IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00871 COA

JOSEPH CLIFTON WALKER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MACK A. BETHEA

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFERY A. KLINGFUSSDISTRICT ATTORNEY: WILLIAM MARTIN

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MOTION FOR REHEARING FILED:9/9/97

MANDATE ISSUED: 11/25/97

EN BANC

COLEMAN, J., FOR THE COURT:

A jury in the in the Circuit Court of Harrison County found Joseph Clifton Walker guilty of murder for the homicide of David "Rocky" Reid. The trial court sentenced him to life imprisonment in the custody of the Mississippi Department of Corrections. Walker appeals from the trial court's final judgment and sentence to present to this Court thirteen issues, all of which this Court resolves adversely to Walker. We affirm the trial court's final judgment of Walker's guilt of murder and its sentence of Walker to serve life imprisonment in the custody of the Mississippi Department of Corrections.

I. FACTS

On the morning of June 3, 1993, Walker's friend, Kevin Simmons, in the company of Greg Nordstrom, drove by Walker's family's home located in West End Homes in Biloxi and got Walker so that all three of them might go fishing in the Back Bay. While they were fishing in the Back Bay, Walker fired a pistol which he had borrowed from a friend, and Simmons also fired it. After Walker, Simmons, and Nordstrum had fished all day, they went to Greg Nordstrum's house where they went swimming. Walker left the clip from this pistol at Nordstrum's house where the police later recovered it. After Walker and Simmons concluded their swim at Nordstrum's house, the two of them went to Simmons' home, where they cooked and ate the fish they had caught earlier that day. After they had finished their meal at Simmons' home, Walker and Simmons went to an unspecified location to play basketball. When they tired of playing basketball, Simmons drove Walker in Simmons' car to the old Biloxi - Ocean Springs bridge which spanned Biloxi Bay between these two cities. Because the bridge had been severed in two, the bifurcated structure served only the purpose of a fishing pier and as a place for teenagers from Biloxi, D'Iberville, and environs to hang out at night.

When Simmons and Walker arrived at the west end of the Biloxi segment of the old bridge, they encountered several people whom Simmons knew, among whom were Paul Landry, Joe Tanner, and Eddie Graham. After Simmons had turned his car around and parked it facing to the west, Walker

and he got out of the car, talked to the others for a minute or two, and then got into Paul Landry's Jeep. Landry, Tanner, and Graham also got into the Jeep. Landry got in the driver's seat, and Joe Tanner occupied the front passenger's seat. Eddie Graham took the right rear passenger's seat; Walker claimed the middle rear passenger's seat; and Simmons sat in the rear left passenger's seat. The quintet's mission was to drive to the east end of the Biloxi segment of the bridge to "check on some girls who were being taken advantage of." The girls were identified as Ashley Wilson and Christy Landry.

When Landry had driven to the east end of the Biloxi segment of the bridge, he pulled his Jeep into the turning bay which was located there and stopped. All five of the Jeep's occupants exited the Jeep. A group of five D'Iberville High School students, all male, were already at the east end of the bridge. Landry's group approached the D'Iberville group, and some members of each group conversed with members of the other group. Because Simmons and Walker saw some of the D'Iberville group whispering in the ears of other members of their group, they concluded that the D'Iberville quintet intended to start trouble with the Landry quintet, so all five of the young men who had ridden in Landry's Jeep judiciously decided to get back into the Jeep to leave.

After all five occupied the same seats in the Jeep, Landry backed it out of the turnaround preparatory to driving west toward Biloxi. Just as Landry was backing out of the turnaround, one of the girls about whom the Landry quintet had gone to see drove up. This girl asked Landry's group to wait for her to turn around so that she could follow them back to the west end of the bridge. As Landry waited for her to turn around, members of the D'Iberville group approached the driver's side of the Jeep and stood beside it. One of the D'Iberville group asked Kevin Simmons, who again sat in the left rear passenger's seat, if he was the one who had started trouble with a cousin of one of the D'Iberville group a couple of weeks ago at a party. Simmons replied, "No. I [don't] know what you're talking about." Joseph Walker stood from his seat in the middle of the back seat and inquired of the D'Iberville group if they had any problems. One of the D'Iberville group retorted, "Yeah, we have a problem with all of y'all."

No sooner was this statement spoken than Walker, who was still standing, withdrew the pistol which he had taken fishing earlier that day from within his pants. All of the D'Iberville quintet stepped back when Walker thus displayed the pistol, *sans* clip, and Walker put the pistol down somewhere in the Jeep. When Walker put the pistol down, the D'Iberville troop again approached the Jeep. As they again approached the Jeep, Walker picked up a baseball bat and jumped down from the back seat to the rear of the Jeep. There are several versions of exactly what happened next, but it is for certain that Walker swung the bat and struck David "Rocky" Reid on the top of the head while the remainder of the D'Iberville group ran away. Simmons, among other witnesses, testified that Reid had retreated several steps toward the edge of the bridge and had placed his arms above his head as Walker prepared to swing the bat. Most, if not all of the D'Iberville group, ran westerly on the bridge toward Biloxi. Reid collapsed on the bridge with his head resting in a pool of blood.

After Walker swung the baseball bat and struck Reid on his head, Walker also began running westerly along the bridge with the bat in his hand. When Walker came to the three pickup trucks parked one behind the other on the bridge, which members of the D'Iberville group had driven earlier to the bridge, he struck the first two trucks with the bat and shattered windows in both of them. Kelly Swanzy, a member of the D'Iberville group who owned the third pickup, raced to his truck from

which he recovered a tire tool. Just as he gained control of the tire tool and went to the front of his truck, Walker ran to his truck while he was swinging the bat. Swanzy pointed the tire tool at Walker and prepared to use it to deflect Walker's blow, should Walker decide to swing the bat at him. Then Landry drove up in his Jeep and stopped long enough to allow Walker to get in the Jeep. Once Walker was in the Jeep, Landry drove westerly to where Simmons had parked his car, stopped, and let Simmons and Walker out. Simmons drove Walker back to his home in Biloxi. Kevin Simmons testified that while he drove Walker back home, he asked Walker, "Do you think he is dead?" Walker replied, "No. I don't think so. He's just unconscious."

As soon as Landry had driven away in his Jeep, the other members of the D'Iberville quintet returned to the unconscious Reid, placed his motionless body in one of their pickups, and delivered him to the emergency room of the Biloxi Regional Medical Center where he was attended by Dr. Charles J. Gruich. Reid was soon transported to a hospital in New Orleans where he was sustained by life support systems. When the life support systems were terminated two days later on June 5, 1993, David "Rocky" Reid formally died.

At approximately five o'clock on the morning of June 4, 1993, Gerald Forbes, an investigator with the Biloxi Police Department, and another officer went to Walker's home where they found him asleep on a couch in his room. They arrested Walker and took him to the headquarters of the Biloxi Police Department where they interrogated him pursuant to their having "*Mirandized*" him. Walker gave a statement to these officers, the further discussion of which we reserve for our analysis and resolution of Walker's issues which he has presented in his appeal.

II. TRIAL

On October 22, 1993, the grand jury in and for the Second Judicial District of Harrison County indicted Walker for the murder of David "Rocky" Reid pursuant to Section 97-3-19 of the Mississippi Code of 1972. The indictment formally charged that "Joseph Clifton Walker . . . did wilfully, feloniously, and without the authority of law kill and murder David "Rocky" Reid, a human being, with the deliberate design to effect the death of a human being . . . ."

On May 2, 1994, the trial court conducted a hearing on Walker's motion to suppress his confession to Investigator Gerald Forbes, pursuant to which hearing, the trial judge denied the motion. On May 11, 1994, the trial court conducted a hearing on Walker's motion for a change of venue, pursuant to which the trial judge denied the motion. Walker's trial began on Monday, July 25, 1994. Four days later, on Thursday, July 28, the jury returned a verdict of "[G]uilty of murder" against Walker, and the trial judge sentenced him to serve "life imprisonment in the custody of the Mississippi Department of Corrections." This Court reserves further discussion of the events, evidence, and testimony in this case for its review and resolution of Walker's thirteen issues which he presents in his appeal.

III. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES

Walker presents the following issues to this Court for its review, analysis, and resolution. We recite them as Walker composed them in his brief:

A. Whether the court erred in refusing to grant Instruction D-26, which was the theory of defendant's

case.

B. Whether the lower court erred in granting instruction S-8A over objection of the defendant.

C. Whether the lower court erred in granting State's Instruction S-10A and S-14B over objection of the defendant, and amending the indictment.

D. Whether the lower court erred in changing the wording of certain defense jury instructions when said instructions used exact language conforming to either Mississippi Code Annotated or to case law and in failing to consider more than six instructions.

E. Whether the lower court erred in not hearing defendant's motion to dismiss for failure of venue and then allowing at trial the matter of venue to be determined by one hearsay witness over the objection of the defendant.

F. Whether the lower court erred in not suppressing the defendant's statement.

G. Whether the lower court erred in denying the defendant's motion for a change of venue.

H. Whether the lower court erred by not allowing the defendant to impeach the credibility of witnesses.

I. Whether the lower court erred in limiting the youth court records.

J. Whether the lower court erred in not hearing any evidence concerning speedy trial violations.

K. Whether the verdict at the trial was contrary to the evidence or strongly against the weight of the evidence and was insufficient to support a conviction of murder.

L. Whether the lower court erred in not sustaining the defendant's objection to the photograph of the victim's being introduced into evidence.

M. Whether the lower court erred in overruling the defendant's motions without making finding of facts and conclusions of law.

Issues A. through D.

Because all of Walker's first four issues relate to what he asserts were errors in the trial judge's

instructing the jury, this Court elects to review these four issues simultaneously. We begin with establishing the appropriate standard of review for the determination of whether the trial court erred in granting or denying instructions which either party has requested.

1. Standard of review

In *Collins v. State*, No. 94-KA-00565, slip op. at 3 (Miss. Jan. 30, 1997) the Mississippi Supreme Court enunciated the following standard of review for jury instructions:

This Court's standard of review in reviewing jury instructions is as follows:

In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. (citations omitted).

As for the issue of whether the trial court erred when it refused to grant an instruction which a party requested, the Mississippi Supreme Court in *Willard v. Paracelsus Health Care Corp*., 681 So.2d 539, 543 (Miss. 1996) established the following standard of review:

[O]ur rule is this: [t]he refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper only if the trial court -- and this Court on appeal -- can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inference which may be drawn from the evidence in favor of the requesting party, that no hypothetical reasonable jury could find the facts in accordance with the theory of the requested instruction. (citations omitted).

This Court also acknowledges that the Mississippi Supreme Court has established this standard of review which pertains to whether the jury instructions as a whole properly instruct the jury:

On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Accordingly, defects in specific instructions do not require reversal where all instructions taken as a whole fairly--although not perfectly--announce the applicable primary rules of law. However, if those instructions do not fairly or adequately instruct the jury, this Court can and will reverse.

Boone v. Wal-Mart Stores, Inc., 680 So.2d 844, 845 (Miss. 1996). Because Walker complains of jury instructions which he requested but which the trial judge refused, the *Willard* standard of review is the more precisely relevant in this case, but we remain aware of the general standards from *Collins* and *Boone* as we begin our review and resolution of these four issues.

2. Did the trial judge err when he failed to consider more than six of Walker's instructions?

This question is but a portion of Walker's fourth issue, but Walker's issues on other jury instructions

relate to this sub-issue because he argues that the trial judge's insistence on considering only six of his "substantive law" instructions inhibited and/or frustrated his presentation of specific jury instructions. Thus, we begin our collective review of these four issues by resolving this sub-issue. If the trial judge erred in this manner as Walker contends, then he may also have erred in other issues of instructing the jury.

When the case *sub judice* was tried in July, 1994, Rule 5.03 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provided that "[t]he attorneys may submit no more than six instructions on the substantive law of the case to opposing counsel to which the opposing party shall dictate into the record the specific objections . . . ."[(1)] UCRCCP 5.03. Walker's counsel pre-filed twenty-five jury instructions in the case at 5:00 o'clock p.m. on July 26, the day after the trial began. The record reflects that in compliance with Rule 5.03, the trial judge required Walker's counsel to select six of those twenty five prefiled jury instructions to present to the State, with which Walker's counsel complied.

After the trial judge had concluded the conference on jury instructions and asked if the State and Walker's counsel were ready for the jury, Walker's counsel inquired of the trial judge when would "it be appropriate for [him] to make into the record any objections and cite my theories on the instructions that were not given." The trial judge responded, "I'm not going to let you do that." The trial judge then explained:

I think you gave me a little bit more than six and I accepted those, but the ones that you submitted to the court after my request for six, no more than six, are the ones that I have given and considered. The only ones that I considered are [jury instructions nos.] 12A, D-27, D-23, D-17, whichever amended version is being given and is marked -- which I think is C -- D-21, D-20A. The only ones of those instructions which I have refused are D-21, and it's the position of this court that we don't need to chop down any more trees.

The trial judge then continued:

I'm not going to allow the attorneys to potentially put the Court in error by running 25, 27, 30, 50, 100 instructions by the Court and requiring me to consider them. The rule is clear, there are six instructions. And I've advised you that under certain circumstances I would allow you to go beyond that other than to consider all of them.

The Mississippi Supreme Court has held that error based on the misapplication of Rule 5.03 of the Criminal Rules of Circuit Court Practice "will not lead to reversal absent actual prejudice to the defendant." *Shaw v. State,* 540 So. 2d 26, 29-30 (Miss. 1989). In an explanation of the rule's allowing only six instructions to be submitted, the Court has written:

This interpretation suggests that the matter lies within the sound judicial discretion of the trial judge who may limit or expand "for good cause shown," the number of instructions to be submitted to the court and to the jury depending upon the complexity of the suit. The submission of six instructions to the court has served a good purpose to avoid a proliferation of instructions. We see no reason why it

should not be continued as a numerical beginning point for submission of instructions to the court so long as it does not become an inflexible rule thereby exceeding the sound judicial discretion of the trial court. We admonish trial counsel to submit among his six requested instructions one which presents his theory of the case as supported by the evidence.

Young v. State, 451 So. 2d 208, 211 (Miss. 1984).

Rule 5.03 allowed six instructions on the substantive law of the case. The trial judge allowed Walker's counsel to submit seven instructions by excluding the peremptory instruction which Walker requested because the peremptory instruction was not substantive to Walker's theory of the case. Unless this Court later determines either that the six substantive law instructions which Walker's counsel submitted to the State did not adequately present Walker's theory of the case to the jury or that one of the jury instructions of which Walker complains in these four issues ought to have been granted, then the trial judge's compliance with Rule 5.03's limitation of the number of instructions submitted to the State to six was not error. Of course, this Court will consider only those instructions to which Walker has assigned a specific issue.

3. Instruction D-26

In his first issue, Walker contends that the trial judge erred when he refused to grant Instruction D-26, which Walker contends was the theory of his case. Instruction D-26 read as follows:

The Court instructs the jury that in considering the case before you, you may resolve the question of whether the Defendant faced death or great bodily harm at the hands of the group of boys who confronted him by considering the number of boys present and the combined force of their hands and feet as potential weapons against the Defendant. A weapon may be any means likely to produce death or serious bodily harm, and fighting with fists does not invariably fall into the category of simple assault, and hands and fists may constitute a means likely to produce death or serious bodily injury to the Defendant.

It must be noted that while the trial judge, prosecutor, and defense counsel spent almost an entire afternoon and an additional period of time the next morning to consider the propriety of the various jury instructions which the State and Walker's counsel requested, Walker's counsel never asked the trial judge to grant Instruction No. 26. While Walker's counsel filed this instruction along with his other twenty five or so instructions, the file copy contains no indication whether the instruction was given or refused.

The Mississippi Supreme Court confronted this identical situation in *Ballinger v. State,* 667 So. 2d 1242, 1252 (Miss. 1995), in which the appellant, who had been convicted of capital murder and sentenced to death, argued that the trial court had improperly refused to grant two instructions. The supreme court resolved this issue by opining as follows:

Ballinger argues that two instructions dealing with robbery, D-22 and D-29, were improperly refused by the trial court. Although D-22 is found in the court papers it is not marked in any fashion as being refused, given or withdrawn. There is no mention of D-22 in the transcript. Counsel did not draw it to the attention of the trial court during the discussion of jury instructions nor in Ballinger's motion for

new trial. It is the appellant's duty to make sure a claimed error is properly preserved on record. This failure to make a sufficient record concerning instruction D-22 precludes Ballinger from complaining now that the instruction was not given.

Id. Ballinger is dispositive of this issue because the record wholly fails to reflect that Walker's trial counsel requested the trial judge to consider granting it, notwithstanding the trial judge's announcement that he wanted only six instructions from both the State and Walker.

Had Walker's counsel deemed Instruction No. 26 critically important to his theory of the case, as he now argues that it was, he ought to have exercised his prerogative of specifically requesting the trial judge to grant it as a seventh or even eighth instruction. We earlier quoted the trial judge's advice to Walker's counsel that "under certain circumstances I would allow you to go beyond [the six instructions] other than to consider all of them." Because Walker's counsel declined to take the trial judge at his word by requesting that he at least grant Instruction No. 26, we hold that he is procedurally barred from raising this issue. *See Gray v. State*, 472 So. 2d 409, 416 (Miss. 1985) (stating that "[t]he combined failure to object or to request an appropriate instruction operates to waive any objection on this issue).

Regardless of the procedural bar, there was no error in the jury's not having been given Instruction No. 26. Walker cites *Jackson v. State*, 594 So. 2d 20 (Miss. 1992) and *Blaine v. State*, 17 So. 2d 549 (Miss. 1944) to support his position on this issue. In *Jackson*, the appellant, who had been convicted of aggravated assault on his former wife by severely beating her with his hands and fists, argued that hands and fists could never constitute "a means likely to produce death or serious bodily harm." *Jackson*, 594 So. 2d at 23. The supreme court disagreed and held "that whether or not hands and closed fists constitute, under [Section] 97-3-7(2)(b), a 'means likely to produce death or serious bodily harm' involves a question of fact to be decided by the jury *in light of the evidence*." *Id.* at 24 (emphasis added). In *Blaine*, the appellant was convicted of assault and battery with means likely to produce death in resisting an officer lawfully attempting to arrest another person, a crime for which aggravated assault is the successor. *Blaine*, 17 So. 2d at 549. The appellant had kicked and stomped the town marshal of McCool with his feet on which he wore cowboy boots. *Id.* at 550. Blaine appealed to argue that "a battery with hands and feet is not [a means or force likely to produce death] ." *Id.* The Mississippi Supreme Court affirmed Blaine's conviction because the jury remained free "to give due weight to the parties, the place, the means used, and the degree of force employed." *Id.* Thus, neither *Jackson* nor *Blaine* support the proposition that hands and fists are deadly weapons *per se*. Both of these cases stand for the proposition that where there is evidence to support the jury's inference that hands, feet, or fists were used so as to constitute a means or force likely to produce death, then it is proper so to instruct them. The jury cannot be so instructed if there is no evidence from which to infer that hands and fists constitute a means likely to produce death or serious bodily injury to someone.

The only evidence in the record about the victim's use of his arms and hands immediately before he was struck was to employ them as a shield to ward the blow from the baseball bat which Walker wielded. At best, the testimony of Walker and other defense witnesses established that Reid may have held his arms and fists in an elevated, and thus aggressive, position as he approached the Jeep, but not even Walker testified that Reid struck him. Neither was there any evidence that by training, Reid

was able to employ his hands as dangerous instrumentalities or that Walker knew that Reid was able to use his arms, hands, or fists as "means likely to produce death or serious bodily injury to someone." The testimony from those witnesses for both the State and Walker who observed the appellant deliver the fatal blow to Reid's head was that Reid was backing away from Walker when Walker struck Reid in the head with the bat. Walker testified that he had closed his eyes when he swung the bat with his right hand.

Walker's first issue is procedurally barred, but even so, there was no error in the jury's not being instructed by Instruction 26 because there was no evidence in the record to support it. *See Catchings v. State*, 684 So. 2d 591, 595-96 (Miss. 1996) (stating that "[b]efore an instruction may be granted, there must be in the record an evidentiary basis for it."(citation omitted)).

4. Instruction S-8A

In his second issue, Walker argues that the trial judge erred when he granted Instruction S-8A, which the State requested. Instruction S-8A reads as follows:

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

To support his position on this issue, Walker cites *Flowers v. State*, 473 So. 2d 164 (Miss. 1985), in which the Mississippi Supreme Court condemned an instruction, which Walker asserts is sufficiently similar to S-8A in the case *sub judice* to warrant reversal of his conviction. The instruction which the supreme court condemned in *Flowers* read as follows:

The court instructs the jury that to make a homicide justifiable on the ground of self-defense, the danger to the slayer must be either actual, present and urgent, or the slayer must have reasonable grounds to apprehend a design on the part of the deceased to kill him, or to do him great bodily harm, and in addition to this that there was imminent danger of such design being accomplished, and *hence mere fear, apprehension or belief, however sincerely entertained by the slayer, that another designs to take his life or to do him great bodily harm will not justify the slayer in taking the life of the latter party. The slayer may have a lively apprehension that his life is in danger or that he is in danger of great bodily harm, and believe the grounds of his apprehension just and reasonable, and yet he acts at his own peril.* He is not the final judge; the jury may determine the reasonableness of the grounds on which he acted.

If you believe from the evidence in this case beyond a reasonable doubt that the defendant, James Willie Flowers, did unlawfully, willfully, feloniously and of his malice aforethought shoot and kill Joe Lee Edison, a human being, at a time when he, the said James Willie Flowers, was not in any imminent danger of great bodily harm either real or apparent being inflicted upon him, then it is your sworn duty to find the defendant, Willie James Flowers, guilty of murder.

Id. at 164-165 (emphasis added). The Mississippi Supreme Court quoted from its earlier opinion in *Scott v. State*, 446 So. 2d 580, 583-84 (Miss. 1984), to condemn the instruction as it read in *Flowers*:

Recently, in *Robinson v. State*, [473 So.2d 164 (Miss. 1983),] this Court condemned an instruction similar to S-8. This is so because the instruction is self-contradictory and confusing. The troublesome part is the first sentence of the final paragraph. If a party has "an apprehension that his life is in danger" and believes "the grounds of his apprehension just and reasonable" a homicide committed by that party is in self-defense. These are the grounds upon which a claim of self-defense must be predicated. (citations omitted) A party acting upon this principle does not "act at his peril."

Flowers, 473 So.2d at 165.

While the beginning of the instruction which the Mississippi Supreme Court condemned in *Flowers* is quite similar to the Instruction S-8A in the case *sub judice*, the language to which the Mississippi Supreme Court objected in *Flowers* was omitted from Instruction S-8A. In *Lenoir v. State*, 445 So. 2d 1371, 1372 (Miss. 1984), the supreme court suggested that the following instruction on self-defense was appropriate:

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

Our comparison of the *Lenoir* instruction with Instruction S-8A in the case *sub judice* reveals that Instruction S-8A is nearly identical to the *Lenoir* instruction.

Walker also proposes that because Instruction S-8A failed to list all of the circumstances in which a homicide is justifiable pursuant to Section 97-3-15 of the Mississippi Code of 1972, the trial judge erred when he granted it.[(2)] More specifically, Walker complains that Instruction S-8A omits the instruction that a homicide is justifiable "when committed in the defense of any other human being." Miss. Code Ann. § 97-3-15(f) (Rev. 1994). Because Section 97-3-15 contains eight distinct justifications for the killing of a human being, we analyze this issue only in terms of "the defense of any other human being."

We begin by noting that Walker cites no case law on which to rest his assertion that Instruction S-8A ought to have included a reference to justifiable homicide in "the defense of any other human being." Therefore, we analyze this error in the fundamental way of determining whether there was any evidence in the record to establish that when Walker struck Reid with the bat, he did so in the defense of any other person. In his brief, Walker does not bother to identify whom else he was defending when he struck Reid. If it were his friend, Kevin Simmons, whom the D'Iberville five accosted about causing trouble at a party two weeks previously while Simmons sat in the left rear seat of the Jeep next to Walker, there is absolutely no evidence that Simmons was ever attacked by

any of the D'Iberville group. When the prosecutor asked Simmons, "Did any body strike you or attempt to strike you?," Simmons replied, "No." No other witness testified that Kevin Simmons was in danger of being harmed at any time before Walker struck Reid.

Because there was no evidence that Simmons or any other member of Landry's quintet was involved in a fight or threatened with harm by a weapon wielded by any of the D'Iberville group, there was no evidentiary basis on which to rest the inclusion of the "the defense of any other human being" justification for the taking of a life. Therefore we resolve this second issue against Walker on both prongs of his argument and hold that the trial judge did not err when he granted Instruction

S-8A.

5. Instructions S-10A and S-14B

For his third issue, Walker argues that the trial court erred by granting Instructions S-10A and S-14B, which the State requested but to which he objected, and that by granting Instruction S-14A, the trial judge amended the indictment, which was itself an error. The instructions about which Walker complains in his third issue read as follows:

Jury Instruction S-10A

Joseph Clifton Walker has been charged with the offense of murder.

If you find from the evidence in this case beyond a reasonable doubt that Joseph Clifton Walker:

1. on or about June 3, 1993, in the Second Judicial District of Harrison County, Mississippi; and,

2. did willfully, unlawfully and with a deliberate design to effect the death of David "Rocky" Reid, kill David "Rocky" Reid, by striking him in the head with a baseball bat; and,

3. the striking of David "Rocky" Reid was not done in necessary self-defense, then you shall find the defendant guilty of murder.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Joseph Clifton Walker not guilty of Murder.

Jury Instruction S-14B

Joseph Clifton Walker has been charged with the offense of murder.

If you find from the evidence in this case beyond a reasonable doubt that:

1. Joseph Clifton Walker, on or about June, 1993, in the Second Judicial District of Harrison County, Mississippi;

2 killed David "Rocky" Reid,

3. by striking him in the head with a baseball bat, while swinging the bat wildly with his eyes closed,

4. at a time when Joseph Clifton Walker was committing an act extremely dangerous to others and evincing a depraved heart, regardless of human life, and,

5. without any premeditated design to effect the death of any particular individual, and further,

6. the striking of David "Rocky" Reid was not done in necessary self-defense,

then you shall find the defendant guilty of murder.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Joseph Clifton Walker not guilty of Murder.

Walker was indicted for murder under subpart (a) of Mississippi Code Section 97-3-19 which states:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

Miss. Code Ann. § 97-3-19(a) (Rev. 1994). Walker asserts that Instructions S-10A and S-14B were conflicting and perforce amended the indictment for murder on which he was tried to include subpart (b) of Mississippi Code section 97-3-19. Subpart B provides:

The killing of a human being . . . shall be murder in the following cases:

. . . .

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

Miss. Code Ann. § 97-3-19(b) (Rev. 1994).

Walker argues the two instructions charge different things and are in conflict with each other because each lists a different theorem to establish the crime of murder. He also complains that because he was indicted under Section 97-3-19(a), with which Instruction S-10A conforms, the trial court's granting Instruction S-14B impermissibly amended the indictment to charge him with crime of murder as defined in Section 97-3-19(b).

The Mississippi Supreme Court resolved this same issue in *Catchings v. State*, 684 So. 2d 591 (Miss. 1996). In that case, Catchings was indicted for murder under Section 97-3-19(a) of the Mississippi Code, and he argued that the instructions read to the jury were improper because they effectively amended the indictment referring to subpart (b) of Section 97-3-19. *Id.*at 598-99. Catchings, like

Walker, cited *Quick v. State*, 569 So. 2d 1197 (Miss. 1990), which held, "[T]he state can prosecute only on the indictment returned by the grand jury and . . . the court has no authority to modify or amend the indictment in any material respect." *Id.* at 1199. Responding to Catchings argument, the supreme court opined:

Quick was indicted under subsection (b) of the aggravated assault statute, which requires purposeful, wilful, and knowing actions on the part of the accused. See Miss. Code Ann. § 97-3-7(2)(b) (1972). The indictment was apparently amended, and *Quick* was convicted under subsection (a) of the aggravated assault statute, which requires recklessness and extreme indifference to the value of human life. See Miss. Code Ann. § 97-3- 7(2)(a) (1972).

The *Quick* court held that the jury instructions clearly contained a "new element which was not contained in the original indictment and ... it was evidently this part of the instruction upon which the jury returned its verdict. Under these circumstances we have no alternative but to reverse and remand ..." [*Quick*] at 569 So.2d at 1200.

However, the case sub judice can be distinguished from *Quick*. With regard to the murder statute, subsections (a) and (b) have "coalesced." Indeed, [t]here is no question that the structure of the statute suggests two different kinds of murder: deliberate design/premeditated murder and depraved heart murder. The structure of the statute suggests these are mutually exclusive categories of murder. Experience belies the point. As a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life. Our cases have for all practical purposes coalesced the two so that Section 97-3-19(1)(b) subsumes (1)(a). *Mallett v. State*, 606 So.2d 1092, 1095 (Miss. 1992). See also *Hurns v. State*, 616 So.2d 313, 321 (Miss. 1993). The judgment in this case was issued in February, 1993, well after this Court first interpreted the statute in this manner. Therefore, this argument is without merit.

Catchings, 684 So. 2d at 599.

Because the Mississippi Supreme Court has held that subparts (a) and (b) of Section 97-3-19 of the Mississippi Code have "coalesced," the trial judge did not err by granting both Instruction S-10A and Instruction S-14B. We find against Walker and affirm the trial judge on this issue.

6. Instructions D-12 and D-24

For his fourth issue, Walker argues that the trial judge erred by amending Instructions D-12 and D-24, both of which he requested that the trial judge grant by including them in the six instructions to which the trial judge restricted him pursuant to Rule 5.03 of the Criminal Rules of Circuit Court Practice. As originally drafted and submitted by Walker, the second paragraph of Instruction D-12 read as follows:

The Court instructs the Jury that although you may find in this case that Joseph Clifton Walker was armed with a baseball bat on the evening in question, if you also believe that Joseph Clifton Walker never had any intent to kill David "Rocky" Reid, and that he was then and there faced with a situation where the deceased was in a group or gang of boys which had made threatening remarks and gestures

in the direction of Joseph Clifton Walker, and that Joseph Clifton Walker then and there reasonably believed that the group or gang of boys was attempting to hurt him or would hurt him and that Joseph Clifton Walker had reasonable cause to believe and did believe that he was in imminent danger of being killed or receiving serious bodily harm at the hands of the gang of boys, and it was necessary to swing at them to save his own life, then you will find the defendant Joseph Clifton Walker not guilty.

During the conference on jury instructions, the trial judge opined about the original form of Instruction D-12: "I think we ought to put David "Rocky" Reid and/or others" instead of "group" in all the instructions. I think we ought to list the victim in this case going back to D-12." Walker's counsel responded, "Your honor, we would object to that. Our theory of the case is definitely a group, [Walker] was under attack by the group at one time, or he perceived himself to be under attack by the entire lot of them." The second paragraph of Instruction was accordingly amended to read as follows:

The Court instructs the Jury that although you may find in this case that Joseph Clifton Walker was armed with a baseball bat on the evening in question, if you also believe that Joseph Clifton Walker never had any intent to kill David "Rocky" Reid, and that he was then and there faced with a situation where *David "Rocky" Reid and/or others* had made threatening remarks and gestures in the direction of Joseph Clifton Walker, and that Joseph Clifton Walker had reasonable cause to believe and did believe that he was in imminent danger of being killed or receiving serious bodily harm at the hands of *David "Rocky" Reid and/or the individuals with him*, and it was necessary to swing at them to save his own life, then you will find the defendant Joseph Clifton Walker not guilty.

(emphasis added).

In his brief, Walker claims that the Mississippi Supreme Court approved Instruction D-12 as he originally submitted it to the trial judge in *Cook v. State*, 467 So. 2d 203 (Miss. 1985), but our perusal of this case reveals that while the supreme court considered instructions in *Cook*, Instruction D-12 was not among them. *Cook* is the only case which Walker cites to support his position on this part of his fourth issue. This Court holds that Instruction D-12A did nothing to prejudice the defendant, and it did not frustrate the presentation of his theory of the case to the jury. We affirm the trial court's granting Instruction D-12A.

Walker also asserts the trial court's changes to his proposed instruction D-24 were error.

After the trial judge amended Instruction D-24, it read as follows:

The Court instructs the jury that "heat of passion" is defined in criminal law as a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter.

Pertaining to this instruction, when the trial judge asked defense counsel, "Do you have any objections to that [instruction as] given?" Walker's counsel replied, "No, Your Honor." We earlier noted that the supreme court has opined that when defense counsel fails to object to an instruction or

affirmatively states that he or she has no objection, the issue is waived. *See Gray,* 472 So. 2d at 416. We therefore need not resolve the issue of whether the trial judge erred when he granted Instruction D-24.

Issue 5. Whether the lower court erred in not hearing defendant's motion to dismiss for failure of venue and then allowing at trial the matter of venue to be determined by one hearsay witness over the objection of the defendant.

Walker cites Section 19-1-47 of the Mississippi Code (Rev. 1995) to establish that the boundary of Harrison County runs "thence along the middle of [the] Bay of Biloxi Bay to its entrance at the east end of Deer Island . . . ." Then he asserts that "[t]he site of this incident was clearly on the Jackson County side . . . ." Of course, "[t]he local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed." Miss. Code Ann. § 99-11-3 (Rev. 1994). In *Jones v. State*, 606 So. 2d 1051, 1055 (Miss. 1992), the Mississippi Supreme Court confirmed that "[v]enue is an indispensable part of a criminal trial and it may be proved by direct or circumstantial evidence. *Griffin v. State*, 381 So.2d 155, 158 (Miss. 1980); Cf. *Fairchild v. State*, 459 So.2d 793, 799 (Miss. 1984) ('may be proved by circumstantial evidence or inferentially.')."

In the case *sub judice*, the State asked Gerald Forbes, an investigator with the Biloxi Police Department who investigated the crime scene the night that Walker fatally injured Reid: "What state and county and judicial district was that crime scene located at [sic]?" Walker's counsel objected to the question because his knowledge of the location of the crime scene would be based on hearsay. The trial judge noted the objection, overruled it, and advised defense counsel, "You can take care of it on cross." Investigator Forbes then answered, "Harrison County, Second Judicial District, State of Mississippi." When he cross examined Investigator Forbes, Walker's counsel asked him nothing about the basis for his testimony that the venue of this crime lay in the Second Judicial District of Harrison County. Walker's counsel never produced any testimony that Walker struck Reid on the Jackson County side of the Bay of Biloxi. Thus, this Court finds that the State established venue of this crime in the Second Judicial District of Harrison County, and we decide Walker's fifth issue against him.

Issue 6. Whether the lower court erred in not suppressing the defendant's statement.

Walker filed collectively a series of motions, among which was a motion to "suppress confessions or statements." Several weeks before Walker's trial, the trial court conducted a hearing on Walker's motion to suppress a statement which he had given Investigators Gerald Forbes and James Banta within an hour's time of their having arrested Walker at Walker's home around 5:00 o'clock a.m. the morning after he had struck Reid with the baseball bat. Among the reasons which Walker assigned to suppress his confession were: (1) the *Miranda* warnings as Investigators Forbes and Banta gave them to Walker were incomplete, (2) Walker, who was in learning disabled classes in high school and could not read and write well, did not understand the warnings, and (3) his confession was not free and voluntary. While the matter has become secondary to the posture which this issue has assumed, the Court notes that Investigator Forbes advised Walker of his rights not to incriminate himself on two occasions and went to some length to be satisfied that Walker understood those rights.

At the conclusion of the hearing, the trial judge denied Walker's motion to suppress his statement by

opining as follows:

Here we have a man, as I stated, that understood what the situation was and what his concern with the truth was. He was candid with the court on the stand, he understood the questions asked by the lawyers, he understood the questions asked by the Court, he made rational responses to those questions. There is no indication of any abuse in the car as the police went down, any violence going on in the car. There's no record of any violence down at the police station.

I think the law is clear that in this particular case, in this record for the reasons cited, and for other reasons that are clearly in this record, indicate that the rule must fall in favor of the admissibility of the statement. And the motion to suppress is overruled.

Regardless of the trial court's denying Walker's motion to suppress his statement, the State did not introduce the statement into evidence as a part of its case in chief against Walker. Instead, when Walker testified in his own behalf, the State used Walker's statement to impeach certain aspects of his testimony. Even then, the State did not move to introduce Walker's statement into evidence; the consequence of which was that the jury only heard such portions of Walker's statement to the police that impeached Walker's testimony.

The record discloses that during its cross-examination of Walker, the prosecutor asked Walker, "Now you gave a statement to the police, didn't you?" Walker replied, "Correct." The prosecutor proceeded to elicit from Walker that he had lied when he told the police that he had a play gun because in fact he had had a real gun the night of June 3, 1993. On direct examination, Walker did not testify that any of the D'Iberville group had swung at his friend, Kevin Simmons, but he told the police that when someone swung at Kevin, he stood in the Jeep and asked if any of them had a problem before he jumped from the Jeep. Walker told the police that after he had struck Reid with the bat, he then started chasing "after one more," but in his direct testimony, Walker stated that he was not chasing anybody when he ran west on the bridge. He explained that he had begun running because he was "mad and upset, confused." When the prosecutor asked Walker about other statements which he had made to the police in contradiction to his testimony on direct examination, Walker would reply that he did not remember.

In *Bowen v. State*, 607 So. 2d 1159, 1162 (Miss. 1992), the Mississippi Supreme Court explained that "[i]t is well settled that a confession that is not voluntarily given cannot be used in the State's case-in-chief or for impeachment purposes, [but a] voluntary statement that is inadmissible due to some technical violation of *Miranda*, however, can be used for impeachment purposes if the defendant testifies to the contrary." (citation omitted). *See Harris v. New York*, 401 U.S. 222, 224-25 (1971) (holding that even if the accused was given a defective *Miranda* warning because the officers inadvertently failed to tell him that he was entitled to an attorney, the confession could be used for impeachment purposes since there was no question but that the confession was free and voluntary).

Bowen establishes that the real issue before this court is whether Walker's statement to the police was free and voluntary. If it was, then the State was entitled to use it to impeach Walker's testimony when Walker testified in his own behalf. During the hearing to suppress, Walker's mother testified that when she admitted police officers into her home early in the morning of June 4, they went to her son's room where one officer drew his pistol and put its barrel at Walker's head while the other grabbed her

son by the throat and yanked him up onto his feet before he had fully awakened. Then, the investigators placed her son in handcuffs and escorted him to a police car, in which they drove him to the Biloxi police headquarters. Walker corroborated his mother's version of his arrest by testifying that all he remembered was that "one of the detectives . . . grabbed me by the neck and pulled me up." He also remembered that an officer was holding a gun at his head as he was being pulled onto his feet by his throat.

The investigator admitted that he and the other arresting officer drew their guns before they arrested Walker, but Banta explained that he knew that Walker had had a pistol the night before and that when they went into his room, his hands were beneath the sheet so that they could not be certain what, if anything, was in his hands. Banta explained that when he had awakened Walker, he instructed him to place his hands outside the sheets, with which Walker complied. Then he and the other officer got Walker on his feet and handcuffed him. Banta denied that he had grabbed Walker by his throat.

Both Forbes and Banta testified that they had offered Walker nothing in return for his statement, that they had not coerced him in any manner to obtain his statement, and that Walker had given them his statement freely and voluntarily. On cross-examination, Walker admitted that while he was scared when he was taken to police headquarters, Investigator Forbes, to whom he later gave the statement, had done nothing to scare him. Walker further testified that Forbes did not pull a gun on him when they arrived at the police headquarters. When the prosecutor asked Walker, "And you wanted to talk to the police to tell them your side, didn't you?," Walker replied, "Correct." We have noted that after the hearing had concluded, the trial judge found: "There is no indication of any abuse in the car as the police went down, any violence going on in the car. There's no record of any violence down at the police station."

"On the issue of whether a defendant's confession was made voluntarily, the trial judge is the finder of fact." *Simon v. State*, 688 So. 2d 791, 808 (Miss. 1997). In *Alexander v. State*, 610 So. 2d 320, 325 (Miss. 1992), the Mississippi Supreme Court recited the following standard of review for evaluating whether the trial judge erred in admitting a confession:

So long as the [trial] court applies the correct legal standards, 'we will not overturn a finding of fact made by a trial judge unless it be clearly erroneous.' Where, on conflicting evidence, the court makes such findings, this Court generally must affirm. Thus, the trial judge's finding that [appellant's] statements were voluntarily given is a finding of fact that cannot be reversed unless he applied an incorrect legal standard or his order is clearly erroneous.

Id. at 325 (citations omitted).

Our review of the evidence from which the trial judge concluded that Walker's statement had been made freely and voluntarily was sufficient to support his conclusion as a finding of fact. He did not apply an incorrect legal standard in denying Walker's motion to suppress his statement. Thus, we affirm the trial judge's finding that Walker's statement was voluntarily given. Because his statement was voluntary, it was not error for the State to use it to impeach Walker's direct testimony as it did. We resolve Walker's sixth issue adversely to him.

Issue 7. Whether the lower court erred in denying the defendant's motion for a change of venue.

The trial court conducted a hearing on Walker's motion for change of venue prior to the trial of this case. Walker called two witnesses in support of his motion, Kelly McKoin, an attorney of Biloxi who had been practicing law for forty two years, and Eugene Henry, a former assistant district attorney who was then serving as municipal judge for the City of D'Iberville. McKoin testified that Reid was "well thought of" in D'Iberville and that Reid came from an influential family. He had read articles in two newspapers about Reid's death, and he opined that Walker could not receive a fair trial in the Second Judicial District of Harrison County because Reid had been a very popular boy and because there was a great deal of ill will against Walker. McKoin also noted that the other young men who had been involved in the altercation were also from prominent families so that their testimony would be given more weight by jurors in the Second Judicial District of Harrison County than would jurors in another district who would have no knowledge of the witnesses' families. The D'Iberville municipal court judge, Gene Henry, testified similarly to McKoin and opined that "the minds of the people of D'Iberville hold such a grudge and an ill will against" Walker that he could not receive a fair trial in the Second Judicial District of Harrison County. Henry also related that there had been discussions about this case among the Biloxi Police Department, the Harrison County Sheriff's Department, and the D'Iberville City Council.

To rebut Walker's case, the trial judge, State, and Walker's counsel interrogated ten members of a special venire from the Second Judicial District to further their determination of whether Walker could receive a fair trial in the Second Judicial District. We summarize the results of those interrogations as follows: One juror knew nothing at all about the case. One juror's child was a friend of Reid's family. One juror knew Reid. Four jurors had heard talk about the case. Four jurors remembered reading about the case in the newspapers. For whatever reason, four jurors remembered the case in general. One juror opined that the case had racial overtones. Another juror's children knew others who were involved in the affray but not Reid. One juror knew Walker.

As for their opinions about whether Walker could get a fair trial in the Second Judicial District of Harrison County, six were of the opinion that Walker could get a fair trial, and two did not have an opinion either way. Not one of the ten jurors opined that Walker could not get a fair trial in the Second Judicial District. Of those jurors who remembered talk about the incident, all testified that what talk they had heard about the case had occurred within a week or two after the incident. None stated that there had been talk within several months about the matter.

The record contains no evidence about the nature and extent of the pre-trial publicity in this case, whether by newspaper, radio, or television. While the record contains an expression of Walker's counsel's concern about properly marshaling his peremptory challenges during the jury selection process, Walker did not formally move the trial judge to afford him additional peremptory challenges, and none of his issues pertain to errors which the trial judge may have committed in the process of selecting the jury. Thus, the record indicates that the trial judge was able to seat a jury without undue difficulty which would otherwise have been caused by a pool of jurors who were biased against Walker.

Section 99-15-35 of the Mississippi Code of 1972 (Rev. 1994) provides for the change of venue in a

criminal case if the accused "cannot have a fair and impartial trial in the county where the offense is charged to have been committed" "by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind." In *Simon v. State*, 688 So. 2d 791, 804 (Miss. 1997) (citations omitted), the Mississippi Supreme Court reviewed the standard of review for the issue of whether the trial court erred in its decision to grant or to deny a motion for change of venue. The supreme court related:

It is well-established in our jurisprudence that "the granting of a change of venue is a matter so largely in discretion [sic] of the trial court that a judgment of conviction will not be reversed on appeal on the ground that a change of venue was refused, unless it clearly appears that trial [sic] court abused its discretion." This Court later refined this discretionary standard in *Fisher v. State*:

We have repeatedly held that the matter of whether venue should be changed in a criminal proceeding is committed to the sound discretion of the trial judge. A corollary premise is that we will not reverse for failure to grant a change of venue unless the trial judge has abused his discretion.

Id. (quoting *Fisher v. State*, ___ So. 2d ___ (Miss. 19__)).

In *Shook v. State*, 552 So. 2d 841, 849 (Miss. 1989), the supreme court affirmed a denial of a change of venue motion when "fifty-four out of the one hundred six persons in the venire had either discussed the case, read about it in the newspaper or had other knowledge concerning the case." The Court wrote: "[T]he percentage of veniremen who have heard of this case, in and of itself, [is not] indicative of the need for a change of venue." *Id.* at 850. In the case *sub judice*, the trial judge denied the change of venue requested by Walker.

Only two witnesses, both lawyers, opined that Walker could not receive a fair trial in the Second Judicial District. Of the ten members of another jury panel whom the trial court, the State, and Walker's counsel interrogated, not one opined that Walker could not receive a fair trial in that district. Six opined affirmatively that he could receive a fair trial, and two had no opinion on the subject. The record contains no evidence of pre-trial publicity, and Walker has not demonstrated that based upon responses during voir dire, any juror had expressed bias against him. Indeed, Walker raises no issue about the fairness of the jury selection process. The evidence indicated that talk about the case had died shortly after the crime had occurred. With all these facts in mind, this Court holds that the trial judge exercised sound discretion when he denied Walker's motion for change of venue, and thus we affirm his denial of that motion.

Issue 8. Whether the lower court erred by not allowing the defendant to impeach the credibility of witnesses.

During the State's direct examination of Kevin Simmons, who sat to Walker's left in the rear seat of Landry's Jeep, Simmons testified that they went to the end of the bridge because they were concerned about the welfare of two girls whom they believed to be at the west end of the Biloxi segment of the bridge. When the State asked Simmons to identify the persons who, he thought, might harm the girls, Simmons responded, "I'm not sure. There was some other guys down there that said that the guys

down there were trouble makers, and they'd try to start some trouble." On cross- examination, Walker's counsel asked Simmons, "What kind of reputation did these boys at the end of the bridge have?" The prosecutor objected to this question on the ground that "his reputation is not in issue," and the trial judge sustained the objection. Walker also complains that the trial judge sustained the State's objections to his questions of two witnesses, Joseph Gunter and Kelly Swanzy, whom he called, about the reputation of John Korn and Kelly Swanzy for violence.

Walker contends that the trial court's sustaining the State's objections to his questions about the reputation of members of the D'Iberville group for violence violated his right to confront the witnesses against him which the Sixth Amendment to the United States Constitution and Section 26 of the Mississippi Constitution guarantee him. However, he cites no authority to support this assertion. It must be noted that only one of the witnesses, Kevin Simmons, was called by the State to testify against him; Walker called the other two witnesses, Joseph Gunter and Kelly Swanzy. Any violation of Walker's right to confront his accusers would apply only to Kevin Simmons, whom the State called to testify against Walker.

Walker's eighth issue is an evidentiary issue, and as such it is governed by the Mississippi Rules of Evidence. Rule 404 provides that "[e]vidence of the character of a witness" is admissible "as provided in Rules 607, 608, and 609." M.R.E. 404(3). Rules 607, 608, and 609 deal exclusively with impeaching a witness's reputation for truthfulness -- not for "peace and violence." The traditional function of reputation for peace and violence has been restricted to establishing a victim's reputation for violence in those criminal prosecutions where the accused's defense was that of self-defense. It is thought that the victim's reputation for violence becomes relevant to establishing whether the accused or the victim was the aggressor in an affray which resulted in the victim's death or injury. *See Berry v. State*, 455 So. 2d 774, 776 (Miss. 1984) (stating that while "[t]he general rule is that the character or reputation of the deceased is not admissible in a murder case[,] . . .[a]n exception to this rule is where there is doubt as to who was the aggressor.") Because Reid was Walker's victim -- and not any other member of the D'Iberville five --the reputation of any other member of that group was irrelevant, and the trial judge correctly sustained the State's objections to the questions about the other members' reputation for violence.

Finally, Walker complains in this issue that the trial court erred when it denied him the right to cross-examine John Korn about his youth court record, but we will deal with this issue in the next issue. We resolve Walker's eighth issue against him.

Issue 9. The lower court erred in limiting the youth court records.

We earlier noted the collection of motions which Walker filed as one pleading. Among those motions was the production of "[a]ny records of criminal convictions and arrest of any witnesses, including youth court or family court records." The trial judge entered an order by which he ordered that Walker's attorney "be given all criminal records of potential witnesses for the State, including Youth Court records, so that he may examine said records to determine whether they may be used to attack the credibility of said witnesses." Still later the trial judge entered yet another order by which he sustained Walker's request for "any delinquent acts handled by the Youth Court of any witnesses . . . as to any acts that would by felonies if committed as an adult or if the act involves dishonesty or false statement." The trial judge's orders were based on Rule 609(d) of the Mississippi Rules of Evidence,

which reads:

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Walker produced a copy of an undated letter from the Restitution Program Coordinator of the Harrison County Family Court addressed to one Kenneth Tarter with which she enclosed a check in the amount of $30.00 "as a beginning restitution payment to you from [John Korn]." The letter also stated that "[i]f the other person charged is not adjudicated, John will be responsible for the full amount of $520.60." Walker also produced copies of medical bills addressed to Tarter. The letter and medical bills were marked for identification but were not introduced into evidence.

In this ninth issue, Walker complains that "no Youth Court records were disclosed in violation of Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice."[(3)] He then submits that "[i]t was obvious from the letter and the bills submitted in the proffer . . . that John Korn had a Youth Court conviction that would have been a felony had he been tried as an adult." What may be obvious to Walker's counsel does not become obvious to this Court from its perusal of the record in this case. Even though the State called John Korn as a witness on the first day of trial, Walker's counsel did not request the trial judge to excuse the jury so that he might ask Korn if he had been adjudicated a delinquent child in the Harrison County Family Court.

"Our law is clear that an appellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved." *Lambert v. State*, 574 So. 2d 573, 577 (Miss. 1990). The record fails to demonstrate that there was such an adjudication of John Korn as a delinquent child such that it could be used to impeach his testimony in accordance with Rule 609(d) of the Mississippi Rules of Evidence. We decline to find a violation of UCRCCP 406(a) by the State when the record is void of such violation. We resolve this issue against Walker.

Issue 10. The court erred in not hearing any evidence concerning speedy trial violations.

Among the collection of twenty five motions which Walker filed as one pleading, was the assertion of "his right to a speedy, public trial by jury as guaranteed under the Sixth Amendment . . . ." In its order which granted, denied, or otherwise dealt with this series of twenty five motions, the trial judge reserved its ruling on the defendant's motion to speedy, public trial for trial. On the morning of Monday, July 25, 1994, the day that Walker's trial began, the trial judge, the State, and Walker's counsel discussed various motions, among which was Walker's motion for speedy trial. However, Walker's counsel did not present the motion for speedy trial to the trial judge for his adjudication, and the record contains no order of adjudication on that motion.

As the Mississippi Supreme Court explained in *Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436, 446 (Miss. 1989) (citations omitted):

It is not the duty of the judge to search out and bring up such matters, but the affirmative duty rests upon the party filing the motion to follow up his action by bringing it to the attention of the trial court Therefore, [appellant's] Motion to Compel is not properly before this Court, for a trial judge will not be put in error on a matter which was not presented to him for decision.

Walker failed to present this motion for a speedy trial to the trial judge for his decision, and, therefore, this Court will not put him in error on this issue. Although we decline to address this issue for the foregoing reason, we note that this case had originally been set for trial on May 2, 1994, eleven months after Walker had been arrested on June 4, 1993, but it was continued on motion of Walker's second attorney whom the court had appointed to assist his original counsel because his newly appointed counsel had not "had ample time to speak with the Defendant's list of witnesses and prepare a just defense for said defendant."

Issue 11. Whether the verdict at the trial was contrary to the evidence or strongly against the weight of the evidence and was insufficient to support a conviction of murder.

We first discuss the matter of the sufficiency of the evidence of Walker's guilt of murder, which is challenged by motions for directed verdict and for judgment JNOV. *McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the State must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court will "reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Id.*

This Court thinks it unnecessary to review all the inconsistencies in the testimony and evidence which the State and Walker adduced for the jury's consideration. To be sure, there were inconsistencies and contradictions in the testimony, to some of which we have already alluded. However, there was evidence that Reid was backing up with his arm raised above his head to ward the blow which he saw that Walker was about to deliver with the baseball bat. Walker admitted in his direct testimony that he "swung hard." When the prosecutor asked Walker to demonstrate how hard he swung the bat, Walker replied, "I might hit something if I show you how hard I was swinging." Kevin Simmons testified that he took Walker with him to the east end of the bridge because Walker was a good fighter. Dr. Paul McGarry, the pathologist who performed the autopsy on Reid's body opined that the "[c]ause of [Reid's] death was blunt injury to the head causing laceration of the scalp, fracture of the skull, and extensive bruising of the brain." The evidence was sufficient to support the verdict of Walker's guilt of the murder of David Reid. We affirm the trial judge's denial of Walker's motion for judgment notwithstanding the verdict.

We next consider Walker's argument that the verdict of his guilt of murder was against the weight of the evidence. Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain,* 625 So. 2d at 781. New trial decisions rest within the discretion of the trial court. *Id.* A motion for a new trial should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an

unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). This Court will reverse the trial court and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain* at 781.

Walker asserts that "[t]his was a killing in the heat of passion," and thus manslaughter. The jury was instructed on what constitutes heat of passion as the concept relates to manslaughter, but they convicted Walker of murder instead. It is not an unconscionable injustice to allow the jury's verdict of "Guilty of murder" to stand. We affirm the trial judge's denial of Walker's motion for a new trial.

Issue 12. Whether the lower court erred in not sustaining the defendant's objection to the photograph of the victim's being introduced into evidence.

Walker argues that the photograph of Reid's fatal laceration to the top of his head introduced as an exhibit to the testimony of Dr. Paul McGarry, the forensic pathologist who performed Reid's autopsy, "was exhibited only to inflame the jury and was not used in a probative way."

Walker cites *Hart v. State*, 637 So. 2d 1329, 1330 (Miss. 1994), in which the supreme court affirmed the conviction of the appellant who argued that the admission of two postmortem photographs was erroneous. Discussing the standard of review in an admissibility of photographs issue, the Court wrote:

It is well settled in this state that the admission of photographs is a matter left to the sound discretion of the trial judge and that his decision favoring admissibility will not be disturbed absent a clear abuse of that judicial discretion. . . . A photograph, even if gruesome, grisly, unpleasant, or even inflammatory, may still be admissible if it has probative value and its introduction into evidence serves a meaningful evidentiary purpose.

. . . .

Autopsy photographs are admissible only if they possess probative value.

Id. at 1335 (citations omitted).

The photograph of Reid's fatal wound was probative on another issue. Walker testified under the State's cross-examination that he had closed his eyes and swung the bat "parallel with the ground." Had Walker swung the bat parallel with the ground as he testified, his striking Reid in the side of his head, rather than the top, would have been more likely. On the other hand, Dr. McGarry, opined that the blow to the top of Reid's head was "a diagonal motion." Dr. McGarry testified, "It's neither straight up and down, it's neither straight downward or straight horizontally. It's coming in at an angle like this from his left toward his right and downward and backward." The angle of the blow to Reid's head was relevant to the veracity of Walker's story that he just closed his eyes and swung the bat because he was afraid. A more vertically inclined blow might well imply that Walker swung more deliberately at Reid than his testimony reflects. Thus, the picture of the fatal wound confirmed that it was located on the top of Reid's head as Dr. McGarry testified and corroborated his opinion about

the direction in which the bat traveled as it cracked into Reid's skull. Because its probative value clearly outweighed whatever prejudicial impact the blood in and around the wound might have had, the trial judge did not abuse his discretion when he admitted the photograph into evidence. We affirm the trial judge's admission of the photograph into evidence.

Issue 13. Whether the lower court erred in overruling the defendant's motions without making finding of facts and conclusions of law.

In this issue, Walker presents a general allegation of the trial court's error by asserting that his motions were overruled without the trial judge making any findings of fact or conclusions of law. In support of his argument, he cites *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), a domestic relations case originating in chancery court, by writing in his brief, "This Court has previously determined that the courts can not deprive a citizen of his money or property without a finding of fact or conclusion of law." He argues that we are to make a parallel analysis by applying that case to the case *sub judice* because "[t]here is no reason to believe that this principle should not be applied to those situations that affect life and liberty."

Walker cites no specific instance of the trial judge's failure to make such findings of fact by which he was prejudiced. Neither did he include this particular issue in his post-conviction motion. Thus he failed to preserve it for our review. *See Davis v. State*, 660 So. 2d 1228, 1251 (Miss. 1995) (holding that error not raised in post-trial motions may not be reviewed on appeal). Walker cites no direct authority to support his allegation that the trial court erred in this manner. Consequently, we find that this issue has no merit, and we resolve it against Walker.

IV. SUMMARY

On none of his thirteen issues has Walker prevailed. The trial judge's granting the jury instructions which the State requested, about which Walker complained, and the trial judge's amendment of Walker's instructions which he granted, about which he also complained, were all proper. The trial judge's restricting Walker to submitting six instructions on the substantive law complied with Rule 5.03 of what was then the Uniform Criminal Rules of Circuit Court Practice. Walker did not request the trial judge to grant additional jury instructions such as his Instruction D-26, which we found was not warranted by the evidence in the record. The jury was properly instructed on Walker's theories of his defense, self-defense and manslaughter by way of his having acted in "the heat of passion."

The State established from the direct testimony of Investigator Gerald Forbes that the crime was committed in the Second Judicial District of Harrison County. Even if Walker established a *prima facie* case to establish that he was entitled to a change of venue, the trial judge did not abuse his discretion when he found that the State had rebutted Walker's *prima facie* case. Walker's statement to the police was freely and voluntarily given so that regardless of any alleged deficiencies in the *Miranda* warning which Investigator twice gave Walker, the State was entitled to use his statement strictly to impeach Walker's direct testimony. This is especially true because the State never introduced Walker's statement into evidence.

The photograph of Reid's wound on the top of his head was relevant to corroborate the opinion of Dr. McGarry that Reid died from blunt trauma to his head and that the blow from the bat was

delivered more in a diagonal manner than parallel with the ground as Walker testified. Thus, the photograph was more probative value than it was prejudicial. The State's evidence against Walker was more than sufficient to convict him of murder, and the jury's verdict of his guilt of the murder of David Reid was not against the weight of the evidence. Thus, this Court affirms the trial court's judgment of Joseph Clifton Walker's guilt of murder in the death of David "Rocky" Reid on June 3, 1993, and its sentencing Walker to serve a life sentence in the custody of the Mississippi Department of Corrections.

THE HARRISON COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF THE CRIME OF MURDER AND ITS SENTENCE OF THE APPELLANT TO SERVE A TERM OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. Effective as of May 1, 1995, Rule 3.07 of the Uniform Circuit and County Court Rules superceded Rule 5.03 of the Mississippi Uniform Criminal Rules of Circuit Court Practice, but Rule 3.07 also provides that "attorneys must select no more than six jury instructions on the substantive law of the case from the instructions prefiled and present them to the judge."

URCCC 3.07.

2. Section 97-3-15 reads in part:

(1) The killing of a human being by the act, procurement, or omission of another shall be justifiable in the following cases:

(a) When committed by public officers, or those acting by their aid and assistance, in obedience to any judgment of a competent court;

(b) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty;

(c) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in retaking any felon who has been rescued or has escaped;

(d) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in arresting any felon fleeing from justice;

(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling house in which such person shall be;

(f) When committed in the lawful defense of one's own person or any other human being, where there

shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;

(g) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed;

(h) When necessarily committed in lawfully suppressing any riot or in lawfully keeping and preserving the peace.

Miss. Code Ann. § 97-3-15 (Rev. 1994).

3. Rule 4.06(a) reads:

Upon written request by the defendant, the prosecution shall disclose to each defendant or to his of her attorney, and permit him or her to inspect, copy, test, and photograph, without the necessity of court order, the following which is in the possession, custody, of control of the State, or the existence of which is known, or by the exercise of due diligence may become known, to the prosecution.

UCRCCP 406(a).