IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANDRE DESHON MIDDLETON — APPELLANT

VS. — NO. 2007-KA-1023-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DESHUN T. MARTIN
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANDRE DESHON MIDDLETON **APPELLANT**

VS. **NO. 2007-KA-1023-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal against a judgment of the Second Judicial District of the Circuit Court of Panola County, Mississippi, in which the Appellant, Andre Deshon Middleton, was convicted and sentenced for the crime of **FELONY CHILD ABUSE**, (Miss. Code Ann. §97-5-39(2) (1972).

STATEMENT OF THE FACTS

On or before October 24, 2005, in Panola County, Mississippi, Andre Deshon Middleton (Middleton) did wilfully, unlawfully and feloniously, knowingly and intentionally abuse or mutilate Irvin Wren, a child with the birth date of May 1, 2005. (R. E. 6). On June 6, 2007, the Appellant was sentenced to 25 years in the Mississippi Department of Corrections for **FELONY CHILD ABUSE**, in violation of Miss. Code Ann. § 97-5-39(2) (1972). (R. E. 29).

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. THOMAS BOULDEN TO TESTIFY THAT THE MECHANISM OF THE INJURY TO IRVIN WREN WAS MOST LIKELY SHAKING.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

II.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. GREGORY STIDHAM TO TESTIFY THAT THE INJURIES SUSTAINED BY IRVIN WREN WERE CHARACTERISTIC OF A SHAKEN BABY.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

III.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. KAREN LARKIN AS AN EXPERT IN THE FIELD OF PEDIATRICS WITH A SPECIALITY IN CHILD ABUSE AND NEGLECT.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

IV.

THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE A JUDGMENT NOT WITHSTANDING THE VERDICT.

Smith v. State, 826 So.2d 768, 770 (Miss. App. 2002) holds that in determining whether a jury verdict is against the overwhelming weight of the evidence, the Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.

THE ARGUMENT

PROPOSITION I.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. THOMAS BOULDEN TO TESTIFY THAT THE MECHANISM OF THE INJURY TO IRVIN WREN WAS MOST LIKELY SHAKING.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Appellant's counsel wrongly asserts that Dr. Thomas Boulden's testimony was opinion testimony. (R. E. 16). (Tr. 114). Dr. Thomas Boulden was properly qualified as an expert in the field of radiology dealing with children. The expert testimony of Dr. Thomas Boulden in below.

Q. Okay. What does that explain to the jury? What does that tell us about Irving Wren and what you found to be wrong with Irving Wren?

A. It says that there's, as I described, the blood inside the head between the hemispheres And on the left, and that the mechanism of that was most likely due to shaking. (Tr. 113).

The expert testimony of Dr. Thomas Boulden was proper.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION II.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. GREGORY STIDHAM TO TESTIFY THAT THE INJURIES SUSTAINED BY IRVIN WREN WERE CHARACTERISTIC OF A SHAKEN BABY.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Appellant's counsel asserts that the basis for the objection to Dr. Gregory Stidham's testimony was that there was no level of acceptance in the scientific and medical community that would meet the requirements of MRE 702. (R. E. 19). Appellant points to the doctor stating that there is differing opinions in the medical community about Shaken Baby Syndrome. (Tr. 88). Dr. Gregory Stidham was properly qualified as an expert in the field of pediatric trauma. (Tr. 88). However, Dr. Gregory Stidham's expert testimony in this case does point to Shaken Baby Syndrome.

> Q. What does that leave us with as the cause of these injuries?
> A. The most common thing, that combined with some subsequent findings, which include hemorrhages in the retina, which is the back part of the eye, the combination of those brain injuries plus the retinal hemorrhages are so characteristic of a shaken baby that – (Tr. 95 - 96).

The analytical framework provided by the modified Daubert standard requires the trial court to perform a two-pronged inquiry in determining whether the expert testimony is admissible under Mississippi Rule of Evidence 702. Under Mississippi Rule of Evidence 702 expert testimony should be admitted only after a two pronged inquiry. First, the witness must be qualified as an expert

because of the knowledge, skill, experience, training, or education he or she possesses. Mississippi Rule of Evidence 702. Second, the witness's scientific, technical, or other specialized knowledge must assist the trier of fact. Watkins v. U-Haul International, Inc., 770 So.2d 970, 973 (Miss. App. 2000), Mooneyham v. State, 915 So.2d 1102 (Miss. App. 2005), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).

The aforementioned two part test was met. It is well reflected in Dr. Gregory Stidham's transcript testimony qualifying him as an expert (Tr. 81 - 91) and in the below testimony.

A. Basically neurologic damage simply means that there was abnormal -- his neurologic exam on the exam of his brain function was not normal; and when I said that he was in a comatose state, specifically he was not opening his eyes, he was not crying, he was -- he would respond to painful stimuli like when you pinched him, he would withdraw, but he did not respond in the normal appropriate way a baby would if his brain were normal.

Q. You told us that the child suffered or had a hematoma; is that right?

A. Yes, sir, subdural hematoma.

Q. What is a subdural hematoma?

A. A subdural hematoma is a -- a hematoma is a fancy word for a clot, and the clot is located in the subdural area over the surface of the brain.

Q. What causes a hematoma?

A. Some sort of an injury that causes bleeding.

Q. You mentioned that the child suffered from brain swelling or a swollen brain; is that right?

A. Yes, sir.

Q. What does that mean?

A. It's another marker for some injury that has taken place to the brain itself. The subdural hematoma would imply that there was an injury probably to blood vessels that supplied the brain or provided drainage of blood from the brain. The swelling of the brain itself would imply that the

entire brain was also somehow injured, presumably by the same insult that caused the hematoma.

Q. Now illness. Is there any proof that illness caused these injuries to Irving Wren?

A. None, none at all.

Q. So we can exclude illness, correct?

A. Yes.

Q. We can exclude car wreck.

A. Yes.

Q. We can exclude baseball bat.

A. Yes.

Q. We can exclude falls from a great height.

A. Yes, sir. (Tr. 94 - 95).

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION III.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. KAREN LARKIN AS AN EXPERT IN THE FIELD OF PEDIATRICS WITH A SPECIALITY IN CHILD ABUSE AND NEGLECT.

Mississippi Rule of Evidence 703. BASES OF OPINION TESTIMONY BY EXPERTS:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Appellant's counsel essentially is maintaining that Dr. Karen Larkin does not meet the Daubert qualifications. (R. E. 23). The State contends this is not the case. Dr. Karen Larkin's qualifications as a properly proffered Daubert expert regarding the field of pediatrics with a subspecialty in abuse and neglect is complete throughout the record. (Tr. 118 - 125).

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION IV.

THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE A JUDGMENT NOT WITHSTANDING THE VERDICT.

Smith v. State, 826 So.2d 768, 770 (Miss. App. 2002) holds that in determining whether a jury verdict is against the overwhelming weight of the evidence, the Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.

The State counters that the jury heard all of the evidence, exhibits and testimony, and the members of the jury believed the evidence produced by the prosecution. The jury verdict should stand.

The correct standard as stated above in Smith, is to take the evidence presented by the prosecution as true together with reasonable inferences. The evidence cited in the record, taken as true together with reasonable inference is more than sufficient evidence in support of the jury's verdict. Furthermore, weight and sufficiency of the evidence will be discussed in detail below.

The applicable standard of review is found in Dilworth v. State, 909 So.2d 731, 741 (Miss. 2005) and Bush v. State, 895 So.2d 836, 843 (Miss. 2005). The standard of review for a post-trial motion is abuse of discretion.

In Carr v. State, 208 So.2d 886,889 (Miss.1968) the court held:

> We stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' However, this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.

Reasonably, matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. "Weight" implicates the denial of a motion for a new trial while "sufficiency" implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. May v. State, 460 So.2d 778, 781 (Miss. 1984).

In other words, the remedy for a defect in "weight" is a new trial while the remedy for a defect in "sufficiency" is final discharge from custody.

Where a defendant has made post-trial motions assailing the sufficiency of the evidence, " . . . the trial court must consider all of the evidence - not just the evidence which supports the State's case - in the light most favorable to the State." Winters v. State, 473 So.2d 452, 459 (Miss. 1985). See also McClain v. State, 625 So.2d 774 (Miss. 1993). This includes the defendant's evidence, if any, which must be construed in a light most favorable to the prosecution's theory of the case.

In judging the legal "sufficiency," as opposed to "weight," of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. Hart v. State, 637 So.2d 1329, 1340 (Miss. 1994); Edwards v. State, 615 So.2d 590, 594 (Miss. 1993); Clemons v. State, 460 So.2d 835, 839 (Miss. 1984); Forbes v. State, 437 So.2d 59, 60 (Miss. 1983); Bullock v. State, 391 So.2d 601, 606 (Miss. 1980); Boyd v. State, 754 So.2d 586 (Miss. App. 2000).

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction or JNOV should be overruled. Brown v. State, 556 So.2d 338 (Miss. 1990); Davis v. State, 530 So.2d 694 (Miss. 1988). As stated

previously, a finding that evidence is insufficient results in a discharge of the defendant. May v. State, 460 So.2d 778, 781 (Miss. 1984).

Put another way, the trial court, and this Court on appeal as well, must accept the State's evidence as true and view it in a light most favorable to the State's theory of the case.

The State counters that the jury heard all of the evidence, exhibits and testimony, and the members of the jury believed the evidence produced by the prosecution. The jury verdict should stand.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

DESHUN T. MARTIN
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

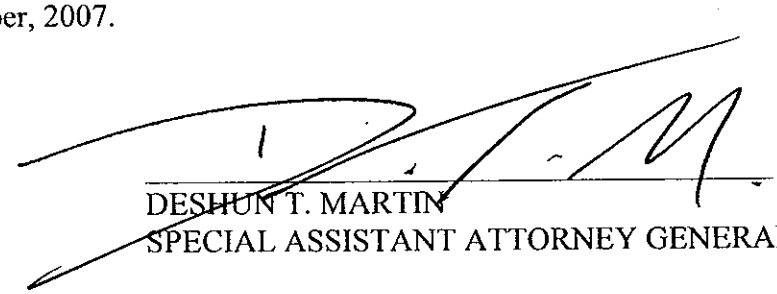
I, Deshun T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew C. Baker
Circuit Court Judge
Post Office Drawer 368
Charleston, MS 38921

Honorable John W. Champion
District Attorney
365 Losher St.
Hernando, MS 38632

David L. Walker, Esquire
Attorney At Law
Panola County Public Defender
Post Office Box 719
Batesville, MS 38606

This the 31st day of October, 2007.



DESHUN T. MARTIN
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680