FONSHANTA ANTHONY — APPELLANT

V. — NO. 2008-KA-1348-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Hunter N Aikens, [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Fonshanta Anthony

FONSHANTA ANTHONY APPELLANT

V. NO. 2008-KA-1348-COA

STATE OF MISSISSIPPI APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Fonshanta Anthony, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Andrew K. Howorth, Circuit Court Judge

This the 1st day of December, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

FEDERAL CASES

STATE CASES

STATE RULES

FEDERAL RULES

FONSHANTA ANTHONY APPELLANT

V. NO. 2008-KA-1348-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EXHIBIT S-12, WHICH CONTAINED INADMISSIBLE HEARSAY EVIDENCE THAT PREJUDICED ANTHONY'S CASE.**

II. **THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN ANTHONY'S CONVICTION OF FELONY CHILD ABUSE, AS REASONABLE HYPOTHESES CONSISTENT WITH HER INNOCENCE COULD NOT BE EXCLUDED.**

III. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND ANTHONY WAS GUILTY, AT MOST, OF FELONY CHILD NEGLECT.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Marshall County, Mississippi, wherein Fonshanta Anthony (Anthony) was charged under a two-count indictment for (1) felony child abuse under Mississippi Code Annotated section 97-5-39(2) and (2) the lesser offense of felony child neglect under Mississippi Code Annotated section 97-5-39(1)(b). (C.P. 1-2). Following a jury trial held on August 20-22, 2007, the Honorable Andrew K. Howorth, Circuit Judge, presiding Anthony was convicted of the crime of felony child abuse. (C.P. 80-82, R.E. 6-8). Anthony was sentenced

81-82, R.E. 7-8). Anthony is presently incarcerated and now appeals to this Court for relief.

STATEMENT OF THE FACTS

Anthony lived at the Broadmoor Apartment complex in Byhalia, Mississippi, with her two children, nine-month-old B.A.[1] and two-year-old Jarvarious. On the night of July 18, 2005, B.A. was badly burned in a bathtub at Anthony's apartment. On a previous occasion, Anthony complained to the apartment complex manager that the water in her apartment was too hot. (Tr. 283). After police investigation, Anthony was charged with felony child abuse and the lesser offense of felony child neglect. The evidence adduced at trial revealed the following.

On the night of July 18, 2005, Anthony ran bath water for B.A. and Jarvarious, and she placed Jarvarious in the bathtub. (Tr 165, 172, Ex. S-6). Anthony then took her garbage outside to the dumpster. (Tr. 165, 173, Ex. S-6). Three witnesses saw Anthony take her garbage out: (1) Cassandra Watkins, a neighbor; (2) Shelia Lawrence, the property manager of the Broadmoor Apartment complex; and (3) Robert Jones, a maintenance employee of the Broadmoor Apartment complex. (Tr. 137-38, 143, 279-280). According to these witnesses, Anthony took her trash out sometime between 9:05 p.m. and 9:15 p.m. (Id.).

When Anthony returned to her apartment, she placed B.A. in the tub and went to the bedroom to lay out clothes for the children after their bath. (Tr 165, 172, Ex. S-6). While in the bedroom, Anthony heard the water turn on in the bathroom, and she yelled at Jarvarious to turn the water off. (Id.). However, the water kept running. (Tr. 173). Anthony then heard Jarvarious cry out, "mama, mama, [B.A.] boo booed in the tub." (Id.). Anthony ran to the bathroom, saw pieces of B.A.'s skin floating in the tub, and pulled him out of the water. (Id.). She then ran next door to

to whether Jarvarious was in the tub or out of the tub when Anthony [illegible]

Watkins testified that Anthony beat on her door and asked her to "dial 911 for my baby." (Tr. 136). Watkins asked Anthony what happened, and Anthony said that "[Jarvarious] had turned the hot water on her baby." (Id.). Watkins then ran down to Anthony's aunt's apartment (also in the Broadmoor Complex) to get Anthony's dad. (Id.). In route, Watkins saw Cleveland Clark and told him what happened. (Tr. 139).

Clark then told Lawrence, the property manager, that a baby had been burned.[3] (Tr. 145, 148). Lawrence and Clark then went to Anthony's apartment and found Anthony with B.A. in her arms, crying and rubbing B.A. (Tr. 144, 148). Lawrence, a certified nursing assistant, told Anthony to stop rubbing B.A. because it was making the injuries worse. (Tr. 144). Lawrence took B.A. and placed him on a sheet until the paramedics arrived. (Tr. 144). From the record it appears that Lawrence took B.A. to Anthony's aunt's apartment, where B.A. stayed until medical personnel and police arrived. (Tr. 120, 144).[4]

---

[2] This is significant because, as explained in the argument below, this was a circumstantial evidence case, and a reasonable theory of the case was that Jarvarious turned the hot water on and either climbed out of the tub before turning the water on or immediately after as the water temperature escalated but before it reached a temperature sufficient to cause burning.

[3] On direct examination, Lawrence initially stated that the police came and told her that a baby had been burned. (Tr. 143). However, Lawrence corrected this misstatement after reading her statement that was given to police on the night in question; Lawrence testified twice that Clark came and told her about the incident. (Tr. 145, 148, Ex. 4 id).

[4] B.A. was at Anthony's aunt's apartment when police arrived, and Lawrence testified that, when she took B.A. from Anthony, Lawrence "told her to cover me and not let anyone get close to me because [Anthony's] aunt is a certified nursing assistant and so am I, so we got the baby on a sheet." (Tr. 120, 144).

David Taylor was the first police officer to arrive; he arrived at the same time as the medical personnel. (Tr. 119). Officer Taylor was advised that B.A. was at the aunt's house, so he went there. (Tr. 120). Anthony was standing just outside the apartment (a few feet from the door) with her uncle. (Tr. 99, 120). As paramedics tended to B.A. in the ambulance, Anthony was crying, and trying to get back to see B.A., but her uncle wouldn't let her. (Tr. 110, 126, 134). B.A. was transported to Le Bonheur Hospital in Memphis. (Tr. 109).

Officer Taylor and Officer's Cris Sowell and Clyde Gunter (who had since arrived) entered Anthony's apartment and found pieces of B.A.'s skin in the bathtub; there was no water in the tub. (Tr. 105-108, 127, 160, Ex. S-2A-H). The officers also discovered that the hot water heater in Anthony's apartment was set at approximately 160 degrees. (Tr. 109, 127, Ex. S-2(I)). When Officer Gunter exited Anthony's apartment, he saw her outside crying in the arms of her uncle. (Tr. 110). Anthony made the statement "I would never do anything to deliberately hurt my child." (Tr. 110). Robert Jones, a maintenance employee of the Broadmoor Apartment complex testified that, prior to the incident at issue, Anthony had complained to Lawrence about the water temperature in her apartment unit. (Tr. 283).

Officer Sowell went to Le Bonheur Hospital and took a statement from Anthony at 2:00 a.m. on July 19, 2005. (Tr. 162-65). In her statement, Anthony recounted that she ran the bath water, placed Jarvarious in the tub, and went outside to throw away the trash. (Tr. 165, Ex. S-6). When she returned, she put B.A. in the tub and went to the bedroom to lay out the children's clothes. (Id.). She heard the water turn on in the bathroom and yelled at Jarvarious to turn it off. (Id.). Jarvarious then yelled "mama, mama, B.A. boo booed in the tub." (Id.). Anthony then ran to the bathroom,

(Id.).

After the incident, Patricia Amosike of the Marshall County DHS Office spoke with Anthony and received an account of the incident. (Tr. 172). In this statement, Anthony described the incident just as she did in her statement to police. (Tr. 172-73, compare, Ex. S-6). On June 19, 2005, Amosike examined Jarvarious and noticed no injuries on his body. (Tr. 174). Again, it is significant that the record does not reveal whether Jarvarious was in the tub or out of the tub when Anthony entered. And it is reasonable to conclude that Jarvarious was not in the tub, as he was not burned.

B.A. was transferred from Le Bonheur Hospital to Shriners Burns Hospital in Galveston, Texas, where he was treated by Dr. Art Sanford. (Tr. 197-98, Ex. S-9). At trial, the State tendered (and the court accepted) Dr. Sanford as an expert in the field of "general surgery including burn injuries and pediatric burns and related fields." (Tr. 196). Dr. Sanford testified that, as a result of the incident, B.A. had third degree burns on approximately sixty percent (60%) of his body. (Tr. 208). He stated that such burns could happen very rapidly ("in seconds") in water above 130 degrees. (Tr. 202, 249, 253). Based on the pattern of B.A.'s burn injuries, Dr, Sanford opined that B.A.'s injuries were caused by a forced immersion. (Tr. 237-240, 245). He claimed that, at the time B.A. was burned, he was leaning forward in a sitting position with his legs out in front of him and his hands in the water. (Tr. 238-240). Dr. Sanford also stated that "there would have to be force (from either the side or behind) pushing his chest, his torso forward." (Tr. 240).

In reaching his opinion that the injuries were intentionally caused, Dr. Sanford found significant that B.A.'s burn injuries were marked by straight clear lines of demarcation, with the absence of splash marks. (Tr. 210, 238, Ex. S-17(A)-(R)). To this end, Dr. Sanford stated that he would expect a child to be "thrashing" or "flailing" when exposed to the pain caused by hot water.

The jury was instructed as to felony child abuse and the lesser [illegible] neglect. (C.P. 71-76). After deliberation, the jury found Anthony guilty of felony child abuse. (C.P. 80, Tr. 313, R.E. 6). The trial court sentenced Anthony to serve a term of twenty years. (C.P. 80-81, Tr. 314, R.E. 7-8). The trial denied Anthony's motion for a new trial. (C.P. 83, 88, R.E. 11).

SUMMARY OF THE ARGUMENT

The trial court erred in admitting into evidence exhibit S-12, the abuse report, during Dr. Sanford's direct examination. The abuse report itself was hearsay, and it was replete with inadmissible hearsay evidence (hearsay within hearsay) which severely prejudiced Anthony's defense. Additionally, the introduction of the abuse report violated Anthony's Sixth Amendment right to Confrontation. Therefore, Anthony is entitled to a new trial.

The evidence was insufficient to sustain Anthony's conviction for felony child abuse. Significantly, this case was a circumstantial evidence case. Accordingly, the State had to prove that Anthony was guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with her innocence. As explained in more detail in the argument below, the evidence did not exclude the conclusion that Jarvarious caused B.A.'s injuries, and such a conclusion was reasonable under the evidence adduced at trial. Consequently, this Court should reverse Anthony's conviction for felony child abuse and render a judgment of acquittal on that charge.

Should this Court find the evidence sufficient to support Anthony's conviction for felony child abuse, Anthony contends that the verdict was against the overwhelming weight of the evidence, Accordingly, Anthony respectfully requests that this Court reverse her conviction and sentence for felony child abuse and remand this case for a new trial on felony child neglect.

most, of felony child neglect, therefore, Anthony requests that, should [illegible]

trial is not warranted, that this case be remanded for re-sentencing for felony child neglect.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT S-12, WHICH CONTAINED INADMISSIBLE HEARSAY EVIDENCE THAT PREJUDICED ANTHONY'S CASE.

At trial, the State called Dr. Art Sanford to give his expert medical opinion that B.A.'s injuries were consistent with a forced immersion which indicates that the injuries were caused intentionally. During Dr. Sanford's direct examination, the State sought to introduce a four-page document entitled "ABUSE/NEGLECT RISK FACTOR ASSESSMENT" ("abuse report") as exhibit S-12. (Tr. 202-04, Ex. S-12).[5] According to Dr. Sanford, psychologists at Shriners hospital prepare abuse reports as a measure in the way of compliance with Texas law requiring physicians (or any adult) to report suspicious injuries evincing abuse. (Tr. 202-03). The abuse report was prepared by Dr. Laura Rosenberg, a psychologist employed at Shriners Hospital; significantly, Dr. Rosenberg did not testify at trial. (Tr. 203-04, Ex. S-12).

When the State offered the abuse report into evidence, defense counsel immediately objected that it was hearsay. (Tr. 204). However, the trial court overruled the objection, and admitted the

---

[5] To briefly summarize, the abuse report begins with a purported statement/report of the incident apparently prepared by Dr. Rosenberg after speaking with Anthony. (Tr. 203-04, Ex. S-12). Next, the abuse report contains a note of Dr. Rosenberg stating in part: "This case was concerning due to the child's age, level of supervision provided, and the nature of the injuries." (Ex. S-12). The remainder of the abuse report consists the following individual categorical headings: (1) "Forced-Immersion Demarcation," (2) "Injury Demarcation, Other," (3) "History of Injury," (4) "Caregiver-Patient Relations," and (5) "Family." (Id.). Each categorical heading is followed by "sub-categories" that were apparently checked if deemed relevant to the respective heading in the instant case. (Id.).

This is part of your regularly kept record for the treatment of this patient." (Tr. 204). Thus, the trial court's basis for admitting the abuse report is altogether unclear.

The State then meticulously examined Dr. Sanford on every aspect of the abuse report. (Tr. 204-06, 210-18). In fact, the State went so far as to project the abuse report onto a screen for the jury to follow along with Dr. Sanford's direct examination. (Tr. 210). As explained in the argument below, the abuse report was inadmissible hearsay, the introduction of which severely prejudiced Anthony's case. Furthermore, the abuse report contained statements that were testimonial in nature. Therefore, the admission of the abuse report violated Anthony's Sixth Amendment Right to confrontation.

The trial court's decision to admit or exclude evidence is reviewed under the abuse of discretion standard of review. *Smith v. State*, 986 So. 2d 290, 295 (¶12) (Miss. 2008) (citing *Jones v. State*, 962 So. 2d 1263, 1268 (¶21) (Miss. 2007)).

A. The "Abuse Report" Itself was Hearsay and Contained Hearsay Within Hearsay.

Mississippi Rule of Evidence 801(c) 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." M.R.E. 801(c). Rule 801(a) provides that "[a] 'statement' is ... an oral or written assertion." M.R.E. 801(a)(1).

The abuse report was prepared by Dr. Rosenberg, who did not testify at trial. The abuse report contained numerous written statements/assertions of Dr. Rosenberg. Specifically, the most damaging hearsay statements of Dr. Rosenberg consisted of the following:

> (1) a purported statement/report of the incident given by Anthony and prepared by Dr. Rosenberg after speaking with her; this statement contained facts not present in Anthony's other statements that were properly put before the jury, i.e., the statement

(2) a note stating that "[t]his case was concerning due to the child's age, level of supervision provided, and the nature of the injuries," (Tr. 203-04, Ex. S-12), and

(3) a statement (hearsay within hearsay) that indicated that Anthony gave differing versions of the incident to different persons that identified those alleged differences.[6] (Tr. 203-04, Ex. S-12).

At trial, Dr. Sanford read the entire abuse report and the document was admitted as an exhibit. Because no one with personal knowledge of these statements (Dr. Rosenberg or otherwise) was present at trial, the abuse report lacked a sufficient foundation for admittance into evidence. Consequently, the abuse report was itself hearsay and contained hearsay within hearsay.

B. The Abuse Report was not admissible under Mississippi Rule of Evidence 703.

At the core of this issue is Mississippi Rule of Evidence 703 and, to a lesser extent, Rule 702. Rule 702 governs the admissibility of expert opinion testimony and the requisite qualifications to give an expert opinion.[7] M.R.E. 702. Under Rule 702, a prerequisite to the admissibility of expert

---

[6] According to the abuse report, these statements (of Anthony) were derived from the following sources: (1) the report given to Dr. Rosenberg (contained in the abuse report), (2) a report given to Shriners Hospital staff, (3) a report given to staff at Le Bohneur Hospital. (Id.).

Incredibly, the alleged statement Anthony gave to the Shriners (source 2) appears nowhere in the record aside from Dr. Rosenberg's note. According to Dr. Rosenberg's note in the abuse report, Anthony told someone at Shriners that a fourteen year-old relative was watching the children in the bathroom at the time of the incident. (Ex. S-12). No witness with personal knowledge was present at trial to provide a proper foundation for the statement's admission. This statement was hearsay within hearsay within hearsay! Because this statement provided a version of events inconsistent with Anthony's other statements (which were consistent), Anthony's credibility and, thereby, her defense were severely prejudiced.

[7] Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

The permissible sources of the facts or data forming the basis for an expert's opinion are addressed in Rule 703, which provides:

> 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.

M.R.E. 703. Thus, Rule 703 permits an expert opinion testimony even if the expert relied in part on inadmissible facts or data, provided that the facts or data are of a type reasonably relied on by experts in the field.

However, while Rule 703 does not render an expert's opinion inadmissible because the expert relied on inadmissible sources in forming the opinion, the rule does not permit the wholesale admission into evidence of the inadmissible facts or data upon which the expert relies. See generally, M.R.E. 703 cmt ("Most of [a physician's underlying facts or data] are admissible in evidence, *but only with the expenditure of substantial time in producing and examining various authenticating witnesses.*") (emphasis added).

To this end precisely, this Court has explained: "While Mississippi Rule of Evidence 703 allows an expert to use certain other sources in forming his or her own opinion, Rule 703 is not a vehicle for admissibility of otherwise inadmissible evidence." *Koestler v. Koestler*, 976 So. 2d 372, 381 (¶32) (Miss. Ct. App. 2008). Additionally, the Mississippi Supreme Court has held that it is error for an expert to refer to hearsay statements contained in the report of another non-testifying

---

> or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

("while [an expert] witness may rely on information which is inadmissible in evidence, [...] not give the witness the right to circumvent the rules of hearsay by giving statements which corroborate his view.") (citing *U.S. v. Grey Bear*, 883 F.2d 1382,1392-93 (8th Cir.1989)).

These decisions are consistent with Federal Rule of Evidence 703, which was amended in 2000 to emphasize that the inadmissible facts of data on which an expert relies are not admissible into evidence by virtue of the expert's reliance on them. In this regard, FRE 703, as amended, reads as follows:

> 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 the expert 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 *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

F.R.E 703 (emphasis added). The Advisory Committee Note to FRE 703 clearly explains that "[r]ule 703 [was] amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." F.R.E. 703 advisory committee's note.

The abuse report was not admissible under Rule 703 by virtue of Dr. Sanford's reliance on it. To be sure, it is clear that the probative value of the abuse report (if any) is substantially outweighed by its prejudicial effect. Dr. Sanford was called as an expert to render his medical opinion that the pattern of B.A.'s injuries were consistent with a forced immersion, or intentionally caused. Thus, the relevancy of Dr. Sanford's expert medical opinion testimony was constrained to his personal examination and treatment of B.A. as well as his medical conclusions. Much of the

Dr. Sanford's medical diagnosis and treatment of B.A., such as Dr. Rosenberg's [illegible]

Anthony's statement, his conclusory note: "[t]his case was concerning due to the child's age, level of supervision provided, and the nature of the injuries," and his comparison of Anthony's prior statements and conclusion that they were inconsistent. Simply put, Dr. Sanford could have offered the same opinion testimony without the abuse report, and the abuse report provided little to no assistance to the jury in understanding his testimony. Instead, through the guise of expert opinion testimony, it commented directly on Anthony's guilt and credibility via multiple layers of inadmissible hearsay.

Consequently, the abuse report was not admissible under Rule 703.

C. The Abuse Report was not Admissible Under the "Business Records" Exception to the Hearsay Rule.

Although unclear, it is possible to infer from the record that the trial court admitted the abuse report under the "business records" exception to the hearsay rule. The business records exception is addressed in Mississippi Rule of Evidence 803(6), which provides as follows:

> (6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . .

M.R.E. 803(6).

Under Rule 803(6) a business record, in order to be admissible, must be "accompanied by 'testimony of the custodian or other qualified witness,' unless the document is self-authenticated in accordance with Rule 902(11). *Davison v. Mississippi Dept. of Human Services*, 938 So. 2d 912,

testimony of "all participants who made the record," the rule does require that testimony concerning the source of these documents is offered by an individual 'with knowledge who is acting in the course and scope of the regularly conducted activity.'" *Ferguson v. Snell*, 905 So. 2d 516, 519-20 (¶12) (Miss. 2004) (quoting *Miss. Gaming Comm'n v. Freeman*, 747 So. 2d 231, 242 (Miss.1999); *see also* Rule 803(6) cmt ("the source of the material must be an informant with knowledge who is acting within the course of the regularly conducted activity.").

In the instant case, Dr. Sanford was not the custodian of records and lacked personal knowledge regarding the hospital's filing practices as well as the abuse report's completion as to matters outside of his physical exam. To this end, Dr. Sanford made several admissions on cross-examination:

> Q. [A]nd that leads me to my next line of questioning which is the history that you related with respect to B.A., that is, in fact, history which has been gathered by another person; is that not right?
> A. Yes.
> . . .
> Q. So when [the District Attorney] put the list of factors [in S-12], some checked and some with question marks and some left blank on here, that is, in fact, another person other than you who has recorded information from some source and has put that information down here on a list, and it's from the list you're testifying, not based on your personal knowledge gathered from Ms. Anthony; isn't that right?
> A. It's a compilation of all the care givers.
> Q. Yes, sir. But my point is this: That compilation is not based on your personal knowledge, is it?
> A. Not completely.
> . . .
> A. The physical exam part of that is from me. The other social things are from a group of people, yes.

(Tr. 254-55). As can bee seen, Dr. Sanford possessed no personal knowledge of the making of the abuse report concerning the Anthony's statement and the history of the injury.

More importantly, Dr. Sanford possessed no personal knowledge of the hospital's filing

the State failed to elicit testimony to establish that Dr. Sanford possessed such knowledge. To be sure, Dr. Sanford admitted on cross-examination:

> Q. In what role is your administrative duty at the hospital?
> A. It's probably less than five hours a week, mostly administration of residents and fellows.
> Q. Would it be fair to say that you kind of know how the hospital operates generally?
> A. Yes.

(Tr. 258). Thus, it is clear that Dr. Sanford possessed no personal knowledge (or surely insufficient personal knowledge) regarding the hospitals filing practices.

Because Dr. Sanford lacked the personal knowledge necessary to establish a proper foundation for admitting the abuse report as a business record, the trial court erred to the extent that it relied on the this exception in admitting the abuse report.

Moreover, the abuse report is reasonably characterized as a document created in anticipation of litigation, as it lies outside the hospital's usual operations (providing medical care to patients). As Dr. Sanford testified, the hospital prepares an abuse report when it encounters suspicious injuries as a measure of compliance with Texas law requiring physicians to report suspected abuse. Thus, the physicians who prepare the report have a motive to err on the side of caution and marshall the facts, or present them in a light most consistent with abuse in order to protect them from liability for lack of compliance. *See generally, Jones v. Hatchett*, 504 So. 2d 198, 202 (Miss.1987) (documents

prepared in anticipation of litigation rather than in the course of a regularly conducted business activity are not admissible under the business records exception) (citing *City of Bay St. Louis v. Johnston*, 222 So. 2d 841, 845 (Miss.1969) (reliability of business record is based on presumption

that person who has duty to keep record has no motive to suppress or distort truth))

terminate parental rights, as well as criminal prosecutions for abuse and neglect. Where, as here, a physician or other professional has compiled inadmissible hearsay evidence from numerous sources, it is patently unjust to allow a prosecutor to introduce this evidence through the backdoor, via the business records exception, especially in a criminal prosecution where a defendant's confrontation rights are implicated. Thus, the interests of justice require that the abuse report be considered a document prepared in anticipation of litigation, and inadmissible under the business records exception.

However, should this Court determine that the abuse report falls within the business record exception, Anthony contends that the probative value of the abuse report is substantially outweighed by its prejudicial effect. Accordingly, the abuse report should not be deemed admissible as a business record or otherwise.

D. The Admission of the Abuse Report Violated Anthony's Sixth Amendment Right of Confrontation.

The admission of the abuse report was improper under the Confrontation Clause of the Sixth Amendment because, it directly conveyed to the jury out-of-court testimonial statements made by persons (Dr. Rosenberg and others) that Anthony never had the opportunity to cross-examine.

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court held that a defendant's right to confront the witnesses against him or her prohibits admission of testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 54, 124 S.Ct. at 1365-66. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct.

statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis*, 547 U.S. at 821, 126 S.Ct. at 2273.

The *Crawford* Court declined to "spell out a comprehensive definition of 'testimonial.'" *Id.* 541 U.S. at 68, 124 S.Ct. at 1374. In *Crawford*, the Court held only that, under any definition, statements are testimonial if given as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [in response] to police interrogations." *Id.* However, the *Davis* Court further defined "testimonial" as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 574 U.S. at 822, 126 S.Ct. at 2273-74. Significantly, the *Davis* Court instructed that statements may be deemed "testimonial" even in the absence of police interrogation. *See Id.* Fn. 1. (Our holding refers to interrogations . . . This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial."). In finding the statements at issue in non-testimonial, the Court in *Davis* considered the following factors: (1) whether the witness was describing past events current circumstances, (2) whether the statements were given to "resolve a present emergency" or "simply to learn (as in *Crawford*) what had happened in the past," and (3) the degree of formality in the circumstances of the giving of the statement. *Davis*, 574 U.S. at 826-27, 126 S.Ct. at 2276-77.

Applying the reasoning of *Davis*, the statements contained in the abuse report must be considered testimonial. As *Davis* makes clear, it is not necessary that the statements were given

abuse; thus, the statements contained in the abuse report were only "once removed" from actual police interrogation, in that, they were prepared in an accusatory fashion and ultimately ended up in hands of the prosecution to be used accordingly. Also, the statements in the abuse report described past events and were aimed at establishing the very facts of the suspected abuse. Further, the statements were not made to resolve an ongoing emergency; police had responded and B.A. was already receiving medical attention. Finally, the abuse report was prepared in a formal fashion–for the very purpose of reporting suspected abuse to authorities as required by law. Essentially, the abuse report was prepared in anticipation of litigation.

In light of the foregoing, the abuse report must be considered testimonial. Accordingly, its admission into evidence violated Anthony's right to confront the witnesses against her. Because the case was a circumstantial evidence case, and the evidence of intent came only from Dr. Sanford's testimony, the error in admitting the abuse report resulted in severe prejudice and substantially jeopardized the fairness of the trial. Therefore, Anthony is entitled to a new trial.

II. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN ANTHONY'S CONVICTION OF FELONY CHILD ABUSE, AS REASONABLE HYPOTHESES CONSISTENT WITH HER INNOCENCE COULD NOT BE EXCLUDED.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "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." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy

the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

Anthony was indicted for felony child abuse under Mississippi Code Annotated section 97-5-39 (2); accordingly, the State was required to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that Anthony did "intentionally . . . whip, strike or otherwise abuse or mutilate [B.A.] in such a manner as to cause serious bodily harm." Miss. Code Ann. § 97-5-39 (2)(a) (Rev. 2006).

Significantly, this case is a circumstantial evidence case.[8] Therefore, "the State [was] required to prove [Anthony's] guilt not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis consistent with innocence." *McRee v. State*, 732 So. 2d 246, 250 (¶14) (Miss. 1999) (citing *Deloach v. State*, 658 So. 2d 875, 876 (Miss.1995)). As explained below, the evidence did not exclude every reasonable hypothesis consistent with Anthony's innocence on the charge of felony child abuse.

Anthony's statements revealed that she was in the bedroom laying out the children's clothes when she heard the water come on in the bathroom, and she yelled at Jarvarious to turn the water off, but to no avail. (Tr 165, 172-73, Ex. S-6). She then heard Jarvarious yell: "mama, mama [B.A.] boo booed in the tub." (Id.). Anthony then went into the bathroom, discovered that B.A. had been burned, pulled him out of the tub, and had her neighbor call 911. (Id.). Thus, according to Anthony's statement's, B.A. was injured when his older brother turned the hot water on. From this, no reasonable inference may be drawn that Anthony intentionally burned B.A..

[8] The trial court acknowledged this and gave the jury a circumstantial evidence instruction.

testimony. Based on the pattern of B.A.'s burn injuries (mainly, clear straight-line demarcation and the absence of "splash marks"), Dr, Sanford opined that B.A.'s injuries were intentionally caused. (Tr. 210, 237-240, 245, Ex. S-17(A)-(R)). He testified that, at the time B.A. was burned, he was leaning forward in a sitting position with his legs out in front of him and his hands in the water. (Tr. 238-240). Dr. Sanford also stated that "there would have to be force (from either the side or behind) pushing [B.A.'s] chest, his torso forward." (Tr. 240). He further stated that a burn such as B.A.'s could happen "in seconds" in water above 130 degrees. (Tr. 253).

The State (and Dr. Sanford) equate a forced immersion with the intentional infliction of the injury. However, Anthony contends that the two are not synonymous. While Dr. Sanford's testimony indicated that B.A.'s injuries were consistent with a forced immersion, he could not testify as to how the injury occurred (i.e. that Anthony herself caused the injury), only that B.A. was sitting in the tub and *force was applied, pushing his torso forward into the water*. Given this evidence, reasonable hypotheses consistent with Anthony's innocence (other than Anthony's intentional infliction) arise to explain how the injury occurred.

First, it is reasonable to conclude that Jarvarious turned on the hot water and stepped on B.A.'s back to climb out of the tub as the water in the tub rapidly increased in temperature. The evidence supports such a conclusion: (1) Jarvarious was not burned in the incident, (2) significantly, the evidence did not reveal whether Jarvarious was in the tub or out of the tub when Anthony entered the bathroom, (3) Dr. Sanford testified that B.A.'s injury would occur in seconds in water above 130 degrees; the evidence established that the hot water heater was set at approximately 160 degrees! Thus it is reasonable to conclude that Jarvarious, upon feeling the rapidly warming water, escaped injury by stepping on B.A.'s back to climb out of the tub, thus forcefully pushing B.A.'s

A second reasonable hypothesis is that Jarvarious stepped out of the tub before turning on the hot water and pushed B.A. into the tub either intentionally or unintentionally in a playful manner. In this regard, it is not unusual for a child to resent or be jealous of his or her younger sibling. Also, it is not unusual for young siblings to push, pull, or otherwise exert force upon one another in a playful manner.

Because one or both of the above-mentioned hypotheses were reasonablely inerrable from the evidence adduced at trial, the jury's verdict was contrary to law and supported by insufficient evidence. Accordingly, Anthony urges this honorable Court to reverse her conviction and sentence for felony child abuse and render a judgment of acquittal on that charge.

III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND ANTHONY WAS GUILTY, AT MOST, OF FELONY CHILD NEGLECT.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

Should this Court determine that the evidence was sufficient to support Anthony's conviction and sentence for felony child abuse, Anthony asserts that the verdict was against the overwhelming weight of the evidence. As explained above, the State presented no substantial evidence that

Anthony intentionally burned B.A., came from Dr. Sanford's testimony that the injuries were consistent with a forced immersion. However, even given Dr. Sanford's testimony, reasonable explanations other than an intentional act on Anthony's part could not be excluded by the remaining evidence. There was evidence that Anthony had previously complained about the water temperature in her apartment unit. Also, According to Anthony's statements given to police and to Amoske (and corroborated in part by the testimony of Lawrence, Jones and, Watkins), B.A. was injured when Jarvarious turned on the hot water while she was in the bedroom. Thus, the overwhelming weight of the evidence does not support a finding that Anthony intentionally caused B.A.'s injuries.

Because the verdict was against the overwhelming weight of the evidence, Anthony respectfully submits that this Court should reverse her conviction for felony child abuse and remand this case for a new trial. Alternatively, should this Court determine that a new trial is not warranted, Anthony respectfully submits that the overwhelming weight of the evidence established that she was guilty, at most, of felony child neglect under section 97-5-39 (1)(b). Accordingly, Anthony respectfully requests that this Court remand this case for re-sentencing for felony child neglect under section 97-5-39(1)(b).

CONCLUSION

Anthony submits that, based on the propositions cited and briefed above, together with any plain error noticed by this Court which has not been specifically identified, the judgment of conviction for felony child abuse entered by the trial court should be reversed and rendered. Should this Court find sufficient evidence to sustain the conviction, Anthony argues, in the alternative, that this case should be reversed and remanded for a new trial or, as a last resort, remanded for re-sentencing for felony child neglect.

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

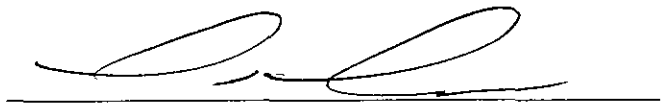
I, Hunter N Aikens, Counsel for Fonshanta Anthony, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Andrew K. Howorth
Circuit Court Judge
384 Goodman Raod East, Suite 314
Oxford, MS 38655

Honorable Ben Creekmore
District Attorney, District 3
Post Office Box 1478
Oxford, MS 38655

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 1st day of December, 2008.



Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200