IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 96-KA-00815-COA

JOE SLAUGHTER A/K/A JOE L. SLAUGHTER **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	05/21/96
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN H. OTT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: BILLY L. GORE
DISTRICT ATTORNEY:	DUNNICA O. LAMPTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MANSLAUGHTER: SENTENCED INTO THE CUSTODY OF THE MDOC FOR 18 YRS WITH THE LAST 6 YRS TO BE SERVED ON POST RELEASE SUPERVISION; PAY RESTITUTION IN THE AMOUNT OF $8,010.65 & COURT COSTS;
DISPOSITION:	REVERSED AND REMANDED - 09/21/1999
MOTION FOR REHEARING FILED:	10/05/99; denied 11/16/99
CERTIORARI FILED:	
MANDATE ISSUED:	12/07/99

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT

¶1. Slaughter was indicted for murder and convicted of manslaughter in the Pike County Circuit Court in May of 1996. He appeals asserting four separate issues. We find that only the fourth issue has merit, i.e., whether the trial court erred in overruling the defense's objection to rebuttal testimony going to whether Slaughter had previously displayed a pistol when he argued with another individual, and whether the State should have revealed the identity of this individual during discovery. Upon this issue we reverse and remand

this case for further adjudication consistent with this opinion.

FACTS

¶2. Slaughter shot and killed his wife's former husband, Alex Lambert. Slaughter claimed self-defense. Lambert had a long history of antagonism towards Slaughter, and Lambert also had a history of abusing his ex-wife, Sissy Slaughter. Slaughter and Lambert got into a fist fight in a convenience store parking lot, where Lambert got the better of Slaughter. Slaughter testified that he thought the fight was over and walked back to his truck, but saw Lambert following him with a knife in his hand. Slaughter stated he pulled his nine millimeter pistol from his truck and fired twice, whereupon Lambert briefly ducked behind an ice machine. Lambert quickly jumped out again, which frightened Slaughter, so he fired twice more. Apparently Lambert was turning around as Slaughter fired because the fatal shot hit him in the back and passed through his heart. Some witnesses corroborated Slaughter's claim that Lambert followed him to his truck and brandished a knife, but others testified that the fight was over, and Lambert was walking away when Slaughter fired.

DISCUSSION

¶3. In his opening statement, Slaughter's attorney stated, " [Slaughter] carried a pistol in his truck, in his Lott Furniture truck, for a long time. Never used, never pulled it, never had any reason before. So he did have a gun in his truck all the time." No other mention of Slaughter's prior use of a pistol was made during the trial, until the State cross-examined Slaughter. That is, during Slaughter's direct examination, his attorney asked no questions as to whether Slaughter had pointed a pistol at another individual.

¶4. However, apparently sometime after opening statements, but during the trial's first day Lee Felder told the prosecuting attorney that Slaughter had pointed a pistol at him approximately one and a half years before the trial. Consequently, during cross-examination the following exchange occurred between the State and Slaughter.

> Q: Your attorney in his opening statement, you heard what he said didn't you?
>
> A: I don't recall what he said.
>
> BY MR. OTT: I'm going to object to any cross-examination about anything in opening statements. I don't think that is proper at all.
>
> BY THE COURT: I haven't heard the question yet. I'll reserve ruling.
>
> BY MR. OTT: Whatever it is.
>
> Q: Your attorney said on opening statement that you never pulled a gun on anyone.
>
> A: I have not ever pulled a gun on anyone.

¶5. Subsequently, Felder was called as a rebuttal witness for the State. Slaughter's attorney again objected, contending there had been a discovery violation because the State had not disclosed Felder as a witness in its discovery response. The State argued that Felder's name was not disclosed during discovery both because Felder's knowledge of this issue was not known by the State until after the defense made its opening statement, and because Uniform Circuit and County Court Rule 9.04 (1) only requires disclosure

of "witnesses in chief."

¶6. The trial court ruled there was no discovery violation and that "the credibility of a witness is always at issue when he takes the witness stand." Thereafter, Felder testified:

> Q: Let me ask you on what occasions, if any, the defendant Joe Slaughter pulled a weapon on you or exhibited a weapon in your presence and threatened you.
>
> A: About a year of so back - You want me to tell -
>
> Q: Yes, sir -
>
> A: - the incident?
>
> Q: Yes, sir.
>
> A: I had a little run-in with him on a street corner. And a couple of hours later he showed up down on our lot where I was unloading my truck. And we had words. And I asked him to leave, that I was fixing to call the police. And he went out to his truck and brought out a, to me it appeared to be a semi-automatic weapon, like a nine millimeter or a forty-five, something like what these police officers use. And I continued to go towards him and he got in his, he went ahead and got back in his truck and left. I was going to call the law because, because of this situation.
>
> Q: Where did the weapon come from?
>
> A: He was, he was in, he had a, he was in a Lott's Furniture truck. He went around his truck and got it out of his truck. It was in his truck.

1. DISCOVERY VIOLATION

¶7. There is no reason to doubt the prosecution's contention that Felder's testimony was unknown prior to trial. Felder was scheduled to drive a bus to transport the jury, which accounted for his attending the trial, and the relevancy of his knowledge as to whether Slaughter had previously displayed a pistol could not have been known until after opening argument. Further, Uniform Circuit and County Court Rule 9.04 (1) only requires the disclosure of rebuttal witnesses if their testimony could have been offered during the State's case-in-chief.

¶8. However, the supreme court has made an addition to the above rule in sometimes requiring rebuttal witnesses be listed in discovery. In *Nicholson v. State*, 704 So. 2d 81, 88 (Miss. 1997), the supreme court held that it was error to allow a rebuttal witness to testify when that witness's identity was known before trial, and the substance of the testimony could have been introduced in the State's case- in- chief. *See also Hosford v. State*, 525 So. 2d 789, 792 (Miss. 1988)(holding the State must introduce all evidence going to guilt or innocence in its case-in-chief)). These cases establish that the State cannot circumvent discovery by introducing evidence "through the back door" during rebuttal rather than presenting all relevant evidence going to the elements of a crime during its case-in chief. *Id*. However, *Nicholson* does not apply here because the rebuttal testimony was both unknown until trial and, as discussed below, should not have gone to proving any element of the crime. Therefore, the issue of a discovery violation is without merit.

Rebuttal Testimony

¶9. M.R.E. 613 (b) provides that extrinsic evidence of a prior inconsistent statement is admissible if the witness is offered an opportunity to explain or deny the prior statement. However, *Quinn* v. State, 479 So. 2d 706, 708 (Miss. 1985) and its progeny hold that the State may inquire into past acts *only* if the defense first opens the issue to paint the defendant in an innocent light.(1) That is to say, the State may not elicit the statement to be rebutted during cross-examination; rather, the defense must first "open the door" during direct examination. *Spraggins*, 606 So. 2d at 597. In this case, the only "door opening" that occurred was Slaughter's attorney's opening statement. Thus, at first glance, it may appear that this case runs afoul of *Quinn.*

¶10. However, in closing argument the State may comment upon the defense's opening statement. *See, e.g., Taylor v. State*, 672 So. 2d 1246, 1269 (Miss. 1996). The State in its brief correctly points out if a defense attorney mis-states a fact during opening argument, a jury may be left with a misunderstanding of the fact unless the State is afforded the opportunity to rebut. Moreover, in this case, there was no practical way for the State to counter the defense's contention that Slaughter had never drawn a weapon from his truck in anger unless it produced evidence he did so.

¶11. Further complicating the State's predicament, M.R.E. 608 (b) prohibits showing a prior bad act through extrinsic evidence but provides the prior act may be inquired into through cross-examination.(2) Therefore, the only way for the State to rebut Slaughter's attorney's statement was to put forth evidence tending to show it was false, and the only means available to it for putting forth this evidence was to question Slaughter during cross-examination as to whether his attorney had correctly stated the facts. This Court is mindful of the trend of supreme court cases closely limiting the scope of the State's impeachment of defendants. Nevertheless, keeping in mind the need for the jury to be fully informed, we do not find error in the trial court's decision to either allow the State to cross-examine Slaughter as to whether he had employed a pistol previously, or allow the state to impeach Slaughter though Felder's testimony.

¶12. In so holding, however, this Court, must keep in mind the possible prejudice to a defendant that can arise through impeachment. The supreme court has held that rebuttal questioning of a witness who impeaches a defendant's statement may not go into the details of the act surrounding the rebuttal. *Stewart*, 596 So. 2d at 853 . That is, the scope of cross-examination "may not exceed the invitation offered." *Id. See also Spraggins* 606 So. 2d at 597; *Blanks v. State*, 547 So. 2d 29, 37 (Miss. 1989).

¶13. The specific facts of this case present a difficult decision. The specific statement that Slaughter's attorney made during opening argument was so closely tied to the facts of the case that it was difficult for the State to formulate a question for Felder that did not go into specific details of the prior act. Slaughter's attorney stated, "[h]e's [Slaughter] carried a pistol in his truck, in his Lott Furniture truck, for a long time. Never used, never pulled it, never had any reason before. So he did have a gun in his truck all the time." However, the *real issue* that the State should be permitted to inquire into was not Slaughter's predilection to act in conformity with the prior act, but Slaughter's attorney's candor towards the jury. The trial court could have limited the State to simply eliciting a statement from Felder that he had seen Slaughter draw a pistol from his truck in anger. There was no reason for the jury to hear the Felder and Slaughter had been arguing, or that even though Felder and Slaughter had ceased arguing Slaughter still drew the pistol, or that

the pistol closely resembled the weapon used to kill Lambert. It is impossible to see how the jury could not have been prejudiced when it heard Felder say:

> A: I had a little run-in with him on a street corner. And a couple of hours later he showed up down on our lot where I was unloading my truck. And we had words. And I asked him to leave, that I was fixing to call the police. And he went out to his truck and brought out a, to me it appeared to be a semi-automatic weapon, like a nine millimeter or a forty-five, something like what these police officers use. And I continued to go towards him and he got in his, he went ahead and got back in his truck and left. I was going to call the law because, because of this situation.
>
> Q: Where did the weapon come from?
>
> A: He was, he was in, he had a, he was in a Lott's Furniture truck. He went around his truck and got it out of his truck. It was in his truck.

This detail is exactly what the supreme court has prohibited. *See, e.g., Spraggins*, 606 So. 2d 597.

¶14. Therefore, we hold the trial court should have limited the State's questioning of Felder to simply eliciting enough so that the State could in closing argument refer to Slaughter's opening argument and say words to the effect, "you were told Slaughter never drew a weapon in anger from his truck, but that was not true." As such, this holding is fact specific. It should not apply in many cases because defense attorneys certainly do their clients no favors if they allow the State to paint

them as having dubious credibility for the jury.

¶15. **THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS. COSTS OF APPEAL ARE ASSESSED TO PIKE COUNTY.**

BRIDGES, DIAZ, LEE, PAYNE, AND THOMAS, JJ., CONCUR. SOUTHWICK, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J., AND IRVING, J. MOORE, J., NOT PARTICIPATING.

SOUTHWICK, J., CONCURRING

¶16. My disagreement centers on the issue of Slaughter's possible prior threats with a weapon. I too would reverse and remand. In my view, though, the majority announces a rule that improperly permits the introduction of extrinsic evidence to rebut a collateral matter and will tend to create additional error in other cases.

¶17. My first point is fairly minor. The majority refers to the evidentiary rule regarding prior inconsistent statements. MRE 613(b). Even if the assertion by defense counsel is considered to be Slaughter's own statement, a reasonable holding, there is no "prior statement made by him" which is being introduced. M.R.E. 613 (a). The prior evidence is not of a statement but of the action of the accused of having once used a gun on someone else. In my view Rule 613(b) has no application

¶18. Secondly, I agree that even though the defense counsel's statement is not evidence, it does remain suspended in the trial and potentially affects the jurors in their deliberations. A precedent relied upon by the

majority holds that the State may respond in its closing statement to the failure of the defense to follow through on what it said in the opening statement that it would prove. *Taylor v. State*, 672 So. 2d 1246, 1269 (Miss. 1996). The *Taylor* defense counsel's opening argument included the assertion that the State's witnesses were not reliable because they were not law enforcement officers. In closing argument the prosecutor responding by saying that these witnesses were credible even though not officers. Had they been officers, the prosecutor speculated that the defense approach would have been to suggest the officers had beaten the statements out of the defendant: "[i]f you have it one way, they will get up here and say, scream to you it should have been another." *Id.* The court held that this suggestion that the defense would distort whatever facts were presented was regrettable and over-zealous advocacy in response to a defense tactic, but it was not reversible error. *Id.* at 1270.

¶19. In the Fifth Circuit case relied upon in *Taylor*, defense counsel "suggested the government's female witnesses had engaged in various illegal acts and intimate relationships with a government investigator and also complained that the witnesses would not answer questions before the trial. During closing arguments, the prosecutor rebutted the charges" by commenting how despicable those comments were. *United States v. Jennings*, 724 F.2d 436, 444 (5th Cir.1984).

¶20. Neither *Taylor* nor *Jennings* concerned whether the State may *introduce evidence* to rebut an opening statement. In our case the State went well-beyond responding with argument but cross-examined Slaughter and introduced a rebuttal witness. The initial question is the right of the State to cross-examine the accused on the point made by his counsel. At the minimum, once Slaughter took the stand I would consider defense counsel's opening statement to be the equivalent of an assertion by the accused during his direct testimony. If he could be cross-examined about his own statement that he never threatened anyone, then he can be cross-examined about his counsel's similar statement.

¶21. The normal limits for impeachment would permit cross-examination on this sort of assertion. One supreme court precedent explained a still-earlier precedent this way:

> In response to questions posed by his own attorney, Quinn purposely portrayed himself as "pure as the driven snow." "To be sure, every defendant brought to trial may, if he wishes, try to paint himself as being as pure as the driven snow." *Quinn v. State*, 479 So.2d [706, 708 (Miss.1985)]. Having portrayed himself as "pure," on direct examination by his own attorney, this Court held that Quinn opened the door for the state to attack his credibility on cross examination by questioning him about a drug sale which he made four days prior to the one for which he was on trial.

Spraggins v. State, 606 So.2d 592, 596 (Miss. 1992). In *Spraggins* the State did not try to introduce other evidence of the prior transactions, but only questioned the defendant. The court did not state a specific evidentiary rule that would permit the testimony, but cited approvingly two pre-Rules case whose principle is one of an accused's "opening the door" with a denial. *Id.* at 596-97, citing *Quinn*, 479 So.2d at 708, and *Pierce v. State*, 401 So.2d 730, 732-33 (Miss.1981). In further explanation of these pre-Rules decision, the court held that when an accused "on direct examination seeks to exculpate himself, such testimony is subject to impeachment on cross-examination, even though it may reveal that the defendant committed another crime unrelated to the one for which he is on trial." *Spraggins*, 606 So. 2d at 597-98, citing *Stewart v. State*, 596 So.2d 851, 853 (Miss. 1992).

¶22. Though some of the evidentiary rules are related, no specific rule directly addresses the right of the State to respond on cross-examination to inaccurate testimony on direct. That does not mean *Spraggins*

and similar cases ignore the evidentiary rules. In addition to specific rules referring to using character evidence or prior crimes to impeach, one rule states that cross-examination is "not limited to the subject matter of the direct testimony and matters affecting the credibility of the witnesses." M.R.E. 611 (b). Instead, under "wide-open cross-examination any matter may be probed that is relevant." M.R.E. 611 (b) cmt. This and rules granting the trial judge broad discretion in controlling introduction of evidence (M.R.E. 611 (a)) and permitting the introduction of evidence whose probativeness is not outweighed by its prejudicial effect (M.R.E. 403), all combine to allow reasonable response to the invitation given on direct examination by a witness's testimony.

¶23. Under that authority, because of his counsel's assertion that he had never threatened anyone, Slaughter could be asked about the other incident. Slaughter denied the threat. So far no error in my view occurred, but the State did not stop there. To determine the propriety of moving beyond cross-examination, we are assisted by one recent decision. Similar facts arose in *Nicholson v. State*, 704 So. 2d 81 (Miss. 1997). Nicholson was the coach of a girl's softball team and was being tried for sexual battery of a member of the team. Nicholson denied the incident and also stated that he would never do anything like this to any child. As a rebuttal witness the State called another member of the team who said Nicholson had done something similar to her. *Id.* at 83.

¶24. The supreme court examined a variety of evidentiary rules regarding the issue. Most basic is the right of the defendant to put on evidence of a pertinent trait of his character and for the prosecution to rebut. M.R.E. 404(a) (1). In a cited precedent in which the defendant had denied that he would ever hurt anyone for money, the court had found that this was relevant evidence under Rule 404(a) and the State could rebut it by offering evidence that he had previously been convicted of such a crime. *Rowe v. State*, 562 So. 2d 121, 123 (Miss. 1990), cited in *Nicholson*, 704 So. 2d at 84. Though *Rowe* seemed quite similar, the court distinguished it by emphasizing that the evidence was of a prior conviction, not just of a prior uncharged bad act. *Nicholson*, 704 So. 2d at 84-85.

¶25. The court held that had Nicholson been convicted of a similar assault, that evidence might have been admissible as impeachment. *Nicholson*, 704 So. 2d at 85, M.R.E. 609. Usually Rule 609 is used to permit introduction of prior convictions to prove that the accused is not trustworthy; crimes involving dishonesty are automatically admissible and others are if their probative value outweigh their prejudicial effect. *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987). Admission does not depend on the witness having denied the crime, but depends instead on whether the conviction is probative that his testimony is untrustworthy. Five factors must be evaluated on the record for admission; had Nicholson been convicted of a similar prior crime, that would be a factor weighing *against* admitting the evidence. *Id.* at 637. Nonetheless, based on *Nicholson*, Rule 609 is support for using a prior conviction if the accused on direct opens the door by denying ever having engaged in similar conduct. What is not clear is why Rule 609 becomes an impediment to allowing the admission of Rule 404(a)(1) evidence that is not a prior conviction. If it is a proper trait of character, the evidence would not appear to need to pass through the filter of Rule 609. Only Rule 403 regarding the prejudicial nature outweighing it probative value would seem to block it.

¶26. Another rule addressing the introduction of evidence to disprove a defendant's testimony is Rule 608. The rule is captioned "Evidence of Character and Conduct of Witness." Rule 608 (a) permits attacking credibility by introducing opinion and reputation evidence but only on the witness's character for truthfulness. M.R.E. 608 (a). It has been called a new concept in state practice, in that it permits the witness's conduct that has not led to a criminal conviction to be the basis for cross-examination if the

conduct is probative on the character for truthfulness. Carolyn Ellis Staton, Mississippi Evidence 150 (3d ed. 1995). It does not appear to me that asking on cross-examination whether the witness was lying on direct when he denied some event is the subject matter of this rule. Instead, the Rule applies to situations such as in one suit when a witness was asked if she had ever altered a prescription given her by a doctor; that would tend to show dishonesty in the same manner as would conviction of a crime of dishonesty. *Ball v. Sloan,* 569 So.2d 1177, 1179 (Miss. 1990). The supreme court held this was proper cross-examination but also the end of the matter. *Id.* After the witness denied doing so, the pharmacist was called to state that the prescription appeared altered. That was reversible error. *Id.*

¶27. If Rule 608 is seen as applicable, it would be because showing that a witness has lied on the stand, if only about the color of the otherwise irrelevant automobile that she drove to court, tends to show a character for untruthfulness. Rule 608 discusses both character and reputation. "Character" is the inner reality; "reputation" is the community perception. Lying on the stand might be seen as Rule 608 character even though it has nothing to do with reputation. Whether Rule 608 is the vehicle that admits this evidence is largely irrelevant, since cases such as *Spraggins* dealing with "door opening" would permit as much. The clear error if Rule 608 applies is that it blocks inquiry beyond cross-examination. Though the State under Rule 608 could on cross-examination challenge Slaughter's denial that he had ever threatened anyone, that is a "specific instance of conduct of the witness, [introduced] for the purpose of attacking or supporting his credibility," that may not be "proved by extrinsic evidence." M.R.E. 608 (b).

¶28. The *Nicholson* court addressed Rule 608 to say that Rule 608 (b) would prevent calling a rebuttal witness. *Nicholson,* 704 So. 2d at 85. It also held that Rule 608 applies to character evidence of witnesses, apparently contrasting that with broader use to impeach as to misstatements. *Id.* at 87. In my view Rule 608 does not apply but should be limited to evidence generally probative of the character for untruthfulness. Even so, Rule 608 is not necessary to permit a response on cross-examination to the invitation granted by direct testimony. Making it apply tends to confuse the meaning of the rule.

¶29. It appears *Nicholson* was driven by a number of concerns, including the general nature of the denial by the accused -- "I've never done anything wrong to any child." *Id.* at 88. Another factor was the case law that other bad acts regarding sexual abuse under Rule 404(b) could be inquired into only if the acts were with the same child. *Id.* at 83-84.

¶30. *Nicholson* is a well-conceived effort to explain the at-times conflicting rules regarding evidence such as this. Though perhaps not completely successful in making all the strands of the evidentiary rules and caselaw into a seamless web, the case does stand for the proposition that a witness's general denial of having engaged in other similar criminal conduct does not open the door to extrinsic evidence of that conduct. The case could even be read not to permit cross-examination of the witness, but if so that is probably over-broad writing. The invitation issued in the present case by the defense counsel's opening statement was to cross-examine the accused regarding whether he had ever threatened anyone previously with a gun. To proceed to prove through other witnesses the facts of that possible assault was improper as it tended to put Slaughter on trial for a crime other than that in the indictment.

¶31. Therefore, calling the purported victim of the previous gun-waving, Lee Felder, to give extrinsic evidence was reversible error. I disagree with the majority that his examination could be narrowly tailored; I find it was prohibited.

McMILLIN, C.J. AND IRVING, J., JOIN THIS SEPARATE OPINION.

1. *See, e.g., Blackman v. State*, 659 So. 2d 583, 583-84 (Miss. 1995); *Spraggins v. State* 606 So. 2d 592, 595-97 (Miss. 1992); *Stewart v. State*, 596 So. 2d 851, 853-54 (Miss. 1992).

2. *See also Lewis v. State*, 580 So.2d 1279, 1287 (Miss.1991); *Pinson v. State*, 518 So.2d 1220, 1223 (Miss.1988).