

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DOUGLAS DUVALL HILL**

**FILED**

**APPELLANT**

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SUPREME COURT  
COURT OF APPEALS**

**VS.**

**NO. 2007-KA-1527**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S PRE-TRIAL MOTION TO SEVER HIS TRIAL FROM THE TRIAL OF THE CO-DEFENDANT.
- II. THE JURY WAS SUFFICIENTLY INSTRUCTED WITH REGARD TO CIRCUMSTANTIAL EVIDENCE.
- III. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL AND FOR ACQUITTAL NOTWITHSTANDING THE VERDICT AS THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT THE DEFENDANT FELONIOUSLY ABUSED THE CHILD IN QUESTION AND AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

## STATEMENT OF THE FACTS

On June 29, 2004, Dr. Stangle, a pediatrician working at Keesler Air Force base, received a call that a nine-week-old baby had been brought in with swelling on his left eye. (Transcript p. 35-36). She was also informed that this baby, Jalen Hill, had thrown up several times and was experiencing a drop in his heart rate. (Transcript p. 36). Upon examination, Dr. Stangle noticed swelling around his eye, on his scalp, on the back of his head, and on his cheek as well as bruising on his back and lower buttocks. (Transcript p. 37 and 39). She notified child protective services and ordered a CT scan. (Transcript p. 39 - 40). The results of the CT scan indicated that there had been a fairly recent injury to the infant's head. (Transcript p. 40). Dr. Stangle contacted a neurologist and admitted Jalen to ICU because it was her opinion that the injury was life threatening. (Transcript p. 41). Dr. Stangle also noted that Jalen's liver enzymes were elevated which indicated that there was also an injury to the liver. (Transcript p. 42). X-rays were taken which indicated that Jalen had an old rib fracture, two new fractures on his leg, and one old fracture on his leg. (Transcript p. 44).

At trial, when questioned about the nature of these injuries, Dr. Stangle testified that it was her opinion that Jalen had been intentionally harmed or injured. (Transcript p. 55 and 57). She also testified that Jalen could not have injured himself and there was no medical condition which could have caused the injuries. (Transcript p. 55).

Dr. Stangle further testified that she asked the parents how these injuries occurred. (Transcript p. 37). Jalen's father, the Defendant Douglas Hill, told her that he did not know how any of the injuries occurred. (Transcript p. 38). Jalen's mother, Danita Hill, told the doctor that Jalen was not like that when she left that morning for work. (Transcript p. 39). The parents indicated that Jalen was not in day care and that there were no other adults or children in their house. (Transcript p. 42). Mr. and Ms. Hill could offer Dr. Stangle no explanation for Jalen's extensive injuries.

(Transcript p. 56).

Because of the nature of the injuries, an investigation was conducted. At the conclusion of the investigation, both Mr. Hill and Ms. Hill were arrested and charged with felony child abuse. The two were tried together and both convicted of felony child abuse. They were each sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

### **SUMMARY OF THE ARGUMENT**

The trial court acted within its discretion in denying Mr. Hill's pre-trial motion to sever his trial from the trial of the co-defendant as there was no indication that the co-defendant intended to attempt to exculpate herself at the expense of Mr. Hill and as there was no indication that the balance of the evidence tended to go more to the guilt of Ms. Hill than toward his guilt or vice versa. Moreover, Mr. Hill is procedurally barred from arguing that any testimony at trial evidenced that the trial judge should have granted the motion to sever. The trial court clearly stated at the hearing on Mr. Hill's motion that Mr. Hill could renew his motion to sever during the trial if Ms. Hill testified in a way that evidenced that she was attempting to exonerate herself at his expense. However, Mr. Hill not only failed to renew his motion to sever, but also, failed to raise the issue in his motion for new trial. Procedural bar notwithstanding, Mr. Hill was not entitled to have his trial severed from Ms. Hill's trial as Ms. Hill's testimony was not an attempt to exonerate herself at the expense of Mr. Hill and as the balance of the evidence did not go more to the guilt of one defendant than the other.

The jury was sufficiently instructed regarding circumstantial evidence. Moreover, there is sufficient evidence to support the verdict and the verdict is not against the overwhelming weight of the evidence.

## ARGUMENT

### I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S PRE-TRIAL MOTION TO SEVER HIS TRIAL FROM THE TRIAL OF THE CO-DEFENDANT.

Defendants jointly indicted are not entitled to separate trials as a matter of right. *Sanders v. State*, 942 So.2d 156, 158 (Miss. 2006) (citing *Price v. State*, 336 So.2d 1311, 1312 (Miss. 1985)) (*emphasis added*). Pursuant to Uniform Rule of Circuit and County Court 9.03, the granting or refusing of severance in cases not involving the death penalty is within the discretion of the trial court. *Id.* (*emphasis added*). “The decision whether to grant a severance depends on whether the severance is necessary to promote a fair determination of the defendant’s guilt or innocence.” *Id.* (quoting *Carter v. State*, 799 So.2d 40, 44 (Miss. 2001)). With these standards in mind, Mr. Hill places the following question before the court in his brief: “whether it is proper for a trial judge to deny severance of a trial when one of the co-defendants has given a statement indirectly implicating the other co-defendant as the perpetrator of the crime charged.” (Appellant’s Brief p. 10).

There are two factors that should be considered by a trial court when determining whether or not to sever a trial: “(1) whether the testimony of one co-defendant tends to exculpate that defendant at the expense of the other, and (2) whether the balance of the evidence tends to go more to the guilt of one defendant than the other.” *Sanders v. State*, 942 So.2d 156, 158 (Miss. 2006) (citing *Duckworth v. State*, 477 So.2d 935, 937 (Miss. 1985)). In Mr. Hill’s motion to sever, he merely asserts that he “would be severely prejudiced in appearing at a trial of this cause with the co-defendants due to the quality and lack of evidence which the State has against Defendant Douglas Duvall Hill, compared to the great weight of evidence which the State has against his co-defendant.” (Record p. 34). This motion did not assert that Ms. Hill’s statement was an attempt to exculpate herself at his expense. Moreover, at the hearing on the matter, the trial judge specifically asked

whether “either of the defendants [gave] statements which were exculpatory of their own actions and inculpatory of the co-defendant’s.” (Transcript p. 3). After getting a vague response from Mr. Hill’s counsel, the trial judge asked the following “in [Ms. Hill’s] first statement or in her second, for that matter, did she at any time say Mr. Hill abused the child?” (Transcript p. 4). To which Mr. Hill’s counsel replied, “No, your honor.” (Transcript p. 4). Later Mr. Hill’s counsel admits that “this motion might be premature as far as if we were in trial and the issue came up.” (Transcript p. 6). The State briefly discussed the evidence it had against each defendant and the trial judge denied the motion at that time but indicated that Mr. Hill could renew the motion during trial if there was any indication that Ms. Hill began to attempt to exculpate herself at the expense of Mr. Hill.

As such, the record is clear that Mr. Hill did not even allege in his motion to sever or at the hearing on the motion that Ms. Hill was attempting to exonerate herself by pointing the finger at him. Thus, the first factor to be considered by the court weighed in favor of denying the motion to sever. Also, while Mr. Hill did allege in his motion that the balance of the evidence tended to go more to the guilt of Ms. Hill than toward his guilt, there was nothing presented at the hearing to indicate that his allegation was correct. Thus, the second factor also weighed in favor of denying the motion to sever. Therefore, the trial judge acted within his discretion in denying Mr. Hill’s pre-trial motion to sever.

Furthermore, Mr. Hill is procedurally barred from arguing that the testimony at trial evidenced that the trial judge should have granted the motion to sever as the trial court clearly stated at the hearing on Mr. Hill’s motion to sever that Mr. Hill could renew his motion to sever during the trial if he saw fit. The Court specifically held as follows:

Absent the type of statements we’ve been describing, I’m going to deny the motion for severance. If, during the course of the testimony at trial, something of that nature presents itself, I’ll allow you to - - where she attempts to exonerate herself and point



the finger at Mr. Hill, I'll allow you to renew that motion, and we'll visit it at that time.

(Transcript p. 10). At no point during the trial did Mr. Hill renew his motion to sever even though the trial court expressly told him to renew the motion if Ms. Hill's testimony pointed the finger at him. The arguments made by Mr. Hill on appeal that Ms. Hill changed her story during trial and "indirectly" implicated that Mr. Hill abused Jalen should not be considered by this Honorable Court as they were never raised before the trial court. *See Smith v. State*, 724 So.2d 280, 319 (Miss.1998) (holding that "a trial judge will not be found in error on a matter not presented to him for decision"). The trial judge specifically stated that if Mr. Hill felt that Ms. Hill was attempting to exonerate herself by pointing the finger at Mr. Hill, then he should renew the motion. At trial, Mr. Hill clearly did not believe that Ms. Hill was attempting to exonerate herself at his expense as he never renewed the motion. Additionally, Mr. Hill clearly did not believe that Ms. Hill attempted to exonerate herself at his expense in retrospect either as the matter was not raised in his motion for new trial. *See Beckum v. State*, 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial) and *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial). Accordingly, Mr. Hill should be procedurally barred from raising the issue on appeal.

Procedural bar notwithstanding, Mr. Hill was not entitled to have his trial severed from Ms. Hill's trial. Even considering the arguments made by Mr. Hill on appeal regarding Ms. Hill's testimony at trial, the trial should not have been severed. First, Ms. Hill's testimony did not evidence an attempt to exonerate herself at the expense of Mr. Hill. At no point during the trial did Ms. Hill

even allude to the fact that Mr. Hill was the one who abused Jalen much less outright state that Mr. Hill was Jalen's abuser. The Mississippi Supreme Court has previously noted that "joint trials that tend to violate [the first] factor tend to involve co-defendants with inconsistent defenses." *Sanders v. State*, 942 So.2d 156, 160 (Miss. 2006). In the case at hand, there were not inconsistent defenses. Mr. Hill's defense was basically - I don't know how it happened, I didn't do it, maybe he sustained that injury when he fell from the bouncy seat or from the high chair. (Transcript p. 169 - 204). Ms. Hill's defense was basically: - I don't know how it happened, I would never abuse my child, the injury must be the result of my accidentally hitting his head on the crib, I know I previously said that I hit him, but that was a lie, I don't know how it happened. (Transcript p. 142 - 168). Neither defendant pointed the finger at the other. The Hills, just as the defendants in *Sanders v. State*, both testified on their own behalf and both attempted to establish only that they did not abuse their nine-week-old son. 942 So.2d at 160.

Mr. Hill argues that Ms. Hill's testimony was "blame-shifting" as in *Payton v. State*, 785 So.2d 267 (Miss. 1999). (Appellant's Brief p. 13). However, the State contends that not only was there no overt attempt by Ms. Hill to shift the blame to her husband but there was also no blame shifting whatsoever. She never insinuated that Mr. Hill had anything to do with the injuries suffered by Jalen. For instance, when asked how the injuries to his backside occurred she stated: "I don't know how this happened. But I know I would never intentionally hurt my child." (Transcript p. 161). With regard to the bruise on his neck she stated: "I don't know how this injury got here either." (Transcript p. 162). When asked about the leg injuries, she suggested that maybe it was from when she pushed his legs up and down when he was constipated (Transcript p. 163) and with regard to the liver damage she simply stated: "I have no explanation for that." (Transcript p. 164). She does mention that she hit her son's head against the crib and that her husband told her that he

fell from the bouncy seat. (Transcript p.162 and 164). None of these explanations in any way implicate Mr. Hill in feloniously abusing their son. Additionally, the Supreme Court noted that *Payton* was the only case where the Court “found that mere blame-shifting, rather than a defendant’s attempt to fully exculpate himself at his co-defendant’s expense, necessitated severance.” *Sanders*, 942 So.2d at 160. The *Sanders* Court went on to note that in *Payton* there were inconsistent defenses and there was prejudice which was evidenced in the disparity in sentencing verdicts. *Id.* The Hill’s case differs in that the defenses were basically the same, there was no prejudice, and both Mr. and Ms. Hill received the same sentences.

Second, the balance of the evidence did not go more to the guilt of one defendant than the other. While Ms. Hill, at one point, certainly admitted to striking the infant, which she later recanted, and Mr. Hill never confessed to abusing the child, there was sufficient evidence that Mr. Hill abused his son, as set forth in detail below, including but not limited to the testimony of the neighbor. Much of the same evidence can be used to illustrate both defendant’s guilt, including but not limited to, the testimony of the doctors regarding the nature of the injuries, the fact that both parents were the only people Jalen came in contact with near the time of the injuries. However, there is independent evidence establishing each parents’ guilt. Ms. Hill admitted to striking the child out of frustration (Exhibit 8) and a neighbor testified that he heard a male voice say “shut up” and then heard a smack after which he heard the baby cry as if he were in pain. (Transcript p. 136 - 137).

Further, a strong case that Mr. Hill did abuse Jalen was established at trial even if Ms. Hill had never testified. There was considerable evidence of Mr. Hill’s guilt, as set forth in detail below, without Ms. Hill’s testimony. This Court has previously held that “unless one can show actual prejudice, a trial court cannot be found to have abused its discretion.” *Collins v. State*, 817 So.2d 644, 659 (Miss. Ct. App. 2002).

As such, the trial of Mr. Hill should not have been severed from the trial of Ms. Hill. Therefore, Mr. Hill's first issue is without merit.

## **II. THE JURY WAS SUFFICIENTLY INSTRUCTED WITH REGARD TO CIRCUMSTANTIAL EVIDENCE.**

Mr. Hill also argues that the jury was not properly instructed with regard to the circumstantial nature of the evidence against Mr. Hill. (Appellant's Brief p. 17). However, the Mississippi Supreme Court recently held that "in determining whether error exists in granting or refusing jury instructions, the instructions must be read as a whole; if the instructions fairly announce the law and create no injustice, no reversible error will be found." *Jones v. State*, 962 So.2d 1263, 1272 (Miss. 2007) (quoting *Martin v. State*, 854 So.2d 1004, 1009 (Miss. 2003)) (*emphasis added*). Accordingly, the jury in the Hill's case was instructed as follows with regard to the case against Mr. Hill:

### **INSTRUCTION S-2**

DOUGLAS DUVALL HILL has been charged with the offense of Felony Child Abuse.

If you find from the evidence in this case, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, that:

1. DOUGLAS DUVALL HILL, on or about June 29, 2004, in the Second Judicial District of Harrison County, Mississippi,
2. did willfully, unlawfully, feloniously, and intentionally whip, strike or otherwise abuse or mutilate Jalen J. Hill, a child of the age of nine (9) weeks at the time in question, in such a manner as to cause serious bodily harm, to-wit: by causing destruction to the body, multiple broken bones and multiple intracranial hemorrhaging of the said Jalen J. Hill,

then you shall find the defendant guilty of Felony Child Abuse.

If the State failed to prove any one or more of these elements beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty of Felony Child Abuse.

(Record p. 54) (*emphasis added*).

#### INSTRUCTION D-4

The Court instructs the jury that because this case is based on circumstantial evidence, the burden of proof is greater than the burden of proof beyond a reasonable doubt. In order to find the Defendant, Douglas Duvall Hill, guilty of felony child abuse in this case, you must find the State has proven that the Defendant, committed each and every element of the crime of felony child abuse beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with the innocence of the defendant.

(Record p. 57) (*emphasis added*). The jury was further instructed that “the presumption of innocence attends the Defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of his/her guilt beyond a reasonable doubt. The defendant is not required to prove his/her innocence.” (Record p. 47). The jury was also instructed that “a reasonable doubt may arise from the whole of the evidence, the conflict of the evidence, the lack of evidence, or the insufficiency of the evidence; but however it arises, if it arises, it is your sworn duty to find DOUGLAS DUVALL HILL ‘not guilty.’” (Record p. 56).

Accordingly, as in *Boone v. State*, the jury was properly instructed even though “no per-se ‘two-theory’ instruction was given.” 964 So.2d 512 (Miss. Ct. App. 2006). Moreover, just as the jury in *Jones v. State*, Mr. Hill’s jury was instructed that Mr. Hill “was presumed innocent (*See* Record p. 47), and every reasonable hypothesis other than that of guilt must be excluded in order to find [the defendant] guilty (*See* Record p. 54, 56, and 57).” 962 So.2d 1263, 1272 (Miss. 2007). Mississippi law states that jurors are presumed to have followed the instructions of the court. *See Long v. State*, 934 So.2d 313, 316 (Miss. Ct. App. 2006). As such, the jury, in finding Mr. Hill guilty of felony child abuse, found that he was guilty to the exclusion of EVERY OTHER REASONABLE HYPOTHESIS CONSISTENT WITH HIS INNOCENCE. Thus, they considered his theory - I don’t know how it happened, I didn’t do it, maybe he sustained that injury when he fell from the bouncy seat or from the high chair (Transcript p. 169 - 204) - and found it unreasonable.

As the *Jones* Court held, “there is no error if all instructions taken as a whole, fairly, but not necessarily perfectly, announce the applicable rules of law.” *Id.* (*emphasis added*). Thus, the jury was properly instructed.

**III. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S MOTION FOR A NEW TRIAL AND FOR ACQUITTAL NOTWITHSTANDING THE VERDICT AS THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT THE DEFENDANT FELONIOUSLY ABUSED THE CHILD IN QUESTION AND AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Mr. Hill also argues that “the prosecution failed to produce legally sufficient evidence against him and the jury’s verdict was not supported by the evidence presented, but reflected the passion, prejudice, and anger in the charge of felonious child abuse.” (Appellant’s Brief p. 22). This Court has previously noted that “[w]hen on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, [the court’s] authority to interfere with the jury’s verdict is quite limited.” *Phinisee v. State*, 864 So.2d 988, 992 (Miss. Ct. App. 2004) (*emphasis added*). The evidence which is consistent with the verdict must be accepted as true. *Lee v. State*, 469 So.2d 1225, 1229-30 (Miss.1985) (citing *Williams v. State*, 463 So.2d 1064, 1067 (Miss.1984); *Spikes v. State*, 302 So.2d 250, 251 (Miss.1974)). The State must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* (citing *Glass v. State*, 278 So.2d 384, 386 (Miss.1973)). Basically, “once the jury has returned a verdict of guilty in a criminal case, [the court is] not at liberty to direct that the defendant be discharged short of a conclusion on [its] part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.” *Id.* (citing *Fairchild v. State*, 459 So.2d 793, 798 (Miss.1984); *Pearson v. State*, 428 So.2d 1361, 1364 (Miss.1983)) (*emphasis added*). With this standard in mind, there is sufficient evidence in the case at hand to prove each and every

required element of felonious child abuse.

Mississippi Code Annotated §97-5-39(2)(a) states that “[a]ny person who shall intentionally (i) burn any child, (ii) torture any child, or (iii) except in self-defense or in order to prevent bodily harm to a third party, whip, strike, or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse of a child.” Thus, the State had to prove that Mr. Hill intentionally caused serious bodily harm to his child. It is well-established Mississippi law that “a conviction may be had on circumstantial evidence alone.” *Tolbert v. State*, 407 So.2d 815, 820 (Miss. 1981) (citing *Fortenberry v. State*, 62 So.2d 325 (Miss. 1953)). Additionally, “circumstantial evidence need not exclude every possible doubt but only every reasonable doubt, or reasonable hypothesis of innocence.” *Id.* The Supreme Court further noted in this regard that:

The question must be determined by a jury in each particular case within the principles prescribed by law; within these limitations, the power of circumstances to satisfy the understanding and conscience of the jury beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, is always the test of the sufficiency of circumstantial evidence. . . . the sufficiency of circumstantial evidence is peculiarly for the determination of the jury, because it is always solemnly to be weighed and acted upon by their understanding and consciences, and is from its very nature, the subject of inferences and conclusions in their minds, and that a verdict, therefore, found on circumstantial evidence, will always be permitted to stand unless it is opposed by a decided preponderance of the evidence, or is based on no evidence whatever.

*Id.* (citations omitted) (emphasis added).

The State of Mississippi met its burden and provided sufficient evidence that Mr. Hill abused his nine-week-old infant son. The evidence presented at trial establishes the following facts in this regard:

- a. Dr. Spangle first saw Jalen at approximately noon on June 29, 2004. (Transcript p. 35 and 64).
- b. Dr. Spangle first noticed swelling over Jalen’s left eye. He also had some

- dropping of his hear rate and had thrown up a couple of times. (Transcript p. 36)
- c. Dr. Stangle testified that the CT scan results “meant that there had been serious injury to the head of the infant and that it was fairly recent.” (Transcript p. 40).
  - d. Both Dr. Stangle and Dr. Weintraub classified the head injury as a life threatening injury. (Transcript p. 41 and 76).
  - e. Dr. Weintraub testified that the CT scan revealed both fresh injuries and old injuries. (Transcript p. 74).
  - f. When asked about the force required to cause a nine-week-old baby to have bleeding on the brain, Dr. Weintraub replied, “It takes a significant amount of trauma or a force to cause those types of bleeds within the brain. . . These forces, in order to obtain that sort of injury, it requires either a significant amount of blunt force trauma, a very strong strike that is seen, for example, on a very high impact motor vehicle collision or from shearing forces from rapid acceleration, deceleration, and twisting from a shaking or type motion as well can cause those injuries.” (Transcript p. 74 - 75).
  - g. Dr. Weintraub also testified that the injuries could not have been caused from hitting a baby’s head on a crib. Even dropping the baby to the floor would not cause those type injuries. (Transcript p. 75).
  - h. Dr. Weintraub further testified that the follow up MRI showed a loss of brain tissue and noted that “it requires a significant amount of blunt force trauma, significant strike to the skull, or very aggressive shaking of the child” to cause this. (Transcript p. 79).
  - i. Dr. Stangle testified that Jalen had elevated liver enzymes which means that there was an injury to the liver. (Transcript p. 42).
  - j. Dr. Stangle asked Mr. and Ms. Hill if Jalen had been in a car accident which could have caused the injury. They responded that he had not. Dr. Stangle testified that “the only other reason would be that the child had been hit in the stomach with something.” (Transcript p. 44).
  - k. Dr. Spangle also testified that Jalen had both old rib fractures and new fractures in his legs. (Transcript p. 44).
  - l. Dr. Spangle testified that the only way these type of leg fractures could occur on a nine-week-old baby are “with shearing force, meaning that you are pulling rapidly or you’re twisting rapidly or you’re doing both rapidly.” (Transcript p. 45).
  - m. Dr. Spangle also testified that there was a bruise on Jalen’s back in the shape of a mouth. (Transcript p. 52 - 53).
  - n. Mr. and Ms. Hill informed Dr. Stangle that there had been no one else taking care of Jalen. He had not been in day care and there were no other adults or kids in the house. (Transcript p. 42).
  - o. Dr. Spangle testified that “it was our opinion and my opinion that the child had been intentionally harmed or injured” and that he could not have injured himself. (Transcript p. 56).
  - p. Dr. Spangle also testified that there were old and new injuries but that the



most recent injuries occurred during the last 6 - 12 hours. The head injury had to have occurred after his last feeding because babies don't feed well with bleeding on the brain. (Transcript p. 57).

- q. Mr. Hill testified that he was Jalen's primary care giver during the day. (Transcript p. 182).
- r. Mr. Hill was unable to explain the serious injuries. He did, however, attempt to explain them by stating that Jalen fell out of a bouncy seat and a high chair. (Transcript p. 185 and 195).
- s. Mr. Hill testified that he never saw Ms. Hill hit Jalen. (Transcript p. 203).
- t. Mr. Hill told investigators that he arrived home from work on June 29, 2004 at approximately 2:45 a.m. (Transcript p. 93).
- u. Mr. Hill also told investigators that his wife left for work at 6:45 a.m. (Transcript p. 93).
- v. Ms. Hill told investigators that she last fed Jalen at 1:30 a.m. (Transcript p. 111).
- w. Gerald Moralde, the neighbor living in the other section of the Hill's duplex, testified that while he was in his computer room which is across from Jalen's room, he heard a male's voice say "shut up" and heard a smack during the day at some point during June of 2004. He then heard the baby cry as if he were in pain and not his normal fussy cry. Mr. Moralde described the male's voice as aggressive and stated that he heard no other voices. (Transcript p. 136 - 137).

Accordingly, there is sufficient evidence of the crime of felonious child abuse.

Mr. Hill additionally argues that the verdict was against the weight of the evidence.

(Appellant's Brief p. 17). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

[This 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. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

*Pierce v. State*, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993). Mr. Hill claims that "the only evidence even indirectly incriminating [him] in the commission of this repugnant crime is the inconsistent 'self

serving' statements and testimony from Damita Hill, whose story can only be characterized, at best, as suspicious, and at worst, outright perjury." (Appellant's Brief p. 27). This assertion, however, is simply not accurate. As noted above, there was more evidence of Mr. Hill's involvement in causing Jalen's numerous injuries than simply Ms. Hill's testimony. Furthermore, "the jury is the sole judge of the of the weight and credibility of the witnesses." *Thomas v. State*, 754 So.2d 579, 582 (Miss. Ct. App. 2000).

Additionally, Mr. Hill's theory - I don't know how it happened, I didn't do it, maybe he sustained that injury when he fell from the bouncy seat or from the high chair - is not reasonable. Mr. Hill testified that he did not notice a problem until 10:00 a.m. on the morning in question. This is not plausible for two reasons. First, he said in his statement that Ms. Hill told him that Jalen went to sleep at 2:00 a.m. (Exhibit 7). He, nonetheless, testified that he did not go into Jalen's room to check on him until 10:00 a.m. Not hearing a peep from nine-week-old Jalen for 8 hours was of no concern to him. That in and of itself is suspicious. Secondly, and perhaps most importantly, Mr. Hill testified that he had not seen any of these injuries. (Transcript p. 184). There is absolutely no way a father living in the same house with his newborn baby would not know about the types of injuries Jalen incurred. This is true particularly in light of the fact that the doctors testified that many of the injuries were old injuries and should have been noticed by Mr. Hill prior to the day in question. Thus, Mr. Hill's theory that he just knew nothing of any of Jalen's injuries and that he did not cause them is not reasonable.

As there is sufficient evidence to sustain the verdict and as the verdict is not against the overwhelming weight of the evidence, Mr. Hill's final issue is without merit.

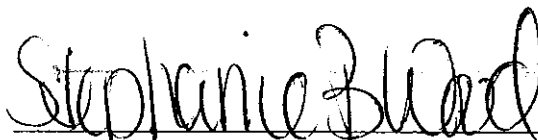
## CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Douglas Duvall Hill as there were no reversible errors, there was sufficient evidence to support the verdict, and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "Stephanie B. Wood", written over a horizontal line.

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## **CERTIFICATE OF SERVICE**

I, Stephanie B. Wood, 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:

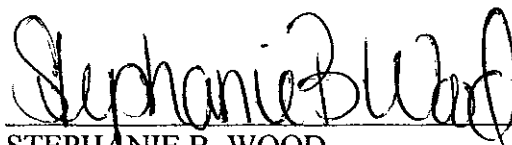
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