IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHERELLE L. GERMAN — APPELLANT

VS. — NO. 2008-KA-1277

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2008-KA-1277-COA

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STATEMENT OF THE CASE

Procedural History

Cherelle L. German was convicted in the Circuit Court of Lafayette County on a charge of felonious child abuse of his daughter Mikia German[1] and was sentenced to a term of 40 years in the custody of the Mississippi Department of Corrections with ten years suspended. (C.P.28-29) Aggrieved by the judgment rendered against him, German has perfected an appeal to this Court.

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[1]The victim's name is spelled inconsistently in the record. It appears as "Mikia," "Makia," and "Ma'kia." For the sake of consistency, the state will refer to the child as "Mikia." Likewise, her two-year-old brother's name appears as "Neven" and "Nevin"; the state will refer to the older child by the former spelling.

Substantive Facts

Shortly after midnight on November 7, 2005, Detective Scott Mills of the Lafayette County Sheriff's Department was dispatched to the emergency room of the hospital in Oxford to investigate a case of possible child abuse. When Detective Mills arrived there, he was briefed by Captain Joey Carwyle and by Holly Jeffrey of the Department of Human Services. (T.40-43) Recounting this briefing, Detective Mills testified as follows:

> What was relayed to me was we had about a two month old female child. She had been brought in to the ER by her mother and father and that she had suffered some or she was just being fussy and crying at home, wouldn't eat. They became alarmed and brought her to the ER and while at the ER they were described an incident by the father that the child, the 2 month old, was sitting in a little bouncy seat and that the seat had overturned. It was sitting on the floor and had overturned and she apparently sustained some injuries from that and that was the only injury that he knew of that she had sustained.
>
> (T.43)

Detective Mills "went into the room" where the baby "was being treated and attended to" and took photographs of her. Thereafter, he "went back outside the examination room with Captain Carwyle and Mrs. Jeffrey and shortly thereafter" the baby's mother Toya Hilliard "came out of the room." Detective Mills asks her if they "could speak with her for a minute and she agreed ..." Detective Mills, Mrs. Jeffrey and Mrs. Hilliard then went into a quiet location which he referred to as "the prayer room." (T.43-44) Detective Mills related Mrs. Hillard's statement as follows:

> She described some events through the day of the 6th which would have been the daylight hours and she had worked all day she worked on campus at the time. ... As a matter of fact she had to be at work by 8:00 a.m. and she didn't get off until about 7:30 that night. ... She gave us a statement, basically, to that fact and she said when she got home I think Mikia [the

> two-month-old victim] was asleep at the time and she woke up kind of fussy afterwards. She went to attend to her, got her quieted back down, went about some more of her business preparing supper. And she went to, she became fussy, again and she went to check on her again and it was sometime during that point that Mr. German, Cherelle German, ... met her in the hallway and told her that the bouncy seat had turned over earlier that day and he just wanted her to know that basically. And so she tried to quiet the child a couple of times. She said the child would not eat and would still remain fussy and she became alarmed after she had been there for a while and couldn't console her and she went to a next door neighbor's house with Mikia. She carried Mikia with her to call and try to get medical advice ...
>
> (T.44-45)

Having taken Mrs. Hillard's statement, Detective Mills and Mrs. Jeffrey asked German to tell them what had happened, and he agreed to speak with them. German stated that the previous day, he had been at Mrs. Hilliard's apartment at 2105 Delores Drive, where he routinely "visited on and off." Mrs. Hilliard's mother, Kay Hill, had been present for a while. At one point, German fell asleep. Mrs. Hill woke him at about 4:30 or 5:00 to tell him that she was leaving and that he would have to look after the baby, Mikia, and her brother Neven, who was approximately two years old. After Mrs. Hill left the house, German "had to go into the kitchen." He put Mikia "in a little bouncy seat." He then left the room for about two minutes. As he walked into the bathroom, he "heard Mikia yell out" and "came back into the living room area" to find that "her bouncy seat was overturned on the floor and that Neven was trying to set the bouncy seat back upright." German "set her up and checked her, ... [k]ept her awake for 15 or 20 minutes to observe her ... " When Mrs. Hilliard returned at approximately 7:40, he "told her right away that Mikia had fallen over in the bouncy seat." They finally took the baby to the emergency room at "around 10 p.m." (T.44-48)

Later that morning, Mikia was taken by helicopter to Le Bonheur Children's Hospital in Memphis. Mrs. Hilliard and German went back to her apartment "to gather up some clothes and travel onward to Memphis ... to be with Mikia." Detective Mills asked and was given permission to go inside the apartment so that German would "explain ... what had happened ..." Once they were inside, German offered to show Detective Mill and Mrs. Jeffrey what had occurred. He then "set the bouncy seat back up in the floor as he stated it was sitting" and then "demonstrated how he found it" after it had "turned over." (T.53-56)

In January 2006, German waived his *Miranda* rights and gave Detective Mills a second statement at the Lafayette County Sheriff's Department. (T.59) According to Detective Mills,

> At that point he said that the baby Mikia had been crying a lot that day and was just basically getting on his nerves which that may not be verbatim but basically the baby was crying a lot, wouldn't be quiet and he finally picked the baby up underneath it's [sic] arm pits and shook the baby he stated one time.
>
> (T.59-60)

Dr. Jason Waller, accepted by the court as an expert in the field of emergency medicine, testified that he saw Mikia when she was brought into the emergency room at the Oxford hospital. (T.107-09) Asked to describe how the patient had presented and his evaluation and treatment of her, Dr. Waller testified as follows:

> The infant was brought in by the father with the complaint of having fallen out of the bouncy seat and sustained a head injury. In the process of examining the baby I noticed some bruises to the face, something that I didn't feel would be consistent with falling out of a bouncy seat. And I didn't really think that a two month old could fall out of a bouncy seat on its own so we proceeded with a CT scan of the head.

(T.109)

The CT scan "showed blood around the brain or bleeding internally," indicating a traumatic injury. Dr. Waller "had the nurses notify the social worker and they notified the sheriff's office." Because the child had sustained a life-threatening injury, she was prepared for transportation to Le Bonheur Children's Hospital in Memphis, a facility "specialized in taking care" of children with such injuries. (T.109-11)

Dr. Waller took a statement from the defendant and made further notes. Those are set out below:

> Patient's father states that he went to the bathroom and when he returned the child had fallen out of the bouncy seat and on to the floor. He states two year old child was near when injury occurred. Mom was at work at the time of the incident. Father states bouncy seat was on the floor and it turned over. I advised the father that the child has a significant injury. More than that would be expected for bouncy seat turning over. Advised that DHS will investigate this incident. Bruising to both sides of face an [sic] extensive intracranial hemorrhage. Suspect child abuse. DHS and Sheriff's investigator to come to ER to interview family.
>
> (T.113-14)

Dr. Waller went on to testify that Mikia had sustained "three different bruises" to her face: "One above the left eye on the temple region. One below the right eye and one on the left chin." He found this fact significant "[b]ecause they [the bruises] were on different sides of the face. If the child had just fallen once you would expect a bruise on the side of the face or in the middle of the face but not on two separate sides of the face." (T.114)

Having continued to treat Mikia periodically since she first presented to the emergency room, Dr. Waller testified that the child was "severely developmentally disabled. Can't sit up. Has a feed tube. Is unable to eat on her own ... " (T.117) According to Dr. Waller, Mikia

would "require care for the rest of her life." He doubted whether she would ever walk or talk. As a result of the brain injury, she suffered from probable blindness, "[p]rofound neurological deficits," and life-threatening seizures. (T.125)

Dr. Greg Stidham, accepted by the court as an expert in the fields of pediatrics and pediatric critical care, testified that he examined Mikia shortly after she arrived at Le Bonheur. Her condition was "[e]xtremely critical" at this point. The infant was experiencing "bleeding over the surface of the brain, swelling of the brain and hemorrhages in the retina ... " She also suffered severe seizures which required a two-week stay in the intensive care unit of the hospital. "The cause of the seizures was the brain injury documents by the CT Scans ... " (T.90-92)

When the prosecutor asked, "What is the mechanism of injury? Can you describe the mechanism of injury?" Dr. Stidham testified as follows:

> The constellation of the three things which I mentioned; the brain swelling, the bleeding over the surface of the brain associated with the retinal hemorrhages are considered pathognomic or exclusively, almost exclusively caused in an infant under a year of age by a severe shake, a shake impact which would be a shake, a very vigorous aggressive shaking with the impact of also hitting the head some sort of surface. It may be something as soft as a pillow so that there may not be any external evidence of the injury by the impact amplifies the force of the shake.
>
> (T.95-96)

Because the child's skull was fractured, Dr. Stidham's opinion "lean[ed] toward the shake impact type of injury as opposed to a pure shake injury." He explained that the former injury would occur "where the child is very violently shaken but also shaken against some sort of surface, a flat surface just as opposed to freely being shaken in the air." (T.97) Finally on

direct examination, Dr. Stidham was asked to review the brain swelling and hemorrhaging, the retinal images and the external injuries and to state "what type of trauma and force would cause those injuries." (T.101-02) He answered,

> It would require a very violent shaking against some sort of a surface, not just like a little shake but shaking like this probably against some sort of table, probably not a hard surface because there would have been more external injury. But some soft or hard enough to cause the skull fracture but not hard enough to cause bleeding to the scalp or bleeding to the skin.
>
> (T.102)

When the prosecutor inquired whether he had reached this conclusion "to a reasonable degree of medical certainty," Dr. Stidham replied, "Virtually one hundred percent certainty." (T.102)

On redirect examination, Dr. Stidham testified that he did not think a two-year-old child could have caused these injuries. Moreover, the damage was too severe to have been caused from a fall "just from two feet above the floor." (T.106)

Mrs. Hilliard testified that on November 6, she went to her job at "Arrow Mark out on the campus." She left her two-year-old son and baby daughter, Mikia, with the defendant, who was the baby's father. When she left the house, the defendant "was still in the bed," and Mikia "was in her crib asleep." She did not appear to have any injuries. At approximately 2:00 p.m., Mrs. Hilliard phoned German to tell him that she had been asked to work a second shift. German was "upset," telling her that he "had something to do" and that she was "messing up his plans." Mrs. Hilliard then phoned her sister, who agreed to pick up the children to care for them while she worked the second shift. When she called German to tell him of this arrangement, he said something to the effect of, "Don't worry about it." Mrs. Hilliard then called her sister to tell her "don't even worry about it." (T.126-31)

At approximately 2:45 p.m., Mrs. Hilliard made a brief visit to her apartment to feed Mikia and play with her. German continued to express his indignation at her having forced him to "cancel" his "plans." She departed at about 4:45 to return to work, leaving only Mikia, her two-year-old son Neven, and German in the apatment. At this point, Mikia was in her crib and seemed to be content and uninjured. (T.131-33)

When Mrs. Hilliard returned home at approximately 7:35, German was lying on the couch with Mikia on his chest. "[D]ishes were everywhere," so Mrs. Hilliard began washing them. Mikia "started crying." Mrs. Hilliard took the baby and soothed her; the infant "went to sleep." Her mother "took [her] to her crib" and returned to the kitchen. About five minutes later, the baby began crying again, and, once more, her mother calmed her and put her back to bed. According to Mrs. Hilliard, "The third time she didn't really want to calm down." When she put Mikia back into her crib, she "noticed a bruise on her right cheek and .. went up front and asked him [German] what happened to her." German told Mrs. Hilliard that the baby had "fallen" earlier when her bouncy seat had toppled. He added that the child had "done been screaming" in his ear "all night." (T.133-34)

Mrs. Hilliard and German finally took Mikia to the emergency room, and she was eventually airlifted to Le Bonheur. When she was asked whether Mikia had "ever been the same since that night," Mrs. Hilliard testified, "No. ... They said she has severe epilepsy. She will probably never talk. She is not able to sit or stand by herself. She doesn't have good head control and she will have a lot of mental delays." She also had to be fed through a tube inserted directly into her stomach. (T.136-38)

SUMMARY OF THE ARGUMENT

First, the state contends German has not shown that his trial counsel rendered constitutionally ineffective assistance. He has not established that his counsel's performance was so deplorable as to require the trial court to declare a mistrial *sua sponte*.

Furthermore, German may not be heard to complain about the admission of evidence which he elicited.

Finally, the state submits the verdict is not contrary to the overwhelming weight of the evidence. The state presented substantial proof that the defendant was guilty of felonious child abuse.

PROPOSITION ONE:

GERMAN HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

German argues first that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized follows:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal**

> **has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss. App.1999).

Because this point is raised on direct appeal, the defendant encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss. App. 2006); *Madison v.* State, 923 So.2d 252 (Miss. App. 2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

German has not shown that his trial counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. Because he has not sustained the particular burden he faces when raising this issue on direct appeal, the state submits his first proposition should be denied without prejudice to its being advanced in a motion for post-conviction collateral relief.

For the sake of argument, the state addresses German's particular claims. First, he asserts his trial counsel committed an unprofessional lapse by failing to object to medical opinion testimony given by Detective Mills. (T.49-52) The state counters that defense counsel's choice of whether "to make certain objections" falls "within the ambit of trial strategy." *Hancock v. State*, 964 So.2d 1167, 1175 (Miss. App. 2007). Furthermore, assuming *arguendo* that Detective Mills's testimony was objectionable and that defense counsel committed an unprofessional error in failing to interpose an objection, the state submits that this testimony was cumulative to that properly admitted during the direct examinations of Dr. Stidham and Dr. Waller. It follows that even if German could demonstrate an unprofessional lapse, he could not show prejudice with respect to this point.

German asserts next that his trial counsel was constitutionally ineffective in eliciting testimony about German's offer to submit to a polygraph examination. The record demonstrates that defense counsel wished to introduce this testimony to show that German did not appear "at the jail" to confess to this crime, but to undergo a polygraph examination. (T.64-71) The trial court summarized defense counsel's position as follows: "And what you want is the clear picture that he came in to be polygraphed and he decided to confess." (T.71) Defense counsel responded,

> What I want is for the jurors to understand the facts of

> what happened. Like I said Mr. Creekmore specifically asked Detective Mills what happened on January 4th. And Detective Mills went into fair detail other than what I'm saying. So he testified that that is what happened on January 4th. He needs to testify to everything that happened. The jurors are entitled to that not just what they want them to know.
>
> * * * *
>
> What I want the jurors to understand is that my client did not have the intent of giving a confession as Detective Mills is putting it. And I want them to also understand that my client was under duress because my client was interrogated by the polygraphers and the prosecution they have one of the polygraphers on the list they were going to call this person but they thought better of it because they know that they shouldn't call them.
>
> (T.71-72)

As shown by the foregoing excerpt, defense counsel articulated a rational purpose for eliciting this evidence. Thus, counsel's procedure with reference to this issue was a matter of trial strategy. That decision is entitled to "much deference" and should be viewed without "the distorting effects of hindsight." *Powers v. State*, 883 So.2d 20, 34 (Miss.2003). German has failed to establish that his trial counsel committed an unprofessional error in eliciting testimony about the defendant's offer to submit to a polygraph examination.

Additionally, German contends his trial counsel committed an unprofessional lapse in stipulating to the fact that Mikia's injuries were "substantial and profound." On direct examination, Mrs. Hilliard testified about her child's permanent damage and the continual need for medication and hospitalization. (T.139) Thereafter, the following was taken:

> BY MR. DIXON: Your Honor, I object to this line of questioning. **It's undisputed that the child has suffered serious injury. We have had two doctors testify to the child's injuries.** And Mrs. Hilliard herself has already testified that the child is seriously injured. I believe that

everyone in the courtroom understand that at this point.

BY MR. TROUT: If counsel is offering to stipulate that the child is severely and profoundly injured, neurologically and otherwise and stipulate to that then we will certainly not ask any more questions.

BY THE COURT: He is asking if you want to stipulate with exactly what he just said.

BY MR. DIXON: I will stipulate to the child is seriously injured but that in no way means who injured the child or how the child was injured.

BY MR. TROUT: I'm not asking for any stipulation on how the child was injured. I just want a stipulation that the child was seriously and profoundly injured.

BY MR. DIXON: I will stipulate, Your Honor.

(emphasis added) (T.139-40)

Viewed with the required deference, defense counsel's action must be deemed strategic. Obviously, counsel was attempting to prevent the jury's hearing any further heart-rending testimony about the lingering effects of the baby's devastating injuries. In any case, the stipulation was cumulative to the detailed testimony of Dr. Stidham and Dr. Waller. It follows that German can establish neither an unprofessional lapse nor prejudice with respect to this point. See *Bell v. State*. 879 So.2d 423, 440 (Miss.2004), and *Waldon v. State*, 749 So.2d 262, 267 (Miss. App. 1999).

Finally, German argues that his trial counsel was ineffective in failing to proffer a circumstantial evidence instruction. The state counters that even if such an instruction had been tendered, the court would not have erred in refusing it. "The supreme court has found that a defendant's admission to an important element of a crime negates the need for a circumstantial evidence instruction." *Smith v. State*, 981 So.2d 1025 , 1032 (Miss. App.

2008). Accord, *Swinney v. State*, 829 So.2d 1225, 1236-37 (Miss.2002). While German did not give a full confession, he did admit that he shook the baby. This admission was sufficient to obviate the need for a circumstantial evidence instruction. Thus, defense counsel cannot be faulted for failing to request such a charge.

The state reiterates that German has not shown that his trial counsel's performance was so deficient as to require the trial court to declare a mistrial *sua sponte*. His first proposition should be denied.

PROPOSITION TWO:

GERMAN MAY NOT PUT THE TRIAL COURT IN ERROR FOR ADMITTING TESTIMONY WHICH HE ELICITED

Under his second proposition, German argues that the trial court committed reversible error in allowing evidence that he had offered to submit to a polygraph examination. The state incorporates by reference its response under Proposition One of this brief in asserting that German himself elicited this evidence.

This issue arose during cross-examination of Detective Mills, when defense counsel asked, "Why was he [German] in your presence to begin with?" Having been granted the request to be heard outside the presence of the jury, the prosecutor expressed his concern that defense counsel was on the verge of inquiring about whether a polygraph examination had been requested. The court acknowledged that although the defendant had never submitted to such examination, the fact that he had offered and/or been asked to submit to one would be inadmissible. As stated under Proposition One of this brief, defense counsel went on to delineate his reasons for eliciting testimony that his client had gone to the jail to submit to a polygraph examination. (T.63-69) Thereafter, the court stated the following, in pertinent part:

> BY THE COURT: All right. I think the State has avoided the subject dutifully and deliberately ... If you are using it to show why he was present at the jail then, you know, and you think it's exculpatory, then I think under those circumstances maybe you can seek to illicit [sic] testimony about the polygraph. Because the polygraph itself is peripheral to the point you are trying to make. You are trying to say why he is in the jail.
>
> * * * * *
>
> I don't see any problem with you cross-examining him on that point if that is your wish. All right. So I am going to allow the testimony about polygraph because it's not polygraph results it's the point you are trying to establish about the nature of the interrogation. You don't need to avoid responding to questions about the polygraph. With the understanding if he decides to ask you about that you can respond.
>
> (T.69-73)

The prosecutor then pointed out, "Just so that we are clear that they are waiving whatever objections they have to the polygraph." The court responded, "The record speaks for itself on these points." (T.73)

The state acknowledges at the outset that evidence of a witness's offer to take a polygraph test, the fact that he took such a test, or the results thereof are not admissible, whether offered by the state or the defense. *Weatherspoon v. State*, 732 So.2d 158, 161-62 (Miss.1999). However, admission of evidence regarding a witness's offer or refusal to take a polygraph test "does not automatically demand reversal." *Rubenstein v. State*, 941 So.2d 735, 768 (Miss.2006) Rather, "The nature of the admission and the circumstances attendant to its disclosure must be considered." *Id.* The issue is also subject to the procedural bar in the absence of objection. *Id.*

It is axiomatic that a defendant cannot complain about the admission of evidence

elicited by himself. *Jordan v. State*, 995 So.2d 94, 112 (Miss.2008). Accord, *Towner v. State*, 726 So.2d 251, 255 (Miss. App. 1998). "Whenever a defendant makes a calculated, tactical choice and comes out on the losing end, he cannot then shift the burden to the state or to the trial judge." *Lancaster v. State*, 472 So.2d 363, 366 (Miss. 1985). Having made such a deliberate choice, the defense may not put the trial court in error on this point. German's second proposition should be denied.

PROPOSITION THREE:

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Finally, German challenges the weight of the evidence undergirding his conviction. To prevail, he must satisfy the following formidable standard of review:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is also well settled. "[T]his 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." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss. Ct. App. 2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss. App. 2004).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reitereated in *Hales v. State*, 933

So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence of German's guilt of felonious child abuse. Specifically, the state presented credible proof that the victim had been injured by a violent, aggressive shaking with impact, and that these injuries could not have been caused by a fall from a "bouncy seat" or by a two-year-old child. The defendant was the only person present who could have inflicted this damage. The state also presented evidence that the defendant was irritated with having been tasked with child care and with the baby's crying in particular. He also admitted that he shook the infant.

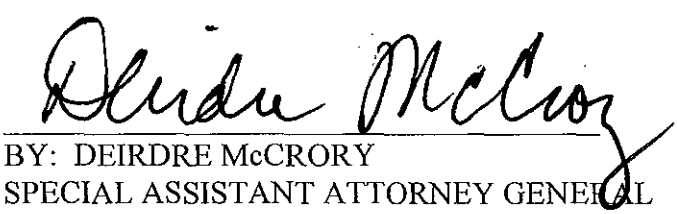
No basis exists for disturbing the jury's determination that German was guilty of felonious child abuse. His final proposition should be denied

CONCLUSION

The state respectfully submits the argument presented by German are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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