rule of Evidence 404(b), which provides:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

M.R.E. 404(b). The exceptions listed in Rule 404(b) are not exclusive. This Court has held that another purpose for admitting evidence of prior bad acts is that "the State has a legitimate interest in telling a rational and coherent story of what happened." ***Davis v. State***, 40 So. 3d 525, 530 (Miss. 2010) (quoting ***Brown v. State***, 483 So. 2d 328, 330 (Miss. 1986)) (internal quotations and citations omitted). Further, "[w]here substantially necessary to present to the jury the complete story of the crime, evidence or testimony may be given even though it may reveal or suggest other crimes." ***Id.*** (quoting ***Brown***, 483 So. 2d at 330).

¶34. If the evidence is allowed under Rule 404(b), it still must pass through Rule 403, which is the "ultimate filter through which all otherwise admissible evidence must pass." ***McKee v. State***, 791 So. 2d 804, 810 (Miss. 2001). Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if the 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." M.R.E. 403.

¶35. At the hearing, the State argued that the evidence of Stone's prior bad acts was admissible to show proof of every listed purpose in Rule 404(b): motive, opportunity, intent,

preparation, plan, knowledge, identity, and absence of mistake or accident. The State also argued that evidence of Stone's prior bad acts was necessary to present a rational and coherent story of the crime, to show why Carolyn and Kay had been afraid of Stone, and to explain why there was a restraining order against Stone.

¶36. Stone objected. He argued that the State had to specify which of the Rule 404(b) exceptions applied to the prior-bad-acts evidence. He argued that the prior bad acts were irrelevant because the elements of aggravated assault did not require the State to prove that the Carolyn had been afraid of Stone, because the 2005 and earlier incidents were too remote in time to be relevant to Stone's intent in 2010, and because the "restraining order" actually was a conviction for criminal trespass with a conditional suspended sentence. In rebuttal, the State argued that, because a restraining order had been in place against Stone, the prior bad acts were not too remote in time. The State further argued that, without describing Carolyn's fear in the past, it would be impossible for the State to present a rational and coherent story of what occurred in 2010.

¶37. The trial court admitted the evidence of prior bad acts, stating that:

> [R]egarding [the State] not identifying which one of the factors under 404 they're seeking to do it for, it appears to me they're offering it for all of them, for motive, for opportunity, for his intent, his preparation, his plan and what he was going to do, and knowledge, he's the one that did it for the purpose of his identity, and certainly absence of mistake or accident on his part. I think it goes to show all of them. And it's not being offered to show character.

The trial court further found that the evidence was not more prejudicial than probative under Mississippi Rule of Evidence 403, because all of the acts had involved the victim of the

crime for which Stone was on trial. The trial court offered to give a limiting instruction, but Stone's counsel did not request one at the jury-instruction conference.[12]

¶38. Stone argues that the prior-bad-acts evidence was inadmissible under Rule 404(b) and Rule 403. This Court reviews a trial court's decision admitting or excluding evidence for abuse of discretion. ***Richardson v. State***, 74 So. 3d 317, 329 (Miss. 2011). But "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." M.R.E. 103(a).

¶39. Rule 404(b) "exists to prevent the State from suggesting that, since a defendant has committed other crimes previously, the probability is greater that he is also guilty of the offense for which he is presently charged." ***Robinson v. State***, 35 So. 3d 501, 506 (Miss. 2010) (quoting ***Jasper v. State***, 759 So. 2d 1136, 1141 (Miss. 1999)). Evidence of prior bad acts tends to divert the jury's attention from the true crime, mislead the jury, and prejudice the jury against the defendant. ***Id.*** (quoting ***Floyd v. State***, 166 Miss. 15, 148 So. 226, 230 (1933)). The Court applies a two-part analysis to determine the admissibility of evidence under Rule 404(b):

> The evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the probative value of the evidence must outweigh the prejudicial effect. The second part of this analysis is required by Mississippi Rule of Evidence 403, as Rule 403 is the ultimate filter through which all otherwise admissible evidence must pass.

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[12] This Court has held that whether to request a limiting instruction concerning Rule 404(b) evidence, and thereby draw the jury's attention to the evidence, is a matter of trial strategy in the exclusive province of the defendant after consultation with counsel. ***Tate v. State***, 912 So. 2d 919, 928 (Miss. 2005).

Welde v. State, 3 So. 3d 113, 117 (Miss. 2009) (internal citations and quotations omitted).

¶40. In ***Hargett v. State***, 62 So. 3d 950, 953 (Miss. 2010), Hargett was convicted of sale of marijuana and hydrocodone. He argued that the State erroneously had referred to his prior drug crimes at trial. ***Id.*** The Court of Appeals affirmed, stating that "each questioned instance falls squarely within the exception provided in M.R.E. 404(b)." ***Id.*** This Court reversed because "the court failed to explain how any exception applies," and the evidence of prior drug crimes was excessive and unnecessary to tell the complete story of the crime for which Hargett was on trial. ***Id.*** *See* ***U.S. v. Yeagin***, 927 F.2d 798, 803 (5th Cir. 1991) (stating that a trial court ruling on the admissibility of evidence under Rule 404(b) "should require the government to explain why the evidence is relevant and necessary on a specific element that the government must prove").

¶41. As in ***Hargett***, here, the trial court broadly applied all the Rule 404(b) exceptions by finding that the prior-bad-acts evidence was admissible for every exception. The trial court specifically addressed only two of those eight exceptions, identity and absence of mistake or accident. The court found that the prior-bad-acts evidence was relevant to identify Stone as the perpetrator. This finding was error, because Stone's identity as the perpetrator was not in issue. The trial court also found that the prior-bad-acts evidence showed absence of mistake or accident. However, mistake or accident also was not in issue. Stone did not claim mistake or accident as a defense, and none of the evidence submitted by either party suggested that Stone had injured Carolyn by mistake or by accident. The trial court did not

explain how the other exceptions applied, or why the probative value of the evidence for each Rule 404(b) purpose outweighed its prejudicial effect.

¶42. While the majority lists motive, intent, and absence of mistake or accident as the applicable exceptions, it likewise provides no analysis of how these exceptions apply. The majority's analysis merely finds Stone's prior bad acts were relevant to prove the elements of aggravated assault under Rule 401. But establishing that prior-bad-acts evidence is relevant is not the proper inquiry – the court should find that the evidence is probative of each Rule 404(b) exception it finds applicable. As the learned Judge Frank H. Easterbrook has stated, the trial court "must both identify the exception that applies to the evidence in question and evaluate whether the evidence, although relevant and within the exception, is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant's character." ***U.S. v. Beasley***, 809 F.2d 1273, 1279 (7th Cir. 1987). When the trial court's discretion is exercised, it "will rarely be disturbed." ***Id.***

¶43. I would find that, because the trial court overestimated the probative value by erroneously finding all the Rule 404(b) exceptions applicable, its balancing of the probative value versus prejudicial effect under Rule 403 was flawed and entitled to no deference. I would find that the probative value of the evidence to show motive was substantially outweighed by the prejudicial effect under Rule 403. In my opinion, the only conceivable noncharacter purpose for the evidence of Stone's prior conduct toward Carolyn was to show that Stone was motivated by anger at his sister. But while the aggravated assault at issue

occurred in 2010, the prior bad acts had occurred at least five years earlier. Contrary to the State's argument, no restraining order was in place against Stone at the time of the aggravated assault. And Stone's prior acts of threatening and slapping his sister five years previously had no apparent connection with his actions in 2010. For example, there was no showing that Stone's reasons for his anger toward Carolyn in 2005 persisted into 2010.[13] Therefore, the evidence of prior bad acts was of limited probative value. In addition to remoteness, any probative value was further lessened by the presence of other evidence from which the State could have shown Stone was angry with Carolyn; there was testimony that Stone had a rocky relationship with Carolyn and that the two had problems, and that Stone was jealous of Carolyn.

¶44. In contrast, the prejudice to Stone was substantial. The evidence of Stone's prior bad acts was thoroughly explored during the testimony of every family member who testified against Stone. These family members also testified numerous times that Stone's presence at the house in 2010 had violated a restraining order. But as previously explained, there actually was no restraining order against Stone at that time. The prior-bad-acts evidence suggested a decision on an impermissible basis: that, because of Stone's prior conflicts with

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[13] The majority finds that the remoteness of prior bad acts evidence is a matter for the jury to weigh. It cites a case affirming the admission of prior acts of child molestation in a child-molestation case. ***Gore v. State***, 37 So. 3d 1178, 1186 (Miss. 2010). However, ***Gore*** did not hold that remoteness is *never* to be considered by the trial court. ***Id.*** In fact, remoteness has *always* been relevant to the trial court's determination of probative value under Rule 404(b). ***Lesley v. State***, 606 So. 2d 1084, 1091 (Miss. 1992); ***U.S. v. Broussard***, 80 F.2d 1025, 1040 (5th Cir. 1996). Therefore, I find the majority's analysis to be incorrect.

his sister in which he had threatened and slapped her, he was more likely to be guilty of the charged assault. Further, the evidence of Stone's propensity for conflict with his sister, along with the erroneous evidence that Stone had violated a restraining order, was the type of evidence with a strong tendency to prejudice the jury by playing on their emotions and sympathies. There is a substantial danger that this evidence improperly influenced the jury's decision that the particular circumstances showed Stone was guilty of aggravated assault, rather than simple assault.

¶45. Finally, I would find that the admission of Stone's prior bad acts was not harmless error. This Court has held that an error will be deemed harmless if the same result would have been reached without the error. ***Tate v. State***, 912 So. 2d 919, 926 (Miss. 2005). In ***Robinson v. State***, this Court held that the erroneous admission of prior-bad-acts evidence was not harmless because it had forced Robinson to take the stand to attempt to mitigate the effect of the evidence. ***Robinson***, 35 So. 2d at 926. Likewise, the admission of Stone's prior bad acts forced Stone to testify to explain each incident. This implicated Stone's constitutional right to refrain from testifying. *See* ***id.*** As in ***Robinson***, the admission of evidence of Stone's prior bad acts forced Stone either to testify in an attempt to mitigate the damage caused by the evidence, or to forego that right and permit the jury's consideration of the prior-bad-acts evidence with no response. I cannot say that, absent the error in admitting the prior-bad-acts evidence, the result would have been identical. I would reverse and remand for a new trial.

KITCHENS AND KING, JJ., JOIN THIS OPINION. DICKINSON, P.J., JOINS IN PART.