IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-01695 COA

LACORY HARRIS **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

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

I. LaCory Harris, Appellant

II. Honorable Winston Kidd, Hinds County Circuit Court Judge

III. Honorable Stanley Alexander, Hinds County Assistant District Attorney

IV. Honorable Michelle Purvis, Former Hinds County Assistant District Attorney

V. Honorable Sam Wilkins, Defense Trial Counsel

VI. Honorable Robert Wilkins, Defense Trial Counsel

VII. J. Kevin Rundlett, Esq., Defense Appellate Counsel

This the 22nd day of March, 2007.

J. Kevin Rundlett

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II. **THE TRIAL COURT ERRED BY ADMITTING HIGHLY PREJUDICIAL AND UNRELIABLE HEARSAY STATEMENTS INTO EVIDENCE AS AN EXCITED UTTERANCE WHEN THE STATEMENT WERE NOT SPONTANEOUS, BUT THE RESULT OF CONSCIOUS REFLECTION;**

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STATEMENT OF ISSUES

ISSUE ONE:

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO DISPLAY AN INJURED INFANT TO THE JURY WHEN THE CHILD'S PRESENCE WAS HIGHLY PREJUDICIAL AND NOT PROBATIVE ON ANY DISPUTED ELEMENT OF THE ALLEGED OFFENSE

ISSUE TWO:

THE TRIAL COURT ERRED BY ADMITTING HIGHLY PREJUDICIAL AND UNRELIABLE HEARSAY STATEMENTS INTO EVIDENCE AS AN "EXCITED UTTERANCE" WHEN THE STATEMENTS WERE NOT SPONTANEOUS, BUT WERE THE RESULT OF CONSCIOUS REFLECTION

ISSUE THREE:

TRIAL COUNSEL PREJUDICED THE DEFENDANT THROUGH INEFFECTIVE ASSISTANCE

- **A. TRIAL COUNSEL FAILED TO PROCURE EXONERATING PHONE RECORDS;**
- **B. TRIAL COUNSEL FAILED TO OBJECT TO CONTINUOUS, PREJUDICIAL LEADING QUESTIONS DURING THE DIRECT EXAMINATION OF THEALLEGED VICTIM, OR IN THE ALTERNATIVE, THE COURT COMMITTED PLAIN ERROR BY ALLOWING THE SAME**

ISSUE FOUR:

THE TRIAL COURT ERRED BY REFUSING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL WHEN THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF INCARCERATION

LaCory Harris is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT OF THE CASE

Shantanner Montgomery and Cory Harris spent the majority of the weekend of September 14th , 2001 together. On Sunday morning, September 16th , LaCory asked Ms. Montgomery to drive him to his brother's home. Montgomery agreed and placed her infant child, Kennedy Montgomery, in a car seat in the back of her vehicle and proceeded to drive Cory to his brother's. However, instead of driving the proper route, Montgomery proceeded north on I-220 at a high rate of speed in a direction away from LaCory's brother's home evidencing her anger. During the ride, LaCory borrowed Montgomery's cell phone and proceeded to call another female. When Montgomery realized who LaCory had called, she lunged for the phone and caused a serious accident. Both of Montgomery's wrists were fractured, and her child suffered a severed foot. None of the witnesses called by the State, other than Montgomery, saw what happened in the vehicle the moments before the accident. Montgomery was unable to face the damage she caused and fabricated a story that

LaCory Harris caused the accident by jerking the steering wheel.

There is no question that LaCory and Montgomery had a prior romantic relationship. (T.R. at 98). Montgomery was a jealous and reckless woman. During the relationship, LaCory dated at least two other women. (T.R. at 219). Montgomery suspected or knew of these other women and on at least one occasion saw LaCory in the car with another woman and carelessly chased him down the highway at over 100 miles per hour. (T.R. at 98,99, 222).

LaCory was indicted for two counts of aggravated assault with a deadly weapon for the injuries that Montgomery and her daughter sustained in the accident. The jury trial commenced on July 5th, 2005, in Hinds County. Before trial, the defense raised three motions *in limine,* of which two were denied. (T.R. at 2-8). The first and the last motion were denied. The first motion that was denied was an attempt to exclude the fact that LaCory fled the scene of the accident. (T.R. at 78). The next motion that was denied was an attempt to prevent the young child, Kennedy, from being present in the courtroom. (T.R. at 15).

The State's case included testimony from Montgomery that LaCory intentionally grabbed the steering wheel and several hearsay statements made by Montgomery at the scene of the accident. (T.R. at 126, 132, 137, 147). At the end of the State's case, the defense requested a motion for directed verdict. (T.R. at 173). The motion was denied.

Based on the testimony and the instructions given by the trial court, the jury

found LaCory guilty of two counts of aggravated assault. On September 8, 2005, LaCory was determined to be a habitual offender, based upon prior non violent offenses, and was sentenced to serve a term of twenty years. (R.E. at 7). The defense filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (R.E. at 13) The motion was denied. (R.E. at 20). LaCory appeals and respectfully requests that this Court reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits of the case.

SUMMARY OF THE ARGUMENT

Having heard the evidence in this case, no reasonable juror should have found LaCory Harris guilty beyond reasonable doubt, and the jury's decision was based upon extreme prejudice and sympathy. The only evidence that LaCory Harris intentionally caused the accident at issue in this cause came from the lips of his jealous and angry ex-girlfriend, Shantanner Montgomery. The remainder of the State's witnesses were wrongfully allowed to testify to hearing Montgomery incriminate LaCory at the scene of the accident. Witness Sherry Green saw the accident occur but could not testify that LaCory jerked the steering wheel. Witnesses Missy Hayes, Jeffrey Stallworth, Tonya Chambers, and Jackie Watson arrived after the accident occurred. None of them saw what happened in the vehicle prior to the accident. The aforementioned hearsay statements, coupled with wrongfully allowed

testimony of LaCory leaving the scene, a gruesome, wrongfully allowed view of young Kennedy Montgomery's amputated leg; evidence of LaCory's extensive criminal history, and defense counsel's errors so inflamed the prejudice of the jury that the jury ignored the court's instructions.

Defense counsel was ineffective during trial and caused serious prejudice to LaCory Harris. First, counsel failed to obtain phone records that would have proven the heart of the defense and contradicted Montgomery's version of the story. Second, counsel allowed the prosecution to ask over 50 harmful, leading questions of Montgomery during her direct examination without objection. (R.E. at 28-55) (T.R. at 96-123)

Lastly, the Appellant urges this Court that the trial court erred by refusing to grant the Appellant's motion for a new trial because the jury's verdict was clearly against the overwhelming weight of the evidence. As indicated previously, the jury's verdict was based upon the severity of the child's injury, the inadmissable hearsay testimony of the bystanders, and the Appellant's criminal history , instead of being based upon the plausibility of the facts surrounding the car accident. This Honorable Court should reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits of the case.

ARGUMENT

ISSUE ONE:

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO DISPLAY AN INJURED INFANT TO THE JURY WHEN THE CHILD'S PRESENCE WAS HIGHLY PREJUDICIAL AND WAS NOT PROBATIVE ON ANY DISPUTED ELEMENT OF THE OFFENSE

The child in this case was so severely injured that her leg was amputated. The prosecution saw this as an opportunity to use this tragic injury to prejudice the jury against LaCory Harris from the beginning of the trial. The trial court erred in allowing the prosecution, over a timely objection and motion by the defense, to display the injured infant to the jury during the entire trial. (R.E.. at 21,25) (T.R at 15). Appellant submits that the injured infant should have been excluded under ***Mississippi Rule of Evidence 403***, which states that evidence is to be excluded when the probative value of the evidence is substantially less than the prejudicial effect. ***Miss. R. Evid., Rule 403.*** On appellate review, the Court must determine if the trial court abused its discretion in admitting the prejudicial evidence.

Rule 403 of the Mississippi Rules of Evidence is the ultimate filter through which all otherwise admissible evidence must pass. ***Hoops v. State,*** 681 So. 2d 521 (Miss. 1996). Unfair prejudice does not mean harmful to a party's case, but rather evidence having a tendency to lead a jury to base a decision on an improper basis or to influence the outcome of the trial by improper means. ***Fed. R. Evid., Rule 403, advisory committee's note.*** Unfairly prejudicial evidence is evidence that is more

likely to arouse an emotional response than a rational decision by the jury, or otherwise causes the jury to base its decision on something other than the established propositions of the case. ***United States v. Beechum,*** 585 F. 2d 898 (5th Cir. 1978).

In ***Foster v. State,,*** the Mississippi Supreme Court held:

> [A] trial court presented with a Rule 403 objection to relevant evidence must engage in a balancing process. The more probative the evidence is, the less likely it is that the potential prejudice will substantially outweigh the probative value. On the other hand, the less probative value the evidence has, the less significant the potential prejudice has to be to justify exclusion.

Foster v. State, 508 So. 2d 1111, 1117 (Miss. 1987)(quoting , ***Moore v. State,*** 806 So. 2d 308 (Miss. Ct. App. 2001)). The overriding consideration is whether the evidence is more likely to lead a jury to focus on relevant, objective facts established by the prosecution or other, impermissible grounds.

In this case, there is no question that a severely disabled and disfigured child is highly emotional. Accordingly, the question is whether displaying an injured infant child to a jury is more likely to lead the jury to base a judgement on the evidence presented by the prosecution or more likely to cause them to convict solely out of sympathy. Appellant contends that it is more likely to evoke sympathy.

The Mississippi Appellate Courts have not considered the specific issue of an injured child having an unfairly prejudicial impact on a jury, but the Mississippi Supreme Court has considered the impact of photographs of murder victims many times. ***Billiot v. State,*** 454 So. 2d 445, 459-60 (Miss. 1984); ***Cabello v. State,*** 471 So. 2d 332, 341 (Miss. 1985); ***McNeal v. State,*** 551 So. 2d 151 (Miss. 1989). The

prejudicial effect of photographs of a gruesome murder victim is comparable to that created by an injured infant's severed leg. Trial courts should exclude photographs which are gruesome or inflammatory and lack an evidentiary purpose. ***Id.*** For example, our Supreme Court has stated that photographs of a murder victim "should not ordinarily be admitted into evidence where the killing is not contradicted." ***Shearer v. State,*** 423 So. 2d 824, 827 (Miss. 1982); ***Sharp v. State,*** 446 So. 2d 1008, 1009 (Miss. 1984). The Supreme Court also frequently looks for efforts to minimize the prejudicial effect of the evidence, such as using black and white photos. ***Id.***

Other jurisdictions have reached similar conclusions. In ***State v. Williamson,*** a Tennessee criminal appellate court considered the prejudicial effect of showing black and white photos of an injured child to a jury. ***State v. Williamson***, 919 S.W. 2d 69 (1995). Noting that the pictures were highly inflammatory, the court concluded they were not unfairly prejudicial because there was only one picture, the child's eyes were closed, the prosecution did not seek to maximize the emotional impact of the picture, and the defense did not offer to stipulate the injuries. ***Williamson***, 919 S.W. 2d at 69 (1995). Due to the defense not agreeing to stipulate to the injuries, the picture became an essential element to the case. ***Id.***

In the case before this Court, the prosecution did not attempt to minimize the impact of the injured child, but rather deliberately sought to inflame the jury by positioning the infant directly in front of the jury not only on the day when her injuries were presented as evidence, but every other day of the trial as well. Furthermore, the

defense offered to stipulate the injuries to the child but the prosecution refused, again presumably seeking to maximize the unfair prejudicial effect of the injured child. The child's injury was prominently displayed to the jury during the entire trial under the guise of her exercising her right to see the outcome of the trial as a victim. However disingenuous it may seem that an 18 month old baby had an interest in seeing the trial, sitting her in the front row was calculated to draw attention to a crying baby and her terrible injuries. The injuries could have been stipulated, the injuries could have been established from the medical records, or the injuries could have been established by testimony on one day. Any or all of these would have been appropriate. However, displaying the child for the entire trial was not. Because the injuries to the alleged victim were not disputed and because the prosecution clearly sought to maximize the impermissible prejudice resulting from the child's injuries, LaCory Harris was unable to receive a fair trial and the lower court erred in admitting this evidence. Accordingly, this Court should reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits of the case.

ISSUE TWO:

THE TRIAL COURT ERRED BY ADMITTING HIGHLY PREJUDICIAL AND UNRELIABLE HEARSAY STATEMENTS INTO EVIDENCE AS AN "EXCITED UTTERANCE" WHEN THE STATEMENTS WERE NOT SPONTANEOUS, BUT WERE THE RESULT OF CONSCIOUS REFLECTION

The bias and prejudice towards the Appellant was present throughout the trial and originated at the scene of the car accident. This unjust bias and prejudice ultimately resulted in the Appellant receiving an unfair trial. The only witness called by the State who testified that LaCory committed a crime was Montgomery. The remainder of the State's witnesses were wrongfully allowed to testify as to hearing Ms. Montgomery incriminate LaCory at the scene of the accident. Witness Sherry Green saw the accident occur but could not testify that LaCory jerked the steering wheel. Witnesses Missy Hayes, Jeffrey Stallworth, Tonya Chambers, and Jackie Watson arrived after the accident occurred. None of them saw what happened in the vehicle prior to the accident. After the accident, Montgomery told these bystanders that the Appellant grabbed the steering wheel causing her to lose control of the car. At trial, during the bystanders' testimony, the court properly ruled that the statements were hearsay. (T.R. at 126, 132, 135). However, the trial court abused its discretion by allowing the hearsay statements into evidence as an "excited utterance." ***Id***. When Montgomery made the statements, she was no longer under the stress of the car accident, but was preoccupied with escaping responsibility for her actions. The fact that LaCory left the scene of the accident and the severity of Montgomery's

daughter's injuries were *"intervening matters"* which took this excited utterance out of the exception and made it inadmissible hearsay. The inadmissable hearsay improperly bolstered Montgomery's testimony and credibility with the jury, while at the same time, causing unfair prejudice to and bias against the Appellant.

A. Montgomery's Statements to the Bystanders at the Scene of the Car Accident Were Hearsay Statements

Rule 801(c) of the Mississippi Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ***MRE 801(c).*** "Hearsay is not admissible, except as provided by law." ***Hercules Inc. v Walters***, 434 So.2d 773, 726-27 (Miss. 1983). The rationale for the exclusion of hearsay evidence is that it is generally unreliable and untrustworthy. ***Id.*** The bystanders testimony about Montgomery's statement at the scene of the accident was correctly identified by the trial court as hearsay. (T.R. at 126, 132, 135). The bystanders testimony included an out-of-court statement made by Montgomery at the scene of the accident that was offered to prove that the Appellant grabbed the steering wheel. ***Id.*** The bystanders did not have any reason or motive to lie about what Montgomery said at the scene of the accident, however, they did not personally witness what she stated happened. e Montgomery absolutely had a reason to fabricate such a self-serving statement. Shortly after the accident, even before she had a chance to get out of the car, Montgomery quickly realized that as a result of her careless conduct, her daughter had

suffered severe injuries in the accident. (T.R. at 101). In an attempt to absolve herself of the life-long shame and guilt of causing her daughter's trauma, she quickly invented a story blaming the Appellant for the accident. Montgomery's self-serving statements to the bystanders illustrate why out-of-court statements are generally regarded as untrustworthy, unreliable, and, therefore, inadmissible evidence .

B. The Bystanders' Hearsay Statements Should not Have Been Admitted Through the "Excited Utterance" Exception

Mississippi Rules of Evidence provides exceptions for the exclusion of hearsay statements which are reliable and trustworthy. ***Miss. R. Evid. 803.*** An excited utterance is one of the specific categories of hearsay statements that can be considered trustworthy under the proper circumstances, thus they may be admissible. ***Miss. R. Evid. 803(2).*** An excited utterance is a statement "that relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ***Id.*** The rationale for the excited utterance exception is that certain "circumstances may create such an excited condition that the capacity for reflection is temporarily impeded and that statements uttered in that condition are thus free of conscious fabrication." ***Cox v. State,*** 849 So. 2d 1257, 1269 (Miss. 2003).

When determining whether a statement is an excited utterance, the Mississippi Supreme Court has held that spontaneity is the "essential ingredient" into the inquiry. ***Davis v. State,*** 611 So. 2d 906, 913-14 (Miss. 1992) (quoting ***Miss. R. Evid. 803(2),*** Official Comment). For a statement to be spontaneous, "it is important there has been

no intervening matter to eliminate the [declarant's] state of excitement and call into question the reliability of the utterance." ***Berry v. State***, 611 So. 2d 924, 926 (Miss. 1992). There is no precise rule regarding the length of time that must exist between the exited event and the declarant's statement. ***Cox***, 849 So. 2d at 1269. The most important issue is the duration of the excited state. ***Id.*** Some people will stay in a state of excitement longer than others, thus the duration of the excited state will vary greatly depending on the circumstances of each case. ***Id.***

In ***Owens v. State,*** the Mississippi Supreme Court held that the declarant's statement to the police that he been forced to jump out of a moving car by the appellant an hour after the event was not admissible as an excited utterance. ***Owens v. State,*** 716 So. 2d 534, 535 (Miss. 1998). The appellate court further held that the statements were not truly spontaneous, but were the result of conscious reflection. ***Id.*** at 536. At the trial of Owens, a police officer testified regarding the declarant's emotional state. ***Id.*** The officer described the declarant's demeanor as "upset", "angry", "pissed off", "very mad", and "ready to talk". ***Id.*** The Court found that the declarant's capacity for reflection was not impeded by the stress of the event. ***Id.*** Instead, the declarant was angry and upset about being forced out of a moving car. ***Id.*** Consequently, the appellate court found that the declarant's statement regarding the alleged event was not spontaneous and therefore, not free from the dangers of conscious fabrication and self-interest. ***Id.***

In contrast to *Owens*, the appellate court, in ***Carter v. State*** held that a declarant's statement, that his sister had just shot his wife, which was made during a 911 call and then to a police officer only moments later was admissible hearsay under the excited utterance exception. ***Carter v. State,*** 722 So. 2d 1258, 1260, 1261 (Miss. 1998). The court held that the key question was whether "the [declarant] was still in an excited state when he made the statements." ***Id.*** at 1261. Unlike in ***Owens***, the court held that the declarant in ***Carter***, made the statement during the 911 call and then to the first police officer on the scene. ***Id.*** Moreover, the police officer testified that the declarant was still in an excited state. ***Id.*** Because of the short of amount time between the events and the statement and the absence of a "intervening matter" to impede the declarant's state of excitement, the Court held that the "statement was spontaneous enough to fall under the excited utterance exception." ***Id.***

The case at bar is more analogous to ***Owens,*** rather than ***Carter.*** Montgomery's vehicle had time to come to a rest, Montgomery had time to get up and move around. The witnesses who arrived after the accident had time to stop their respective vehicles, remove their seat belts, exit their vehicles, and make their way down the overpass to Montgomery's location. Montgomery's capacity for reflection was not impeded by the stress of the car accident. Instead, she was angry and upset at the Appellant for calling another woman on her phone. (T. R. at 227). For Montgomery's statement to the bystanders to be completely spontaneous, she had to

be more than just "upset" and "angry," and dominated by the stress of the event in such a fashion to remove all possibility of reflection. ***Owens***, 722 So. 2d at 1261. Phrased more precisely, "the circumstances must show that it was the event speaking through the person and not the person speaking through the event." ***First S.W. Lloyds Ins. Co. v. MacDowell***, 769 S.W. 2d 954, 959 (Tex App. 1989).

The circumstances in the instant case do not conclusively show that the event was speaking through Montgomery, instead of her speaking through the event. It is undisputed that there was a short lapse of time between the event and the statements. (T.R. at 126, 132, 135). However, the appellate court precisely held in *Carter* that the real issue is the declarant's *state of mind* when she made the statement to the bystanders. ***Carter,*** 722 So. 2d at 1260. According to the court's reasoning, the question in the instant case, becomes whether Montgomery was "smart" enough, in the short period of time from the accident and the hearsay statement, to concoct a self-serving story absolving her self of responsibility and blame the Appellant for her actions. Montgomery was capable of concocting such a self-serving story and that is exactly what she did. She was angry that Cory had made a phone call to another woman in her presence, she was angry that Cory left the scene, and she was guilt ridden about causing the accident and injuries to her child.

Montgomery testified that the **first** thing she noticed after the accident was the Appellant leaving the scene. (T.R. at 101). Next, she testified that she realized that

her daughter's leg had been severed. (T.R. at 101). These two observations were the *two* "intervening matters" that interrupted Montgomery's state of excitement regarding the car accident. Like the declarant in ***Owens***, Montgomery's statements regarding the car accident were not spontaneous, but rather the result of conscious fabrication and self-interest. Moreover, the statements are patently unreliable and decisively untrustworthy. As such, the trial court should have held that the hearsay statements were not admissible according to the excited utterance exception.

C. The Trial Judge Abused His Discretion by Admitting the Inadmissible Hearsay Statements That Ultimately Resulted in Prejudice to the Appellant

The trial court abused its discretion by admitting the bystanders' hearsay testimony into evidence. This Court has previously held that it "will only reverse a trial court's decision when an abuse of discretion results in prejudice to the Appellant." ***Austin v. State***, 784 So. 2d 186, 193-94 (Miss. 2001). In ***Edwards v. State*** the appellate court held that the admission of hearsay statements resulted in prejudice to the appellant because of the significant differences between the hearsay statements given by a police officer and the declarants' testimony. ***Edwards v. State***, 736 So. 2d 475, 479 (Miss. 1998). The hearsay statements implied that the declarants saw the Appellant shortly after the shooting. ***Id.*** When in fact, the declarants' testified that they were unsure about the duration of time between the shooting and when they actually saw the Appellant. ***Id.***

In the instant case, the hearsay statements were not significantly different from Montgomery's testimony. However, the hearsay statements improperly bolstered her testimony and, therefore, ultimately resulted in prejudice to the Appellant. Each of the three bystanders testified that Montgomery, while at the scene of the accident, said that the Appellant grabbed the steering wheel. (T.R. at 126, 132, 135). Nevertheless, the only two true witnesses regarding the details of the car accident were Montgomery and the Appellant. The inclusion of the bystanders' hearsay statements improperly made Montgomery's version of the story more believable than the Appellant's.

In the eyes of the jury, the bystanders were neutral witnesses who had no reason to lie regarding what they saw and heard at the scene of the accident. However, as discussed earlier, Montgomery had a motive to fabricate a story to absolve herself of responsibility of the car accident that severely injured her daughter. And because of Montgomery's self-serving interest, her statements to the bystanders should not have been admissible. The jury should have been required to base its decision only upon the accounts of Montgomery and LaCory Harris. Because the jury perceived Montgomery's testimony to be more credible as a result of the hearsay statements, the Appellant was prejudiced and denied his right to a fair and unbiased trial. Therefore, this Court should reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits

of the case.

ISSUE THREE:

TRIAL COUNSEL PREJUDICED THE DEFENDANT THROUGH INEFFECTIVE ASSISTANCE

The standard of review for a claim of ineffective assistance of counsel was set forth by the United States Supreme Court in ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). To bring a successful claim for ineffective assistance of counsel, pursuant to the Court's ruling in *Strickland,* the defendant must prove that his attorney's overall performance was deficient and that this deficiency deprived him of a fair trial. ***Id.*** at 689, see also, ***Moore v. State,*** 676 So. 2d 244, 246 (Miss.1996) (citing, ***Perkins v. State,*** 487 So. 2d 791, 793 (Miss.1986)). We must be mindful of the "strong but rebuttable presumption that an attorney's performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." ***Covington v. State,*** 909 So. 2d 160, 162 (Miss. Ct. App.2005) (quoting ***Stevenson v. State,*** 798 So. 2d 599, 602 (Miss.Ct.App.2001)). To overcome this presumption, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland,*** 466 U.S. at 694, 104 S.Ct. 2052; ***Woodson v. State,*** 845 So. 2d 740, 742 (Miss.Ct.App.2003).

A. DEFENSE COUNSEL FAILED TO SUBPOENA EXONERATING CELL PHONE RECORDS

The Supreme Court of Mississippi has ruled that the failure to subpoena potentially exonerating witnesses can give rise to reversal based upon ineffective assistance. ***Stringer v. State,*** 627 So. 2d 326 (Miss. 1993). Stringer's trial counsel failed to subpoena several witnesses that may have proven his defense in a constructive drug possession case. The supreme court reversed his conviction and remanded to the trial court. ***Id. at 330.***

LaCory Harris' entire defense hinged on the fact that the accident occurred because he made a phone call on Montgomery's cell phone to another woman. LaCory claims that when he made the aforementioned call, Ms. Montgomery snatched for the phone, causing her to lose of control of the vehicle. (T.R. at 227). An allegation of ineffective assistance of counsel based on the failure to properly prepare must state how any additional investigation, such as interviewing witnesses or investigating facts, would have significantly aided the defense during the course of the trial. ***Brown v. State,*** 798 So. 2d 481, 495 (Miss.2001). Montgomery's phone records would have clearly established the placing of the call in question adding great weight to LaCory's testimony and absolutely contradicting Montgomery's version of events. Trial counsel admittedly made no effort to obtain the phone records and stated they had never seen them during closing arguments. (R.E. at 56) (T.R. at 285).

A simple subpoena duces tecum, or motion therefore, would have easily procured the proof of the phone call at issue. The Mississippi Courts only require that such a subpoena explain to whom it would be directed and the substance to be proven by the documents. ***Eaton v. State,*** 140 So. 729 (Miss. 1932); ***Stevens v. Locke,*** 125 So. 529 (Miss. 1930). Based upon the foregoing, there is a reasonable probability that but for trial counsel's failure to procure the phone calls, the outcome of LaCory Harris' trial would have been different.

B. TRIAL COUNSEL FAILED TO OBJECT TO DAMAGING LEADING QUESTIONS DURING THE DIRECT EXAMINATION OF SHANTANNER MONTGOMERY, IN THE ALTERNATIVE THE COURT COMMITTED PLAIN ERROR BY ALLOWING CONSISTENT LEADING QUESTIONS

The use of leading questions on direct examination is generally prohibited on direct examination by Rule 611(c) of the Mississippi Rules of Evidence. ***Miss. R. Evid. 611(c).*** The comment to Rule 611(c) states, "[l]eading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case." ***Miss. R. Evid. Rule 611(c),* comment.** The Mississippi Court of Appeals has further ruled that allowing the use of leading questions that are not inconsiderable and speculative is reversible error. ***McDavid v. State,*** 594 So. 2d 12, 17 (Miss. Ct. App. 1992). At least 50 harmful, leading questions were asked by the Assistant District Attorney during Montgomery's direct without objection.

One only needs to read the questions asked by the prosecution, ignoring the answers, in order to see the case as the prosecution wanted the jury to see it. This is improper. The following is a chronological listing of the improper leading questions asked during the direct examination of Montgomery:

Q: Did you perceive that as a threat? (T.R. at 98, line 1)

Q: Did you have a new man in your life at this time? (T.R. at 98, line 6)

Q: Now prior to this morning and you said that you had moved on, did you have any reason to believe that he had moved on? Did he have any other girlfriends that he was seeing that you knew about? (T.R. at 98, lines 1-4)

Q: Did you ever attempt to run him off the road? (T.R. at 100, line 17)

Q: Have you ever threatened him? (T.R. at 100, line 19)

Q: Did you depend on him for support? (T.R. at 101, line 3)

Q: Was it a great financial blow to your budget when you broke up with him? (T.R. at 101, line 5)

Q: Was there bleeding? (T.R. at 103, line 15)

Q: Can you show the jury her leg and if you would I think you said her foot was dangling? (T.R. at 103, lines 17-18)

Q: Were you upset? (T.R.at 104, line 2)

Q: Were you frieghtened? (T.R.at 104, line 4)

Q: You stated that Mr. Harris said that he was going to hurt you in the worst way he could? (T.R. at 104, lines 13-14)

Q: Did he accomplish what he wanted to do? (T.R. at 104, line 19)

Q: At any time while you were riding up the highway did the Defendant ask you to use the cell phone? (T.R. at 104, line 21)

Q: At any time did he use a cell phone and call one of his other women? (T.R. at 104, lines 24-25)

Q: Did the car wreck happen exactly the way you just told us it happened? (T.R. at 104 lines 27-28)

Q: After the car stopped rolling down the hill, did he jump out of the car and run? (T.R. at 105, line 1)

Q: Did he ever come back to try to help you? (T.R.at 105, line 4)

Q: Did he call 911? (T.R. at 105, line 6)

Q: Has he ever even called and asked how you and your daughter are doing? (T.R. at 105, lines 8-9)

Q: And is this the man that snatched the steering wheel of your car and caused the wreck on September 16th 2001? (T.R.at 106, lines 1-3)

Q: No doubt in your mind about that? (T.R. at 106, line 5)

Q: Ms. Montgomery, after the wreck happened did you go to the emergency room? (T.R. at 118, line 26)

Q: Did they give you medicine? (T.R. at 118, line 29

Q: Were you in pain? (T.R. at 119, line 2)

Q: And were you still in pain a couple of days later when the police talked to you? (T.R. at 119, lines 4-5)

Q: Did they give you medicine for the pain? (T.R. at 119, line 8)

Q: Two or three days later when officer Smith spoke with you were you still in pain? (T.R. at 119, line 10)

Q: Is it possible that had something to do wit why you don't remember what al you said? (T.R.at 119, lines 13-14)

Q: And I think you testified earlier that you were in severe pain for about a week after the accident? (T.R. at. 120, line 15)

Q: Now on September 28th, '01 had your pain subsided somewhat? (T.R. at 120, line 18)

Q: Were you off of the narcotics and drugs they were giving you for pain? (T.R. at 120, line 21)

Q: Was your mind clear at that time? (T.R. at 120, line 24)

Q: After you read over that statement, does it contain what really happened on that day? (T.R.at 121, line 18)

Q: Is it what you just told the jury? (T.R. at 121, line 21)

Q: Did LaCory Harris play patty cake with your child prior to him snatching the steering wheel? (T.R. at 121, line 23)

Q: And is that what happened? (T.R. at 121, line 26)

Q: Did he snatch the steering wheel? (T.R.at 121, line 28)

Q: Was there anything dealing with a phone call to a girlfriend? (T.R. at 122, line 1)

Q: He was over there trying to make up with you wasn't he? (T.R. at 122, line 4)

Q: He wanted you back? (T.R. at 122, line 7)

Q: You had a good job? (T.R. at 122, line 9)

Q: He didn't have one did he? (T.R. at 122, line 11)

Q: He didn't have a job? (T.R.at. 122, line 13)

Q: He wanted to make up with you correct? (T.R. at 122, line 15)

Q: Would it make any sense for him to call another woman if he's trying to make up with you? (T.R. at 122, lines 17-18)

Q: Is that the first you ever heard of that today? (T.R. at 122, line 20)

Q: Is it ridiculous? (T.R. at 122, line 23)

Q: Did he run like a scalded dog from the car after? (T.R. at 122, line 25) (objected to and sustained)

Q: Did he run? (T.R. at 123, line 1)

Q: Did he hurt you in the worst way like he said he would? (T.R. at 123, line 4)

Q: Is everything you've told the jury the truth? (T.R. at. 123, line 7)

See also (R.E. at 28-55).

As detailed, *supra,* substantially the entire line of questioning on Montgomery's direct examination consisted of improper leading questions that unfairly elicited the exact response desired by the State. There was only one objection by the defense. (T.R. at 122, line 27) This Court should reverse and remand based upon counsel's failure to object. In the alternative, this Court should find that the trial court committed plain error by allowing the consistent leading questions. This Court is authorized to invoke the plain error rule where contemporaneous objection was not made to leading questions and it is shown that the defendant's substantive rights have been affected. ***Morgan v. State,*** 793 So. 2d 615, 616 (Miss. Ct. App. 2001). The only witness in this case to allege that LaCory Harris had the intent to cause bodily injury was Montgomery. The jury based its decision to convict upon her leading testimony, along with the inadmissible hearsay, the prejudicial sight of an injured child, and LaCory's tainted past. LaCory's right to a fair trial was destroyed by the leading questions allowed by the court. Montgomery's testimony was improperly colored by the State and has caused patent, substantial, and adverse impact on the integrity of LaCory's trial.

While ***Morgan*** did not find plain error, it is distinguishable from the case at hand. ***Id.*** In ***Morgan***, the direct examination of an officer was found to have only a

few leading questions that were foundational and not prejudicial. ***Id.*** The direct examination of Montgomery contains at least 50 harmful leading questions directed at the elements of the crime of aggravated assault. ***Morgan*** further cites the extensive amount of other evidence supporting a conviction. ***Id.*** In the case at bar, the only evidence, and it is suspect, of the alleged crime comes from Montgomery's own mouth. LaCory Harris was denied his fundamental right to a fair trial and requests that this Court reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits of the case.

ISSUE FOUR:

THE TRIAL COURT ERRED BY REFUSING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL WHEN THE VERDICT OF THE JURY WAS CLEARLY AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The Appellate Courts of our state are authorized to sit as a hypothetical "thirteenth juror" and to weigh the evidence in the light most favorable to the verdict. ***Conley v. State,*** 948 So. 2d 462 (Miss. Ct. App. 2007). While sitting in this position, should the appellate court disagree with the verdict of the jury, the proper remedy is to grant a new trial. ***Id.*** LaCory's case is one where the jury was so inflamed by bias and prejudice that they were ready to convict the Appellant from the beginning of trial. After a tragic car accident, a jilted woman fabricated a story to blame her

misfortune on her unfaithful lover. Her uncorroborated, self-serving story led to the indictment of LaCory Harris for aggravated assault. When LaCory was put on trial, the jury only needed to hear the following three otherwise inconsequential bits of information: there was a severely injured infant; LaCory was a womanizing, ex-convict; and LaCory left the scene of the accident. On those inadmissible facts alone and without regard to whether LaCory actually used the car as a weapon, the jury found LaCory Harris was guilty beyond a reasonable doubt. The uncorroborated testimony against LaCory was inherently implausible and against the greater weight of the credible evidence.

A. The Inferences Drawn by the Jury were Unreasonable and against the Weight of the Evidence.

When reviewing a challenge to the weight of the evidence, the standard of review is abuse of discretion. ***Howell v. State***, 860 So. 2d 704, 764 (Miss. 2003). In determining if the trial judge abused his or her discretion, the Appellate Court should weigh "the evidence in the light most favorable to the prosecution" and grant "all reasonable inferences" in favor of the jury verdict. ***Dilworth v. State,*** 909 So. 2d 731, 736 (Miss. 2005). Although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise when "from the whole circumstances, the_testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind." ***Thomas v. State,*** 129 Miss. 332, 92 So. 225, 226

(1922). When the evidence and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable [people] could not have found beyond a reasonable doubt that the defendant was guilty," the appellate court should reverse and render the jury verdict. ***Edwards v. State,*** 469 So. 2d 68, 70 (Miss. 1985). Accordingly, the court should determine the inferences drawn by the jury; determine if the inferences are reasonable; and ensure that the jury did not abandon its duty by basing its determination of fact on some alternate, and impermissible, basis such as bias, passion or prejudice. ***Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co.,*** 920 So. 2d 422 (Miss. 2006).

In ***Mister v. State,*** the Mississippi Supreme Court held that the evidence was inherently unreliable and that the verdict was against the weight of the evidence. ***Mister v. State,*** 190 So. 2d 869,871 (Miss. 1966). Mr. Mister was convicted of arson based on the uncorroborated testimony of one witness, Robinson. ***Id. at 869.*** Robinson testified that as he and Mister were driving home, Mister decided to burn the house and told Robinson to "step aside." ***Id. at 869.*** Mister denied any guilt and argued there was no physical evidence that he started the fire. ***Id. at 870.*** The court found that Robinson's testimony was inherently unreliable because of self interest and because of the lack of evidentiary support. ***Id. at 871.*** Although the witness was not an accomplis and was not charged, the witness had a "manifest" interest in absolving himself of moral blame for the incident. ***Id.*** Furthermore, there was no evidence of

Mister starting the fire and Robinson admitted that Mister had no materials to start the fire. ***Id.*** Accordingly, the verdict of the jury was reversed and a second jury was allowed to pass on the case. ***Id.***

In the case at hand, the jury heard conflicting testimony about the accident. Shantanner Montgomery testified that she knew LaCory was cheating on her and that she told LaCory she was going to leave him. (T.R. at 98). Montgomery claimed that LaCory was playing "patty-cake" with Montgomery's child, who was sitting unrestrained in the backseat of the car, when supposedly he suddenly said, "I am going to hurt you in the worst way" and, according to her testimony, grabbed the steering wheel, causing the accident. (T.R. at 102). LaCory , on the other hand, testified that he told Montgomery that he was going to leave her for another woman. (T.R. at 224-225). As she was driving him home, he called this other woman on his cell phone. (T.R. at 227). Montgomery got upset and tried to grab the phone, causing her to lose control of the car. (T.R. at 227).

Like Robinson in ***Mister***, Montgomery had a manifest interest in avoiding moral blame for the accident. There was also no physical evidence to support either version of these events. Without the improperly allowed hearsay testimony, the injured child, and the evidence of LaCory 's tainted history, LaCory 's version of events is much more logical, plausible, and probable than Montgomery's.

B. The Testimony of Montgomery was Biased, not Credible, and Given Undue Weight because of the Extraneous and Improper Evidence Allowed.

Montgomery's testimony is unbelievable and, therefore, unreliable for several reasons. First, her testimony is completely unsupported by any physical evidence or any additional witnesses who could corroborate her story. Second, her testimony is inherently unlikely. Montgomery testified that LaCory went from playing "patty-cake" with a child into a fit of jealous rage, so powerful that he was willing to risk killing himself in his alleged attempt to hurt her. LaCory is a self-admitted womanizer with a non-violent criminal past. It is highly unlikely that such an individual would be so enraged by one of his women supposedly leaving him that he would be willing to die over it. Third, Montgomery's testimony is not credible. Montgomery's credibility is undermined by her bias and interest in the outcome of the case. The jury wholly ignored her lies about properly securing her child in the car seat. Montgomery testified under oath that she had properly restrained her child in the car seat prior to leaving her home. (T.R. at 107). Yet her statements to officers on the scene and at the hospital were that she had not done so. (T.R. at 165, 201).

Although Montgomery was never charged in this incident, she clearly has a moral interest in absolving herself from the guilt of knowing that her poor decisions permanently disfigured and disabled her child. Furthermore, she is biased against LaCory because the personal relationship she enjoyed with him was ending. Either by her then deciding she did not want to be with him or by being disrespected by knowing he was calling another woman on her phone in her car, Montgomery has

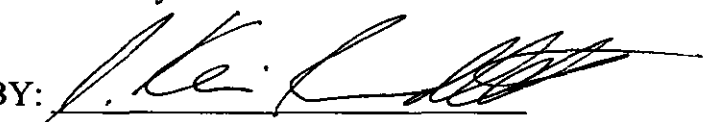
reason to be biased against LaCory . Accordingly, it was not reasonable for the jury to find beyond a reasonable doubt that LaCory was guilty from the minuscule amount of evidence produced by the State at trial.

Finally, the Court should consider the "totality of the circumstances" to look for sources of bias that might lead the jury to make irrational inferences and inflammatory conclusions. In this case, the sources of jury bias were as follows: a severely injured child was displayed to the jury during the entire trial; LaCory was prejudicially depicted as a womanizing, ex-convict; and LaCory left the scene of the accident. These factors so inflamed the passions of the jury and led them to impermissibly and improperly give weight the evidence where none was due. Because of the inherent unreliability of Montgomery's testimony, the clear sources of unfair bias against the Appellant, and the directly contradictory and inconclusive evidence, a jury could not reasonably infer beyond a reasonable doubt that LaCory intended to cause the accident. Accordingly, this Court should reverse and render this case, discharging the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, reverse and remand this case to the Hinds County Circuit Court for a new trial on the merits of the case.

CONCLUSION

The Appellant submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on the charges of aggravated assault, with instructions to the lower court. In the alternative, the Appellant submits that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully Submitted,
LaCory Harris

BY: 
J. Kevin Rundlett

CERTIFICATE OF SERVICE

I, J. Kevin Rundlett, attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 22nd day of March, 2007.

J. Kevin Rundlett, MSBN [redacted]
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